PASADENA UNIFIED SCHOOL DISTRICT
Surplus Property "7-11" Committee Meeting /Burbank Property

NOTICE AND AGENDA

February 1, 2017
7:00 P.M.
ROOM 229
351 S. HUDSON AVENUE
PASADENA, CA 91101

1. PRELIMINARY

   a. Call to Order

   b. Roll Call (Establishment of a Quorum)

      1. Francis B Boland _____
      2. Mark C. Nicoletti _____
      3. George L Tan _____
      4. Blair L. Miller _____
      5. Helena A. Ayala _____
      6. Lewis R. Watson _____
      7. Robert L. Martinez _____
      8. Kathleen M. Sanchez _____

2. PLEDGE OF ALLEGIANCE

3. INTRODUCTIONS

   a. 7-11 Committee Members, District Staff and Consultants, if any

4. SELECTION OF CHAIR AND CO-CHAIR / ACTION

   a. Motion By _____ Seconded by _____ Vote _____

5. COMMENTS FROM THE FLOOR
   Persons wishing to make comments to the 7-11 Committee on non-agendized items may do so at this time. Each speaker is requested to limit their comments to no more than three (3) minutes. Please fill out a Speaker Card and turn it in to the Chair if you wish to address the Committee.

6. OVERVIEW OF SURPLUS PROPERTY COMMITTEE PURPOSE AND DUTIES

   a. Reference Tab 1 - Summary of Surplus Property Advisory Committee Duties

   b. Reference Tab 2 - Open Public Meeting Requirements Under The Brown Act and California Education Code

   c. Reference Tab 3 - Conflict of Interest Law

   d. Reference Tab 4 - Summary of Surplus Property Procedures

7. OVERVIEW OF PROPERTY

   a. Reference Tab 5 – Burbank Property / Reference Documents

8. REVIEW ENROLLMENT PROJECTIONS

9. DEVELOPMENT OF PRIORITY USE LIST / ACTION

   a. Burbank Property:

      Motion By _____ Seconded by _____ Vote _____

10. DISCUSSION OF PROPOSED NEXT COMMITTEE MEETING AND TIMELINE / ACTION

    a. Motion By _____ Seconded by _____ Vote _____

11. COMMENTS FROM COMMITTEE MEMBERS

12. ADJOURNMENT

M E M O R A N D U M

TO: Surplus Property ("7-11") Advisory Committee
PASADENA UNIFIED SCHOOL DISTRICT

FROM: Constance Schwindt, District Legal Counsel

DATE: February 1, 2017

RE: **Summary of Real Property Advisory Committee Information**

This memorandum addresses both the formation and duties of an Advisory Committee to be convened for the purpose of making recommendations concerning the future use or disposition of property.

Summary of Advisory Committee

Education Code section 17388 requires that prior to the sale, lease, or rental in excess of thirty (30) days of any excess real property, a governing board of a school district must appoint an Advisory Committee to advise the governing board in the development of District-wide policies and procedures governing the use or disposition of school buildings or space in school buildings which is not needed for school purposes.[1]

We recommend that the District comply with the following requirements for the convening of an Advisory Committee prior to selling or otherwise disposing of the property:

1. Formation of Advisory Committee

Education Code section 17389 states that an Advisory Committee **must consist of not less than seven (7) and *not more* than eleven (11) members**, and must be represented by each of the following:

(a) The ethnic, age group, and socioeconomic composition of the District.
(b) The business community, such as store owners, managers, or supervisors.
(c) Landowners or renters, with preference to be given to representatives of neighborhood associations.

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[1] While Education Code section 17388 references "school buildings or space in school buildings," other sections refer generally to "real property." Accordingly, it is our opinion that school districts should comply with the "advisory committee" provisions for vacant property as well as school buildings.

(d) Teachers.
(e) Administrators.
(f) Parents of students.
(g) Persons with expertise in environmental impact, legal contracts, building codes, and land use planning, including, but not limited to, knowledge of the zoning and other land use restrictions of the cities or cities and counties in which the surplus space and real property is located.

2. Duties of an Advisory Committee

Pursuant to Education Code section 17390, an Advisory Committee must do all of the following:

(a) Review the projected school enrollment and other data as provided by the District to determine the amount of surplus space and real property.
(b) Establish a priority list of use of surplus space and real property that will be acceptable to the community.
(c) Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings for community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for child care development purposes pursuant to Education Code section 17458.
(d) Make a final determination of limits of tolerance of use of space and real property.
(e) Forward to the District's governing board a report recommending uses of surplus space and real property.

Please note that the provisions for an Advisory Committee do not set forth a minimum time period in which these duties must be completed.

Furthermore, as an extension of a legislative body (the District Governing Board), please note that the Advisory Committee must follow all Brown Act requirements.

aalrr
Atkinson, Andelson Loya, Ruud & Romo
A Professional Law Corporation

OPEN PUBLIC MEETING REQUIREMENTS UNDER THE BROWN ACT AND CALIFORNIA EDUCATION CODE

I. INTENT

A. Government Code Section 54950 clearly states the legislative intent underlying the Brown Act:

> **Public agencies in this state exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and their deliberations be conducted openly.**
>
> **The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.**

It is in light of this legislative policy that the Brown Act has been liberally interpreted.

B. The courts have interpreted this statement of legislative intent in the following manner.

The purpose of the Brown Act is to facilitate public participation in local government and to curb misuse of democratic process by secret legislation by public bodies. [Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116.]

1. Under the Brown Act -"interested persons" entitled to sue to enforce its provisions are not confined to residents within the jurisdiction of the legislative body involved, nor to taxpayers therein. [McKee v. Orange Unified School Dist. (2003) 110 Cal.App.4th 1310, 1316.]

C. At the November 2, 2004 election, the voters of California adopted Proposition 59, which adds Subdivision (b) to Section 3 of Article I of the California Constitution. Proposition 59 does the following:

1. Adds to the state Constitution the requirement that meetings of public bodies and writings of public officials and agencies be open to the public.

2. Provides that statutes and rules furthering public access be broadly construed, or narrowly construed, if they limit public access.

3. Requires that new statutes and rules limiting access contain findings justifying the necessity of the limitation.

4. Preserves the constitutional rights of privacy, due process, and equal protection; and expressly preserves existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies.

II. THE "RULE" - GOVERNMENT CODE SECTION 54953

A. All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter. If a given entity fits within any definition of a legislative body, then it is subject to the various requirements of the Brown Act.

B. Government Code Section 54952 defines a "legislative body" to include the following:

1. The governing board of a school or community college district, ROP or JPA, etc. [Government Code Section 54952(a).]

2. Commissions, committees, boards, or other bodies of a local agency, whether permanent or temporary, decision-making or advisory, created by resolution or some other formal action of a legislative body. [Government Code Section 54952(b).]

a. E.g., personnel commissions.

b. E.g., academic senates. [66 Ops.Atty.Gen. 252 (1983).]

c. E.g., Community college student body associations. Such organizations are advisory to district boards and are therefore a legislative body and subject to the Brown Act. [75 Ops.Atty.Gen. 145 (1992).]

3. "Legislative body" does not include advisory committees composed solely of the members of the legislative body which are less than a quorum of the legislative body. [Government Code Section 54952(b).]

a. Not all less-than-a-quorum committees are excluded from the definition of a "legislative body." To be excluded, the committee must:

1) be "advisory" only;

2) not be "decision-making"; and

3) not be a standing committee.

E.g., an ad hoc committee comprised solely of less than a quorum of the board created for the purpose of advising the full board on the qualifications of candidates for appointment to a vacant position is not a legislative body. [Henderson v. Board of Education (1978) 78 Cal.App.3d 875.]

b. If the ad hoc committee includes members who are not members of the board, the Act will apply.

c. Committees appointed by the superintendent, without any formal action by the board, are not covered by the Act. However, the board must not in any way "instigate" the formation of the committee; the concept of "formal action" is broadly construed. [Joiner v. City of Sebastopol (1981) 125 Cal.App.3d 799, 805; and Frazer v. Dixon Unified School District (1993) 18 Cal.App.4th 781, 792-793.]

d. Where a school district's board of trustees has formed a committee, known as the district liaison council, consisting of eight representatives from the community, seven employees of the district, and one student, to interview candidates for the position of district superintendent, the committee is subject to requirements of the Brown Act (e.g., the notice, agenda and public participation requirements). However, where appropriate, the committee may also rely on the personnel exception in Section 54957 and meet in closed session when it is interviewing candidates, reviewing resumes, discussing qualifications, and arriving at a decision prior to the actual appointment. [80 Ops.Atty.Gen. 308 (1997).]

e. Meetings between unions representing a community college district's employees and the district's joint labor/management benefits committee (JLMBC) were within the Educational Employment Relations Act (EERA) "meeting and negotiating discussion between a public school employer and a recognized or certified employee organization" exemption from Ralph M. Brown Act open meeting requirements, since the JLMBC was a designated representative of the district. [Cal.Gov.Code §§ 3543.3, 3549.1(a), and Californians Aware v. Joint Labor/Management Benefits Com., (2011) 200 Cal.App.4th 972.]

1) The Joint Labor Management Benefits Committee ("JLMBC") of the Los Angeles Community College District was created by the District's collective bargaining agreements, and not by the Board's policy on the same subject.

2) The Court of Appeal and the Attorney General distinguished the District's JLMBC, created through the collective bargaining process, from the textbook review committee created by board policy in Frazer, supra. [92 Ops.Atty.Gen. 102, 107 (2009).]

f. The Act applies to any "other body" a local agency creates unless the other body consists of (1) less than a quorum of the local agency's members, and (2) is only advisory. [Taxpayers for Livable Communities v. City of Malibu (2005) 126 Cal.App.4th 1123.]

g. Councils and schoolsite advisory committees established pursuant to Sections 52012 (repealed), 52065 (repealed), 52176 (district-wide advisory committees on bilingual education), and 52852 (school site councils), subdivision (b) of Section 54425 (school advisory committee on compensatory education), Sections 54444.2 (migrant education parent advisory council), 54724 (repealed), and 62002.5 (parent advisory committee and school site councils), and committees formed pursuant to Section 11503 (parent involvement programs under Chapter 1 of the ESEA), or Section 2604 of Title 25 of the United States Code (repealed), are subject to some aspects of the Brown Act. [Education Code Section 35147(b).] Section 35147(c) provides the following modified rules for councils and committee described above:

1) Any meeting held by a council or committee specified in above shall be open to the public and any member of the public shall be able to address the council or committee during the meeting on any item within the subject matter jurisdiction of the council or committee.

2) Notice of the meeting shall be posted at the schoolsite, or other appropriate place accessible to the public, at least 72 hours before the time set for the meeting. The notice shall specify the date, time, and location of the meeting and contain an agenda describing each item of business to be discussed or acted upon.

3) The council or committee may not take any action on any item of business unless that item appeared on the posted

agenda or unless the council or committee members present, by unanimous vote, find that there is a need to take immediate action and that the need for action came to the attention of the council or committee subsequent to the posting of the agenda.

4) Questions or brief statements made at a meeting by members of the council, committee, or public that do not have a significant effect on pupils or employees in the school or school district or that can be resolved solely by the provision of information need not be described on an agenda as items of business.

5) If a council or committee violates the procedural meeting requirements of this section and upon demand of any person, the council or committee shall reconsider the item at its next meeting, after allowing for public input on the item.

6) Any materials provided to a schoolsite council shall be made available to any member of the public who requests the materials pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1). [Education Code Section 35147(d).]

4. Standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by resolution or other formal action of a legislative body, are legislative bodies for purposes of the Brown Act.

5. A board, commission, committee, or other multi-member body that governs a private corporation, limited liability company, or entity is a "legislative body" if it:

a. Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected body to a private entity [Government Code Section 54952(c)(1).];

or

b. Receives funds from a local agency and the membership of the governing body includes a member of the legislative body of the local agency appointed by the legislative body of the local agency. [Government Code Section 54952(c)(2).]

6. Even though a nonprofit corporation, which administered subsidized childcare and education services pursuant to a contract with a board of education, was not a legislative body within the meaning of the Brown

Act, provisions in the nonprofit corporation's contracts with the board requiring the corporation to comply with the Brown Act "to the extent of the publicly funded program(s)" it administered, were enforceable by members of the public in a breach of contract action for declaratory and injunctive relief, since the intended third-party beneficiary of the contractual provisions was the general public. [Service Employees Inter. Union, Local 99 v. Options--A Child Care and Human Service Agency, (2011) 200 Cal.App.4th 869, 879.]

7. The governing board of a jointly-administered trust fund, whose members are appointed equally by a city and a labor union representing city employees and whose purpose is to address labor-management issues relating to the health, safety, and training of city employees, is not required to hold its meetings open to the public. [87 Ops.Cal.Atty.Gen. 19 (2004).]

8. Other provisions of law may subject certain organizations to the Brown Act, e.g., community college district auxiliary organizations. [Education Code Section 72674.]

C. "Member of a legislative body of a local agency" is defined to include any person elected to serve as a member of a legislative body who has not yet assumed the duties of office. Such persons must conform their conduct to the requirements of the Act, and will be treated, for purposes of enforcing the Act, as if they had already assumed office. [Government Code Section 54952.1.]

A legislative body may require that each member be given a copy of the Act. Similarly, someone who has been elected to serve on the body, but has not yet assumed office, may be given a copy of the Act.

III. WHAT IS A MEETING?

A. The 1993 Amendments to the Act added a specific definition of a meeting. This definition codified prior interpretations of the Act by the Attorney General and the state appellate courts.

1. A meeting is a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted. [Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (1978) 263 Cal.App.2d 41; and 61 Ops.Atty.Gen. 220 (1978).] (Luncheon meetings where public business is discussed are subject to the Brown Act.)

a. Deliberation in this context connotes not only collective decision-making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. [Frazer, 18 Cal.App.4th at 794.]

2. Meeting includes “study,” “discussion,” “informational,” “fact-finding,” or “pre-meeting” gatherings of a quorum of the members of a board. Whether action is or is not taken is irrelevant. [42 Ops.Atty.Gen. 61 (1963).]

3. The passive receipt by individual board members of their mail does not constitute a meeting. [Roberts v. City of Palmdale, (1993) 5 Cal.4th 363, 376.]

B. “Old” definition of a meeting and prohibited communications:

1. Any congregation of a majority of the members of the legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body. [Former Government Code Section 54952.2(a).]

2. Except as authorized by Section 54953, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body **to develop a collective concurrence as to action to be taken** on an item by the members of the legislative body is **prohibited**. [Emphasis added.] [Former Government Code Section 54952.2(b).]

3. See, Wolfe v. City of Fremont (2006) 144 Cal.App.3d 533, which held that a "collective concurrence" was an element of a violation of former Section 54952.2(b), and that a “collective concurrence” required not only that a majority of the council members share the same view, or “concur,” but also that the members have reached that shared view after interaction between or among themselves, whether directly or through an intermediary.” The Legislature overruled Wolfe, at least in part by its 2009 amendments to Government Code Section 54952(a) and (b).

C. Current definition of a meeting and prohibited communications.

1. By the enactment of Chapter 63, Statutes of 2008 (S.B. 1732), effective January 1, 2009, the Legislature repealed a significant portion of Wolfe and established a new definition for a meeting in Section 54952.2(a) and imposed new restrictions in Section 54952.2(b).

a. As used in this chapter, "meeting" means any congregation of a majority of the members of a legislative body at the same time and location, *including teleconference location as permitted by Section 54953*, to hear, discuss, deliberate, *or take action* on any item that is within the subject matter jurisdiction of the legislative body. (Emphasis added.)

b. Correspondingly, the prohibitions in Section 54952.2(b) have been significantly amended to read as follows:

> *(b)(1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.* (Emphasis added.)

2. The amendments added a Section 54952.2(b)(2) which reads as follows:

> *Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.* (Emphasis added.)

3. Whereas Wolfe held that a violation of the prohibition on serial meetings occurs only if a series of meetings by members of a body results in a collective concurrence, new Section 54952.2 would instead prohibit a majority of members of a legislative body of a local agency from using, outside a meeting authorized by the act, a series of communications of any kind, directly or through intermediaries, to *discuss*, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

4. The new legislation also contains the Legislature's declaration that it disapproves the holding in the Wolfe case to the extent it construes the prohibition on serial meetings to apply only where there is a collective concurrence, and would state its intention that the changes made by this bill supersede the holding in Wolfe.

   a. Section 1(a) of Chapter 63 in uncodified language provides as follows:

   > (a) The Legislature hereby declares that it disapproves the court's holding in Wolfe v. City of Fremont (2006) 144 Cal.App.4th 533, 545, fn. 6, *to the extent that it construes the prohibition against serial meetings by a legislative body of a local agency, as contained in the Ralph M. Brown Act . . .*

> to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition *rather than also including the process of developing a collective concurrence as a violation of the prohibition*. (Emphasis added.)

b. Section 1(b) makes clear that the new language in Section 54952.2(a) and (b) supersedes the holding in Wolfe.

D. Serial, but less than a quorum meetings of a district's governing board members with a mediator in an effort to reach a settlement for the termination of the district's president, constituted the collective acquisition and exchange of facts preliminary to an ultimate decision. The court found the mediator to be an intermediary for purposes of Section 54952.2(b). [Page v. MiraCosta Community College Dist. (2009) 180 Cal.App.4th 471.]

1. The meetings at issue in Page also violated the closed session exception for litigation., Section 54956.9, discussed below, since they involved the Board meeting not only meeting with the district's legal counsel, but also a mediator.

E. In Galbiso v. Orosi Public Utility Dist. (2010) 182 Cal.App.4th 652, 668 the court held that comments made by the utility district's attorneys did not give rise to an inference that a secret meeting took place. One of the referenced comments was merely a statement in The Fresno Bee to the effect that OPUD "probably will consider" going forward with a tax sale. This comment was made in the context of the protracted litigation between the district and Ms. Galbiso.

