LEAGUE OF CALIFORNIA CITIES

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Via Electronic and U.S. Mail

Marc J. Nolan, Deputy Attorney General
California Attorney General's Office
300 Spring Street, Suite 1702
Los Angeles, CA 90013
Email: Marc.Nolan@doj.ca.gov

Re: Opinion No. 10-206

Dear Mr. Nolan:

I write on behalf of the League of California Cities in response to your solicitation of views of interested parties regarding Opinion No. 10-206, which will interpret the Brown Act's real estate exception.

The League is an association of 474 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee (LAC), which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The LAC monitors appellate litigation affecting municipalities as well as requests from the Attorney General for views on pending requests for legal opinions. In addition, the League is advised by its Brown Act Committee, comprised of several city attorneys, which monitors litigation, legislation, and requests for views from the Attorney General on Brown Act matters. Both the LAC and Brown Act Committee reviewed the Attorney General's request on Opinion No. 10-206 and offer the following response.

Before proceeding, the League notes that it has reviewed the response submitted by the California State Association of Counties, dated July 15, 2010, and agrees with the views expressed in that letter. The League writes separately to further focus on the Brown Act's plain language, which makes clear that a public body may have a closed-session discussion with the local agency's real-estate negotiator regarding any matter that affects the price and terms of payment for a specifically identified property or option to purchase such a property.

DISCUSSION

A. The Real Estate Exception

The plain language of the Brown Act makes clear that a public body may have a closed-session discussion with the agency's real-estate negotiator regarding any matter that affects the price and terms of payment for a specifically identified property or option to purchase such a property.

The real estate exception states, in relevant part:

> [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.
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> Cal. Govt. Code § 54956.8 (emphasis added).

The text of this exception defines the scope of permissible closed session discussion. The discussion must be "to grant authority to [the] negotiator regarding the price and terms of payment" for the real property transaction. *See also* Cal. Govt. Code § 54954.5(b) ("safe harbor" agenda notice provision, to include specification ***"whether instruction to negotiator will concern price, terms of payment, or both"***) (emphasis added).

The term "regarding" is synonymous with "relating to." Webster's defines "regarding" as "with respect to: CONCERNING," then defines "concerning" as "relating to: REGARDING." *Webster's Ninth New Collegiate Dictionary* (1983) 272, 991 (capitalization in original). Thus, if an issue relates to the price of the prospective real estate transaction or the terms of payment, the Brown Act permits discussion of the issue in closed session with the legislative body's negotiator until the agreement is concluded.

We do not suggest that the term "regarding" or its synonym, "relating to," should be interpreted in an unfocused way that would betray the statutory text. For example, "the mere fact that one topic (such as a redevelopment loan involving a property) is related to another topic that may properly be discussed in closed session (such as the price or terms of payment on the sale or lease of that property) is not a valid basis for discussing the merely-related topic in closed session." 93 Ops.Cal.Atty.Gen. 51, ---; 2010 WL 2150433 at 5 (2010) (footnoted citation omitted). If a prospective transaction is not in itself covered by the real estate exception, its relationship to an earlier transaction, involving the same property, that may have been within the scope of the exception will not typically bring the prospective transaction within its scope.

But if the legislative body is considering a prospective transaction that <u>is</u> within the scope of the real estate exception, issues that relate to price or terms of payment for that particular purchase, sale, exchange, or lease may be discussed in closed session. Notwithstanding the general principle that closed session provisions in the Brown Act are to be interpreted narrowly, courts must give full force to those provisions, where they apply. *See, e.g., Duval v. Board of Trustees of the Coalinga-Huron Joint Unified School District* (2001) 93 Cal.App.4th 902, 909-11 (concluding that "evaluation of performance" under the personnel exception includes not only formal evaluations such as an annual performance review but also reviews of a particular instance of job performance; and that consideration of criteria for the evaluation and the process for conducting the evaluation are part of the evaluation and properly discussed in closed session); *Travis v. Board of Trustees of the California State University* (2008) 161 Cal.App.4th 335, 346-47 (construing "employment" in personnel exception to encompass return from a leave of absence). Many terms and conditions in real estate agreements, and some issues that are not themselves terms or conditions, relate to price or terms of payment. The plain language of the real estate exception permits their discussion in closed session.

