

CITY OF MORENO VALLEY
MUNICIPAL LAW GUIDEBOOK

Robert L. Hansen
City Attorney
City of Moreno Valley
June 2010

INTRODUCTION

This Municipal Law Guidebook (“Guidebook”) is intended to provide an overview of some of the basic laws and legal procedures affecting the City of Moreno Valley. In many cases, the law leaves each city free to establish policies and practices distinctive to their communities. Where relevant and helpful, the Guidebook will attempt to identify Moreno Valley’s specific policies and practices.

The Guidebook serves as an introduction to municipal law and reference resource for City Officials and employees. We hope that it will provide a basic understanding of the legal issues facing Cities in their day-to-day operations, while assisting officials and employees to know when to turn to the City Attorney’s Office for legal analysis and advice. This Guidebook is meant only as a broad and general overview of laws and procedures. The Laws affecting the City are many and complex. Their correct application requires both professional legal analysis and a thorough and accurate understanding of the facts in each set of circumstances. Therefore, this Guidebook is not intended to replace legal advice based on the facts of particular circumstances. Rather, it is intended to familiarize City Officials and employees with basic legal guidelines and help them to recognize important legal issues that might affect the City and to determine when to seek legal advice from our office.

This is particularly true in the area of conflicts of interest. While there are basic rules all officials must be aware of, most decisions in the conflict of interest area must be made on a case by case basis. It is important to note that newly elected officials are affected by some of these laws even before they take office. For example, newly elected officials who have not yet assumed office are subject to the open meeting requirements of the Brown Act. A meeting of any combination of newly elected and sitting Council members totaling a majority of the future Council where any matter under the Council’s authority is discussed is illegal and can result in prosecution of the participants. Similarly, restrictions on gifts and income received within twelve months of a decision apply to Council members-elect. As discussed in Section 4 of this Guidebook, income and gifts received twelve months prior to an elected official’s consideration of a matter may require disclosure and disqualification.

It is our hope that this Guidebook will be a valuable basic resource as you carry out your duties and responsibilities on behalf of the City of Moreno Valley. We encourage you to contact the City Attorney’s Office for any questions you may have.

TABLE OF CONTENTS

INTRODUCTION.....III

SECTION 1 – ADMINISTRATION OF CITY GOVERNMENT 14

 GENERAL LAW CITY 14

 COUNCIL-MANAGER FORM OF GOVERNMENT 14

 POWERS OF THE CITY 14

 POWERS AND DUTIES OF CITY COUNCIL 22

 POWERS AND DUTIES OF MAYOR 3

 LIMITATIONS ON POWERS AND DUTIES OF COUNCIL AND MAYOR 3

 POWERS AND DUTIES OF CITY MANAGER 66

 LIMITATIONS ON POWERS AND DUTIES OF CITY MANAGER 77

 POWERS AND DUTIES OF THE CITY ATTORNEY 88

Professional Ethics 88

Attorney-Client Privilege 88

Powers and Duties 99

 LIMITATIONS ON POWERS AND DUTIES OF CITY ATTORNEY 99

 POWERS AND DUTIES OF THE CITY CLERK 1040

 LIMITATIONS ON POWERS AND DUTIES OF CITY CLERK 1144

 CITY COUNCIL MEETINGS 1144

 CITY-RELATED ENTITIES 1242

 NON-CITY-RELATED ENTITIES 1343

SECTION 2 – PUBLIC MEETINGS AND THE BROWN ACT..... 1515

 WHO DOES THE BROWN ACT APPLY TO? 1545

 WHAT IS A "MEETING" AND "ACTION TAKEN"? 1646

 TYPES OF MEETINGS 1747

Regular Meetings 1747

Special Meetings 1848

Emergency and Dire Emergency Meetings 1848

 NO ACTION OR DISCUSSION OF NON-AGENDA ITEMS 1848

 CLOSED SESSIONS 1949

Litigation 2020

Threats to Public Property; Security Threats 2222

Personnel 2222

Conference with Labor Negotiator 2323

Real Estate Negotiations 2424

License Applications 2525

 BROWN ACT VIOLATIONS 2525

SECTION 3 – PUBLIC RECORDS AND INFORMATION 2727

 WHAT IS A PUBLIC RECORD? 2727

 PUBLIC POLICY FAVORS DISCLOSURE 2727

 RESPONDING TO PRA REQUESTS 2828

 RECORDS IN ELECTRONIC FORMAT 3030

 PUBLIC RECORDS ACT VIOLATIONS 3131

SECTION 4 – CONFLICT OF INTEREST ISSUES..... 3333

 COMMON LAW DOCTRINE 3434

 POLITICAL REFORM ACT 3434

Disclosure of Economic Interests 3535

Disqualification of Public Officials from Participating in Governmental Decisions 3535

