REPORT OF THE DISTRICT ATTORNEY

ON THE

COMPLIANCE OF THE ORANGE COUNTY

GREAT PARK CORPORATION

WITH THE RALPH M. BROWN ACT

(Government Code § 54050 Et. Seq.)

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INTRODUCTION

The Ralph M. Brown Act (Brown Act) (Govt. Code § 54950 et seq.) provides a complex regulatory scheme the intent of which is to foster openness and public scrutiny of local government. Both criminal and civil sanctions are provided for violations of the Act's provisions. However, criminal sanctions against individual members of a legislative body in only very limited circumstances: where the legislative body undertook an action in violation of the Act <u>and</u> the member **intended to deprive the public of information to which the member knew or had reason to know the public was entitled.** (Government Code § 54959, infra)

At the end of 2005 the Orange County District Attorney's Office received complaints alleging that the Board of Directors of the Orange County Great Park Corporation (hereinafter the Board and the Corporation), violated the Brown Act by meeting in foreign jurisdictions to discuss the final selection of a Great Park design firm. Newspaper articles and editorials discussing these meetings generated further requests for an inquiry by this office.

In accordance with its oversight function under Government Code section 54960, the Orange County District Attorney's Office initiated an inquiry into this matter. This inquiry included interviews of relevant witnesses including members of the Board and other Corporation officials, the review and examination of relevant Corporation documents, including the Agendas and Minutes of the meetings in question, information submitted by the Corporation's General Counsel and video recordings of the meetings in issue. All persons and officials contacted in the course of the inquiry were cooperative.

This report, the result of this process, concludes that **the evidence developed does not indicate that any member of the Board of Directors of the Great Park Corporation acted in violation of the Brown Act with the intent to deprive the public of information to which the member knew or had reason to know the public was entitled. Accordingly, the institution of a criminal prosecution for violation of the Brown Act is not warranted.**

However, the District Attorney's function does not end with this conclusion. In such cases the District Attorney fulfills his statutory role by issuing a report of his findings to provide guidance and foster full compliance with both the letter and spirit of the Brown Act in the future. The issuance of this report fulfills that role.

The report is organized as follows: A discussion of the applicable law precedes a summary of the facts. Using this format allows the facts to be better evaluated and judged in light of the applicable law. The District Attorney's Findings are then detailed followed by a discussion of the applicable enforcement mechanisms provided in the Brown Act. The Report's Conclusions and Recommendations follow. We turn now to the applicable law.

APPLICABLE LAW

I. Requirements of Open Public Meetings

The **Brown Act** is codified in Government Code section 54950 et seq. Its stated purpose is as follows:

> [T]he Legislature finds and declares that the public commissions, boards and councils and the other 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. (Govt. Code § 54950.)

To fulfill this intended purpose, with only limited exceptions, the Act requires that: "**All meetings of the legislative body of a local agency *shall be open and public*, and all persons shall be permitted to attend…"** (Govt. Code § 54953 (emphasis added).)

A. Agencies and Legislative Bodies Subject to the Act's Open Meeting Requirements:

"The Brown Act…is intended to ensure the public's right to attend the **meetings of public agencies. *****The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies." *Mckee v. Los Angeles Interagency Metropolitan police Apprehension Crime Task Force* (2005) 134 Cal. App. 4th 354, 358. (Emphasis Added) To fulfill this purpose the types of local public agencies subject to the open meeting requirements are broadly defined. Govt. Code § 54951 provides that the term "'local agency' means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency."

In *Torres v. Board of Commissioners* (1979) 89 Cal. App. 3d 545, the reach of this definition was discussed. Noting that state agencies were covered by another Statute (The Bagley-Keene Act, Govt. Code § 11120, *et seq*) which provided for similar open meeting requirements, the court concluded that "the Legislature intended that all agencies be included in some open meeting act unless expressly excluded. *Id* at 549. In discussing why a housing authority was a "local agency" within the meaning of the Brown Act, the court delineated criteria for adjudging when an agency is subject to the Act.

> [A] housing authority…is included within the statutory definition of a local agency under the Brown Act in that it is either an "other local public agency" or a "municipal corporation" or both….*** In order to give meaning to the term "municipal corporation" in…section 54951 we hold that such term…includes such entities as housing authorities. (Citation) Such a holding is also in harmony with the intended broad coverage of the Brown Act. In addition, a housing

> authority is **local in scope and character, restricted geographically in its area of operation, and does not have statewide power or jurisdiction….** (Emphasis Added) *Id* at 549-550.

The Brown Act also includes a broad definition of "legislative body." Govt. Code § 54952 provides in pertinent part that "legislative body" means:

> a) The governing body of a local agency created by state and federal statute.
>
> (b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. ***
>
> (c)
> (1) A board, commission, committee, or other multimember body that governs a private corporation, limited liability company, or other entity that either:
>
> (A) Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation, limited liability company, or other entity.
>
> (B) Receives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency.

B. Types of "Meetings" Subject to the Act's Open Meeting Requirements

"Meeting" is also broadly defined, and "**includes any congregation of a majority of the members of a legislative body at the same time and place to <u>hear, discuss, or deliberate</u> upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.** Govt. Code § 54952.2 (Emphasis Added)

> **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."*** [Citations.] ***The…term "meeting" must be construed expansively….*** *Frazer v. Dixon Unified School District* 18 Cal.App.4th 781, 794-795 (1st Cir. 1993) (Emphasis Added)
>
> **Thus, '<u>the Brown Act ... is not limited to gatherings at which action is taken</u> by the relevant legislative body; 'deliberative gatherings' are included as well**." [Citations.] **Deliberation in this context connotes not only collective decision making, but also "*the collective acquisition and exchange of facts preliminary to the ultimate decisions*.**
> *216 Sutter Bay Associates v. County of Sutter* 58 Cal.App.4th 860, 876-877 (3rd Cir. 1997) (Emphasis Added)

Consistent with these rulings, The Attorney General concluded in a 1998 opinion that "deliberative" or "fact gathering" meetings remain subject to the open meeting requirements of the Brown Act.

> “[T]he 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.” (81 Ops.Atty.Gen.Cal 156 (1998), pp. 6-7 (emphasis added).)

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)

II. Exceptions: Out of Jurisdiction Meetings – Limitations

Court decisions have held that the Brown Act’s open meeting requirements are to be interpreted liberally to accomplish its purpose.