F. The requirements of the Brown Act do not apply to the following:

1. Individual contacts or conversations between a member of a legislative body and any other person *that do not violate subdivision (b) of Section 54952.2*. [Government Code Section 54952.2(c)(1).]

2. The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general concern to the public or agencies of the type represented by the legislative body, provided a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the local agency. This paragraph is not intended to allow members of the public free admission to a gathering where the organizers have required the other participants to pay a fee as a condition of attendance. [Government Code Section 54952.2(c)(2).]

3. The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body. [Government Code Section 54952.2(c)(3).]

4. The attendance of a majority of the members at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body. [Government Code Section 54952.2(c)(4).]

5. The attendance of a majority of the members at a purely social or ceremonial occasion provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body. [Government Code Section 54952.2(c)(5).]

6. The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers. [Government Code Section 54952.2(c)(6).]

    a. Members of the legislative body of a local public agency may not ask questions or make statements while attending a meeting of a standing committee of the legislative body "as observers." [81 Ops.Atty.Gen. 156 (1998).]

    b. Members of the legislative body of a local public agency may not sit in special chairs on the dais while attending a meeting of a standing committee of the legislative body "as observers." Id.

G. Effective January 1, 2012: When two legislative bodies of the same local agency convene meetings to take place either simultaneously or subsequently, and one body is a quorum of the other, the compensation the members will receive for the meeting must be announced. [Government Code Section 54952.3.]

IV. PUBLIC MEETING PROCEDURES

A. Certain boards must meet at least monthly and must, by rule, fix the time and place for their regular meetings. [Education Code Sections 1011, 35140, 35144, and 72000(c)(4).] [Government Code Section 54954.]

1. The governing board of any union or joint union high school district, shall hold its regular meetings either monthly or quarterly. The governing board of any other high school district, shall hold its regular meetings monthly. [Education Code Section 35141.]

B. Location of Meetings [Government Code Sections 54954(b) and (c).]

1. Regular and special meetings of school and college district boards must be held within the territory of the district, except in order to:

a. Comply with state or federal law or a court order, or attend a judicial or administrative proceeding to which the local agency is a party.

b. Inspect real or personal property which cannot conveniently be brought within the boundaries of the district provided that the topic of the meeting is limited to items directly related to the real or personal property.

c. Participate in meetings or discussions of multi-agency significance that are outside the jurisdictional boundaries of the district. However, the meeting must be held within the territory of one of the participating agencies and be noticed by all participating agencies as provided for in this chapter.

d. Meet in the closest meeting facility if the local agency has no meeting facility within the boundaries of the district, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction.

e. Meet with state or federal officials, where a local meeting would be impractical, solely to discuss legislative or regulatory matters affecting the district over which the state or federal officials have jurisdiction.

f. Meet at or near a facility owned by the agency located outside its territory, if the meeting is limited to items directly related to that facility.

g. Meet at the office of the agency's attorney for a closed session on pending litigation, when to do so would reduce fees or costs.

2. Additionally, school board meetings may be held outside the district for the following purposes:

   a. Attend a conference on non-adversarial collective bargaining techniques, e.g., CFEIR.

   b. Interview members of the public residing in another district regarding the potential employment of an applicant for the position of the superintendent of that district.

   c. Interview a potential employee from another district. [Government Code Section 54954(c).]

3. Community college districts must hold their meetings within their own jurisdiction, except if certain, very limited exceptions apply:

   a. Meeting with another local agency.

   b. Meeting in closed session with counsel to discuss pending litigation. [Education Code Section 72000(d)(2)(A) and (B).]

   c. It is not clear whether the language in Education Code Section 72000(d)(2) is intended to be the only authority for holding community college district board meetings outside of the district, or whether the exceptions in Government Code Section 54954(b) also provide authority for holding specified meetings outside of the District.

4. A JPA must meet within the territory of at least one of its member agencies, unless one of (a) through (g) above applies. [Government Code Section 54954(d).]

5. If, by reason of a fire, flood, earthquake, or other emergency, it is unsafe to meet in the usual place, the meetings shall be held for the duration of the emergency at the place designated by the presiding officer or his designee, in a notice to the local media that have requested notice, by the most rapid means available at the time. [Government Code Section 54954(e).]

C. All meetings of a legislative body of a local agency that are open and public shall meet the protections and prohibitions contained in the Americans with Disabilities Act of 1990 ("ADA"). [Government Code Section 54953.2, citing 42 USC Section 12132.]

D. Mailed Notice of Meetings.

1. Any person may request that a copy of the agenda or the documents constituting the agenda packet be mailed to that person. If requested, the agenda and documents in the agenda packet shall be made available in

appropriate alternative formats to person with a disability as required by the ADA, 42 USC Section 12132, and the federal rules and regulations adopted in implementation thereof. Upon receipt of the written request, the legislative body, or its designee, shall cause the requested materials to be mailed at the time the agenda is posted, or upon distribution to all, or a majority of all, of the members of a legislative body, whichever occurs first. [Government Code Section 54954.1.]

2. The agenda shall include information regarding how, to whom, and when, a request for disability-related modification or accommodation, including auxiliary aids or services, may be made. [Government Code Section 54954.2(a)(1).]

3. Any request to receive agenda materials shall be valid for the calendar year in which the request is filed, and must be renewed following January 1 of each year. The legislative body may establish a fee for mailing the agenda or agenda packet, which fee shall not exceed the cost of providing the service.

4. Failure of the requesting person to receive the agenda or agenda packet pursuant to this section shall not constitute grounds for invalidation of the actions of the legislative body taken at the meeting for which the agenda or agenda packet was not received.

E. Special Meetings - 24-Hour Notice [Government Code Section 54956.]

1. The board may only consider business specified in the notice. [Government Code Section 54956.]

2. The board may hold a closed session as part of a special meeting.

3. Notice of the special meeting must be mailed or delivered to the media and posted 24 hours in advance of the meeting. The notice must also be posted on the district's website. (Effective January 1, 2012.)

4. A special meeting may be called by either the president of the board or a majority of the board.

5. A special meeting may not be called regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1. However, this subdivision does not apply to a local agency calling a special meeting to discuss the local agency's budget. (Effective January 1, 2012.)

F. Emergency Meetings in Emergency Situations [Government Code Section 54956.5, as amended in 2002.]

1. Where an emergency involves the potential for disruption, or threatened disruption, of public facilities, a board may hold an emergency meeting without providing normally-required notice and/or posting.

2. An "emergency situation" is defined as either:

   a. An "emergency," defined as:

      1) Work stoppage;

      2) Crippling activity; or

      3) Other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the Governing Board.

   b. A "dire emergency," defined as:

      1) Crippling disaster;

      2) Mass destruction;

      3) Terrorist act; or

      4) Threatened terrorist activity that poses peril so immediate and significant that requiring the board to provide one-hour notice may endanger public health, safety, or both, as determined by a majority of the board.

3. At least one-hour notice to media (those who previously requested notice of special meetings) is required. However, in a "dire emergency," notice need only be made at or near the time the presiding officer or designee notifies other board members. Notice must be made by telephone, unless telephone service is not functioning. In such case, notice shall be made of the meeting and any actions taken as soon as possible thereafter.

4. Board may meet in closed session following a 2/3 vote of the board or unanimous if less than 2/3 of members are present.

5. Special meeting requirements of Section 54956 are applicable except 24-hour notice.

G. Agendas

1. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public.

2. An agenda must be conspicuously posted at least 72 hours prior to the time of regular meetings and on the district's web site. The web site requirement is new as of January 1, 2012. [Government Code Section 54954.2(a).]

3. The location where the agenda is posted must be publicly accessible at all times during the required 72-hour period. For example, the agenda cannot be posted inside a building that is locked and inaccessible to the public during evening hours. [78 Ops.Atty.Gen. 327 (1995).]

   a. The agenda of a meeting may be posted on a touch-screen electronic kiosk accessible without charge to the public 24 hours a day, 7 days a week, in lieu of posting a paper copy of the agenda on a bulletin board. [88 Ops.Atty.Gen. 218 (2005).]

4. A board may not change its posted agenda within the 72-hour period preceding a regular meeting unless one of the following exceptions applies:

   a. A majority determines that an emergency exists pursuant to Government Code Section 54956.5;

   b. A two-thirds vote of the board members present determines that there is a need to act immediately and the need to take action came to the district's attention after the posting of the agenda;

   c. The item was previously posted for a meeting occurring not more than five days prior to the meeting when the action is taken, and at the prior meeting the item was continued to the meeting where action was taken. [Government Code Section 54954.2(b).]

   If no exception applies, the board must either postpone consideration of the item for at least 72 hours or call and notice a special meeting.

5. The agenda must reasonably apprise the public of the matters to be considered in sufficient detail to allow the public to determine whether to participate at the meeting. [Carlson v. Paradise Unified School District (1971) 18 Cal.App.3d 196.] (Action taken pursuant to a defective agenda may be void.)

6. The Act requires that the agenda contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A "brief general description" of an item generally need not exceed 20 words.

7. In Moreno v. City of King (2005) 127 Cal.App.4th 17, the agenda for a special meeting stated that the city council would only consider, in closed session, the employment contract of a public employee. Six days later, the city manager gave the employee a memorandum that contained the details of five alleged incidents of misconduct that had led the city manager to terminate his employment. The court held that the trial court's finding that the special meeting agenda violated Section 54954.2 was equivalent to a finding that it violated Section 54956 because the two statutes contained equivalent requirements. The trial court did not err in finding that the agenda was inadequate because its description provided no clue that the dismissal of a public employee would be discussed at the meeting.

   a. The city did not cure its failure to agendize the issue of the employee's dismissal when the only action reported after a later meeting was the denial of the employee's tort claim.

   b. The employee was deprived of the opportunity to respond to specific accusations, in violation of Cal. Government Code Section 54957, because the city failed to give him advance notice that it would be hearing the city manager's accusations at its closed meeting.

8. The Act imposes limitations on board members' responses to public comments. [Government Code Section 54954.2(a).] In response to public comments, board members and staff may only:

   a. Briefly respond to statements made or questions posed by persons making public comments;

   b. Ask questions for clarification or make a brief announcement;

   c. Provide a reference to staff or other resources for factual information;

   d. Request staff to report back to the body at a later meeting; or

   e. Direct staff to place the matter on a future agenda.

9. Agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records under the California Public Records Act, Government Code

Section 6250 et seq., and shall be made available upon request without delay.

10. This requirement does not apply to certain records made exempt from public disclosure by the Public Records Act. [Government Code Section 54957.5(a).]

11. If a writing that is a public record under subdivision (a) of Section 54957.5, and that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency, is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection pursuant to Section 54957.5(b)(2) at the time the writing is distributed to all, or a majority of all, of the members of the body. [Government Code Section 54957.5(b)(1).]

    a. A local agency shall make any writing described in Section 54957.5(b)(1) available for public inspection at a public office or location that the agency shall designate for this purpose.

    b. Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency. The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.

    c. Documents prepared by the district must be made available for public inspection at the meeting; documents prepared by any other person must be made available after the meeting. [Government Code Section 54957.5(c).]

    d. Nothing in the Act prevents the district from charging a fee or deposit for a copy of a public record as authorized by the Public Records Act. [Government Code Sections 54957.5(d) and 6253.]

    e. No additional charge may be imposed on persons with disabilities in order to make these documents available in appropriate alternative formats. [Government Code Sections 54957.5(b)(2) and (d).]

H. Public Participation [Government Code Section 54954.3, and Education Code Sections 35145.5, and 72121.5.]

1. Members of the public must be allowed to place matters directly related to district business on the agenda.

2. Members of the public must be able to address the board regarding items on the agenda before or during the governing board's consideration of the item. [Education Code Section 35145.5, and Government Code Section

54954.3.] However, Education Code Section 72121.5, relating to community college districts, provides that members of the public must be able to address the board regarding items on the agenda as such items are taken up.

3. In Lindelli v. Town of San Anselmo (2003) 111 Cal.App.4th 1099, 1109, the court held that while Government Code Section 54954.3 permits members of the public to provide input, it does not mandate that they do so. Nothing in the plain language of Government Code Section 54954.3 supported the city's proposed construction--that members of the public must raise a given legal concern about a potential action before any course of action has been adopted, or be forever barred from raising that concern in court.

4. Every regular meeting agenda shall provide an opportunity for members of the public to address the board on any item of interest to the public, within the subject matter jurisdiction of the board.

    a. No action shall be taken until the matter is properly noticed on an agenda or an exception to the 72-hour rule is established.

    b. Every notice of a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item appearing on that agenda before or during consideration of that item. [Government Code Section 54954.3(a).] However, with respect to community college districts, public comment with respect to agenda items must be allowed at the time the item is taken up by the Board. Education Code Section 72121.5 does not distinguish between speakers at a regular meeting or at a special meeting.

    c. In Chaffee v. San Francisco Library Commission (2004) 115 Cal.App.4th 461, the Court of Appeal held that the Act contemplated only one public comment period per agenda, even when the agenda is covered at meetings occurring on different days.

        1) The decision also assumes that speakers wishing to address a topic on the agenda will be permitted to speak when that item is before the body, and not as a group in advance of reaching the item on the agenda.

        2) This statement is at odds with the practice of many bodies which require all speakers wishing to address an agenda item to speak at the beginning of meetings as a group and not at the time the agenda item is brought up. [See also, Galibiso v. Orosi Public Utility District, (2008) 167 Cal.App.4th 1063, 1079, adopting Chaffee's statement

regarding allowing speakers on agenda items to speak when the item is reached, and holding that simply because public comments relate to pending litigation, does not preclude such comments.]

5. The board may adopt reasonable rules and regulations in order to ensure the proper functioning of the meeting. [75 Ops.Atty.Gen. 89 (1992); White v. City of Norwalk 900 F.2d 1421 (9th Cir. 1990); and Kindt v. Santa Monica Rent Control Board 67 F.3d 266 (9th Cir., 1995).] (Regulations governing when the public may address the board are reasonable, content-neutral time, place, and manner restrictions.)

6. In Chaffee v. San Francisco Public Library Com. (2005) 134 Cal.App.4th 109, the Plaintiff asserted that state law and a San Francisco "sunshine" ordinance required the commission to provide each speaker with up to three minutes to make comments at a meeting of the commission. At the meeting in question, the commission's president announced that public comment on each agenda item would be limited to two minutes per speaker, instead of the three minutes normally allotted to each speaker.

   a. The court held that defendants did not violate the Brown Act or the sunshine ordinance in shortening the time allotted to each speaker.

   b. The president stated in his declaration that before the meeting, he anticipated four agenda items would be lengthy. Based on his judgment of the time required for the commission to consider those four items and the other items on the agenda, he concluded the commission would not be able to complete its meeting in a reasonable period unless public comment was somewhat shortened. The minutes indicated that the meeting lasted more than four hours. Chaffee presented no evidence that the president did not reasonably expect the four items he enumerated to be lengthy or that the commission did not reasonably apply its bylaws in the circumstances.

   c. The Brown Act does not specify a three-minute time period for comments, and does not prohibit public entities from limiting the comment period in the reasonable exercise of their discretion. Id. at 116.

7. Dumping gallons of garbage on the floor of a schoolroom during a school board meeting was sufficient to support an arrest for disturbing a public meeting and was not speech protected by the First Amendment. [McMahon v. Albany Unified School Dist. (2002) 104 Cal.App.4th 1275.]

8. "The legislative body . . . shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law." [Government Code Section 54954.3(c).]

    a. This provision, and the Baca case discussed below, make it clear that an action for defamation will generally not lie for statements made at a public meeting.

    b. This provision raises concerns relating to privacy and reputation issues for public employees.

9. Under the Ralph M. Brown Act, the Superintendent of Schools of a high school district may not prohibit an administrative employee of the district from speaking during the public comment period of a public school board meeting on an agenda item concerning his demotion from assistant high school principal to a teaching position. [90 Ops.Atty.Gen. 47 (2007).]

10. In Baca v. Moreno Valley Unified School District, 936 F.Supp. 719 (C.D. Cal. 1996), the court held the board's policy prohibiting the airing of charges or complaints against identifiable district employees to be unconstitutional.

    a. The district's policy was similar to many found throughout the state:

> "No oral or written presentation in open session shall include charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee . . . . All charges or complaints against employees must be submitted to the board under provisions of board policy . . . .
>
> Any individual who violates this policy will be warned to discontinue his/her comments immediately. If the individual willfully interrupts the meeting by refusing to comply with the warning, the board President may authorize the removal of the individual pursuant to Government Code Section 54957.9."

b. Ms. Baca, who was active in the Mexican Political Association (MPA), accused a school principal and the district's superintendent of ignoring numerous complaints brought to them by parents and for acting in a discriminatory manner. Ms. Baca was warned and removed by Riverside County Sheriffs, who were present.

c. The court held that speech criticizing district employees, even if later proved to be defamatory, is protected by both the California and federal Constitutions from government censorship and prior restraint.

1) The public sessions of a board meeting are designated limited public forums. As a result, government may limit speech to certain subjects but may not engage in viewpoint discrimination within a given subject matter area.

2) The court found the following concerns not to be sufficiently compelling to justify limiting Ms. Baca's speech:

a) The employee's privacy rights;

b) The employee's liberty interests;

c) The district's interest in regulating its own meetings.

3) The presence of alternate means of communication between plaintiff and the board, or between plaintiff and other members of the public, was found not to justify or validate the otherwise unconstitutional policy. Specifically, since California law establishes as privileged, statements made in board meetings, requiring persons to bring complaints against district employees outside of such meetings does not provide an adequate alternate location.