Campaign Regulations 3737

City of Moreno Valley Municipal Law Guidebook – June 2010

<i>Mass Mailings</i>	<u>3737</u>
<i>Fair Political Practices Commission</i>	<u>3737</u>
<i>Civil and Criminal Enforcement</i>	<u>3838</u>
INTERESTS IN CONTRACTS (GOV'T CODE §1090).....	<u>3838</u>
PASSES OR DISCOUNTS FROM TRANSPORTATION COMPANIES; FORFEITURE OF OFFICE	<u>3939</u>
INTERESTS IN PROPERTY WITHIN REDEVELOPMENT PROJECT AREAS	<u>3939</u>
SECTION 5 – COMPENSATION, REIMBURSEMENT OF EXPENSES FOR ELECTIVE OFFICERS, AND USE OF PUBLIC FUNDS.....	<u>4141</u>
COMPENSATION OF ELECTIVE OFFICES	<u>4141</u>
REIMBURSEMENT FOR EXPENSES	<u>4141</u>
USE OF PUBLIC FUNDS	<u>4242</u>
MASS MAILINGS AT PUBLIC EXPENSE	<u>4343</u>
MISUSE OF PUBLIC FUNDS	<u>4444</u>
SECTION 6 – LIABILITY OF CITY OFFICIALS FOR CIVIL RIGHTS VIOLATIONS	<u>4747</u>
GIST OF A CIVIL RIGHTS VIOLATION.....	<u>4747</u>
PERSONAL LIABILITY AND IMMUNITIES OF CITY OFFICIALS FOR CIVIL RIGHTS VIOLATIONS	<u>4848</u>
ACTS WHICH MIGHT RESULT IN A CIVIL RIGHTS VIOLATION	<u>4848</u>
<i>Employment Discrimination</i>	<u>4848</u>
<i>Pregnancy, Childbirth, and Related Medical Conditions</i>	<u>4949</u>
<i>Sexual Harassment</i>	<u>4949</u>
<i>Age Discrimination</i>	<u>5050</u>
<i>Disability Discrimination</i>	<u>5050</u>
<i>National Origin and Citizenship</i>	<u>5050</u>
<i>Protected Speech</i>	<u>5151</u>
<i>Land use decisions and actions affecting private land</i>	<u>5151</u>
<i>Improper Pre-condemnation Behavior</i>	<u>5151</u>
<i>City Actions Impermissibly Seeking To Regulate Conduct</i>	<u>5151</u>
<i>Enforcement Of Permissible Ordinances In An Impermissible Manner</i>	<u>5252</u>
<i>Illegal Search and Seizure</i>	<u>5252</u>
<i>Failure To (Adequately) Train</i>	<u>5252</u>
<i>Failure To (Adequately) Supervise</i>	<u>5252</u>
<i>Failure To Intervene Or Prevent An Act (Inaction)</i>	<u>5252</u>
<i>Federal Fair Housing Act</i>	<u>5353</u>
<i>Access To Facilities And Services</i>	<u>5353</u>
<i>First Amendment Access To Public Facilities</i>	<u>5454</u>
THE CONSEQUENCES TO AN OFFICIAL OR A CITY OF BEING FOUND LIABLE FOR A CIVIL RIGHTS VIOLATION.....	<u>5555</u>
SECTION 7 – PROCUREMENT AND PUBLIC WORKS CONTRACTS.....	<u>5757</u>
COMPETITIVE PROCUREMENT	<u>5757</u>
<i>Purchase of Goods</i>	<u>5757</u>
<i>Public Works Contracts</i>	<u>5757</u>
QUALIFICATIONS-BASED PROCUREMENT	<u>5757</u>
EXECUTION OF CONTRACTS; PERSONS AUTHORIZED; LIMITATIONS	<u>5858</u>
REDEVELOPMENT AGENCY CONTRACTS.....	<u>5858</u>
SECTION 8 – CODE ENFORCEMENT	<u>6161</u>
CODE ENFORCEMENT AUTHORITY	<u>6161</u>
ROLE OF THE CITY ATTORNEY	<u>6161</u>
PROSECUTORIAL DISCRETION	<u>6262</u>
TYPES OF CODE ENFORCEMENT CASES	<u>6262</u>
<i>State Laws</i>	<u>6262</u>