> [A]s a remedial statute, the Brown Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed. (Citation) This is consistent with the rule that "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.*, 69 Cal. App. 4th 287, 294 (2nd Cir. 1999)

Provisions that advance the concept of openness and public access are to be construed broadly, exceptions, restricting this are to be narrowly construed.

> **Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act "sunshine law" is construed liberally in favor of openness in conducting public business.** [Citations.]
>
> ***
>
> **[T]he Brown Act should be interpreted liberally in favor of its open meeting requirements, while the exceptions to its general provisions must be strictly, or narrowly, construed.** *Shapiro v. San Diego City Council* 96 Cal.App.4th 904, 917, 920 (4th Cir 2002) (Emphasis Added)

With limited exceptions, meetings are to be held within the jurisdiction of the legislative body. Thee exception relevant to this inquiry, Govt. Code § 54954(b) (2) provides in pertinent part as follows:

> (b) Regular and special meetings of the legislative body shall be held within the boundaries of the territory over which the local agency exercises jurisdiction, except to do any of the following:
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> ***
>
> (2) Inspect **real or personal property which cannot be conveniently brought within the boundaries** of the territory over which the local agency exercises jurisdiction **provided that the topic of the meeting is limited to items directly related to the real or personal property.**

The emboldened language in subsection (b) (2) serves to limit the type of property that can be the subject to such inspections as well as the topics that can be discussed. The common law definition of "real property" encompasses interests in real estate, i.e. "immovable" property, such as land and buildings. "Personal property" has commonly been referred to as "movable" property, that is, any property that can be moved from one location to another. Personal property can include "intangible assets," such as trade secrets, patents, copyrights, trademarks as well as what are termed "competitive intangibles," which include, know how, knowledge, collaboration activities, structural activities or intellectual property. "Competitive intangibles" directly impact productivity, effectiveness and opportunities of an organization and therefore costs, revenues and market value. (Source: Wikipedia: "personal property;" "intellectual property)

Since by definition real property is immovable, the phrase, "which cannot be conveniently brought within the jurisdiction," can only apply to personal, i.e. "movable" property as defined above. There is no reported case expressly interpreting the terms "conveniently" or "directly related," as used in the statute cited above. However, the language of a statute should be interpreted according to its plain meaning and in a manner that does not frustrate its purpose. This is the best way to effectuate legislative intent.

> **The Legislature's intent is best deciphered by giving words their plain meanings.** (Citation) "We have declined to follow the plain meaning of a statute only when it would inevitably have frustrated the manifest purposes of the legislation as a whole or led to absurd results." *Roberts v. City of Palmdale* 5 Cal.4th 363, 376 (1993) Emphasis Added).)
>
> Words used in a statute or constitutional provision should be given the meaning they bear in ordinary use. (Citation) **If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature**…. *Lungren v. Deukmejian* 45 Cal. 3d 727, 735 (1988) (Emphasis Added)

A review of a standard dictionary or thesaurus yields these descriptive words and phrases defining "convenient: and "conveniently:" available, accessible, easily accessible, easily reached, ready, at hand, ready at hand, close at hand, near at hand, at one's fingertips, nearby, accommodating, expedient, affording accommodation or advantage, advantageous, suited to personal comfort, causing the least difficulty, agreeable to the needs or purpose, that which gives ease or comfort., labor saving, does not involve much effort or trouble. Antonyms of this term are awkward, clumsy, unhandy unmanageable, useless. The term's opposite, "inconvenient," is defined as causing difficulty, extra effort, work or trouble.

Using these ordinary meanings to interpret the phrase "cannot be conveniently brought within the jurisdiction" as applied to the property to be inspected yields the conclusion that the property must be of such a nature as to be not easily available, accessible, ready at hand or nearby so that it cannot be brought within the jurisdiction without causing difficulty, extra work or effort, trouble, or in a manner affording accommodation or advantage, agreeable to the needs or purpose or causing the least difficulty.

A similar search for the word "directly" yields: strictly, definitely, rigorously, rigidly, literally, exactly, precisely, expressly, faithfully, definitely, positively, squarely, undeviatingly, unerringly, immediately, absolutely, without deviation, interruption, intervention, digression or diversion and in every, or all, respects. For "related," the descriptive terms are: connected, linked, interconnected, interlinked, interlocked, intertwined, interrelated, involved, tied, coupled, joined, bound, associated, correlated, affiliated and allied.

Using these ordinary meanings of the phrase "directly related" yields the conclusion that **discussions in out of jurisdiction meetings under this exception must literally strictly, rigidly, exactly, precisely and without intervention or deviation be joined, bound, linked, connected or correlated to the property inspected.** In this sense such meetings are NOT similar to, or the same as, meetings held within the jurisdiction.

Such an interpretation limiting the scope of this exception to permit only discussions "directly related" to property inspected not only comports with the letter of the Brown Act but also appears to be required by the California Constitution as well. Article I § 3(b), provides in pertinent:

> (1)The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2)A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, **shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.** (Emphasis Added)

This interpretation is in accord with the California Constitution:

> The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. **The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.**
> *People v. Belton* 23 Cal. 3d 516, 526 (1979) (Emphasis Added).)

The purpose and intent of the Brown is to ensure that the people remain informed as to what their elected representatives are doing.

> **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.** (84 Ops.Atty.Gen.Cal. 30 (2001), supra at 2 (Emphasis Added).)

The exception embodied in Govt. Code § 54954(b) (2) should therefore be as narrowly interpreted as the language allows to effectuate this intent and purpose. Recent decisions in the Courts of Appeals narrowly interpreting other Brown Act exceptions comport with this conclusion.