11. In Holbrook v. City of Santa Monica (2006) 144 Cal.App.4th 1242, the plaintiff city councilmember sued arguing that the fact that city council meetings frequently ran late into the night and included public comment as the final order of business, violated the constitution and the Brown Act. Plaintiffs sought to compel the city council to end its meetings by 11:00 p.m.

a. The court concluded that, with respect to plaintiffs' constitutional claims and asserted violations of the Brown Act, the causes of action arose from protected activity. Plaintiffs failed to show that

preventing the city council from conducting legislative business after 11:00 p.m. benefited the public.

b. The court also concluded that, when plaintiffs accepted their seats on the city council, they forfeited Brown Act standing that they would otherwise have had as California citizens to sue the city council.

1) Not only did plaintiffs assert no interest that differed from that of the general public, they claimed no personal damages or consequences distinct from those of the populace that could create a beneficial interest in them.

2) As no beneficial interest in the workings of the city council was conferred by serving on that entity, plaintiffs did not establish any beneficial interest sufficient to confer standing.

12. Minutes shall be taken recording all actions taken by the governing board. The minutes are public records. [Education Code Sections 35145(a) and 72121(a).]

13. No action may be taken by secret ballot. [Government Code Section 54953(c).]

I. Government Code Section 54953(b) permits teleconferencing, not just "video teleconferencing," for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body. "Teleconferencing" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through audio or video, or both.

1. Teleconference means a meeting of individuals in different locations, connected by electronic means, through either audio or video, or both.

2. Teleconference meetings must comply with all requirements of the Brown Act and all other applicable provisions of law relating to the specific type of meeting or proceeding.

3. All votes taken during a teleconferenced meeting shall be by roll call.

4. Agendas must be posted at each teleconferencing location, agendas must identify each teleconferencing location, and each location must be accessible to the public.

5. Teleconferenced meetings must be conducted in a "manner that protects the statutory and constitutional rights of the parties or the public." [Government Code Section 54953(b)(3).]

6. During the teleconference, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction.

7. The agenda shall provide an opportunity for members of the public to address the legislative body directly, pursuant to Section 54954.3, at each teleconference location.

J. Any person attending a public meeting has the right to record the meeting by still or motion picture camera, or by video or audio tape, absent a finding by the board of persistent disruption of the proceedings. [Government Code Section 54953.5(a).]

1. A board may not prohibit or restrict the broadcast of its proceedings. [Government Code Section 54953.6.]

2. Any tape or film recording made by or at the direction of the board shall be subject to inspection pursuant to the Public Records Act, but may be destroyed or erased 30 days after the taping or recording. Any inspection of a video or audio tape recording shall be provided without charge on a tape recorder made available by the district. [Government Code Section 54953.5(b).]

V. CLOSED SESSION

A. Government Code Section 54957(a) authorizes a board to meet in closed session for the following purposes:

The legislative body of a local agency may hold closed session with the Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or facilities. [Government Code Section 54957(a).]

B. Subject to the conditions in paragraph (b)(2) of Section 54957, consideration of the appointment, employment, evaluation of performance, discipline, or dismissal of an employee. [Government Code Section 54957(b)(1).]

1. This exception permits boards to meet in closed session to discuss and act upon the hiring, firing, intermediate discipline, and evaluation of particular employees, even though, on its face, the statute authorizes only a closed session to "consider" such personnel matters. [Lucas v. Board of Trustees (1971) 18 Cal.App.3d 988; see also, Southern California Edison Co. v. Peevey (2003) 31Cal.4th 781, 799.]

2. When the legislative body of a local agency meets in closed session to consider the proposed dismissal of a public employee but ultimately rejects that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision and the vote or abstention of each member. [89 Ops.Cal.Atty.Gen. 110 (2006).]

3. A county board of education may not meet in closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of certificated or classified employees because the county board is not the employer. [85 Ops.Atty.Gen. 77 (2002).]

4. Discussion must relate to a particular individual.

5. In Duval v. Board of Trustees of the Coalinga-Huron Unified School District (2001) 93 Cal.App.4th 902, the Court of Appeal held that evaluation extends to all employer consideration of an employee's discharge of her job duties after appointment or employment and before dismissal. Section 54957 is not limited to the consideration of formal evaluations. "We conclude the phrase 'evaluation of performance' encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance."

    a. The court also concluded that evaluation may properly include such preliminary matters as the selection of evaluation criteria, the establishment of a fact-gathering mechanism, designation of particular areas of emphasis in the evaluation, and the setting of goals, since each might reflect the board's initial perception of the employee's performance since the last evaluation. All of these considerations must still relate to the employer's exercise of discretion with respect to the evaluation of a particular employee.

    b. Under evaluation of performance, a governing board may take action as to its final findings with respect to evaluation of a particular employee, and may meet with the employee to give him or her input regarding performance.

    c. Personal performance goals are an integral part of the confidential evaluation process and may be discussed in closed session. [Versaci v. Superior Court (2005) 127 Cal.App.4th 805, 822.]

6. Appointment includes the process of reviewing resumes, interviewing, discussing qualifications, and arriving at a decision prior to the actual appointment. [80 Ops.Atty.Gen. 308 (1997).]

    a. Closed sessions held pursuant to this section shall not include discussion or action on proposed compensation except for a

reduction of compensation that results from the imposition of discipline.

b. Nothing in this code section limits whom the Board may choose to advise it when it conducts meetings involving employment matters. In Kaye v. Board of Trustees of San Diego County Public Law Library (2009) 179 Cal.App.4th 48, 62, the court found nothing wrong with the board having legal counsel present in closed session to advise it.

7. Consideration of charges brought against a public employee by another person or employee unless such employee requests a public hearing. [Government Code Section 54957(b)(2).]

a. As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee must be given written notice of his or her right to have the complaints or charges heard in open session. The notice must be delivered to the employee personally or by mail 24 hours before the time for holding the session. If notice is not given, any action against the employee based on the specific complaints or charges shall be null and void.

b. In Furtado v. Sierra Community College District (1998) 68 Cal.App.4th 876, the Court of Appeal made clear that when a district is considering performance evaluations in connection with a decision to nonreelect a probationary faculty member, it is not considering "specific complaints or charges" within the meaning of Section 54957. The court reasoned that the Legislature's use of the word "or" to separate the phrase "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee" from the phrase "to hear complaints or charges brought against an employee by another person or employee unless the employee requests a public session" indicated an intent that a public employee's right to a public hearing should apply only when a board is hearing "complaints or charges."

c. In Fischer v. Los Angeles Unified School District (1999) 70 Cal.App.4th 87, the court found that the mere consideration of reasons for nonreelection did not constitute the hearing of specific complaints or charges brought against an employee by another person or employee.

d. In Bollinger v. San Diego Civil Service Commission (1999) 71 Cal.App.4th 568, a case admittedly involving specific complaints or charges brought by fellow officers, the court found that the 24-hour notice requirement was not violated where the Commission met in closed session only to deliberate on whether to accept the

findings and recommendation of a hearing officer. The consideration of the recommended decision did not constitute the hearing of specific complaints or charges. By analogy, this case supports the conclusion that a governing board need not provide the 24-hour notice when merely deliberating and acting upon the recommended decision of a hearing officer in a classified employee dismissal.

e. In Morrison v. Housing Authority of the City of Los Angeles (2003) 107 Cal.App.4th 860, the Court of Appeal held that where the governing body of a public entity, in a case involving employee discipline, rejects its hearing officer's findings of fact and engages in its own fact-finding, it is conducting a "hearing" on the charges against the employee for purposes of Section 54957 and the employee must be given notice of the right to have the hearing conducted in open session.

f. However, in Bell v. Vista Unified School District (2000) 82 Cal.App.4th 672, the Court of Appeal concluded that the governing board's consideration of the findings of a CIF commissioner constituted the hearing of specific complaints or charges brought by another person or employee when the board's consideration of the CIF's findings led to the termination of a coaching assignment for an otherwise tenured teacher.

g. The Court of Appeal concluded in Kolter v. Commission on Professional Competence of the Los Angeles Unified School District (2009) 170 Cal.App.4th 1346 that the district need not issue a 24-hour Brown Act notice to a certificated employee before commencing dismissal proceedings. This decision is a departure from the widespread precautionary practice of providing employees with 24-hour notice, pursuant to Government Code Section 54957, when a governing board will be considering any "specific complaints or charges brought against an employee by another person or employee" in closed session, regardless of whether any actual disciplinary action will be taken as a direct result of the closed session.

1) The governing board met in a closed session to initiate the process to dismiss Kolter from her employment as an elementary school teacher pursuant to Education Code Section 44934. [See Education Code Section 87672, applicable to community college districts.] LAUSD did not give Kolter any pre-meeting notice that it would be considering charges against her. However, after the closed session, the district sent Kolter notice that it would seek to

dismiss her and informed her of her right to a public hearing.

2) The court, in ruling that the 24-hour notice was not required, found that the governing board need only provide the 24-hour notice when "hearing" complaints or charges against the employee and not when merely "considering" whether to initiate discipline.

h. "Although Section 54957 allows public employees to demand that a governing body air complaints about the employee in public, it does not grant the employees the right to force the conflict behind closed doors." [Leventhal v. Vista Unified Sch. Dist. 973 F. Supp. 951, 958 (S.D. Cal., 1997); and Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal.App.4th 1424, 1439.]

i. The general rule is that closed session access is permitted only to people who have "an official or essential role to play" in the closed meeting. [83 Ops.Atty.Gen. 221, 225 (2000).]

8. The term "employee" is defined to include an officer or independent contractor who functions as an officer or an employee. Elected officers are not employees.

a. A contractor assigned to perform "executive officer services" for a county local agency formation commission (LAFCO) was an "officer" of LAFCO and thus an "employee" within meaning of Section 54957(b). [Hofman Ranch v. Yuba County Local Agency Formation Com'n (2009) 172 Cal.App.4th 805, 811.]

b. Thus, LAFCO's use of a closed session to consider renewal of his contract did not violate the Brown Act, even if contractor provided similar services to four other county LAFCOs, and even though the contract stated that contractor was not an officer or employee and was not subject to LAFCO's day-to-day direction and control, where contractor performed executive tasks including the duties described by statute as the day-to-day business of LAFCO; contractor processed LAFCO-related applications, prepared California Environmental Quality Act (CEQA) and LAFCO-related reports and documents, reviewed projects of concern and prepared responses for LAFCO, and prepared LAFCO's budget. Id.

C. Other Authority for Closed Sessions

1. A board may hold a closed session, based on the advice of counsel, to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would

prejudice the position of the district in the litigation. [Government Code Section 54956.9.]

a. Litigation is pending when any of the following circumstances exist:

1) Proceedings before a court, administrative body, hearing officer, or arbitrator to which the district is a party, have been formally initiated. [Government Code Section 54956.9(c) and (d)(1).]

2) A point has been reached where, in the opinion of the board on the advice of legal counsel, and based on existing facts and circumstances, there is a significant exposure to litigation. [Government Code Section 54956.9(d)(2).]

3) Deciding whether to litigate or whether closed session is proper based on existing facts and circumstances. [Government Code Section 54956.9(d)(3).]

4) Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate litigation, or is deciding whether to initiate litigation. [Government Code Section 54956.9(d)(4).]

b. The "significant exposure" to litigation determination must be made from the "existing facts or circumstances." "Existing facts or circumstances" consist of only one of the following:

1) Facts and circumstances that might result in litigation but which the district believes are not known to the potential plaintiff, which facts and circumstances need not be disclosed. [Government Code Section 54956.9(e)(1).]

2) Facts and circumstances including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the district and that are known to the plaintiff. These facts shall be publicly stated on the agenda or announced. [Government Code Section 54956.9(e)(2).]

3) Receipt of a tort claim or other written communication threatening litigation, which claim or communication shall be made available for public inspection. [Government Code Section 54956.9(e)(3).]

4) A statement made by a person in a public meeting threatening litigation on a specific matter within the

agency's area of responsibility. [Government Code Section 54956.9(e)(4).]

5) A statement threatening litigation outside of a public meeting on a specific matter within the responsibility of the agency so long as the official or employee of the agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting and the record is made available for public inspection. [Government Code Section 54956.9(e)(5).]

c. The board must either state on the agenda or publicly announce the paragraph of subdivision (d) authorizes the closed session, and, when known, the title of the case. [Government Code Section 54956.9(g).]

d. In Southern California Edison Co. v. Peevey (2003) 31 Cal.4th 781, 801, the Supreme Court interpreted corresponding provisions of the Bagley-Keene Act not to require a state body to announce its proposed decision relating to settlement of a case in public session-*identifying the litigation involved*--and accept public comment on the proposed settlement before voting on it. In Peevey, the PUC had recessed to closed session pursuant to the counterpart to Government Code Section 54956.9(g), which does not require the identification of the case by name prior to holding the closed session, if to do so would jeopardize pending settlement negotiations.

1) Although Section 54956.9 does not expressly so provide, it has been construed, generally, also to permit a local legislative body to approve settlements in closed session. [See Southern California Edison Co. v. Peevey, supra., 31 Cal.4th at 798-799 [discussing 75 Ops.Cal.Atty.Gen. 14 (1992), which so opined]; Trancas Property Owners Assn. v. City of Malibu (2006) 138 Cal.App.4th 172, 185.]

2) As "emphasized" in the Attorney General's manual on the Brown Act, "the purpose of [Section 54956.9] is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions." [Cal. Atty. Gen. Office, The Brown Act (2003), p. 40.]

3) Thus, Section 54956.9's implied allowance for adoption of settlements in closed session is subject to limits:

"And whatever else it may permit, the exemption cannot be construed to empower a city council to take or agree to

take, as part of a nonpublicly ratified litigation settlement, action that by substantive law may not be taken without a public hearing and an opportunity for the public to be heard. As a matter of legislative intention and policy, a statute that is part of a law enacted to assure public decision making, except in narrow circumstances, may not be read to authorize circumvention and indeed violation of other laws requiring that decisions be preceded by public hearings, simply because the means and object of the violation are settlement of a lawsuit." [Trancas Property Owners Assn., supra., 138 Cal.App.4th at 187.]

e. In County of Los Angeles v. Superior Court (2005) 130 Cal.App.4th 1099, the superior court had granted the county's motion to compel production of documents listed in a union's deposition subpoena directed to the district attorney, who had conducted an investigation into whether the board violated the Brown Act during two closed sessions.

1) The court of appeal held that the superior court erred when it granted the county's discovery motion. The documents sought by the union were not discoverable because closed session minutes were specifically exempt from disclosure under Section 54957.2. The closed sessions were properly convened under Section 54956.9 to discuss anticipated litigation related to a federal agency's decision to terminate Medicare funding to a medical center under investigation. The minutes of the closed sessions were confidential and were not subject to discovery.

2) Under Section 6254.5(e) of the Public Records Act, the board did not waive any privilege by disclosing the minutes to the district attorney. The letters in the district attorney's investigation file were exempt from disclosure under Sections 6254(f) and 6254.5(e).

f. Section 54956.9 does not authorize the practice of mediating disputes or discussing potential litigation with opposing parties and their counsel. [Page v. Mira Costa Community College Dist. (2009) 180 Cal.App.4th, 471; Shapiro v. Board of Directors of Centre City Development (2005) 134 Cal.App.4th 170, 182-183; and 62 Ops.Atty.Gen. 150 (1979).]

2. A board member may not publicly disclose information that has been received and discussed in closed session concerning pending litigation unless the information is authorized by law to be disclosed. [80 Ops.Atty.Gen. 231 (1997).] (NB: Much of the reasoning of this opinion is equally applicable to the improper disclosure of other closed session

discussions.) [See Government Code Section 54963. Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, 334.] ("We agree with the Attorney General. Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act.")

3. In 86 Ops.Atty.Gen. 210 (2003), the Attorney General concluded that where a member of a city council or county board of supervisors is appointed to sit as that body's representative on the board of another local agency, the appointee may not disclose to his or her appointing authority or its counsel information received in a closed session of the board.

   a. However, Section 54956.96 was added to the Act to permit joint power agencies to adopt policies or bylaws, or include in their joint powers agreement, provisions that authorize a member of a legislative body of a member local agency to disclose information obtained in closed sessions of the JPA that has direct financial or liability implications for that local agency to legal counsel for the member local agency for purposes of obtaining advice on whether the matter has direct financial or liability implications for that member local agency, or to other members of the legislative body of the local agency present in a closed session of that member local agency. [Government Code Section 54956.96.]

   b. The general rule is that closed session access is permitted only to people who have "an official or essential role to play" in the closed meeting. [83 Ops.Atty.Gen. 221, 225 (2000); see also 82 Ops.Atty.Gen. 29, 33 (1999); 46 Ops.Atty.Gen. 34, 35 (1965).]

4. Consideration of student disciplinary action, unless a public hearing is requested in writing [see the specific provisions of Education Code Sections 35146 and 72122], and challenges to a student's records. [Education Code Sections 49070(c) and 76232(c).]

5. A board may hold closed session, pursuant to Government Code Section 54957.6, with its designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits to represented and unrepresented employees, and for represented employees, any other matter within the scope of representation. [Government Code Sections 3549.1 and 54957.6; see also, San Diego Union v. City Council (1983) 146 Cal.App.3d 947.]

   a. The Attorney General has concluded that, since the county board is not the employer, it may not meet in closed session pursuant to the labor negotiations exception. [85 Ops.Atty.Gen. 77 (2002).]

   b. Closed sessions with the local agency's designated representative regarding the salaries, salary schedules, or compensation paid in

the form of fringe benefits may include discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative.

c. Closed session held pursuant to Section 54957.6 shall not include final action on the proposed compensation of one or more unrepresented employees.

d. Note Well: Pursuant to Government Code Section 53262(a) all contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent, community college president, community college vice president, community college deputy vice president, general manager, city manager, county administrator, "or other similar chief administrative officer or chief executive officer of a local agency" shall be **ratified** in an open session of the governing body which shall be reflected in the governing body's minutes.

e. Pursuant to Section 53262(b) copies of any contracts of employment, as well as copies of the settlement agreements, shall be available to the public upon request.

