## INTRODUCTION

In August 2004 the Orange County District Attorney's Office received complaints alleging that the Garden Grove Agency for Community Development (hereinafter the Agency), violated the Ralph M. Brown Act (Brown Act) (Govt. Code § 54950 et seq.) by meeting together in a non-public "serial meetings" on May 25, 2004 in Las Vegas, Nevada. Additional subsequently received complaints alleged that on June 8, 2004, and June 22, 2004, the Agency met in closed session for a matter that was not properly described on the Agenda, and that during that closed meeting discussed matters that should have been aired in a public session.

This Office instituted an extensive inquiry into these complaints as part of its oversight function under Government Code section 54960. In August 2005 a final report was issued which among other findings concluded that the meetings held in Las Vegas to have been in violation of the Brown Act. Specifically that finding stated:

> The meeting(s) in Las Vegas on May 25, 2004 involving a majority of the Board, in the opinion of this office, violated the Brown Act. While there are no published cases specifically interpreting the 1993 amendments to the Brown Act, and the evidence is not unqualified, we believe that the correct interpretation of the statute, its amendments and the available evidence, establishes these meetings as having been held in violation of the Act.

This conclusion was in large part based on prevailing opinions of the Attorney General's Office. As that finding noted there were no published court decisions interpreting the relevant portion of the Brown Act. This is no longer the case. On October 31, 2006 the 1st District Court of Appeals rendered its decision in *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533. The ruling in this case requires a revision to the above finding. Specifically, **it must now be concluded that the meetings of the Agency in Las Vegas were <u>not</u> in violation of the Brown Act.** We now turn to a discussion of the applicable law that compels this revised finding.

## APPLICABLE LAW

The pertinent section of the Brown Act addressed in the *Fremont* opinion is among the Legislature's 1993 amendments to the Brown Act. This provision, Government Code § 54952.2(b), seeks to deal directly with the issue of serial meetings. It provides, **"[A]ny use of direct communication, a personal intermediary or technological devices…by a majority of the members of the legislative body *to develop a collective concurrence* as to action to be taken on an item…is prohibited**." Accordingly, the Act expressly prohibits serial meetings which are conducted through direct communications, intermediaries or technological devices for the purpose of developing a concurrence as to action to be taken. This provision raised the important issue of the meaning of the language "to develop a concurrence as to action to be taken."

In its instructive booklet on the Brown Act, the Attorney General's Office suggested: "In construing these terms, one should be mindful of the ultimate purpose of the Act—to

provide the public with an opportunity to monitor and participate in the decision making processes of boards and commissions," and that, this language largely codifies case law developed by the courts and the opinions issued by this office in the past." Relying in part on the reasoning of these earlier court cases as well as his booklet's guidelines, the Attorney General concluded in a 1998 opinion that "deliberative" or "fact gathering" meetings, as well as those in which decisions are made, remain subject to the open meeting requirements of the Brown Act.

> Finally, the general purposes of the [Brown] Act are to ensure not only that any final actions by legislative bodies of local public agencies are taken in a meeting to which the public has advance notice but also that any deliberations with respect thereto are conducted in public as well. [Citations.] "Deliberations" here would include mere attendance, resulting in the receipt of information. [Citation.] ". . . Deliberation in this context connotes not only collective decision making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision." [Citations.] (81 Ops.Atty.Gen.Cal 156 (1998), pp. 6-7 (emphasis added).)

In a 2001 opinion, interpreting § 54952.2(b), the Attorney General extended this reasoning to serial meetings, concluding that the phrase, "to develop a collective concurrence," did not exclude "deliberative" or "fact gathering" meetings from the open meeting requirements of the Act.