Although involving different facts than those presented tin this matter, the case of *Shapiro v. San Diego City Council*, *supra,* is illustrative of how exceptions to the Brown Act's open meeting requirements are narrowly interpreted by the courts. *Shapiro*. involved the open meeting exception in Govt. Code § 54956.8 which in pertinent part states: "[A] legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease." *Shapiro v. San Diego City Council*, supra, 96 Cal. App. 4th 904, 914. The City Council took the position that "because of the complexity of the transaction, a 'rule of reason' should be applied to enable it to discuss in closed session any and all related topics that may arise in conjunction with a purchase or sale decision, where that purchase or sale decision has only generally been identified to the public through the agenda procedure." Id at 921. In rejecting this position the court stated:

> "On its face, [the exception codified in] section 54956.8 appears to grant a rather narrow scope of authority …to determine what discussions are germane to the particular transaction in real property. Also, section 54957.7, subdivision (a) specifies that a **legislative body in a properly noticed closed session may consider only those matters covered in its statement at an open meeting of the item or items to be discussed** in closed session. Id. At 922 (Emphasis Added)

The Court held that the City Council had no authority to unilaterally determine which topics were to be deemed permissibly related to topics specifically subject to the exception. **"[T]here is nothing in the statutory scheme that grants an unlimited scope of authority to the City Council…to determine what discussions it may deem to be related background information that is essential to the particular transaction in real property**…." Id. at 923 (Emphasis Added)

In short the court stated that there is no "rule of reason" that a local legislative body can rely upon to conduct discussions outside the strictly limited exceptions to the open meeting requirements of the Brown Act.

> The City Council cannot claim substantial compliance under the safe harbor provisions of section 54954.5, subdivision (b), when its anticipated project discussions exceed the scope of the safe harbor notice provisions, and do not involve a specific and identifiable piece of property under discussion, but rather range far a field of a specific buying and selling decision that the negotiator is instructed to work toward.
> **If we were to accept the City's interpretation of the Brown Act in this respect, we would be turning the Brown Act on its head, by narrowly construing the open meeting requirements and broadly construing the**

> **statutory exceptions to it.** *Shapiro v. San Diego City Council*, supra, 96 Cal. App. 4th 904, 924 (Emphasis Added)

III. Notice and Agenda Requirements

In order to invite meaningful public involvement, notice requirements are applicable to all open meetings and exceptions as well. Only topics on an agenda, posted in a publicly accessible place at least 72 hours in advance of the meeting, may be discussed.

> At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting…. A brief general description need not exceed 20 words.
>
> ***
>
> **No action <u>*or discussion*</u> shall be undertaken on any item not appearing on the posted agenda**…. (Govt. Code § 54954.2(a) (Emphasis Added).)

This provision has been rigorously upheld.

> Under section 54954.2, subdivision (a), the legislative body must post an agenda containing 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," **and no action <u>or discussion</u> shall be undertaken on any item not appearing on the posted agenda….** *Shapiro v. San Diego City Council*, supra, 96 Cal. App. 4th 904, 923 (Emphasis Added)

A. "Brief General Description"

In his booklet on the Brown Act the Attorney General states the purpose of this requirement. "The purpose of the general description is to inform interested members of the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body." (The Brown Act, Open Meetings for Legislative Bodies, 2003 Edition, at page 16)

Moreno v. City of King, 127 Cal. App. 4th 17 (6th Cir. 2005*)* addressed what an agenda must contain to meet the requirement of a "brief and general description." The case involved the agenda of a special meeting held pursuant to Govt. Code 54956 and its requirement that the agenda for special meetings "specify…the business to be transacted or discussed. In rejecting the City's contention that the agenda of meetings held under this statute need not comply with the notice requirements of §54954.2, the court held that the notice requirements of both statutes are essentially the same and that to violate one would violate the other. The court then employed a standard dictionary definition of "specify" to say what meeting this requirement would entail.

> We do not understand section 54956 to allow a City to omit the "brief general description" required by section 54954.2. Section 54956 requires the notice to "specify ... the business to be transacted or discussed." Section 54954.2 requires the agenda to give "a brief general description of each item of business to be transacted or discussed." The word "specify" means "**to name or state explicitly or in detail.**" (Webster's Collegiate Dict. (10th ed. 1993) p. 1129.) We cannot conceive of how a city could "specify" an item of business without providing a

> "brief general description" of that item of business. In our view, section 54956's requirement that the notice "specify" is intended to refer back to section 54954.2's requirement that an agenda provide a "description." Since **the two statutes contain equivalent requirements**, the trial court's finding that the special meeting agenda violated section 54954.2 was equivalent to a finding that it violated section 54956. (Emphasis Added)
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> *Moreno v. City of King,* supra, 127 Cal. App. 4th 17, 26

IV. Use of Indirect or Written Communications or Intermediaries/ Serial Meetings:

Govt. Code § 54952.2(b) provides in pertinent part that "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."

The Attorney General concluded that communications subject to this prohibition can include written materials or electronic messages, i.e. e-mails.

> We find no distinction between e-mails and other forms of communication such as leaving telephone messages or sending letters or memorandums. If e-mails are employed to develop a collective concurrence by a majority of board members on an agenda item, they are subject to the prohibition of section 54952.2, subdivision (b). Application of the statute in such circumstances furthers the "broad policy of the act to ensure that local governing bodies deliberate in public." (84 Ops.Atty.Gen.Cal. 30 (2001), p. 5)

Posting or displaying copies of e-mails or memorandums either on a bulletin board or web site or circulating them at a subsequent public meeting thereby to some extent inviting public attention is not sufficient to render this practice permissible under the Brown Act.

> We recognize that…concurrently sending copies of the e-mails to the secretary and chairperson of the agency,…posting the e-mails on the agency's Internet website, and…reporting the contents of the e-mails at the agency's next public meeting would allow the deliberations to be conducted "in public" to some extent. Nevertheless, the deliberations would not be conducted as contemplated by the Brown Act. Members of the public who do not have Internet access would be unable to monitor the deliberations as they occur. All debate concerning an agenda item could well be over before members of the public could be given an opportunity to participate in the decision-making process. (Citation) **Subdivision (b) of section 54952.2 is straightforward and unambiguous. The proposed conditions satisfy neither the specific language nor all the critical purposes of the statute.** (84 Ops.Atty.Gen.Cal. 30, supra, p. 5 (Emphasis Added)
>
> We thus conclude that a majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Brown Act *even if* the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the

agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board.

A. Action of a majority vs. action of an individual.

An important distinction is whether the use of e-mails or memorandums involves the action of a majority or that of an individual. Court rulings have emphasized that the prohibitions of the Brown Act involves the conduct of legislative bodies at "meetings." An action of a single individual is not a meeting.

> The action of one public official is not a "meeting" within the terms of the act….
>
> ***
>
> [B]ecause the term "meeting," as a matter of ordinary usage, conveys the presence of more than one person, it follows that…the term "meeting" means "two or more persons are required in order to conduct a 'meeting' within the meaning of the Act." *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 375-376 (1993).