6. Consideration of real property transactions. This exception permits a board to meet with its negotiator prior to purchase, sale, exchange, or lease of real property to grant authority to its negotiator regarding the price and terms of the transaction. Before discussing the transaction in closed session, the board must identify the real property at issue and the person with whom its negotiator may negotiate. [Government Code Section 54956.8. See, Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904.]

a. The real-estate-negotiations exception to the open meeting requirements of the Brown Act permits the closed-session discussion of: (1) the amount of consideration that the local agency is willing to pay or accept in exchange for the real property rights to be acquired or transferred in the particular transaction; (2) the form, manner, and timing of how that consideration will be paid; and (3) items that are essential to arriving at the authorized price and payment terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential. [94 Ops.Cal.Atty.Gen. 82, 2011 WL 617511.]

7. Nothing contained in the Brown Act shall be construed to prevent the legislative body of a multijurisdictional law enforcement agency, or an advisory body of a multijurisdictional law enforcement agency, from holding closed sessions to discuss the case records of any ongoing

criminal investigation of the multijurisdictional law enforcement agency or of any party to the joint powers agreement, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases. [Government Code Section 54957.8.]

a. "Multijurisdictional law enforcement agency" means a joint powers entity formed pursuant Government Code Section 6500 that provides law enforcement services for the parties to the joint powers agreement for the purpose of investigating criminal activity involving drugs; gangs; sex crimes; firearms trafficking or felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft. [Government Code Section 54957.8(a).]

b. The addition of this provision occurred after the passage of Proposition 59, and provides an example of the legislative findings now required to justify a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies. [See Statutes of 2006, Chapter 427, Section 2.]

8. Districts which are members of a joint powers agency formed for the purpose of insurance pooling may meet in closed session to discuss a claim for the payment of tort liability losses, public liability losses, or workers' compensation liability. [Government Code Section 54956.95.]

9. Consideration of honorary degrees or gifts from a donor who wants to remain anonymous. [Education Code Section 72122.]

10. Discussion by the legislative body of a local agency that has received a confidential final draft audit report from the Bureau of State Audits of its response to that report. [Government Code Section 54956.75.]

D. The right to consider the above matters in closed session includes the ability to take action in closed session. [75 Ops.Atty.Gen. 14 (1992).]

E. The Act requires a brief, general description of each item of business to be transacted, including items to be discussed in closed session. What this means with respect to closed sessions is somewhat ambiguous. However, Section 54954.5 provides a "safe harbor" provision, such that substantial compliance with its suggested language will prevent a finding of a violation of the Act's closed session notice requirements. Examples of the suggested language include the following:

1. CONFERENCE WITH REAL PROPERTY NEGOTIATORS

a. **Property**: (specify the street address, or if no street address, the parcel number or other unique reference to the property under negotiations.)

b. **Agency Negotiator**: (specify the name of the negotiators attending the closed session.) (If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

c. **Negotiating parties:** (specify name of party - not agent.)

d. **Under negotiation:** (specify whether the instructions to the negotiator will concern price, terms of payment, or both.)

2. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION *(Subdivisions (c)and (d)(1) of Section 54956.9)*

a. **Name of case:** (specify by reference to claimant's name, names or parties, case or claim numbers.)

or

b. **Case name unspecified:** (specify whether disclosure would jeopardize service of process or existing settlement negotiations.)

3. CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION

a. **Significant exposure to litigation pursuant to subdivision (d)(2) and (e) of Section 54956.9:** *(specify the number of potential cases.)*

(In addition to the information noticed above, the district may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to paragraphs (2) to (5), of subdivision (e) of Section 54956.9.) This may mean stating the existing facts and circumstances giving rise to a significant exposure to litigation against the district.) See the discussion of the content of paragraphs (2) to (5) of subdivision (e) of Section 54956.9 at pages 28-29, above.)

b. **Initiation of litigation pursuant to subdivision (d)(4) of Section 54956.9:** *(specify the number of potential cases.)*

4. LIABILITY CLAIMS [GOVERNMENT CODE SECTION 54956.95]

a. **Claimant:** (*specify name unless unspecified pursuant to Section 54961*.)

b. **Agency claimed against:** *(Specify name.)*

5. THREAT TO PUBLIC SERVICES OR FACILITIES

   a. **Consultation with**: (*specify name of law enforcement agency and title of officer.*)

6. PUBLIC EMPLOYEE APPOINTMENT

   a. **Title:** (*specify description of position to be filled.*)

7. PUBLIC EMPLOYMENT

   a. **Title:** (*specify description of position to be filled.*)

8. PUBLIC EMPLOYEE PERFORMANCE EVALUATION

   a. **Title:** (*specify position title of employee being reviewed.*)

9. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

   No additional information is required to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation.

10. CONFERENCE WITH LABOR NEGOTIATORS

    a. **Agency designated representatives:** (specify names of designated representatives attending the closed session.) (If circumstances necessitate the absence of a specified representative, an agent or designee may participate in place of the absent representative so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

    b. **Employee organization:** (specify name of organization representing employee or employees in question.)

       or

    c. **Unrepresented employee:** (specify position title of unrepresented employee who is the subject of the negotiations.)

11. CONFERENCE INVOLVING JOINT POWERS AGENCY

    a. **Discussion will concern:** (*specify closed session description used by the joint powers agency.*)

    b. **Name of local agency representative on joint powers agency board:** *(specify name)*

12. AUDIT BY BUREAU OF STATE AUDITS

F. Prior to holding a closed session, the board must disclose, in an open meeting, the items to be discussed in closed session. The announcement can either repeat all of the information already stated on the agenda, or it may simply refer to the items as they are listed on the agenda by number or letter. [Government Code Section 54957.7.]

Nothing in Section 54957.7 shall require or authorize a disclosure of information prohibited by state or federal law.

G. After any closed session, the board must reconvene in open session prior to adjournment and make the disclosures required by Government Code Section 54957.1. The board must report any action taken in closed session and the vote or abstention of every member present thereon as follows:

1. Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported as follows:

   a. If the board's approval renders the agreement final then it must report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held;

   b. If final approval rests with the other party, the board shall disclose the fact of approval and the substance of the agreement upon inquiry by any person as soon as the other party approves the agreement.

2. Approval given to legal counsel to defend, or seek or refrain from seeking appellate review or relief, or enter as amicus curiae in any form of litigation as a result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify the adverse party, and the substance of the litigation.

3. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the particulars will be disclosed upon request once the litigation is formally commenced, unless to do so would jeopardize the agency's ability to complete service of process, or jeopardize the ability to conclude existing negotiations.

4. Approval given to a settlement of pending litigation shall be reported after the settlement is final as specified below:

   a. If the board accepts a settlement offer signed by the opposing party, the board shall report its acceptance and identify the

substance of the agreement in open session at the public meeting during which the closed session is held.

b. If final approval rests with the other party or the court, the board shall disclose the fact of approval and the substance of the agreement upon inquiry by any person as soon as the settlement becomes final.

5. Disposition of claims discussed in closed session pursuant to Section 54956.95 must be reported as soon as reached. The board must identify the name of the claimant, the local agency claimed against, the substance of the claim, and the amount of any settlement.

6. Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee shall be reported at the public meeting at which the closed session is held. The report must identify the title of the position.

However, the report of a dismissal or of the non-renewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

If none of these specified types of "actions" is "taken" during the closed session, there is no duty to report the body's deliberations or the members' votes or abstentions with respect thereto. When the legislative body of a local agency meets in closed session to consider the proposed dismissal of a public employee but ultimately rejects that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision and the vote or abstention of each member. 89 Ops.Atty.Gen. 110 (2006).

7. Approval of an agreement concluding labor negotiations pursuant to Section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other parties to the negotiation.

H. Making the required reports.

1. The reports may be made either orally or in writing. [Government Code Section 54957.1(b).]

2. The board must provide to any person who has submitted a written request to the board within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally

approved or adopted in the closed session. [Government Code Section 54957.1(b).]

If the action taken results in one or more substantive amendments to the related documents requiring retyping during normal business hours, the documents need not be released until the retyping is completed, provided that the presiding officer of the legislative body or his designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

3. In addition, the documents referred to above shall be available to any person on the next business day following the meeting in which the action referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete. [Government Code Section 54957.1(c).]

4. No action for injury to a reputation, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with this section. [Government Code Section 54957.1(e).]

VI. ENFORCEMENT OF THE BROWN ACT

A. Criminal Consequences: Each member of a board who attends a meeting of the board where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor. [Government Code Section 54959.]

1. Action taken is defined to include "collective commitment." Mere deliberation of some action will not trigger the criminal penalty. [Government Code Section 54952.6.]

2. Good faith reliance on an opinion of counsel that a closed meeting is proper, normally would preclude a finding of "wrongful intent to deprive the public of information." [See, Attorney General Index letter 76-173 interpreting pre-amendment language.]

B. Civil Remedies - actions in the form of injunction, mandamus or declaratory relief.

C. The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of **stopping** or **preventing violations** or **threatened violations** of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to **ongoing actions** or **threatened future actions** of the legislative body, or to determine the applicability of this chapter **to past actions** of the legislative body, subject to Section 54960.2, or to determine whether any rule or action by the

legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or to compel the legislative body to audio record its closed sessions as hereinafter provided. [Government Code Section 54960.]

1. The district attorney or any interested person may file an action to determine the applicability of this chapter to **past actions** of the legislative body pursuant to subdivision (a) of Section 54960 only if all of the following conditions are met [Government Code Section 54960.2(a).]:

    a. The district attorney or interested person alleging a violation of this chapter first submits a cease and desist letter to the clerk or secretary of the legislative body being accused of the violation, clearly describing the past action of the legislative body and nature of the alleged violation. (Government Code Section 54960.2(a)(1).]

    b. The cease and desist letter must be submitted to the legislative body within nine months of the alleged violation. [Government Code Section 54960.2(a)(2).]

    c. The time during which the legislative body may respond to the cease and desist letter has expired and the legislative body has not provided an unconditional commitment. [Government Code Section 54960.2(a)(3).]

    d. Within 60 days of receipt of the legislative body's response to the cease and desist letter, other than an unconditional commitment, or within 60 days of the expiration of the time during which the legislative body may respond to the cease and desist letter, whichever is earlier, the party submitting the cease and desist letter shall commence the action or thereafter be barred from commencing the action. [Government Code Section 54960.2(a)(4).]

2. The legislative body may respond to a cease and desist letter submitted pursuant to subdivision (a) within 30 days of receiving the letter. This subdivision shall not be construed to prevent the legislative body from providing an unconditional commitment pursuant to subdivision (c) at any time after the 30-day period has expired, except that in that event the court shall award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to this section, in accordance with Section 54960.5.

3. If the legislative body elects to respond to the cease and desist letter with an unconditional commitment to cease, desist from, and not repeat the past action that is alleged to violate this chapter, that response shall be in substantially the following form:

> To _____:
>
> The [name of legislative body] has received your cease and desist letter dated [date] alleging that the following described past action of the legislative body violates the Ralph M. Brown Act:
>
> [Describe alleged past action, as set forth in the cease and desist letter submitted pursuant to subdivision (a)]
>
> In order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, the [name of legislative body] hereby unconditionally commits that it will cease, desist from, and not repeat the challenged past action as described above.
>
> The [name of legislative body] may rescind this commitment only by a majority vote of its membership taken in open session at a regular meeting and noticed on its posted agenda as "Rescission of Brown Act Commitment." You will be provided with written notice, sent by any means or media you provide in response to this message, to whatever address or addresses you specify, of any intention to consider rescinding this commitment at least 30 days before any such regular meeting. In the event that this commitment is rescinded, you will have the right to commence legal action pursuant to subdivision (a) of Section 54960 of the Government Code. That notice will be delivered to you by the same means as this commitment, or may be mailed to an address that you have designated in writing.
>
> Very truly yours,
>
> _____
> [Chairperson or acting chairperson of the legislative body]
>
> [Government Code Section 54960.2(c)(1).]

4. An unconditional commitment pursuant to this subdivision shall be approved by the legislative body in open session at a regular or special meeting as a separate item of business, and not on its consent agenda. [Government code Section 54960.2(c)(2).]

5. An action shall not be commenced to determine the applicability of the Brown Act to any past action of the legislative body for which the legislative body has provided an unconditional commitment as specified above. During any action seeking a judicial determination regarding the applicability of this chapter to any past action of the legislative body, if the court determines that the legislative body has provided an unconditional commitment, the action shall be dismissed with prejudice. [Government Code Section 54960.2(c)(3).]

6. The fact that a legislative body provides an unconditional commitment shall not be construed or admissible as evidence of a violation of this chapter. [Government Code Section 54960.2(c)(4).]

7. If the legislative body provides an unconditional commitment, the legislative body shall not thereafter take or engage in the challenged action described in the cease and desist letter. Violation of the commitments shall constitute independent violations of the Brown Act, without regard to whether the challenged action would otherwise violate the Brown Act. An action alleging past violation or threatened future violation of this subdivision may be brought pursuant to subdivision (a) of Section 54960, without regard to the procedural requirements of this section. [Government Code Section 54960.2(d).]

8. The legislative body may resolve to rescind an unconditional commitment made by a majority vote of its membership taken in open session at a regular meeting as a separate item of business not on its consent agenda, and noticed on its posted agenda as "Rescission of Brown Act Commitment," provided that not less than 30 days prior to such regular meeting, the legislative body provides written notice of its intent to consider the rescission to each person to whom the unconditional commitment was made, and to the district attorney. Upon rescission, the district attorney or any interested person may commence an action pursuant to subdivision (a) of Section 54960. [Government Code Section 54960.2(e).]

9. A court may impose the requirement that closed sessions be taped if it finds that the board has violated the statutes authorizing closed sessions. [Government Code Section 54960(a).]

10. Tape recordings of closed sessions will be discoverable under very limited circumstances.

D. Violations of the meeting notice and agenda provisions may result in having action taken adjudged null and void. Such actions may be commenced by the district attorney or by any interested person. [Government Code Section 54960.1.]

1. Prior to commencing such an action, the interested person or the district attorney must demand in writing that the board cure or correct the alleged violation.

2. The written demand shall be made within 90 days unless the action was taken in an open session but in violation of the agenda requirements, in which case the demand must be made within 30 days from the date the action was taken.

3. Suit must be brought within 15 days of the board's decision as to whether it will cure or correct or within 15 days after the expiration of the 30-day period to cure or correct demand, whichever is earlier. Even after a lawsuit is filed, the board may cure and correct and have the lawsuit dismissed.

4. Certain actions are not subject to rescission. [Government Code Section 54960.1(d)(1-4).]

5. Successful plaintiffs are entitled to their attorney's fees. Boards may recover attorney's fees only where the lawsuit is frivolous and without merit. [Government Code Section 54960.5.]

6. "Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action, Brown Act violations will not necessarily invalidate a decision. Appellants must show prejudice." [Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 555-556 (no prejudice shown from violation of Government Code Section 54954.2, subd. (a), which "requires that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda").] [San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal.App.4th 1356; Galbiso v. Orosi Public Utility Dist. (2010) 182 Cal.App.4th 652, 671.]

7. To state a cause of action under Section 54960.1, the complaint must allege: (1) that a legislative body violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not correct the challenged action. [Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116-1117.] (Mere conference with legal counsel and the giving of direction to staff did not constitute "an action taken" within the meaning of Section 54952.6. Further, the council's rescission of all

action relating to the improperly-agendized litigation, even though there was no action taken, constituted the cure and correction of the alleged violation.)

E. Attorney Fees.

1. "A court may award court costs and reasonable attorney fees to the *plaintiff* in an action brought pursuant to Section 54960 or 54960.1 *where it is found that a legislative body of the local agency has violated this chapter.* The costs and fees shall be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency." [Government Code Section 54960.5.]

2. Such awards are not mandatory, and are entrusted to the discretion of the trial court. [Galibiso v. Orosi Public Utility District (2008) 167 Cal.App.4th 1063, 1077.]

3. In determining whether to award attorney fees it "should consider among other matters 'the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit.' [Citations.]" [Galbiso supra, 167 Cal.App.4th 1063, 1083, and Bell v. Vista Unified School Dist., supra, 82 Cal.App.4th at p. 686.]

4. "[T]he trial court has the discretion to deny successful Brown Act plaintiffs their attorneys fees, but only if the defendant shows that special circumstances exist that would make such an award unjust." [Id., and Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors, supra, 112 Cal.App.4th at p. 1327.]

5. A court may award court costs and reasonable attorney fees to a local agency defendant in an action only where the defendant has prevailed in a final determination of such action and the court finds that the action was clearly frivolous and totally lacking in merit. [Government Code Section 54960.5.]

M E M O R A N D U M

TO: Surplus Property ("7-11") Advisory Committee
PASADENA UNIFIED SCHOOL DISTRICT

FROM: Constance Schwindt, District Legal Counsel

DATE: February 1, 2017

RE: **Conflict of Interest Law: Real Property**

This memorandum provides an overview of the laws dealing with conflicts of interest and public officials. Specifically, we address the issue of board appointed advisory committee members who own property near land that is the subject of the advisory committee's actions.