Common sense also compels this conclusion. A legislative body cannot, in a meaningful or rational way, instruct its real estate negotiator regarding price or terms of payment without discussing the issues that a reasonable buyer or seller (or lessor or lessee) may take into account in determining the value of a piece of property (or lease). A local agency considering buying a parcel of land does not draw dollar figures out of a hat to determine the maximum purchase price it will accept. Rather, it considers a host of factors that are relevant to making that judgment. If a legislative body could not discuss all those factors in closed session with its real estate negotiator, the real estate exception would be illusory – which could not possibly have been the Legislature's intent in creating the exception. Courts favor statutory interpretations that further rather than undermine the legislative purpose, and eschew statutory interpretations that yield absurd results. *Travis v. Board of Trustees of the California State University* (2008) 161 Cal.App.4th 335, 347.

The statutory purpose of the real estate exception is clear. It is to protect the financial interest of the local agency in negotiations concerning prospective real estate transactions. As the Attorney General has recognized, the purpose is ***"to inform or develop a negotiating strategy*** regarding the price and/or terms of payment for the purchase, sale, exchange, or lease of real property." 93 Ops.Cal.Atty.Gen. 51, ---, 2010 WL 2150433 at 3 (emphasis added). Of course, central to "inform[ing] or develop[ing]" such a negotiating strategy is discussing with the real estate negotiator those factors that relate to price or terms of payment.

For the types of prospective transactions encompassed within the real estate exception (purchase, sale, exchange, or lease), many factors may bear on price or terms of payment. Those factors may be intrinsic to the parcel, such as its location, condition, or legal encumbrances, or other factors concerning the property that real estate appraisers often take into account. *Cf.* Cal. Govt. Code § 6254(h) (excepting from disclosure under the Public Records Act "[t]he contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property" until after acquisition). Obviously, factors that bear on the market value of the property, whether intrinsic or extrinsic to the parcel, are integral to the legislative body's consideration of the price of the prospective transaction, and thus are proper subjects of closed session discussion.

But other factors are equally appropriate subjects of discussion in closed session because of their nexus to consideration of price or terms of payment. For example, the financial circumstances of the party with whom the agency is negotiating may be central to the legislative body's strategizing as to both price and terms of payment. For that matter, when the agency is acquiring a building with existing tenants, their financial stability is relevant to determining purchase price because the agency's projected receipt of rental income bears on the value of the building. And consideration of the agency's financial resources may be discussed in closed session as well, but only for the limited purpose of developing a negotiating strategy with the agency's negotiator. The governing body of a local agency may not use the real estate exception for a comprehensive discussion of the municipal budget outside of public view, but to the extent fiscal needs bear on how much the city can afford to pay for acquisition or lease of a specific property, the body may discuss them in that limited sense with the real estate negotiator in closed session.

Many other considerations bear on price or terms of payment. We cannot list them all here. But the general rule is that the legislative body may discuss in closed session with the real estate negotiator any prospective term in the prospective agreement that could affect the

economic value of the transaction. Some terms are obvious, like calculation and allocation of closing costs attendant to the purchase of a property. Other examples include indemnities and allocation of risk between the parties, for the greater risk of liability a party assumes in the agreement, the less that party may be expected to pay. The terms of a damage and destruction clause, the question of purchasing or leasing a property "as is," the issue of whether the seller or lessor of the property makes representations and warranties concerning the condition of the property, all come back to price and terms of payment.

B. Reporting Action Taken In Closed Session

While the text of the real estate exception is the focal point for analysis of the permissible scope of closed session discussion, it is not the only relevant textual reference. Also relevant is the Brown Act provision requiring the legislative body to publicly report actions taken in closed session. This provision, which cross-references the real estate exception, states in part:

> (a) The legislative body of any local agency shall publicly report any action taken in closed session ... as follows:
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> (1) ***Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8*** shall be reported after the agreement is final, as specified below:
>
> (A) ***If its own approval renders the agreement final, the body shall 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 to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.
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> Cal. Govt. Code § 54957.1 (emphasis added).

This provision suggests that in closed session the legislative body is not limited, in the strictest, most literal sense of the phrase, to instructing the real estate negotiator regarding price and terms of payment. The body may do much more than that; it may also approve an agreement concluding real estate negotiations. That decision necessarily implicates every provision of the agreement.

We do not suggest that this provision for reporting of action in a closed session under the real estate exception trumps the terms of the exception itself. But it helps shape our understanding of those terms. *Renee J. v. Superior Court of Orange County* (2001) 26 Cal.4th 735, 743 (interpretation of a statutory term may be aided by reference to statutory scheme of which it is a part). This reporting provision suggests that in creating the real estate exception, the Legislature did not intend to rigidly segregate discussion of price or terms of payment from discussion of the overall agreement that the legislative body is authorized to approve in closed session.

C. The *Shapiro* Case

Case law interpreting the real estate exception is sparse. *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, provides guidance on certain issues but has limited precedential value given the particular facts of that case and the court's care in limiting its holding to those facts.