"Thus the action of one public official is not a 'meeting' within the terms of the act ...." *Wolfe v. City of Fremont* 144 Cal. App. 4th 533, 543 (2006). Accordingly, if the use of e-mail or memoranda is the act of a single individual or of less than a majority, the prohibitions of the Brown Act are not violated. "The statutory prohibition applies to such use "by a majority of the members of the legislative body. **Anything less than a majority is not covered by the statute**." (84 Ops.Atty.Gen.Cal. 30, supra, p. 5 (Emphasis Added)

In the Attorney General's opinion above, a violation of the Brown Act was found based upon that a majority was involved. ("Here, we are given that a majority of the board members are sending e-mails to each other." (84 Ops.Atty.Gen.Cal. 30 (2001), supra at 5.) Contra wise, in the Supreme Court opinion in *Roberts v. City of Palmdale,* cited above, the Brown Act was not violated. "In that case, members of the legislative body passively received a memorandum from a single individual, its counsel. There was no discussion or exchange of the memorandum outside of an open meeting.

> **We conclude that [the Brown Act] was intended to apply to collective action of local governing boards and not to the passive receipt by individuals of their mail.**
>
> ***
>
> Of course…collective deliberation on public business through a *series of letters* or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement. (Citations) **There was no evidence in this case, however, that there was any collective deliberation outside of the open meeting where the [matter] was discussed….** (*Roberts v. City of Palmdale*, supra, 5 Cal. 4th 363, 376-377 (1993) (Emphasis Added))

B. "Collective Concurrence."

Prior to 2006 no reported case had yet interpreted the meaning of "to develop a collective concurrence." In a (2001) opinion the Attorney General concluded that this phrase does not exclude "deliberative" or "fact gathering" meetings from this prohibition.

> 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…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).)

In the recent case of *Wolfe v. City of Fremont,* 144 Cal. App. 4th 533 (1st Cir. 2006) the Court of Appeals, 1st District addressed the meaning of this language adding a qualification. *Wolfe* held that "**section 54952.2, subdivision (b) now prohibits a legislative body from using virtually any means--whether "direct communication, personal intermediaries, or technological devices"--to reach a 'collective concurrence' outside the public forum.**" Id at 544-545. (Emphasis Added) However, unless a "collective concurrence" is reached, the Brown Act is not violated. "An important qualification to the general rule that informal deliberation is within the scope of the Brown Act is that **some sort of collective decisionmaking process be at stake**." *Id* at 543. (Emphasis Added)

This ruling is of substantial significance to so called "serial meetings," discussions among a majority of members of a legislative body, but where a majority is not present a single time or place.

> [T]he Brown Act contains no absolute prohibition on individual, serial meetings…. and …the Brown Act does not preclude members of a local legislative body from engaging in one-on-one discussions of matters before the body. Rather, as noted above, section 54952.2, subdivision (c) expressly states that the Brown Act does not prohibit "[i]ndividual contacts or conversations between a member of a legislative body and any other person." *Id* at 546
>
> 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), which are unconditionally prohibited. (§ 54953.) (Emphasis Added)

The issue in such circumstances boils down to this: the meaning of the term collective concurrence as to action to be taken." The court in *Wolfe* addressed this issue directly.

> [C]ollective concurrence" would require 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. 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. (§ 54950.) …**the act's requirement of public meetings "comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business.** *Id* at 547. (Emphasis Added)

What's more, this prohibition against serial meetings that result in a collective concurrence is applicable irrespective of the intent of the participating members. In other words if a concurrence results from such non-public serial meetings, they are prohibited whether or not the members actually intended to reach agreement as a result of such meetings.

> 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. (Emphasis Added)

With this applicable law in mind we now turn to the facts of this matter.

FACTS

On **July 2, 1999**, the U.S. Marine Corps Air Station (MCAS), El Toro formally closed. On **March 5, 2002**, Orange County voters approved Measure W, the Orange County Central Park and Nature Preserve Initiative. This initiative overturned the previously enacted Measure A, which had zoned the area for an international airport and amended the County General Plan to provide for a park on the site. The next day, on **March 6, 2002**, the federal government announced that the property would be sold to private owners through an on-line public auction managed by the General Service Administration and would be subject to local zoning regulations.

On **June 24, 2003** The Orange County Great Park Corporation was established by formal action of the Irvine City Council. The Corporation is a non-profit organization charged with the design, construction and maintenance of a park (to be called the Orange County Great Park) on a portion of the site of the former Air Station, within Irvine, "for the benefit of the residents of the City of Irvine and others." (Source: Articles of Incorporation)

The corporation is governed by a nine member Board of Directors consisting of all five members of the Irvine City Council and four other independent directors from Orange County. Land use authority and zoning for the Orange County Great Park, however, remains solely with the City of Irvine and therefore under the control of that city's council. The Articles of Incorporation cannot be amended without the written consent of a majority of those Board members who are also, members of the Irvine City Council (named the "City-Directors").

On **February 16, 2005** the Department of the Navy sold the property to the winning bidder, Lennar Corporation. Lennar Corporation then signed a Development Agreement with the City of Irvine. In that agreement Lennar granted to the City of Irvine 1,347 acres of the former MCAS property for the Great Park and agreed to pay to the City $200 million for the development and maintenance of a park on that grant of land, all in return for development rights to the remainder of the property. Future land purchasers will contribute an additional $200 million. These funds are to be provided to the Great Park Corporation for the design, building and maintenance of the Great Park.

The Board solicited approximately forty different national and international design firms to submit their qualifications for consideration. Twenty-three responses were received and the Board established a "design jury" to review the responses and make recommendations to the Board. This jury consisted of six architects and landscape architects, unrelated to any of the solicited firms. The jury recommended seven firms. Another jury with two carry over members from the first jury to maintain continuity was formed to review of the seven firms and make a final recommendation to the Board.

Each of the seven firms was given six weeks to develop and submit a proposed design for the Great Park to the second jury. When submitted the proposal were posted in Irvine City Hall to enable public viewing. The Board solicited public input, conducted polling from their website and held public meetings with the design firms. By this process the Board narrowed their choice down to three design firms; KEN SMITH Landscape Architect of New York, EMBT of Barcelona, Spain and ROYSTON, HANAMOTO, ALLEY and ABBEY (RHHA) of Mill Valley, California. An on-line public poll of over three thousand Orange County resident's was taken and the proposed design submitted by KEN SMITH was the public's favorite.