1. DISCUSSION

There are two sets of laws that address conflict of interest issues in general and may apply to board appointed advisory committee members and their ownership of property in particular. The Government Code addresses conflicts of interest generally in Section 1090 *et seq*. The Political Reform Act, which can be found in Government Code (Section 87100 *et seq*.) and the California Code of Regulations (Title 2, Section 18700 *et seq*.) also addresses conflicts of interest and specifically discusses the issue of property ownership. This memo focuses on the Political Reform Act since it addresses the issue of property ownership specifically and we do not think the Section 1090 would be triggered here.

A. Political Reform Act

The Political Reform Act is found in the Government Code (Section 87100 *et seq*.) and the California Code of Regulations (Title II, Section 18700 *et seq*.). In general, the Act prohibits any public official from participating in a governmental decision that may affect his or her financial interest. Specifically, the Act lays out a six step analysis to determine if a conflict of interest exists in any given situation. Special instructions are given throughout this analysis when property ownership is at issue. Below, we discuss each step in the context of property ownership.

1. Elements

a. Public Official

As defined by Section 82048, public official includes any member of a state or local government agency, including members of advisory bodies.

b. Influencing a Government Decision

In order for a conflict of interest to exist, the public official must be attempting to use his or her official position to influence a governmental decision. According to Section 18702.1(a), this occurs when "the official votes on a matter, obligates his agency to a course of action, or enters into any contractual agreement on behalf of his or her agency." Any decision that relates to property will fall under this category.

c. Economic Interest

In order to be considered a conflict of interest, the official in question must have an economic interest that may be financially affected by the decision. (Section 87103(b).) In terms of property ownership, the public official in question will have an economic interest if he or she has some type of interest in a piece of property that is worth at least two thousand dollars. (Section 87103.)

d. Potential Effect on Economic Interest

Once it is established that the public official has a financial interest, it must be shown that the economic interest will be or possibly could be affected by the decision. According to Section 18704.2(a)(1), this step is satisfied if the member's property is within 500 feet of the boundary of the government's property.

e. Material Effect

The effect on the public official's property must be material. According to Regulation 18705.2(a), any "reasonably foreseeable" effect on the member's property is presumed to be material. If the public official can argue that the effect was not reasonably foreseeable, this presumption may be rebutted. The Regulation specifically states that a decision is not material if it does not foreseeably affect any of the following:

(1) the termination date of the lease,
(2) the amount of rent paid related to the property,
(3) the value of the right to sublease the property,
(4) the allowed use or actual use of the property, or
(5) the use or enjoyment of the property.

f. Reasonably Foreseeable Effect

At the time the government decision was made, the financial effect on the member's property must be reasonably foreseeable. This standard depends on the facts of the case. However, according to relevant decisions, an effect is always considered reasonably foreseeable if the government's decision will alter the use or value of the property in any manner.

2. Consequences

Once it is determined the public official fits all the elements and has a conflict of interest, he or she must follow the following steps as outlined in Section 87105.

a. Public Identification

First, the member must make the conflict of interest known to the public. The code requires the public identification to be "in detail sufficient to be understood by the public" but it specifically states that "disclosure of the exact street address of a residence is not required." (Section 87105.)

b. Recuse

The member must then recuse himself from discussing and voting on the manner.

c. Absence

The member must leave the room during the vote as well as during any discussion of the matter and any disposition of the matter. The section allows the member to speak about the issue during the time that the general public is allowed to speak on the issue.

B. **Government Code Section 1090**

The Government Code section 1090 *et seq*. also deals with conflicts of interest. This section is broader than the Political Reform Act but it does not specifically address the property ownership issue. It states that public officials cannot hold a financial interest in any contract made by them in their official capacity. As this advisory committee will not be contracting in their official capacity, we believe Section 1090 would not apply.

2. RELEVANT CASE LAW

Conflict of interest issues concerning real property owned by a public official was addressed by the California appellate court in *Downey Cares v. Downey Community Development Commission* (1987) 196 Cal.App.3d 983. In *Downey Cares*, the court considered whether the material financial effect on the value of a councilmember's real property and real estate business of amendment of a redevelopment plan was reasonably foreseeable. The councilmember owned real property in both the old and amended redevelopment project areas and his real estate business was located in the amended area. The trial court based its decision in part on the fact that while amendment of the plan did not spend money on specific projects, it began the process of setting aside revenues for improvements in the plan area. The trial court also found that it had a reasonably foreseeable effect on the councilmember's income as a realtor because such income is based on percentage of property value sold and it was reasonably foreseeable that the amendment to the plan area would increase property values. (*Downey Cares*, *supra*, at 989-90.)

The councilmember argued that the conflict laws did not bar his participation in the action to amend the plan because the amendment of the plan did not specify or authorize any particular projects so it could not have a reasonably foreseeable financial effect on any specific property, including the councilmember's. The councilmember conceded that he might be barred from future votes on implementation of the redevelopment plan, but argued that he was not barred from voting on the amendment of the plan. (*Id*. at 990.)

The Court of Appeal rejected the councilmember's argument as too narrow an interpretation of the PRA. (*Ibid*.) According to the Court:

> In determining the reasonably foreseeable effects of the adoption of the redevelopment plan, the court may justifiably consider that the very purpose of redevelopment is to improve the property conditions in the redevelopment area. [Citation and footnote omitted.] The fact that it might be possible to conceive of specific redevelopment projects which might fail to affect [the councilmember's] property and business does not show the trial court's decision was wrong. The test is whether it was reasonably foreseeable that the adoption of the plan would have a material financial effect on [the councilmember's] property and business, and we find the trial court's decision supported by reasonable inferences and the record.
>
> * * *
>
> Footnote 4: Drawing reasonable inferences that redevelopment will foreseeably increase property values and realtor income, while taking care to decide each case on its individual circumstances, is a reasonable accommodation of conflicting considerations. Such interpretation does not paralyze redevelopment agencies from taking the first steps toward redevelopment. Government Code section 87101 provides: "Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section." This section represents a compromise which permits government agencies to act but minimizes conflicts of interest, reflecting a policy that the actions of a closely divided council or commission should not be determined by a member who is financially interested in the decision. (*Downey Cares, supra*, at 991.)

3. CONCLUSION

If an advisory committee member owns a piece of property that may be financially affected by an act of the committee, the Political Reform Act may require that the committee takes steps to ensure its decisions are not influenced by the advisory committee member in question.

SUMMARY OF SURPLUS PROPERTY PROCEDURES

These materials provide school districts with an overview of practical issues to consider before using or disposing of school district property, as well as the options available and information necessary to better assess current real property use agreements, and make fiscally responsible plans for future use agreements or disposition of school district properties. We will discuss the disposition of surplus real property by way of sale or lease and the options available to school districts for sharing facilities with both public and private entities. The following materials are divided into four categories: (1) disposition of surplus real property; (2) agreements with private entities; (3) agreements with other public entities; and (4) school closures.

I. SALE AND LEASE OF SURPLUS PROPERTY

1. What are the school district's goals/expectations?

2. What limitations (legal, political, etc.) exist on the property?

3. How will these goals, expectations, and limitations be communicated to the Board and to the community?

4. What does the school district desire to do with the funds it receives and is this an allowable use of those funds?

5. With what type of entities (public, private, individual) is the school district dealing?

6. What type of relationship, if any, does the school district have with these entities?

7. What political/community issues will be involved in the school district's decision about the disposition of the property or its ultimate use?

8. Does the school district have a master facilities plan with which the use/disposition of the property must conform?

9. How will the disposition of the property affect the use of other district facilities?

10. Has the school district considered disposing of other properties that may be better suited?

SALE OF PROPERTY

Preliminary Matters

(A) Asset Management Planning

"Asset management", as a term, is often confusing because it means different things to different people. In the context of California public school districts, asset management simply means treating surplus real property -- property no longer needed for programmatic, administrative, or operational use -- in a businesslike way. A school district does this by

taking a holistic look at the need for its real estate over the next ten (10) or twenty (20) years and deciding, based on policy goals, demographic analysis, and economic analysis, what properties may be declared surplus and can generate revenues and how all other district properties are best used.

A well-run business treats any of its assets in a manner which secures the most value for its shareholders. Similarly, a prudent school district, in dealing with its surplus real estate, will be responsible for securing value from these assets for the benefit of its constituents. Acting like a business in handling its surplus real property carries significant benefits for a school district. For example, when it goes out for a bond or a parcel tax, a district assures its constituents that economic value has been properly realized from assets no longer needed for the district's mission purpose, value which can be turned to advantage for other district capital needs.

A school district engages in proper asset management by planning for the long-term use of all its real property assets. For a property which it determines it may not need for the long-term, the district should first inventory it in order to fully understand what it owns. Second, the district should engage in planning for disposition to ensure that it will not be shortchanged if and when the property were to be put on the market. It does this by recognizing that there are various methods to achieving value for a piece of surplus property. In this context, a district should analyze the pros and cons of each approach to disposition - sale or lease of property, exchange or joint venture, sale of property "as is" or with zoning or development entitlements in place, etc. In this way, the district comes to understand the relationship of risk to reward; in the marketplace greater reward almost always carries with it the assurance of greater risk. The question is how does a school district knowledgeably and prudently find the right balance between that reward and that risk?

A recommended way to approach asset management with the goal of ensuring an ultimately successful disposition is to undertake an Asset Management Planning Report. Although this plan can take different forms, essentially an Asset Management Planning Report should provide the school district with the following information and can do so by carrying out the following tasks:

1. Inventory each potentially surplus property (including reference to each property's characteristics and constraints, such as size, zoning and General Plan designations, title issues, current use, and lease and other encumbrances).

2. Summarize lease obligations and other commitments for use by non-district entities of each property, if any.

3. Discuss constraints and opportunities for each property.

4. In regard to property which may be subject to the Naylor Act, memorialize discussions with the Planning Department and the Parks and Recreation Department of the local jurisdiction so the district can avoid surprises (and possibly create compromise).

5. Articulate real-world disposition options for each property and, working with an appraiser, develop value ranges for each option.

6. Look at all potentially surplus properties holistically with reference to all of the real estate owned by the district; i.e., use this process to discover and act on opportunities to resolve all potential land use issues with the local city or county in which the district operates.

7. Summarize legal and procedural requirements for sale or lease or exchange of public school district real property.

8. Present recommendations to district for the preferred manner of disposition for each property and the priority in which they should occur.

It should be remembered that the final version of any good Asset Management Planning Report will be the result of discussions undertaken among school district staff, the Board of Education, the staff of the local city or county, and members of the public. In this way, the Asset Management Planning Report will be able to lead to wide acceptance by the community in any disposition of the district's real property.

(B) Appointment of Advisory Committee (Education Code section 17388)

Pursuant to Education Code section 17388, before surplus real property is sold or leased, the governing board of a school district must appoint an advisory committee to advise the governing board on the disposition of such property. Education Code section 17389 requires that the advisory committee be composed of not less than seven (7) nor more than eleven (11) members and must be representative of specific groups within the community. Sometimes this committee is called a "7-11 Committee."

Education Code section 17389 states that an advisory committee must be represented by each of the following:

a. The ethnic, age group, and socioeconomic composition of the school district.

b. The business community, such as store owners, managers, or supervisors.

c. Landowners or renters, with preference to be given to representatives of neighborhood associations.

d. Teachers.

e. Administrators.

f. Parents of students.

g. Persons with expertise in environmental impact, legal contracts, building codes, and land use planning, including, but not limited to, knowledge of the zoning and other land use restrictions of the cities or cities and counties in which the surplus space and real property is located.

The committee's task is to review data to determine the amount of surplus space or real property available, establish a priority list for its use, provide community input on acceptable uses, and forward its recommendations to the governing board. On recommendation from the advisory committee, a school district's governing board may pass a Resolution of Intention to dispose of real property.

Education Code section 17390 specifically states that an advisory committee must do all of the following:

a. Review the projected school enrollment and other data as provided by the school district to determine the amount of surplus space and real property.

b. Establish a priority list of use of surplus space and real property that will be acceptable to the community.

c. Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings for community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for childcare development purposes pursuant to Education Code section 17458.

d. Make a final determination of limits of tolerance of use of space and real property.

e. Forward to the school district's governing board a report recommending uses of surplus space and real property.

Please note that the provisions for an Advisory Committee do not set forth a minimum time period in which these duties must be completed. Furthermore, as an extension of a legislative body (the school district governing board), please note that the Advisory Committee must follow all Brown Act requirements.

(C) Notice to Local Planning Agency

Government Code section 65402(c) requires a school district to submit a report to its local planning agency before disposing of any real property. The planning agency must report on the disposition's conformity with the applicable general plan within forty (40) days. If the planning agency fails to report on the disposition of such property within forty (40) days, such failure to submit a report is deemed a conclusive finding that the proposed disposition conforms to the general plan. If the planning agency disapproves of the disposition, such disapproval may be overruled by the school district.

(D) California Environmental Quality Act

Prior to disposing of the property, school districts must comply with the California Environmental Quality Act ("CEQA"). School districts may seek a categorical exemption for the sale of surplus property pursuant to CEQA Guidelines section 15132.

(E) Deed Restrictions

Prior to selling any surplus property, a review of the real property deed should be made to discover any possible restrictions.

Requirements Regarding Offering Surplus Property

After the advisory committee recommends the sale of surplus property, a school district must offer to sell the property to certain entities and public agencies as follows:

(A) Sale of Property Designed to Provide Direct Instruction or Instructional Support pursuant to Education Code section 17457.5 and amendments to Education Code sections 17230, 17458, 17464 and 17489

This legislation previously gave charter schools first priority over other entities if the charter school has projections of at least eighty (80) in-district average daily attendance for the following year and submitted a written request to the school district to be notified of surplus property dispositions and the property was designed to provide direct instruction or instructional support. This legislation expired on July 1, 2016 and was not extended by the legislature. However, it is possible that the legislature will renew this requirement in the future and therefore, it is discussed here. The legislation requires that the school district's offer to sell or lease the property to the charter school include the following conditions:

a. The charter school must use the property exclusively to provide direct instruction or instructional support.

b. If the charter school fails to comply with the requirements described above, in the case of a sale, the charter school would be required to immediately offer the property for sale to the school district that previously owned the property. If the school district does not desire to purchase the property, the school district must furnish the charter school with a list of charter schools that have requested notification of surplus property. If the property is not sold to these parties, the charter school must offer it for sale pursuant to the statutory surplus property requirements applicable to school districts. In the case of a lease, such failure to comply would constitute a breach of the lease and entitle the school district to immediate possession of the property in addition to any damages the school district may be entitled to under the lease.

c. Construction of a school building shall comply with the Education Code section 17280 *et seq*. and 17365 *et seq*. Reconstruction or alteration of a school building must comply with Education Code section 17280 *et seq*. and 17365 *et seq*. if the building complied with these sections on the date the property was purchased by the charter school.

d. A charter school selling real property obtained pursuant to section 17457.5 must use the proceeds only for capital outlay, maintenance, and other facility-related costs.

e. The school district and any of the entities authorized to receive offers of sale pursuant to the statutory surplus property requirements have standing to enforce the above conditions and would be entitled to reasonable attorney's fees incurred in such enforcement.

Once the school district has provided written notice to a charter school offering to sell or lease the property, the charter school has sixty (60) days to notify the school district of its intent to purchase or lease the property. If more than one charter school notifies the school district of the intent to purchase or lease the property, the school district may choose the charter school to which it desires to sell or lease the property.

Significantly, the school district can only sell or lease the property to the charter school at a reduced priced based upon the formula set forth in the new Section 17457.5. For a sale, the price is limited to an amount that does not exceed the school district's cost of acquisition (subject to a cost of living adjustment) plus the cost of any school facilities construction undertaken on the property by the school district since its acquisition of the land (subject to an adjustment based on the statewide cost index for class B construction, as annually determined by the State Allocation Board pursuant to Section 17072.10). However, the price cannot be less than twenty-five percent (25%) of the fair market value of the property or less than the amount necessary to retire the share of local bonded indebtedness plus the amount of the original cost of the approved state aid applications on the property. For a lease, the lease payment is limited to an annual rate of not more than five percent (5%) of the maximum sale price, as described above (subject to a cost of living adjustment).

(B) Sale of Surplus Playground, Playing Fields and Recreational Property pursuant to Education Code section 17485 *et seq*. ("Naylor Act")

The purpose of the Naylor Act is for the preservation of recreational and open space property by allowing one governmental agency to purchase such property from another at a reduced price. (Education Code section 17485). In order to be subject to the requirements of the Naylor Act, the surplus property must be a site which has the following characteristics:

a. The property consists of land which is used for school playground, playing field, or other outdoor recreational purposes and open-space land particularly suited for recreational purposes.

b. The property must have been used for one or more of the purposes set forth in the preceding paragraph for at least eight (8) years immediately preceding the date of the governing board's determination to sell the property.

c. No other available publicly owned land in the vicinity is adequate to meet the existing and foreseeable need to the community for playground, playing field, or other outdoor recreational and open-space purposes.

There are some exceptions and limitations to the Naylor Act, which are summarized as follows:

a. If a school building is already erected on the site, the governing board can retain a portion of the property and the surrounding property which must be retained to avoid reducing the value of that part of the school site containing the structures to less than 50 percent (50%) of the fair market value. (Education Code section 17490.)

b. The school district can exempt the property from the Naylor Act if it is purchasing a school site at another location or is expanding another school site by 50 percent (50%) or more. (Education Code section 17497.)

c. A public agency can acquire only so much of the property so as not to exceed 30 percent (30%) of the total surplus land owned by the school district. (Education Code section 17499.)

d. The acquiring agency must maintain the property's use as recreational or open-space property. (Education Code section 17494.)

If it is determined that the property is subject to the Naylor Act, pursuant to Education Code section 17489, the school district must notify the following government agencies regarding the availability of the property:

a. First, to any city within which the land may be situated.

b. Second, to any park or recreation district within which the land may be situated.

c. Third, to any regional park authority having jurisdiction within the area in which the land is situated.

d. Fourth, to any county within which the land may be situated.