The *Shapiro* court framed the issue presented as

> whether it is a reasonable construction of the Brown Act to prohibit the City Council from discussing topics in closed session in conjunction with a real property purchase, etc. transaction, ***when no particular parcel has been identified in the disclosures for the session, and the subject real property is part of a larger transaction giving rise to complex issues.***
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> 96 Cal.App.4th 904, 921-22 (emphasis added).

Under these circumstances, the court's concern that closed session discussions had exceeded their legal bounds was understandable. At the same time, given the precision with which the court framed the issue for decision, the precedential effect of *Shapiro* in other circumstances – for example, when a particular parcel has been identified on the closed session agenda – is at best dubious; possibly persuasive authority, but not likely binding authority. *Kern County Water Agency v. Watershed Enforcers* (2010) 185 Cal.App.4th 969, 982 (cases not authority for propositions they do not consider).

The purpose of the real estate exception is not to shield from the public the legislative body's discussion of basic policy issues, but to facilitate the body's negotiation of a specific real estate transaction. Given the wide range of topics the City Council discussed in closed session, divorced from consideration of a specific real estate transaction, the *Shapiro* court concluded that the Council was improperly concealing basic policy discussions from public view:

> We do not denigrate the important consideration of confidentiality in negotiations. However, we believe that, ***in this case,*** the City Council is attempting to use the Brown Act as a shield against public disclosure of its consideration of important public policy issues, of the type that are inevitably raised whenever such a large public redevelopment real estate based transaction ***is contemplated.***
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> *Id.* at 924 (emphasis added).

Even so, the court did not go so far as to hold that policy discussions relating to a prospective transaction could never occur in closed session. Rather, the court posited the assumption that they could, but on the particular facts of the case concluded that discussion of basic policy issues in closed session violated the Brown Act:

> Even assuming such a balancing process is appropriate [a balance referenced earlier, between the "public need for access to information"on the one hand, and the "public's right to the efficient administration of public bodies" and the "perceived value of confidentiality in effective policy deliberations,"on the other] ***in this instance,*** when we compare ... the published agendas with the

> confidential minutes for the closed sessions, we can only conclude that such a balance should be struck in favor of public disclosure ***in this instance,*** in compliance with both the letter and the spirit of the Brown Act.
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> 96 Cal.App.4th 904, 923 (emphasis added).

Shapiro poses some interpretive difficulties because the court's analysis of what may be discussed in closed session overlaps with its analysis of whether compliance with the "safe harbor" notice provision of the Brown Act provides legally sufficient notice of a closed session. 96 Cal.App.4th 904, 924. Notwithstanding the overlap, the court makes clear that the distinctive and somewhat extreme facts of the case are central to its ruling:

> [The real estate exception] provides a narrowly defined exception to the rule of open meetings, for the purpose of giving instructions to the negotiators ***concerning a particularized and realistically anticipated transaction that the City may complete,*** whether as an individualized transaction or as part of a larger one. The City Council cannot claim compliance under the safe harbor provisions ..., 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 afield of a specific buying and selling decision that the negotiator is instructed to work toward.***
>
> *Id.* (emphasis added).

Again, it follows that *Shapiro* is of limited precedential value in circumstances where a legislative body is considering "a particularized and realistically anticipated transaction that [a city] may complete" or "a specific and identifiable piece of property" or "a specific and identifiable piece of property that the instruction is working toward." Indeed, *Shapiro's* references to the narrow scope of the real estate exception may properly be understood as addressing threshold requirements for coming within the exception, such as the requirement that the agenda identify specific parcel or parcels that are the subject of a prospective transaction, more than limitations on discussion by a legislative body that is properly holding a closed session.

CONCLUSION

To implement the plain language of the real estate exception and effectuate the statutory purpose, the exception must be construed broadly when a legislative body is concretely considering entering into an agreement concerning a specific parcel. All topics that, as a matter of logic and practical judgment, are related to the subject and purpose of the closed session – the legislative body's instructions to the negotiator concerning price or terms of payment of a prospective transaction – are properly within the scope of discussion.

Absent specific factual scenarios presented to the Attorney General, it would be a mistake to hypothesize particular issues and then decide in the abstract whether they may be discussed in closed session under the real estate exception. Our experience as municipal attorneys teaches that proper application of the real estate exception is case-specific. For purposes of the pending request for an opinion, it is best that the Attorney General set forth a general interpretation of the

real estate exception that is faithful to the text and purpose of the exception but that does not prematurely judge its application in specific circumstances.

Thank you for the opportunity to comment on this important issue.

Sincerely,

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