In **May of 2005**, the Board's CEO WALLY KRUETZEN recommended that the Board visit developments designed by the three "finalists," as well as their offices of to gather facts about how the firms were managed. The proposed trip to visit these locations was discussed during several open Board meetings. ROBERT THORNTON, general counsel to the Board, prepared a memo to CEO Kreutzen to address any potential Brown Act issues the Board would face on the trip. This memorandum dated **October 13, 2005** correctly quoted the relevant section of the Brown Act, Govt. Code § 54954(b) (2) which provides in pertinent part that such meetings may be held outside the jurisdiction of a legislative body in order to: "Inspect real or personal property which cannot be conveniently brought within the…jurisdiction <u>provided the topic of the meeting is limited to items *directly* related to the real or personal property."</u> The memorandum acknowledged that the Board intended "to inspect real property (e.g., parks and other landscape architecture work) by the …Park design finalists" as well as the "offices of the design finalists," and that "the parks and the offices to be inspected cannot be conveniently brought within the City of Irvine since [they] are located in other parts of the United States and outside the United States."

On **October 27, 2005** the Board met in an open public meeting in Irvine California. All members, general counsel, Thornton and CEO Kreutzen were present. One of the agenda items was a review of the limits of applicable parts of the Brown Act prior to the upcoming trip. General Counsel Thornton addressed the Board. He referred to his legal memorandum and pointed out that the Brown Act does allow legislative bodies such as the Board to inspect real or personal property outside its jurisdiction "provided that the discussion is limited to the…*issues* directly related thereto." He then restated the rule in a slightly altered form, "the most important thing to remember is that there is a limitation on the discussion of items directly related to those *inspections*." Mr. Thornton also pointed some "common sense examples." One was operational and maintenance issues of the developments visited. In the second relating to visits to the offices of the designers, Mr. Thornton advised that discussion be limited to those issues "directly related to how those offices are to be managed were they to be selected." He also noted that all usual Brown Act limitations apply. The Chairman noted that the CEO was well advised on these matters and would advise the Board concerning matters better left for discussion when the Board returned.

During the meeting a councilperson asked the question, "Just for clarification…since we will be convening a meeting, so it's like when we're at a meeting, we can converse and we can discuss thoughts and ideas about what's before us. I just want clarification,…so if we're all together, and traveling…and the discussion is these properties, it would be just like we're sitting up here at the Board. "We…couldn't conclude an issue, but we could discuss the issues, am I right?" Mr. Thornton replied, "[C]ertainly,…it will be just like your meeting here, with regard to the noticed meetings portions of your trip."

The Chairman then inquired, "[O]ur CEO is well advised of all these matters and will be the enforcer along with others, along the way, is that correct?" The CEO replied, "There may be times that I suggest to you that that may not be an appropriate conversation until we get back into a public setting here in Irvine." The Chairperson then noted that, "[T]his is in effect kind of a movable meeting."… "I think everyone is well apprised of the rules under which we will be operating…."

The board invited the public and media to accompany them on the trip to give them an opportunity to have input on the process of selecting a designer. Orange County Register newspaper reporter NOBERTO SANTANA went on the trip and wrote about it. His articles appeared in that local paper concurrently with the trips. The trips were planned from early November through early December 2005.
The Notice and Agenda prepared for the special meetings scheduled from Nov. 3-9, 2005 stated, "The purpose of the meetings is to inspect real property and personal property at the locations identified. No other business will be conducted at the special meetings."

On **November 3, 2005** the Board visited developed sites in Barcelona Spain. Discussions appeared to be directly related to these sites.

On **November 4**, the Board met at the offices of EMBT Associates also in Barcelona. EMBT representatives made a power point presentation which bore the title, "Orange County Great Park." The presentation discussed various "elements" of a master plan for the Great Park, including proposed attractions and components. The display included maps of The Great Park and drawings of these proposed attractions and components. These displays and discussion included such topics as: points of entrance, transportation corridors, parking, shuttle bus facilities and routes, sports facilities, lakes, promenades, plazas, meadows, gardens, theme parks, museums, restaurants, small shops, observation towers, wildlife, recreational activities, special plant communities, including an orange tree "plantation" to recall Orange County history, a visitor center and other special attractions.

Also discussed were construction issues such as earthwork, grading, watershed planning, phasing of development, and economic issues such as financial "sustainability," and budgetary costs of the various elements. Other questions of the Board and discussions addressed which attractions would be included in which phases of the development.

On **November 5th and 6th**, the Board visited developed sites in Paris, France. All of the discussions at these sites appeared directly related to them.
On **November 8, 2005** the Board conducted a tour of various real properties and points of interest in New York City. All discussions appeared to be directly related to the properties viewed.

On **November 9, 2005** the Board met in the offices of Consultant Buro Happold, in New York, New York. Present also was Ken Smith of Ken Smith Architects and employees and associates of both firms. The meeting involved a video presentation and discussion. In introducing the presentation, Smith said that it would be in two parts; the first, addressed issues of project management and organization to show "how we plan to go about getting this project [i.e., The Great Park] designed and built," and the second, design issues. Smith emphasized that, "It's going to be a 'Great Park,' not a good park," and went on to point out that he and his associates had put together a "great team," introducing each and describing their function. Buro was to be a part of the team.

Some of the management issues discussed by Smith were "methodology of administering the design and building process," the use of "core people embedded in the design team," administrative management to ensure that deadlines are met, commitment to schedule, regular meetings, accountability, the collaborative model of cooperative companies, quality assurance, budget, cost control and how prior projects were handled. The "design" portion involving the "concept plan" included discussion and displays on: park entrances, sports centers, locations of "major activity centers," core transportation centers, pedestrian corridors, tie in with adjacent transportation services, shuttle service, water aspects, removal or retention of runways, restaurants, food courts, acquiring, displaying and preserving a collection of "vintage planes," vendor franchising and liability and prospects for expansion. Additional discussion involved what "components" would be in the first phase, whether that phase could be completed within budget and in time and the percentage of costs allocated to the "design team." Smith said that part of the purpose of his presentation was to show, "How we go about thinking about these things." Finally issues about using a smaller company as opposed to a bigger one were discussed.