The notified agencies have sixty (60) days to respond to the school district in writing. If a particular public agency is interested in purchasing the property, Education Code section 17491 sets forth the method for calculating the purchase price. Pursuant to Education Code section 17491, any property sold pursuant to the Naylor Act ("Naylor Act Property") shall not exceed the school district's cost of acquisition, calculated as a pro rata cost of acquiring the entire parcel comprising the school site, adjusted by a factor equivalent to the percentage increase or decrease in the cost of living from the date of purchase to the year in which the offer of sale is made, plus the cost of any improvement to the recreational and open-space portion of the land which the school district has made since its acquisition of the land. In no event shall the price be less than twenty-five percent (25%) of the fair market value of the land or less than the amount necessary to retire the share of local bonded indebtedness plus the amount of the original cost of the approved state aid applications on the property.

(C) Requirements to Offer District Property to Other Public Agencies

If none of the public agencies listed in Education Code section 17489 purchase the surplus property, or if the property is not Naylor Act property as described above, school districts

must proceed pursuant to Education Code section 17464 which requires that a school district, prior to offering property for sale to the general public, must first offer such property to certain public agencies through two categories of priority.

a. Offer to Public Agencies Pursuant to Education Code section 17464(b)

Pursuant to Education Code section 17464(b), school districts must make a written offer to sell the property to certain public agencies in accordance with Government Code section 54222. These public agencies include the following:

i. Any local entity as defined in Health and Safety Code section 50079 for the purpose of developing low and moderate-income housing (i.e., local housing authorities and/or redevelopment agencies) within whose jurisdiction the property is situated.

ii. To any park or recreation department of any city within which the property is situated.

iii. To any park or recreation department of the county within which the property is situated.

iv. To any regional park authority having jurisdiction within the area in which the property is situated.

v. To the State Resources Agency.

vi. To a non-profit neighborhood enterprise association corporation if the property is located in an enterprise zone as referenced in Government Code section 7073.

vii. To the program area agent if the property is located in a designated program area as defined in Government Code section 65088.4.

If any of the above-referenced entities desires to purchase the surplus property, such entities must notify the school district in writing of their intent to purchase within sixty (60) days after receipt of the school district's notification of intent to sell. (Government Code section 54222(f)).

If the school district receives notice from any of these entities, stating that they desire to purchase the property, the school district and such entities must enter into good-faith negotiations to determine a mutually satisfactory sales price. If a price cannot be agreed upon after good-faith negotiations of not less than ninety (90) days, the property may be disposed of, without further regard to these provisions. (Government Code section 54223).

In the event that the school district receives offers for the purchase of the property from more than one of the above-referenced entities, the school district must give priority to the entity who agrees to use the property for housing for persons and families of low or moderate income. However, first priority must still be given to an

entity who agrees to use the property for park or recreational purposes if the property is already being used and will continue to be used for park or recreational purposes, or if the property is designated for park or recreational use in the local general plan and will be developed for that purpose. (Government Code section 54227).

(D) Offer to Public Agencies Pursuant to Education Code section 17464(c)

Education Code section 17464(c) states that as second priority, the school district must offer the property for sale at fair market value to the following public agencies:

i. Director of General Services for the State of California.

ii. The Regents of the University of California.

iii. The Trustees of the California State University.

iv. The county in which the property is located.

v. The city in which the property is located.

vi. Any public housing authority in the county in which the property is located.

In addition to offering the surplus property for sale to the above-referenced public agencies, Education Code section 17464(c) requires that school districts give public notice to any public district, public authority, public agency, public corporation, or any other political subdivision in the state, to the federal government, and to non-profit charitable corporations by publishing the school district's intent to dispose of the property in a newspaper of general circulation within the school district's boundaries.

The school district must publish this notice once a week for three (3) successive weeks with at least five (5) days intervening between the respective publication dates, not counting the publication dates. Written notices to public agencies listed in Education Code section 17464(c) must be mailed no later than the date of the second published notice.

Any entity who desires to purchase the property must, within sixty (60) days after the third publication of the notice, notify the school district of its intent to purchase. If the entity and the school district are unable to arrive at a mutually satisfactory price during the sixty (60)-day period, the school district may dispose of the property to the general public as set forth below. In the event that the school district receives offers from more than one entity, the school district's governing board may determine which offer to accept.

Resolution for Sale of Property

After the school district follows the above-referenced procedures, the school district must sell the surplus property to the highest bidder, or reject all bids pursuant to Education Code sections 17466-17476. Pursuant to these provisions, the school district's governing board must, in a regular open meeting, adopt a resolution by two-thirds (2/3) vote of all its members, declaring the school

district's intention to sell the property. This resolution must describe the property as well as specify the minimum price and the terms upon which the property will be sold. In addition, the resolution must state the commission, if any, which the district will pay to a licensed real estate broker out of the minimum price. This resolution must fix a time, not less than three (3) weeks thereafter, for a public meeting of the governing board to be held at its regular place of meeting, at which sealed bids to purchase the property will be received and considered.

The language of this resolution is very important as it must contain the terms and conditions upon which the school district will sell the property. Often, it will be practical to adopt a detailed resolution prior to engaging in the notice and negotiation process with public agencies, as set forth above, thereby providing a minimum standard of deal points from which all such negotiations must begin.

The school district may, at its discretion, offer to pay the commission to a licensed real estate broker who is instrumental in obtaining any proposal. If the school district decides to pay such a commission, this must be specified in the above-referenced resolution. No commission may be paid unless it is contained in or with the sealed proposal or stated in or with the oral bid which is finally accepted. Any commission must be paid only out of money received by the school district from the sale of the property.

Furthermore, notice of the adoption of the resolution declaring the school district's intention to sell the property and of the time and place the school district is holding the meeting must be given by posting copies of the resolution signed by the school district's governing board in three (3) public places in the school district, not less than fifteen (15) days prior to the school district's meeting at which the sealed proposals will be received and considered. In addition, the school district must publish such notice not less than once a week for three (3) successive weeks before the district's governing board meeting in a newspaper of general circulation published in the county in which the district or any part thereof is situated.

At the board meeting which the governing board receives and considers the proposals, all sealed bids which have been received, in public session, must be opened, examined and declared. Prior to accepting any written proposal, the governing board must call for oral bids. If upon calling for any oral bids, any responsible person offers to purchase the property upon the terms and conditions specified in the resolution, for a price exceeding by at least five percent (5%) the highest written proposal, after deducting the commission, if any, to be paid a licensed real estate broker, then the oral bid which is the highest after deducting such commission must be accepted by the governing board. Final acceptance by the governing board, however, must not be made until after the oral bid is reduced to writing and signed by the offeror.

Of the written proposals submitted to the school district which conform to all terms and conditions specified in the resolution of intention to sell, which are made by responsible bidders, the proposal which is the highest after deducting any commission, if any, to be paid a licensed real estate broker, must be accepted unless a higher oral bid is accepted as set forth above. In addition, the school district's governing board may, if it deems such action to be for the best public interest, reject any and all bids, either written or oral, and withdraw the property from sale.

USE OF PROCEEDS FROM PROPERTY DISPOSITION- SALE AND LEASE

Use of Proceeds from Property Disposition (Sale)

Education Code section 17462 specifies the manner in which school districts may use surplus property proceeds. Generally, school districts are allowed to use surplus property proceeds for capital outlay expenses or for costs of maintenance of school district property that the governing board of a school district determines will not recur within a five (5)-year period.

Additionally, school districts have the option of depositing their surplus property proceeds into their general fund, if both the governing board of the school district and the State Allocation Board ("SAB") determine that the school district has no anticipated need for additional sites or building construction for the ten (10)-year period following the sale and the school district has no major deferred maintenance requirements. School districts using this option may only use the proceeds for a one-time expenditure and are specifically prohibited from using the proceeds for ongoing expenditures such as salaries and other operating expenses.

Finally, school districts may deposit surplus property proceeds into a special reserve fund to be used for capital outlay expenses, for costs of maintenance of school district property that the governing board determines will not recur within a five (5)-year period, or for the future maintenance and renovation of school sites if the school district's governing board and the SAB determine that the school district has no anticipated need for additional sites or building construction for major deferred maintenance projects for a ten (10)-year period following the sale.

Although the existing law provides methods by which school districts can use surplus property proceeds for general fund or special reserve fund purposes, to do so, a school district essentially has to "opt out" of the School Facility Program for the subsequent ten (10) years. Under Education Code section 17463.7, school districts were given additional options for allocating their surplus property proceeds that, although limited in application and with their own caveats, did not require this "opting out" of the School Facility Program. Please note that Education Code section 17463.7 originally had a sunset date of January 1, 2012; which was extended by subsequent statute to January 1, 2016. Although much discussion has occurred, this statute was not extended past January 1, 2016. Thus, at this time, Education Code section 17463.7 is no longer available for use by school districts.

Use of Proceeds from Property Disposition (Lease)

It is interesting to note that use of proceeds from the lease of surplus property is not specifically addressed in the Education Code sections governing the disposition of surplus property. This lack of clarity led many school districts to take a conservative approach over the years and apply the same restrictions that apply to proceeds from a sale or lease with option to purchase. It is now generally accepted that such proceeds may be expended without the limitations imposed on the proceeds from a sale or lease with option to purchase. In fact, the general fund is likely the appropriate place to hold such funds, pursuant to Education Code section 41002 (which says the general fund is the appropriate place for funds not otherwise designated), unless the district opts, by way of Board resolution pursuant to Education Code section 41003, to allocate a specific fund in which lease proceeds are to be deposited.

The Office of Public School Construction ("OPSC") had long taken the approach of claiming that lease proceeds derived from a lease of a year or less can be used for general fund purposes, but lease proceeds from leases of longer duration must be put in a capital fund for restricted use. The "one year rule" was not based on any law or regulation and was seemingly an arbitrary distinction made by SAB, although the SAB and OPSC claim it is in accordance with Education Code section 17462.

The legislative history of Education Code section 17462, however, indicates that the restrictions were not intended to apply to lease proceeds. During the crafting of the most recent version of section 17642, which came into effect in 2007, the legislature briefly considered using the term lease throughout the section. However, the final adopted section replaced the word lease with the phrase "lease with an option to purchase." This change offers evidence that the legislature intended to exclude leases from the restrictions of Education Code section 17462.

The balance of evidence strongly suggests that the restrictions found in Education Code section 17462 do not apply to lease proceeds. Arguably, the general fund is the only appropriate place to hold lease proceed funds (under Section 41002), unless a school district opts, by way of Board resolution pursuant to Education Code Section 41003, to allocate a specific fund in which lease proceeds are to be deposited. However, until this issue is resolved, school districts must remain vigilant and recognize that they are acting at odds with the opinion of the SAB and OPSC.

LEASE OF PROPERTY

Leases are a common method used by school districts to retain unused property in a manner that is economically beneficial to the school district. However, the leasing of a school district's real property is a highly regulated activity. The Education Code contains specific procedures for leasing property that apply depending on the property type and/or its intended use. In general, we will differentiate between the following property types: classroom space, recreational or Naylor Act property, vacant land, improved property not containing classrooms, and property intended for use for child care.

In order to lease school district property, regardless of the type of use, surplus property procedures must be followed, including the formation of an advisory committee pursuant to Education Code section 17387 *et seq*., that makes recommendations to the school district governing board, as discussed in the Sale of Surplus Property section above.

Board Meeting to Declare Intent to Lease Real Property

Regardless of the type of property or the use intended for that property, the lease process requires that, upon receipt of the advisory committee's recommendations, the governing board make a determination as to the disposition of the property at issue. If the governing board decides to accept the advisory committee's recommendation to lease the property, the board must declare its intent to lease the property by a resolution that is adopted at a regular open meeting by a two-thirds (2/3) vote of all the board members. (Education Code section 17466.) The resolution must describe the property proposed to be leased, specify the minimum rental amount and terms upon which it will be leased (and commission if a broker is involved), and fix a time not less than three (3) weeks thereafter for a public meeting of the governing board at which sealed proposals to lease the property will be received and considered. The stated terms will then be used to determine if a

bidder is responsive to the governing board's requirements. The wording of the resolution is critical to ensuring that the school district receives proposals that meet its needs.

After the governing board adopts the resolution of its intent to lease the property, then the board's desired course of action must be implemented under the procedural requirements of the Education Code as discussed below. It is at this point that the type or use of the property for lease becomes relevant; thus resulting in variations to the lease process concerning the notice required and the priorities for leasing. Leasing property without option to purchase generally requires fewer notices than when a district sells property. Specifically, Education Code section 17464 applies only to sale and lease with option to purchase, so the district does not need to send notices to the entities listed here. Please note, however, arguments have been made that Government Code section 54222 applies to any lease even though Education Code section 17459 identifies only the *sale* of real property, not lease, as subject to Government Code Section 54220 *et seq.* While certain fact-specific issues in some transactions render compliance with this statute impractical, until a court determines this issue definitively, we recommend that school districts offer leases in accordance with Government Code section 54222, as a best practice.

Notice Procedures Based on Type of Property: Variations to the Lease Process Subsequent to Adoption of Intent to Lease

Property Designed to Provide Direct Instruction or Instructional Support

If the property to be leased is designed to provide direct instruction or instructional support it must first be offered to charter schools pursuant to Education Code section 17457.5 and amendments to Education Code sections 17230, 17458, 17464 and 17489, as described above.

Classroom Space

If a school district intends to lease classroom space, it must first offer to lease the property for special education programs to school districts that are part of the school district's special education local plan area or the county office of education with jurisdiction over the school district. (Education Code section 17465.) Under Education Code section 17465(c), the school district must notify, in writing, the school districts and county office of its intent to lease the vacant classrooms for special education programs that they provide. The notice must specify that the lease shall not exceed a term of ninety-nine (99) years and that the lease payment and other terms of the lease are subject to negotiation. The notice shall also state that the offer to lease is not valid for more than sixty (60) days after receipt. (Education Code section 17465(c).) If a school district or county office of education is interested in leasing the property, the lease terms shall be negotiated between the parties and the lease payments "shall not exceed the school district's actual costs for maintenance, operations, and custodial services for the leased classrooms." (Education Code sections 17465(f)(1) and (2).) However, if the area school districts and the county office of education are not interested in leasing the property, the school district may then make the property available to the public through a formal notice and bidding process in accordance with Education Code section 17455 *et seq*., as described below.

Recreation Site--Naylor Act Property

If the property to be leased contains land that was used as a playground, playing field or recreational property for at least eight (8) years immediately preceding the date of the governing

board's decision to lease the property, then Education Code section 17485 *et seq.*, imposes certain requirements, including making the land available first to specific public agencies according to a given priority.

As noted above with respect to disposition of property through sale procedures, if it is determined that the property is subject to the Naylor Act (Education Code section 17489), the school district must notify the following governmental agencies regarding the availability of the property for lease:

a. To any city within which the land is situated.

b. To any park or recreation district within which the land is situated.

c. To any regional park authority having jurisdiction within the area in which the land is situated.

d. To any county within which the land is situated.

The notified agencies have sixty (60) days to respond to the school district in writing. If a particular agency is interested in leasing the property, Education Code section 17491(c) sets forth the method for calculating the lease rate. If none of the notified agencies are interested in leasing the property pursuant to the Naylor Act, then the school district may proceed with the public bidding process under Education Code section 17455 *et seq*.

Lease of Vacant Land

If a school district is considering leasing vacant land, as a preliminary matter, the school district should confirm that the proposed leasing arrangement would comply with any applicable zoning requirements. If the land is vacant and has not been or is not now used for playground, playing field, or recreation purposes, the property would not be considered subject to the Naylor Act. Accordingly, there would be no requirement to offer the property to any entity prior to the public bidding process under Education Code section 17455 *et seq*., as described below.

Lease of Site with Improvements That Do Not Include Classrooms

If a school district wishes to lease improved property that does not include vacant classrooms, such as property containing only administrative buildings, there is no requirement to offer the property to any entity prior to the public bidding process under Education Code section 17455 *et seq*.

Lease of Property to be Used for Child Care and Development Services

If a school district wishes to lease property specifically for use for child care and development services, as permitted under Education Code section 17458, then the property may be offered first to any contracting agency, which includes school districts, community college districts, colleges or universities, county superintendents of schools, counties, cities, public agencies, private nontax-exempt agencies, private tax-exempt agencies, as well as licensed private agencies and parent cooperatives. The term for such a lease must be no less than five (5) years from the date upon which the property is first offered to the agency or until the school district retakes possession of the property, whichever occurs first. Failure by the leasing agency to comply with this requirement

would constitute a breach of contract entitling the school district to immediate possession of the property as well as any damages under the lease agreement.

If none of the contracting agencies are interested in leasing the property for childcare purposes, the school district must comply with the other requirements for leasing the property, depending on the type of property at issue.

Offer to Lease to General Public and Other Public Entities through Formal Notice and Bidding Process under Education Code Section 17455

If the property is not leased to any of the specified entities enjoying priority as described above, then the school district must offer the property to the general public, including public entities not specifically addressed above, under the following Education Code procedures.

Public Notice of Resolution of Intention to Lease and Receive Sealed Proposals

The school district must provide public notice of the resolution of intention to lease the property and the time and place of holding the meeting to receive proposals. (Education Code section 17469.) The school district must: 1) post copies of the signed resolution in three public places in the school district, not less than fifteen (15) days before the meeting; and 2) publish notice not less than once per week for three (3) successive weeks before the meeting in a newspaper published in the county. Education Code section 17471 provides abbreviated notice provisions in the event that the governing board determines in its resolution that the "value" of the lease does not exceed $50 per month based on the market property rental rates.