> The purposes of the Brown Act are thus to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. Not only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions taken. [Citations.] The term 'deliberation' has been broadly construed to connote not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.
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> In analyzing the language of section 54952.2, we may apply well recognized principles of statutory construction. We are to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citations.]
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> As for the requirement …**"to develop a collective concurrence as to action to be taken on an item," we note that *such activity would include any exchange of facts*** [citations] **or**, as we have previously explained in our pamphlet on the Brown Act, **substantive discussions "which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, <u>or advance the ultimate resolution of an issue</u>"** [citation] **regarding an agenda item**. (84 Ops.Atty.Gen.Cal. 30 (2001), pp. 3-6 (emphasis added).)

"Accordingly," in his booklet, the Attorney General concluded that, "with respect to items that

have been placed on an agenda **or are likely to be placed on an agenda**, members of legislative bodies should avoid serial communications of a substantive nature concerning such items."

Courts have held that opinions of the Attorney General, though not binding authority, are entitled to "great weight," especially in this area of the law.

> An opinion of the Attorney General 'is not a mere "advisory" opinion, but a statement which, although not binding on the judiciary, must be "regarded as having a quasi judicial character and [is] entitled to great respect," and given great weight by the courts. [Citations.]' This is especially true in the context of the Brown Act because "the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements**.** *Shapiro v. Board of Directors*, 134 Cal. App. 4th 170, 184 (4th Cir. 2005)

These opinions of the Attorney General and court decisions according such opinions "quasi judicial character " were relied upon by this office in renderings its earlier finding. The decision of the 1st District Court of Appeal in *Wolfe v. City of Fremont* did not address the pertinent opinion of the Attorney General (nor the cases according such opinions "quasi-judicial character)," but nevertheless reached a conclusion clearly at variance with this opinion. This conclusion is now binding "judicial" authority that essentially overrules the "advisory" opinion of the Attorney General.

The opinion in *Fremont* purported to rely on the letter of the law to reach its conclusion which it stated obviated the need to further inquire into the intent behind the Brown Act.

> In construing the language of a statute, "[t]he well-settled objective ... is to ascertain and effectuate legislative intent. [Citations.] To determine that intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the statutory language is clear, we need go no further." (Citations) In construing the language of the act, we are instructed that "the Brown Act is a remedial statute that must be construed liberally so as to accomplish its purpose." *Wolfe v. City of Fremont, supra,* 144 Cal. App. 4th 533, 545.

In addressing Govt. Code § 54952.2(b), the *Fremont* opinion concluded that serial meetings are not *per se* impermissible under the Brown Act. Rather they are permissible if they do not result in a "collective concurrence." Therefore deliberative or fact finding serial meetings that do not develop a "collective concurrence" do not violate the Brown Act.

> The current language of the Brown Act contains no reference to, and does not expressly prohibit, serial meetings.
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> Under Section 54952.2, subdivision (b), **the Brown Act is violated by such serial meetings only if …such meetings are used by a majority of the legislative body to develop a 'collective concurrence' regarding a matter**

**of interest.** (Emphasis Added) *Id* at 546.

The opinion emphasized that the concurrence resulting must have been the result of a collective exchange among a majority, hence, the term, "collective concurrence."

> [A] "collective concurrence" would require not only that a majority [of the legislative body] 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. By requiring collective action in addition to a concurrence, the definition promotes the policy behind the act, which is to ensure that the deliberations---that is, the discussion of matters leading to a decision—of public bodies are done in public. (citation) Id at 547.

The practical effect of the opinion is that while non-public meetings of a majority held "at the same time and place to "hear, discuss or deliberate" issues is, except for limited exceptions, prohibited by the Brown Act, a majority is free to do so serially as long as it reaches no "collective concurrence" as a "result" of such meetings. Thus the "collective acquisition and exchange of facts" may now be done by a majority outside of the public view as long as it is done serially, and an agreement or decision is not reached as a "result"

With respect to serial meetings only, this decision changes the previous interpretations of the Brown Act which had held that "deliberation and action could not be separated as part of the decision making process. (See *Frazer v. Dixon Unified School District* (1st Cir. 1993) 18 Cal.App.4th 781, 794-795, where the court stated, "Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that *the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either.")*