Additional Board meetings were scheduled in the San Francisco Bay Area of California from December 6th through December 8th, 2005. **The Notice and Agenda the special meetings from December 6-8, 2005 stated, "The purpose of the meetings is to inspect real property and personal property at the locations identified. No other business will be conducted at the special meetings."**

On **December 6, 2005** the Board visited a site in Stockton, California. All of the discussions appeared to be directly related to the site. On December 7, the Board visited three sites. Discussions at two of these sites appeared to be directly related to the sites visited.

The third site visited on **December 7, 2005** was the offices of Royston, Hanamoto, Alley and Abey (RHAA), in the Bay Area town of Mill Valley, California. A spokesperson for this firm conducted a presentation to show "what we see for The Great Park, because we've evolved our vision…." In introducing the firm's "vision", the spokesperson said, "You need a design that inspires people that meets their needs, that addresses the community concerns, that's constructible, that's in scale, that appropriate for your site." The purpose of the presentation was to show, "Our (i.e. RHAA's) concept for the Great Park." The spokesperson "pitched" the firm as having "phenomenal people," the best of the best at what they do," and advised the Board that, "You need a team that has experience in implementing large scale projects," that, "You're hiring the brain trust in this room…, and that's what it takes to do a project of this caliber." The spokesperson also warned, "This project, there's a lot riding on it, there's a lot of money, a lot of politics, a lot of community expectations that you have to meet." "You have to do it right." The

spokesperson enthusiastically asserted that, “We have a vision that will make the cover of Time magazine.”

The presentation included slide images of proposed features of RHAA’s “concept” or “vision” for The Great Park, a map of the proposed Great Park and discussions of the RHAA’s proposed features which included: the park entrance, transportation corridors, pedestrian traffic, “alternative” vehicle and power sources such as electric cars and geo-thermal plants, demonstration farms, equestrian center, botanical gardens, water cascades, sports center, museums, groves, plazas, water plazas, swim center and other “aesthetic resources.” The presentation proceeded according to proposed “phases” of design and development.

Other discussion included topics such as “the revenue generating part of [RHAA’s] service,” “cost control,” financial modeling, “sustainable systems,” which features would attract adjacent “high end residential development” and attraction of capital and trying to “contain the exposure” of a political body when an “election is coming up.”

On **December 8, 2005** the Board visited Union Square in San Francisco and the San Francisco Offices of RHAA. All discussions appeared to be directly related to the properties viewed.

Subsequent to these meetings and once the Board had returned home, a 13-page memo, dated **January 16, 2006** was written by the Chairman of the Board, Larry Agran and forwarded to CEO Kreutzen who distributed the memos to all other Board members. The memo argued for the selection of Ken Smith Associates as the designer for The Great Park. Near the conclusion of the memo, Mr. Agran wrote that he had conferred with the Board’s General Counsel and had been advised that pursuant to the Brown Act, the members were “free to discuss and debate the contents of this letter with others….” There was no evidence that this memo was answered by written communications from another Board member, or that a majority of Board members discussed or debated its contents among themselves outside of a noticed public hearing. **On January 23, 2006** in an open meeting the Board voted to select architect Ken Smith Architects to design and develop The Great Park.

FINDINGS

1. **The Board of Directors of the Orange County Great Park Corporation is a legislative body of an agency subject to the requirements of the Brown Act.** The Great Park Corporation was created by the elected Irvine City Council on June 24, 2003. It purpose was to assume responsibility for the design, construction and maintenance of a park for the benefit of Irvine residents (and others) on a portion of former MCAS land granted to the City of Irvine by the purchasing developer. Land use and zoning authority was retained by the City. A majority of the Board of Directors which governs the corporation are also members of the Irvine City Council.

   The Great Park corporation is clearly a “municipal corporation,” “local in scope and character, restricted geographically in its area of operation, and does not have statewide power or jurisdiction.” Accordingly it is a “local agency’ within the meaning of Govt. Code § 54951. In addition the corporation, created by an “elected legislative body” (the Irvine City Council) was delegated authority by that council to design, create and maintain property belonging to the City of Irvine. The city could therefore lawfully retain or delegate all or part this authority as it deemed. Finally, the Board of Directors

of the Great Park Corporation contains the entire elected City Council of Irvine with full voting rights from which it also receives funds to design and build the Great Park. The corporations' Board of Directors is therefore a "legislative body" within the meaning of Govt. Code § 54952, and is accordingly subject to the requirements of the Brown Act.

2 In his October 13, 2005 legal memorandum to the CEO of the Great Park Corporation, General Counsel to the Board provided a correct written statement of the law regarding the permissible scope of out of jurisdiction discussions under the Brown Act. In addition, initially General Counsel gave a correct statement of the applicable law to the Board in the October 27, 2005 meeting. However, subsequent questions and discussions between Board members and General Counsel at that meeting may have created a confusing and inaccurate understanding of the law.

The memorandum drafted by the General Counsel and forwarded to the Board of Directors provided a correct statement of the applicable law governing the permissible scope of discussions in meetings to inspect property outside of the jurisdiction. The relevant section of the Brown Act, Govt. Code § 54954(b)(2) (supra) was accurately quoted. Moreover, General Counsel appropriately emphasized its operative part, the phrase added by the Senate when the section was enacted. Quoting the memorandum, it reads: "Importantly, the items to be discussed at the meeting are limited to those that are 'directly related' to the real or personal property that is the subject of the inspection." In addition the memorandum correctly advised that, "The inspection meetings are subject to standard Brown Act notice, open meeting and public comment requirements."

In the Board's open meeting of October 27, 2005 a further discussion of the applicable Brown Act rules was included on the agenda and raised at the meeting. At this meeting General Counsel again correctly advised that the Brown Act "allows the inspection of real or personal property, provided that the discussion is limited to the…issues directly related thereto…." General Counsel emphasized this point, "I think the…most important thing to remember is that there is a limitation on the discussion of items directly related to those *inspections*." (Although the statement substituted the word "inspections," for the word "property" contained in the statute, this change does not appear to have been of any significance.)

Counsel then offered some illustrative "common examples." The first example advised that "operational and maintenance issues" of the real property inspected could be discussed. The second example advised that discussions in the offices of the prospective designers could include "issues directly related to how those offices are to be managed were they to be selected." Discussions must be "directly related" to the property inspected, in this case the offices. How the offices would be managed in the event the designers occupying them were to be selected relates to the organization of the personnel of the office does not appear directly related to the *property* involved, the offices of the firm, and is premised on an intervening, speculative event, to wit, whether this firm is selected.