Board Meeting to Receive Sealed Proposals

At the time and place fixed in the resolution for the meeting of the governing board, "all sealed proposals which have been received shall, in public session, be opened, examined, and declared by the board." (Education Code section 17472.) The highest proposal made by a responsible bidder that conforms to all terms and conditions specified in the resolution of intention to lease must be accepted unless a higher oral bid is accepted or the governing board rejects all bids. (*Id*.) Because the governing board must award the lease based on the highest proposal, the wording of the resolution containing the terms upon which proposals will be accepted is critical so that the governing board can carefully control the terms of the deal and reject proposals that do not comply with all specified terms.

Prior to accepting any written proposals, the governing board must call for oral bids under the terms and conditions specified in the resolution. (Education Code section 17473.) A responsible oral bid that exceeds the rental price set forth in the resolution by at least 5 percent (5%) shall be accepted when reduced to writing unless the governing board decides to reject all bids and withdraw the property from sale or lease. (Education Code section 17476.) The final acceptance of prevailing bid may be made at either the same session or at any adjourned session of the same meeting held within the following ten (10) days. (Education Code section 17475.)

The procedures discussed above require the award to the highest responsible bidder unless all proposals are rejected. These procedures do not lend themselves to flexibility in the award of proposals based on non-monetary consideration. As a result, the possibility exists that a bid could be received from one entity that contains a rental amount that is greater than the monthly rental

amount stated in a competing proposal, but that is less than the total consideration provided in the competing proposal. The selection of the highest bidder becomes a challenge in that case.

To solve this problem, the governing board resolution must be carefully crafted to allow for the evaluation of the various forms of consideration in addition to the monthly rental fee. For example, improvements to the land proposed by the tenant, and the value of any services provided to the school district by the tenant under the lease agreement should be included in the calculation of the total value of the lease. Additionally, the terms stated in the governing board resolution must be crafted in a manner that allows the governing board to accept only those proposals that meet school district purposes.

WAIVER

The governing board of a school district or a county board of education, on a district-wide or county-wide basis or on behalf of one or more of its schools or programs, after a public hearing on the matter, may request the State Board of Education ("SBE") to waive all or part of any section of the Education Code or any regulation adopted by the SBE that implements a provision of the Education Code. There are, however, some provisions that may not be waived.

Two of the provisions that cannot be waived are Sections 17459 and 17464(a) (that require that school districts offer surplus property for sale to enumerated public entities) and Section 17462 (that dictates exactly to what uses a school district may put its proceeds from the sale of the surplus property).

Procedure

A waiver can be granted upon the completion and submission of a General Waiver Request ("Request") to the Waiver Office of the SBE through an online submission form. Prior to the submission of this Request, the District must complete several tasks.

First, the school district should consult with any employee collective bargaining units. Note that the school district's obligation to consult unions is not limited to employee contract issues, so it would still apply to property transactions. Although union support is not a required condition for approval, the Request must reflect the school district's efforts to involve any bargaining units. The position of the bargaining unit must be clearly marked and explained on the Request. It is recommended that this meeting occur prior to the public meeting, discussed below.

The Request must also be evaluated by the school district's advisory committee. In addition, any other committee or counsel with an interest in the waiver topic should also be consulted. If the committee has any objections, a written summary of the objections must be submitted with the Request.

Next, the school district must conduct a public hearing. A public hearing is not simply a board meeting. It must be a properly noticed public hearing held during a board meeting at which time the public may testify regarding the waiver proposal. It is important that the meeting is properly noticed. Distribution of a local board agenda will not constitute notice of the public hearing. Also, the notice must *specifically* invite public testimony. Proper notice can be achieved by printing a notice that includes the time, date, location and subject of the hearing in a newspaper of general circulation.

Finally, the school district must submit an accurate and complete Request to the State. The SBE may contact the school district during the evaluation period for additional information or with questions about the Request.

Approval

Under Section 33051(a), the SBE must approve any and all Requests, except in those cases where the SBE specifically finds any of the following:

a. The educational needs of the pupils are not adequately addressed.

b. The waiver affects a program that requires the existence of a schoolsite council and the schoolsite council did not approve the request.

c. The appropriate councils or advisory committees, including bilingual advisory committees, did not have an adequate opportunity to review the request and the request did not include a written summary of any objections to the request by the councils or advisory committees.

d. Pupil or school personnel protections are jeopardized.

e. Guarantees of parental involvement are jeopardized.

f. The request would substantially increase state costs.

g. The exclusive representative of employees, if any, as provided in Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, was not a participant in the development of the waiver.

II. WORKING WITH PRIVATE ENTITIES

With respect to assets, school districts have the option of entering into an agreement with a private entity. Private entities can bring additional income, non-monetary resources and other benefits to a relationship with the school district. When entering into agreements with private entities, or in reviewing existing agreements with private entities, school districts should consider these questions:

1. Does the private entity have any non-monetary benefit to offer the school district (i.e., a company may donate school supplies, books, classroom presentations in addition/in lieu of rent)?

2. Has the district maximized the income the private entity is capable of contributing to the school district?

There are four types of arrangements discussed below that are categorized based on legal authority: (1) Joint Occupancy, (2) Exchange, (3) License Agreements, and (4) Charter School Facility Use Agreements.

JOINT OCCUPANCY

A joint occupancy agreement allows school districts to maintain ownership of the surplus property. A school district may enter into leases and agreements relating to real property and buildings to be used jointly by the school district and any private person, firm, or corporation pursuant to Education Code section 17515 *et seq.* Joint occupancy does not require the school district to follow surplus property procedures, although it does require construction of facilities.

With regard to construction, the joint use lease or agreement must require the private entity either to construct or provide for the construction of a building on the property for the joint use of the school district and the private entity. The private entity may, however, designate the school district as its agent to construct the facilities.

Procedure for Undertaking a Joint Occupancy Project

Before a joint occupancy lease or agreement is executed, the school district must follow specific procedures. First, the governing board must adopt a resolution declaring its intention to consider proposals. The resolution must describe the proposed site and specify the intended use of that portion of the building to be occupied by the school district. The resolution must also fix a time, not less than ninety (90) days thereafter, for a public meeting of the governing board to be held at its regular place of meeting. The school district must publish the resolution of intention at least once a week for three (3) weeks in a newspaper of general circulation. At the public meeting, the governing board must consider all of the proposals.

Before the school district's governing board can approve any proposal or enter into an agreement regarding the joint occupancy, the school district must submit the proposal to the SBE for approval. The SBE must notify the governing board of its approval or disapproval within forty-five (45) days of submission.

Pursuant to the joint occupancy provisions of the Education Code, the private entity must file either a bond for the performance of the lease or agreement, or an irrevocable letter of credit issued by a state or national bank for the performance of its obligations.

If the school district will receive money from the current state school facilities program for the project, the school district must hold title to the portion of the property that will be funded with state money. Accordingly, this means that the school district and its partner must carefully apportion title among themselves so that the school district will hold title to the percentage of the property proportional to the percentage of state funding.

Although the agreement will apportion title to a certain percentage of the building to each party, the document can further provide that each party will have a license to use the other party's portion of the building upon whatever terms and conditions the parties agree to in the document.

A significant difference between solely and jointly occupied property is the availability of zoning protection. Government Code section 53094, by which school districts may render zoning ordinances inapplicable to school property, does not apply to property developed pursuant to the joint occupancy sections. Any building that is to be used by a private party is subject to the zoning and building code requirements of the local jurisdiction.

Considerations

The viability of a joint occupancy partnership will depend on the school district's need for facilities and educational programs and whether or not a partner that can assist with those needs is available and interested. A benefit of this type of project is that it can facilitate useful partnerships and allow the district to effectively use sites that may be underutilized. For example, if a school district owns property that is in a commercially desirable location, it may be able to receive significant income, while at the same time retaining an asset that will be more valuable in the future.

However, a significant difference between solely and jointly occupied property is the availability of zoning protection. Government Code section 53094, by which school districts may render zoning ordinances inapplicable to school property, does not apply to property developed pursuant to the joint occupancy sections. Any building that is to be used by a private party is subject to the zoning and building code requirements of the local jurisdiction. Thus, if the district owns property designated as open space or public use, then any potential partner will need to obtain a zone change or variance in order to establish a commercial or residential use on the district's site. This may affect a private partner's willingness to enter into a partnership or may reduce the amount of money they are willing to spend that will go toward school district facilities or income.

Buildings constructed for use by the joint occupancy partner would also need to comply with any city/county codes specific to construction and location of the buildings on the site. If the school district anticipates that the building will eventually be used for school purposes, it will want to make sure it meets school building standards as well. Finally, a joint occupancy lease may not exceed sixty-six (66) years. We have found that some potential partners are wary of this limitation because it can negatively impact their ability to finance construction on the site.

EXCHANGE

A school district may exchange one or more of the properties rather than selling or leasing them pursuant to Education Code section 17536 *et seq*., which provides as follows:

> The governing board of a school district may exchange any of its real property for real property of another person or private business firm. Any exchange shall be upon such terms and conditions as the parties thereto may agree and may be entered into without complying with any of the provisions in this code [including surplus property procedures applicable to the selling and leasing of surplus property] except as provided in this article.

Education Code section 17536 (emphasis added).

> Before ordering any exchange of real property the board shall adopt, by a two-thirds (2/3) vote of its members, a resolution declaring its intention to exchange the property. The resolution shall describe the properties to be exchanged in a manner to identify them, and the terms and conditions, not including the price, upon which they will be exchanged.

Education Code section 17537 (emphasis added).

Therefore, if a school district desires to dispose of surplus property to a private organization, it may do so by following this streamlined procedure if it can: 1) locate a property for which it is willing to exchange its surplus property, and 2) negotiate for the acquisition of the located property by a private organization which will in turn exchange the located property with the school district's surplus property pursuant to an Exchange Agreement.

A decision to exchange its real property allows school districts to forgo following the relatively burdensome surplus property procedures. Specifically, the school district would not be required to appoint an advisory committee pursuant to Education Code section 17387 *et seq*., offer the property to enumerated public agencies through notices and negotiations, nor offer the property through a public bid process should no public agency acquire the property from the school district.

Considerations

If a school district has property that is not ideal for school use, but does not want to give up an asset during a time of low property values, this option is worth considering. A school district can exchange an asset that is either not producing income for the school district, or even costing the school district money, for an asset that will benefit the school district. Potential exchange partners or properties could be sought through a Request for Proposals process or simply by finding properties the district desires. If a school district does not require a site for development of school district facilities or programs, it may also seek "income-generating" properties.

There are, however, both economical and practical considerations that would have to be addressed should a school district decide to exchange its property for another property. Once the school district found a site it desired, it would need to look at the appraised value of the property it wants to exchange and determine if the school district could obtain the type of site it needs for that amount. It should be noted, however, that the exchange need not be exact. For example, the school district may exchange a more valuable piece of undeveloped property for another site on which a developer agrees to construct a building for the school district. Alternatively, it is acceptable to make up a small difference in value with a cash payment. From a practical standpoint, the school district will need to coordinate the timing of the exchange so that if it is exchanging a site that is currently occupied, it will have made sufficient allowances for moving school district programs or preparing the new site for occupancy.

LICENSE AGREEMENTS

A license is a grant of permission to another party to use school district property for some defined purpose. It is, in many respects, similar to an easement or a lease. However, the granting of a license does not require the same cumbersome procedures as the dedication of an easement or the surplus property procedures necessary for a lease.

An increasingly prevalent example of private use of school district property is wireless communications facilities. Wireless carriers must install towers throughout the state to relay signals for wireless phones. School sites often prove ideal locations for these facilities.

A school district governing board may approve a license agreement for a wireless communications facility as a standard board meeting agenda item. A license agreement with a wireless carrier should address all significant terms of the agreement, including the following:

1. License fee;

2. Term of the agreement and renewal provisions;

3. Precise identification of the location and dimensions of the facility;

4. Language obligating the carrier to obtain any necessary permits and approvals and pay for utilities and taxes for the subject property;

5. Insurance and indemnification requirements;

6. Termination provisions;

7. Language addressing interference to, or caused by, existing and future communications facilities;

8. Profit sharing for assignment and subletting of tower space;

9. Fingerprinting of employees and coordination requirements; and

10. Exhibits detailing the planned facility and the work to be done on school property.

It is worth noting that some practitioners recommend utilizing a lease instead of a license because the Education Code does not specifically authorize the licensing of school district property for such purposes. However, Education Code section 35160 ("Permissive Education Code") allows a school district to undertake any activity which is not in conflict with, inconsistent with, or preempted by any law, and which does not conflict with the purposes for which school districts are enacted. We therefore believe a school district may grant a license without complying with the surplus property statutes because those statutes, by their express terms, do not apply to "licenses."

Considerations

Agreements for the placement of wireless communications facilities are often a source of lost revenue for school districts. The form agreement usually proposed by carriers are unacceptable and do not provide a benefit to the school district. It is important to keep in mind that school districts often have very desirable locations for wireless communications facilities and are in a good position to negotiate the fees, terms and any other benefits that may be available.

School districts should also be aware that the installation of capital improvements on property pursuant to a license arrangement can allow a license to be treated similar to an easement and take on some of the characteristics of an easement, such as irrevocability. Thus, careful attention should be given to the wording of a license agreement when the terms will involve the installation of capital improvements by the licensee.

CHARTER SCHOOL FACILITY USE AGREEMENTS

Proposition 39, which was passed by voters in 2000, is comprised of two separate parts that relate to school district facilities. One part enabled school districts to pass a general obligation bond for certain specified purposes by a fifty-five percent (55%) majority vote, provided that certain

oversight mechanisms were in place. The second part of Proposition 39 established Education Code section 47614, which addresses a school district's obligation to provide facilities for charter schools operating within the school district. Regulations governing Proposition 39 were adopted in 2002. In November 2007, the State Board of Education (SBE) revised the Regulations governing Proposition 39 requests. Because there is no connection between the two parts, a school district must provide charter school facilities even if it has not passed a bond pursuant to Proposition 39.

Although allowing a charter school to use school district facilities will likely never be a great source of income for a school district, there are items to consider when entering into a facilities use agreement that can, at minimum, reduce the costs and administrative time devoted to charter school facilities.

The following are key provisions of a facilities use agreement that should be examined to determine if the school district can save costs or increase revenue from a charter school's use of a school district's site:

1. The school district final notification
2. Insurance
3. Indemnification
4. Compatibility with school district policies and programs
5. Charges for facilities costs (pro-rata share and oversight costs)
6. Shared space
7. Maintenance and operations
8. Furnishings and equipment
9. Term
10. California Environmental Quality Act (CEQA)

III. WORKING WITH OTHER PUBLIC ENTITIES

Sharing resources among local public entities can result in creative programs that more efficiently use the available resources of both parties. By increasing cooperation and coordination with other public entities, such as cities, counties or neighboring educational institutions, school districts may be able to achieve significant cost savings in areas such as maintenance, repairs, utilities and capital improvements. Although we are focusing on the use of school district facilities, it is important to remember that not only school sites may have sites that can be shared; school districts should also consider the facilities its cities, counties and other public educational institutions have available and consider whether they may provide a use for the school district. Viewing school sites as a resource for the community not only helps to create cost savings for the school district but helps strengthen the district's ties to the community and other local public entities. Developing an ongoing positive dialogue with local public entities can provide a valuable exchange of information and increased

understanding of these entities' respective goals and needs. While this is not always easy due to political constraints, school districts that successfully create a cooperative dialogue and working relationship with other local public entities may greatly benefit their school programs and often the community overall.

The following questions are useful to keep in mind as school districts look to collaborate with other public entities on the use of facilities:

1. Does the school district already have a positive relationship with the public entity?

2. What steps can be taken to improve the relationship and create a productive dialogue?

3. What educational and community needs can be economically combined (i.e., recreation, daycare, senior citizens, health and social services, and libraries)?

4. Does the school district have facilities available (or that could be made available) that could fulfill multiple needs?

5. Do any local public entities have facilities available that could fulfill multiple needs?

6. Does the school district have existing agreements with any local public entities? If so, can these agreements be improved to provide greater economic and/or practical benefits? (Key provisions to consider include maintenance, repairs, operations, utilities, and capital improvements.)

Once a school district has decided to enter into a shared use arrangement with another public entity, it must decide which type of agreement would best fulfill its objectives. Essentially, this means determining the appropriate legal authority that would allow the use of the school district's facility under the particular set of facts and circumstances involved. There are four (4) types of arrangements discussed below that are categorized based on legal authority: (1) Joint Use Leases, (2) Joint Use Grants, (3) Community Recreation Programs, and (4) Civic Center Act.

JOINT USE LEASES

Education Code section 17527 *et seq*., authorizes the lease of vacant classrooms on a joint use basis with various entities, both public and private, under conditions that will allow the school district to continue to use most of the school facility for school district classroom purposes. The joint use of the property is permitted to take place even during school operating hours. A joint use lease may be entered into with the following types of entities: other school districts, educational entities, governmental units, nonprofit organizations, community agencies, professional agencies, commercial and noncommercial firms, corporations, partnerships, businesses, and individuals. Education Code section 17527 specifically excludes private educational institutions which maintain kindergarten or grades 1 to 12.