> Accordingly, **serial individual meetings that do not result in a "collective concurrence" do not violate the Brown Act.** This is in contrast to nonpublic "meetings," as that term is defined in section 54952.2, subdivision (a), [i.e. meetings at which a quorum is present at the same time and place] which are unconditionally prohibited. *Wolfe v. City of Fremont, supra,* 144 *Cal. App. 4th 533,545.* (Emphasis Added)

In addition, the *Fremont* opinion imposed a "strict liability" rule providing that *if* a consensus did develop as a result of such serial meetings a violation of the Brown Act would be established irrespective of the lack intent of the participants to develop such a consensus.

> Section 54952.2, subdivision (b), in proscribing the use of "direct communication" to reach a collective concurrence, does not include a requirement that the use have been intentional. If a collective concurrence results from direct communication among members of the legislative body, it does not matter whether the participants intended that result. The absence of an intent requirement is consistent with the purpose of the act, which is not merely to prevent conscious backroom deals but to ensure that collective

deliberations, whatever their outcome, are conducted in public. *Id* at 550.

## DEVELOPED FACTS

In brief the pertinent facts are as follows: There are five elected members of the Garden Grove City Council, which also sits as the Board of Directors (the Board) of the Garden Grove Agency for Community Development (the Agency). The City Manager sits as the Agency's Executive Director.

In March or April of 2004, the Project Manager contacted Wynn Resorts, a Las Vegas casino and resort developer to inquire if that firm would be interested in participating in the development of a resort area in Garden Grove. A Wynn representative expressed interest *if* a "gaming component" (i.e. casino) were included.

In May of 2004 the Agency's project manager arranged for two additional Board members to join him, the Executive Director and two other members of the Board in Las Vegas, Nevada to meet developer Steve Wynn. In an effort to avoid violating the Brown Act, the Project Manager arranged two separate, i.e. "serial" meetings with Wynn, each to be attended by two Board members. On **May 25, 2004** four (4) members (a quorum) of the Board met with Mr. Wynn in Las Vegas in two (separate) serial meetings. Although recollections varied the meetings involved "meet and greet" conversations, an exchange of ideas and concepts concerning the development of the resort area of Garden Grove including the potential sight for a casino, a "pitch" by the Agency as to the attractiveness of Garden Grove and the building philosophy of Wynn. The meetings lasted 30-45 minutes.

Three months later, on **August 24, 2004**, in a public meeting, the Board decided to cease all further discussions on the Indian Casino proposal.

## MODIFIED FINDING

**The serial meetings held in Las Vegas on May 25, 2004 by a majority of the Board of Directors of the Garden Grove Agency for Community Development did <u>not</u> violate the Brown Act.**

The two "meetings" in Las Vegas though involving a majority of the Board and held in the same location, were at different times, during each of which less than a majority was present. As recently interpreted by *Wolfe v. City of Fremont*, such "serial meetings" are not in violation of the Brown Act unless held to "develop collective concurrence as to action to be taken." Moreover, if such a collective concurrence results from such serial meetings a violation is established whether or not such a concurrence was intended.

The evidence indicates that the serial meetings held by a majority of the Board were of a "meet and greet" and exchange of information nature. Such serial meetings where a majority is not present at any one do not violate the Brown Act unless a collective concurrence as to action to be taken results. No such "collective concurrence" or "action" resulted. Instead three months after the meetings in Las Vegas, the Board decided to terminate any further discussions of the casino concept. Accordingly, under the ruling of

*Wolfe v. City of Fremont*, a violation of the Brown Act is not established.

It should be stressed that the Wolfe opinion continued to hold that deliberative meetings at which a majority of a legislative body is present remain subject to the Brown Act, whether or not a decision is made or "action" taken. In addition quorums of a legislative body hold serial meetings at the risk of violation the Brown Act if a "concurrence of opinion as to action to be taken" results, whether or not such a concurrence was intended. Such meetings should therefore be undertaken, if at all, with appropriate caution.