Of course the statute does not limit the exception to real property, personal property is covered as well. How the offices would be managed could be considered to be the personal (intellectual property) and the designers and the discussions directly related to that. However, it is not clear that this "intellectual" property could not have been "conveniently" brought to Orange County, California for presentation to the Board in a meeting open to the public. In the absence of a clear indication that such intellectual property could not be conveniently brought the Orange County,

and given the intent of the Brown Act to foster open meetings, the better practice would have been to have such discussions or presentations delivered to the board within its own jurisdiction in an open meeting.

Subsequent questions and discussions may also have contributed to further confusion or inaccurate understanding. A Board member in requesting "clarification," asked the question: "[S]ince we will be convening a meeting, so it's like when we're at a meeting, we can converse and we can discuss thoughts and ideas about what's before us…it would be just like we're sitting up here at the Board. "We…couldn't conclude an issue, but we could discuss the issues, am I right?" "General Counsel answered the question thusly: "[C]ertainly,…it will be just like your meeting here…. " The Chairman of the Board then commented, "It's in effect a movable meeting."

This exchange had the potential effect of contradicting both the written and oral advice given by General Counsel. As noted above, the permissible discussions of out of jurisdiction meetings undertaken to visit property are limited to topics "directly related" to the property. They are therefore not like meetings at home. Furthermore for purpose of the open meeting requirements of the Brown Act, there is no distinction between discussions which "conclude" an issue versus those that simply "discuss" the issues. Where a quorum of the board is present (as was the case here), both are subject to the same open meeting requirements.

In essence the discussions at the October 27, 2005 Board meeting undertaken to clarify the limits imposed by the Brown Act on the Board started well but concluded with what may have contributed to a misunderstanding of the applicable law.

2. **The Notice and Agenda of the Out of Jurisdiction Meetings did not adequately describe the subject matter to be discussed.**

   The Notice and Agenda of all of the meetings was virtually identical: "The purpose of the meetings is to inspect real property and personal property at the locations identified. No other business will be conducted at the special meetings." This description does very little to convey in any specificity the subject matter that was to be discussed and was in fact discussed. It certainly does not "name or state explicitly or in detail" the "business…to be discussed." While a general description need not "exceed 20 words," as the Attorney General notes: "the purpose of the general description is to inform interested members of the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body." The description in this agenda appears inadequate to serve this purpose.

3. **Discussions in six of the nine out of jurisdiction meetings clearly appear to have been conducted within the proper limitations of the applicable exception of the Brown Act in that they were directly related to the real properties inspected which obviously could not have been "conveniently" brought to Irvine.**

4. **Discussions at the remaining three meetings, specifically those held at the offices of the design firm finalists in Spain, New York and the San Francisco Bay Area, extended beyond matters directly related to real property but were related to the personal property of the design firms visited, that is their design concepts and management practices. The evidence does not conclusively establish that all or a**

portion of this personal property could have been conveniently, as that term is defined, brought to Irvine. A violation of the Brown Act therefore cannot be established as having occurred.

A) Discussions at the November 4, 2005 meeting in Barcelona, Spain.

On **November 4, 2005** the Board met in the Offices of EMBT in Spain. Discussions centered on the designer's concept of how it would design and develop The Great Park. It included a video presentation displaying elements of a proposed master plan for the park. This topic does not appear to be "directly related" to the real property inspected, to wit the office. However, it does appear to be directly related to the firm's design concepts for the Great Park. This appears to arguably fall within the ambit of the firm's personal property in the form of "intangible assets" or intellectual property. (See page 6) Given this and the broad definition of convenient which includes "expedient," "nearby" or "ready at hand," (see page 6) and the distance involved (6000+ miles), and the fact that, with the exception of the video presentation, to bring this property to Irvine may have required the travel from a foreign country to the United States of all or some of the firm's personnel, it cannot be concluded that the property could be conveniently brought to Irvine. It also cannot be established that severing the property by insisting that the video not be shown there but sent to the jurisdiction to be viewed at a later time would be "expedient." A violation of the Brown Act therefore cannot bed conclusively established.

B) Discussions at the November 9, 2005 meeting in New York, New York.

On **November 9, 2005** the Board met in Offices of Ken Smith Architects. Discussions were bifurcated into "management issues," describing how the firm would be organized to handle the Great Park project in the event it was to be selected and "design issues," concept components of the firm's ideas for the Great Park. As above these topics do not appear to be "directly related" to the real property inspected, to wit the office. However, again, it does appear to be directly related to the personal property of the firm, i.e. its design concepts for the Great Park. Again, given the broad definition of "convenient" and the distance involved (2500 miles), the evidence does not conclusively establish a violation of the Brown Act.

C) Discussions at the December 7, 2005 meeting in Mill Valley, California.

On **December 7, 2005** the Board met at the offices RHAA in Mill Valley, California. A firm spokesperson conducted a presentation detailing the firm's "vision," and "concept for The Great Park. The presentation not only included proposed features of the park and a sales pitch on why the Board should hire RHAA but touched on such wide ranging topics as methods of "containing [political] exposure" during elections. In addition the RHAA spokesperson "pitched" her firm and its personnel as "the best of the best." Again as above, these topics do not appear "directly related" to the real property examined, to wit the firm's offices in Mill Valley. However, with the exception of the "pitch," undertaken by the spokesperson, the topics appear to be directly related to the personal property of the firm, i.e. its design concepts for the Great Park and its operational expertise. Given the distance involved (about 350 miles), the issue of "convenience" may be more debatable in this instance. However, although rendering this instance troubling, again given the broad definition of "convenient," a violation of the Brown Act by the Board is not conclusively established.

3. **The delivery and receipt of the January 16, 2006 letter from the Chairman to the other Board members in and of itself did not violate the Brown Act. However, it contained advice which if followed by the other Board members may have resulted in a violation of the Brown Act. However, there is not evidence that such violations subsequently occurred.**

The mere delivery of the January 16th letter by Chairman Agran and its *passive* receipt by members of the Board was not in violation of the Brown Act. The sending of the letter was the Act of one Board member. The Brown Act covers action of a majority not a single individual. Moreover, the letter's passive receipt without more by the remaining Board members would not constitute a Brown Act violation, and there is no evidence that any Board members discussed the contents of the memo outside of the public meetings.