Generally, joint use leases require significant advance planning because the school district is required to follow surplus property procedures for leases. (Education Code section 17530.) Specifically, Education Code section 17530 states that applicable provisions of the "Sale or Lease of Real Property" article commencing with Education Code section 17455 must be followed. While

surplus property procedures will be discussed in greater detail in the third section of this presentation, it is important to highlight here that the property must be declared surplus by the governing board before a joint use lease can be entered into. While it is arguable which provisions the legislature had in mind with the phrase "applicable provisions," we believe that such provisions include the procedures for offering the classrooms for special education programs in Education Code section 17465, a governing board resolution, and notice requirements and procedures for public bidding, as discussed below, in the event the property is not leased to entities with leasing priority. (Education Code section 17455 *et seq.*)

Once the property has been declared surplus, the following process and requirements for joint use leases must be satisfied:

Priority

Education Code section 17527 contains a priority system for offering vacant classrooms for lease. The first priority is to be given to "educational agencies for conducting special education programs." Under the first priority, the school district must make the classrooms available to special education programs provided to school district pupils by either other school districts that comprise part of the school district's special education local plan area or by the county office of education having jurisdiction over the leasing school district. These entities have sixty (60) days from receipt of the notification to inform the school district governing board of their intent to lease or not to lease the classrooms. (Education Code section 17465(d).) The lease payments may not exceed the school district's actual costs for maintenance, operation, and custodial service for the leased classrooms. (Education Code section 17465(f)(2).) If no interest is expressed, or if the parties are not able to agree on terms of the lease, then the school district may proceed to the second tier of priority. Second priority is given to "other educational agencies." (Education Code section 17527.)

Non-Interference, Neighborhood Disruption and Student Safety

Prior to entering into a lease or rental agreement, the school district must determine that the proposed joint occupancy and use of school district property or buildings will not (a) interfere with the educational program or activities of any school or class conducted upon the real property or in any building, (b) unduly disrupt the residents in the surrounding neighborhood, and (c) jeopardize the safety of the children of the school. (Education Code section 17529.) We recommend that the school district's board adopt a resolution making such findings.

Space Limitations

Education Code section 17531 limits the amount of space a school district may lease during normal school hours to forty-five percent (45%) of the total classroom space of the specific school and thirty percent (30%) of the school district's total classroom space in operating schools. (Education Code section 17531.) Provided that the thirty percent (30%) limit is not exceeded, the governing board may, upon a two-thirds (2/3) vote, exceed the forty-five percent (45%) limit per school upon making a finding that the leases are compatible with the educational purpose of the school. Moreover, the school district may lease vacant classroom space exceeding the thirty percent (30%) limit if the lease is for any day care center, nursery school, or special education class. (Education Code section 17532.)

Lease Provisions

The tenant(s) must comply with applicable zoning ordinances, use permits, and construction and safety codes. (Education Code section 17533.) The term of the lease agreement must not exceed five (5) years, except that the limit does not apply to agreements including capital outlay improvements made on school property for park and recreation purposes by public entities and nonprofit corporations. (Education Code section 17534.) The rent or lease of vacant classrooms must be for at least fair market value unless the tenant is a public entity. (Education Code section 17535.) However, a less than fair market value rental amount for the public entity is not mandatory.

Considerations

The benefit to a joint use lease is it allows a school district to generate revenue at a school site while continuing to use the site for classroom purposes. Joint use leases are a viable option for a school site currently used for classroom purposes but with a significant amount of excess space due to declining enrollment or other factors. If the school district does not anticipate a need for that excess space in the near future, does not want to give up use of the entire site, and wants to continue using the classroom space, a joint use lease may be a good approach. The timing needs to be considered carefully, however, since compliance with surplus property procedures can be lengthy and cumbersome. For this reason, short-term lease arrangements are not perfectly suited to a joint use lease. However, there is a five (5)-year term limitation to take into consideration. If a lease longer than five (5) years is needed, including a renewal provision may be an option. While a renewal provision is not expressly authorized, we are not aware of any prohibition to including a renewal provision. A more secure approach to including a longer lease term is to have the public entity lessee provide capital outlay for improvements on the site for park and recreation purposes, in which case the five (5)-year limitation would not apply. It is also important to inform potential lessees of the timelines and procedures, and especially the requirements to first offer the space to certain entities.

To get the maximum economic benefit from the joint use lease, school districts should determine their objectives and negotiate for them. For example, if a school district has a need for certain capital improvements on the site, this should be part of the negotiations. The lessee could be asked to contribute the costs for the improvements or at least share the costs. School districts should carefully consider how operating expenses will be shared, particularly utilities, maintenance, repair and security costs. For example, if the school district intends to provide maintenance and repair to the entire site, the lessee should be required to contribute at least an equitable share of those costs based on percentage of use. In some instances, having certain utilities separately metered can make sense. How these provisions are ultimately best drafted will be fact specific. The critical part is to make certain that the questions have been raised, conscientiously considered, and negotiated.

JOINT USE GRANT PROJECTS

Joint use grant projects are governed by Education Code section 17077.40 *et seq*., and do not require a school district to follow surplus property procedures. Joint Use Grant Projects allow school districts to seek grants from the SAB for joint use projects for the construction of the following types of school facilities:

a. Multipurpose rooms;
b. Libraries;
c. Gymnasiums;
d. Child care facilities; or
e. Teacher education facilities.

Relatively recently, the SAB approved regulatory amendments to the School Facility Program ("SFP") Joint Use Program, revising the requirements school districts must satisfy to obtain approval of joint use applications. The amendments, discussed in greater detail below, impact the application filing deadline, the requirements for local bond language, the definition of non-profit organizations as joint use partners, and review of final Division of State Architect ("DSA") approved plans.

General Requirements

Under Education Code section 17077.42, several conditions must be satisfied in order for the grant to be approved. The school district and joint use partner must have a joint use agreement addressing topics such as apportionment of costs for maintenance of the facility. Also, the school district and joint use partner must contribute a total of fifty percent (50%) of the cost of construction for the joint use facility. Of the fifty percent (50%) local contribution, the joint use partner must contribute at least half (twenty-five percent (25%) of the total cost), unless the school district has passed a local bond which specifies that the bond funds are to be used for the joint use project, in which case the school district may provide up to the full fifty percent (50%) local contribution.

Local Bond Funds

If a school district intends to rely on local bond funds in lieu of a contribution from the joint use partner, the language of the bond will need to be specific. The recent amendments require the language in voter-approved local bond measures to now specify that the bond proceeds may or will be used for joint use purposes and the subject joint use project. Inclusion of the term "joint use" in the bond language is critical. The subject joint use project must be identified by either the specific facility type and/or the specific school site.

This amendment affects only voter approved local bonds authorized on or after February 27, 2008. For local bonds passed prior to February 27, 2008, the joint use project may be identified in the voter approved local bond language, the district board resolution authorizing the bond, or school district board meeting minutes.

Eligibility

A school district may apply to the SAB for funding under Education Code section 17077.40 *et seq.*, for a joint use project that meets any of the following criteria:

a. The joint use project is part of an application for new construction funding under this chapter, and will increase the size or extra cost associated with the joint use of the proposed multipurpose room, gymnasium, child care facility, library, or teacher education facility beyond that necessary for school use.

b. The joint use project proposes to either reconfigure existing school buildings or construct new school buildings, or both, to provide for a multipurpose room, a gymnasium, a library, a child care facility, or a teacher education facility, and the project will be located at a school that does not have the type of facility for which funds are requested or the existing facility is inadequate.

c. The joint use project proposes to either reconfigure existing school buildings or construct new school buildings, or both, to provide for facilities to improve pupil academic achievement, and the plans for the facility were accepted for review and approval by the department prior to January 1, 2004.

Application Requirements

In order to be approved for a grant under the School Facility Program, the school district must demonstrate that it has complied with all of the following:

Agreement with a Joint Use Partner

The school district must have entered into a joint use agreement with a governmental agency, public community college, public college or public university, or a nonprofit organization approved by the governing board.

Current SFP Regulation § 1859.2 defines a "Non-Profit Organization" as "an entity that is organized and operated for purposes of not making a profit under the provisions of the Revenue and Taxation Code." The new amendments clarify this definition with respect to the joint use partner's funding source, recognition of non-profit status, and operation of community programs or contribution for continuing operational costs of the project. Specifically, the amendments require that the source of funds from the Non-Profit Organization joint use partner be independent of the partner school district.

The Non-Profit Organization, if not a recognized nationally chartered organization, must have independent governance. A recognized nationally chartered organization is one that OPSC or the SAB recognizes as operating on a national basis and having a charter issued by a national headquarters or governing body. Independent governance means that the Non-Profit Organization and school district may have no more than one common board member, ex-officio board member, officer, management or staff member, regardless of whether voting or non-voting, and whether employee, contractor, or agent; however, this restriction applies only to the extent that the employee, contractor or agent has managerial authority in one or both entities. Finally, the Non-Profit Organization joint use partner must provide community programs and some level of funding toward the project or assistance in providing services that aid the continuing operations for the joint use purpose of the project subsequent to construction.

Terms of Joint Use Agreement

The joint use agreement must specify the following: (1) the method of sharing capital and operating costs; (2) the relative responsibilities for the operation and staffing of the facility; (3) the manner in which the safety of the pupils will be ensured; (4) the amount of the contribution to be made by the school district and the joint use partner toward the fifty percent (50%) local share of eligible project

costs; and (5) how the facility will be used to the maximum extent possible for both school and community purposes.

Plan Approval

The application can be approved only if the project qualifies for funding under Education Code section 17077.40 and the school district has completed preliminary plans for the project and has received California Department of Education approval of the plans.

The new amendments revise SFP Regulation § 1859.129 regarding review of DSA-approved plans. Specifically, OPSC will review the final DSA-approved plans for apportionments received for a Type II Joint Use Project that is not part of a qualifying SFP Modernization Project. If OPSC determines that the approved plans create a reduction in square footage that is greater than or equal to five percent (5%) of the square footage contained in the preliminary plans, a commensurate reduction to the apportionment already authorized will be taken to the next available SAB meeting.

Submission of Application

Once the eligibility and qualifying criteria have been met, the school district must adopt a resolution supporting the submission of the application for joint use funding to the OPSC. In addition to the requirements set forth above, the school district must also certify that it has and/or will comply with the requirements set out in Section 14 of the Application for Joint Use Funding (i.e., proper accounting, compliance with all Education Code provisions regarding school construction, etc.).

Application Filing Period

For each funding cycle, SAB will accept applications from March 2nd of the prior calendar year through March 1st of the then-current calendar year.

Considerations

Joint use grant projects are an excellent way to maximize the resources of two entities and obtain state funding. Keep in mind, however, that in order to utilize state funding opportunities under the SFP Joint Use Program, school districts must understand and comply with the filing and eligibility requirements. In particular, school districts should be mindful of the recent amendments concerning the earlier application filing timeframe, the specificity required in local bond measures in referencing the use of proceeds for a joint use project, the more stringent requirements on eligible non-profit organizations as joint use partners, and the potential reduction in approved apportionment based on OPSC review of approved plans. In addition, similar considerations, as discussed above for joint use leases, will be applicable as to how operating expenses will be shared for such things as utilities, maintenance, repair and security costs.

COMMUNITY RECREATION PROGRAMS USE AGREEMENT

A shared use agreement, based on Education Code section 10900 *et seq*. ("Community Recreation Programs"), allows school districts to enter into agreements with other public entities that have the authority to provide recreation including cities, counties and other school districts. Agreements authorized under these provisions do not trigger surplus property procedures. However, the

circumstances for using such agreements are limited and school districts should be careful to ensure that the proposed shared use is covered by these provisions.

Purpose and Covered Uses

The purpose of the Community Recreation Programs is to provide for "adequate programs of community recreation" in order to "promote and preserve the health and general welfare of the people of the state and to cultivate the development of good citizenship." In furtherance of its purpose of providing adequate programs of community recreation, these provisions allow a school district to grant the use of any school district facility to another public entity to promote and preserve health and general welfare through programs of community recreation. (Education Code section 10910.) "Recreation" is broadly defined to include activities that contribute to the mental development of an individual or group including, but not limited to, activities in the fields of science and literature. (Education Code section 10901.) "Recreation Center" is also broadly defined as a place, structure, or area under the jurisdiction of the public entity even if the primary use is for something other than recreation.

Agreement Terms

There are no statutorily required provisions that the agreements must include. Also, there are no limitations as to the length of the term of the agreement. Education Code section 10912 allows the school district to set the fees for use of the facilities. Education Code section 10914.5 allows school districts to establish a separate account for funds received for community recreation programs and authorized expenses associated with the community recreation funds can be paid from such accounts.

Considerations

The Community Recreation Program is best suited for uses that fall clearly into the category of recreation. A use agreement entered into based on the Community Recreation Program provisions has the potential to generate revenue. However, often the greatest benefit to the school district is from the programs or services offered. School districts should carefully consider how operating expenses will be shared for such things as utilities, maintenance, repair, and security costs, as well as possible contributions for capital improvements.

CIVIC CENTER ACT USE OF FACILITIES

Education Code section 38130 *et seq*. (Civic Center Act) permits school districts to grant use of facilities for a variety of purposes to both public and private entities as well as individuals. (See Education Code section 38130(b).) The terms of such use are set by the school district but are subject to certain limitations, which may include charging fees. Education Code section 38134 limits the fees charged under the Civic Center Act to direct costs, except for certain situations or users such as meetings or entertainment where fees are charged. With respect to youth sports, even if the organization charges fees, the school district cannot charge the youth sports organization more than direct costs. (Education Code section 38134(c).) Direct costs are divided into two categories: capital direct costs and operational direct costs. Capital direct costs are defined to include the estimated costs for maintenance, repair, restoration and refurbishment of District nonclassroom space, including specialty teaching stations such as dance studios. Operational direct costs are defined to include the estimated costs of supplies, utilities, janitorial services, services of

District employees, and/or contracted workers and salaries and benefits paid to District implies directly associated with administering the Civic Center Act to operate and maintain District facilities and grounds. It is important that the calculation of direct costs be based on the formula set forth in Education Code section 38134(g) and the California Code of Regulations applicable to the Civic Center Act, and supported by specific verifiable cost information. School districts should make certain that their Civic Center policies and administrative regulations are up to date and in compliance with legal requirements. It is also important that the facility use agreements under the Civic Center Act contain appropriate indemnification and insurance provisions to adequately protect the school district.

Considerations

The Civic Center Act gives school districts the most day to day flexibility because the uses do not infringe upon the school district's uses of the facility, and because the use by others is generally short in duration. While Civic Center Act uses are not generally looked to as a way to generate significant revenue, it does allow school districts the opportunity to recoup costs.

IV. SCHOOL CLOSURE

With respect to school closures and the general process, there are few statutory requirements. Education Code section 17387 requires only that community input should be obtained prior to school closure, but does not include any specifics on the process or procedure for community input, including convening a 7-11 Advisory Committee or following any other surplus property procedures (discussed below). While the use of a 7-11 committee is recommended for school closures as a good practice, the mandate in Education Code section 17388 to convene a 7-11 Advisory Committee refers only to sale or lease without any reference to school closure. However, Education Code section 17387 reads "[i]t is the intent of the Legislature to have the community involved before decisions are made about school closure or the use of surplus space, thus avoiding community conflict . . . ." Thus, it seems to suggest, at a minimum, that community input should be had prior to school closure.

The California Department of Education ("CDE") provides a checklist that may assist school districts further in the school closure process. Prior to actually closing a school, plans that impact particular groups, such as a transportation plan, should be decided upon for practical reasons in order to facilitate a smooth closure of the school. The CDE checklist provides a good overview of the issues and suggested timeline to facilitate the process. Please note that CDE identifies this timeline as "suggested" only, and notes that timelines will vary based on the size and unique issues for each school district. The timing of the items on the checklist, to the extent they apply to the closure, should be conducted in the manner that makes the most practical sense.

The area of school closures, as it relates to CEQA, has seen some changes in recent years. School closures are usually exempt from CEQA under Public Resources Code section 21080.18 and CEQA Guidelines section 15314. School closures are unique in that they involve both statutory and categorical exemptions from CEQA. There are seldom any CEQA ramifications to a school closure itself. Instead, the concern arises when the students from the closed school are subsequently transferred to other schools (changes in traffic patterns, parking impacts at the other school, additional noise, addition of classrooms, etc.). In 1989, the California Court of Appeal concluded that school closure and attendance reconfiguration actions are "projects" within the

meaning of CEQA. (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School District* (1989) 210 Cal.App.3d 155.) However, Public Resources Code section 21080.18 provides that CEQA does not apply to the closing of any school or the transfer of the students to other schools as long as the only physical changes involved qualify for exemption under any of the categories set out in the CEQA Guidelines.

Prior to 2002, school district boards found that school closure projects were excluded from CEQA under CEQA Guidelines section 15378(b)(5), which provides that projects under CEQA do not include "[o]rganizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment (such as the reorganization of a school district or detachment of park land)." Section 15378(b)(5) again called into question the usefulness of Public Resources Code section 21080.18. But, the California Court of Appeal extinguished the CEQA Guidelines exclusion for school district reorganizations in 2002 in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98.

While the state of the law after 2002 clearly provided that school closure was not excluded from CEQA, it remained unclear whether such a project was exempt from CEQA. That question was settled in 2006 with *San Lorenzo Valley Community Advocates v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356.

The court, in *San Lorenzo*, examined a reconfiguration of several schools involving both school closures and the transfer of many students. The court used a straightforward application of Public Resources Code section 21080.18 to find the school reconfiguration exempt from CEQA. In other words, the court focused primarily on the categorical exemptions in the CEQA Guidelines. The court disregarded potential offsite impacts of the reconfiguration including traffic and air quality impacts, and instead examined the physical changes that would take place onsite at the receptor schools as a consequence of the reconfiguration. Thus, the court held that as long as one of the categorical exemptions apply (and no exceptions apply), no further analysis is required.

V. CONCLUSION

As shown above, school districts have a myriad of options available regarding the use and disposition of their assets. By selecting the appropriate vehicle for the school district's goal, and by taking advantage of each of the benefits that a vehicle may offer, school districts can maximize their income and eliminate unnecessary expenses.