However, the letter advised that its recipients were "free to discuss or debate" its contents "with others." Under the 2001 Attorney General's opinion, cited above, had a majority of the Board members done so amongst themselves outside of an open meeting or had they exchanged e-mails or other written memoranda in doing so, a violation of the Brown Act would have been established. Under the recent *Wolfe* opinion (cited above) had the members engaged in such discussions or exchanges, serial or otherwise, and had a concurrence of opinion consequently resulted (which was the apparent intent of the letter) a violation of the Brown Act would have occurred. As noted there is no evidence that such discussions took place.

ENFORCEMENT OF THE BROWN ACT

Compliance with the Brown Act is considered of great importance by the Legislature. **"The Legislature hereby finds and declares that <u>complete, faithful, and uninterrupted compliance</u> with the Ralph M. Brown Act (citation) is a matter of <u>overriding public importance</u>."** (Government Code § 54954.4 (emphasis added).) The Brown Act contains several enforcement provisions, both criminal and civil. Criminal actions are applicable only to elected members of a legislative body and require a specific intent and action taken.

> **Each member of a legislative body** who attends a meeting of that legislative body 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 § 54959 (emphasis added).)
>
> "**Criminal penalties are available only where some action is taken by the legislative body in knowing violation of the Act**." [Citation.] Civil remedies are available to prevent further or future violations and do not require knowledge, or action taken." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1287 (emphasis added).)

The **term, "action taken**," in turn:

> **[M]eans a collective decision made by a majority** of the members of a legislative body, **a collective commitment or promise by a majority of the members of a legislative body to make a positive**

> **or a negative decision**, **or an actual vote by a majority** of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (Government Code § 54952.6 (emphasis added).)

From this it follows that although violations of the Brown Act may be found, *criminal sanctions are authorized in only very limited circumstances*, involving decisions taken with the knowledge and specific intent to conceal to violate the Act. Civil Actions to enjoin violations of the Act, or which provide for "declaratory relief," do not require any such specific intent or actions in furtherance of that intent.

> **Applicable civil enforcement powers include injunctive and declaratory relief,** to prevent violations or threatened violations, or to "declare," past, or threatened future conduct, to be in violation of the Brown Act.

The power to bring such actions is vested in the District Attorney or other interested persons.

> 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 actions or threatened future action of the legislative body…. (Government Code § 54960(a).)

"Declaratory relief" under Government Code section 54960 is available for past violations where there is a dispute as to whether or not a violation occurred, on the grounds that a denial that past actions were violations of the Act may support an inference that such violations will reoccur.

> [F]or its part [defendant] city does not believe any violation has occurred. City's belief as to the propriety of its action may be found… **in city's failure to concede that the facts alleged by plaintiffs constitute a violation of the Brown Act….. See *Common Cause v. Stirling* (1983) 147 Cal. App. 3d 518, 524 [195 Cal. Rptr. 163] [courts may presume that municipality will continue similar practices in light of city attorney's refusal to admit violation].)** Thus there can be no serious dispute that a controversy between the parties exists over city's past compliance with the Brown Act and the charter. **On that basis alone plaintiffs are entitled to declaratory relief resolving the controversy**. (*California Alliance for Utilities etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1030 (emphasis added).)

Therefore, **"the ripeness doctrine does not require that to obtain declaratory relief [the plaintiff] allege and prove a pattern or practice of past violations. Rather, it is sufficient to allege there is a controversy over whether a past violation of law has occurred."** (Id., at 1029, emphasis added.) "[I]n the absence of declaratory relief plaintiffs will have some difficulty

in preventing future violations." (Id., at 1031). Such relief may therefore be sought in such disputes to declare past actions to be in violation of the Brown Act and to enjoin the legislative body from committing them in the future.

CONCLUSIONS

1. The evidence does not support or warrant a criminal prosecution under the Brown Act.

As noted above **criminal penalties are warranted only where "action is taken…in knowing violation of the Act**." **Neither of these elements is present in this case**. There was no vote upon a motion, proposal, resolution, order or ordinance" taken during the out of jurisdiction meetings. Furthermore, the Board members were not acting in knowing violation of the Act. They had initially received correct legal advice, during the course of discussions at the October 27, 2005 open meeting (although there may have been some confusing and conflicting information imparted during subsequent discussions), and **Board members clearly evinced an intent and desire to comply with the Brown Act.**

There thus appears that there was in fact no intent on the part of any Board member to deprive the public of information to which it was entitled, a required element for criminal liability under the Brown Act. The meetings were video recorded to be made available to the public. The board invited the public and media to accompany them on the trip to give them an opportunity to have input on the process of selecting a designer. An Orange County Register newspaper reporter in fact joined the trip and openly wrote about it in that local Newspaper. The Board members were aware of all of these arrangements prior to their departure.

2. An Action for Declaratory or Injunctive relief is not warranted.

Injunctive or declaratory relief is available for violations of the Brown Act in the past only *if* "there is a controversy over whether a past violation of law has occurred," such that courts may presume similar practices will continue in the future**.** As these circumstances do not currently prevail, an action injunctive and declaratory relief is unwarranted. The District Attorney, of course, reserves the authority to commence such an action in the future should it be warranted.

RECOMMENDATIONS

Based upon the findings and conclusions reached above, the District Attorney makes the following Recommendations for the future in order to encourage conformance with both the letter and spirit of the Brown Act and foster public confidence in the integrity of local government.

1. **Discussions held outside the jurisdiction of the agency under the authority of Government Code § 54954(b) (2) should be strictly limited to topics directly related to the property being inspected. If the property is personal property, care should be taken that ensure that it is truly "inconvenient" to bring it within the jurisdiction. If the personal property is "intellectual property," it should strictly fall within the types of commercial knowledge commonly associated with that term. (See page 6) Given the intent of the Brown Act, to foster public access to all aspects of the decision making process, every reasonable effort should be made to hear, discuss and consider such "intellectual property" as**

future plans and proposals, designs or ideas for development, at open meetings within the jurisdiction.

2. **Meeting agendas should seek to thoroughly describe the subject matter to be discussed. It should be noted that "[t]he purpose of the general description is to inform interested members of the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body." The agenda should therefore strive to "state explicitly or in detail"…"the business to be transacted or discussed." The use of general or generic terms should be avoided.**

3. **Caution should be exercised in non-public serial contacts between members of the Board regarding matters under consideration by the Board, so as to ensure that such contacts do not encourage or involve interchanges which may result in a collective concurrence on action to be taken outside of the public forum.**