City of Moreno Valley Municipal Law Guidebook – June 2010

<i>Property Maintenance</i>	6363
<i>Buildings and Structures</i>	6363
<i>Public Works/Land Development</i>	6363
<i>Planning/Zoning</i>	6363
<i>Fire</i>	6363
<i>Animal Control</i>	6363
<i>Police</i>	6363
<i>Business License</i>	6464
INVESTIGATIONS	6464
<i>Initial Complaint</i>	6464
<i>Identification of Responsible Persons</i>	6464
<i>Searches and Inspection Warrants</i>	6465
<i>Strict Liability</i>	6565
<i>Notice of Violation</i>	6566
<i>Stop Work Order</i>	6666
<i>Officer Notes and Report</i>	6666
<i>City Attorney Referral</i>	6666
<i>Public Records Act</i>	6767
CODE ENFORCEMENT ALTERNATIVES	6767
<i>Administrative Enforcement</i>	6767
<i>Liens</i>	6767
<i>Civil Citations</i>	6768
<i>Misdemeanor Citations</i>	6868
<i>Infraction Citations</i>	6869
<i>Abatement</i>	6969
<i>Civil Injunction</i>	6970
<i>Receivership</i>	7070
COST RECOVERY	7070
SECTION 9 – REDEVELOPMENT AGENCY LAW	7373
AGENCY INCOME AND FINANCING (DEBT)	7373
<i>Tax Increment</i>	7373
<i>Assessment Or Community Facilities Districts</i>	7373
<i>Bond financing</i>	7474
<i>Other</i>	7474
GENERAL POWERS OF A REDEVELOPMENT AGENCY	7474
<i>Redevelopment Agency Is A State Agency</i>	7474
<i>Powers</i>	7475
<i>Project Areas</i>	7575
THE CITY OF MORENO VALLEY REDEVELOPMENT AGENCY	7575
<i>City Council Is Governing Board</i>	7575
<i>Separate Budget</i>	7575
ADOPTING REDEVELOPMENT PLANS	7676
<i>Redevelopment Plan Adoption</i>	7676
<i>Stakeholder Participation</i>	7676
<i>Public Hearing Process</i>	7777
IMPLEMENTING THE REDEVELOPMENT PLAN	7878
<i>Owner/Tenant Participation</i>	7878
<i>Property Acquisition</i>	7878
<i>Relocation</i>	7979
<i>Replacement Housing Plan</i>	8080
<i>Property Disposition</i>	8080
<i>Public Improvements And Other Assistance</i>	8282
SECTION 10 – LAND USE LAW AND ENVIRONMENTAL REVIEW	8685

City of Moreno Valley Municipal Law Guidebook – June 2010

INTRODUCTION.....	8685
CONSTITUTIONAL LIMITATIONS.....	8685
<i>United States Constitution</i>	8685
<i>California Constitution</i>	8786
STATUTORY LAW.....	8887
<i>Statutory Preemption</i>	8887
<i>Federal Laws</i>	8887
<i>State Laws</i>	8988
<i>Local Ordinances And Policies</i>	9089
CEQA AND ENVIRONMENTAL REVIEW.....	9089
<i>Finding of Exemption</i>	9190
<i>Negative Declaration</i>	9190
<i>Mitigated Negative Declaration</i>	9190
<i>Environmental Impact Report</i>	9190
<i>Independent Judgment Test</i>	9291
ANNEXATION OF LAND.....	9291
STATE PLANNING ACT.....	9291
<i>General Plan</i>	9291
<i>Specific Plans</i>	9392
<i>Zoning Ordinances</i>	9392
<i>Other Land Use Decisions</i>	9594
SUBDIVISION MAP ACT.....	9695
<i>Map Required for All Subdivisions</i>	9695
<i>Subdivision Review Process</i>	9796
LAND USE PROCESS, GENERALLY.....	9897
<i>Rules Governing Hearing Processes</i>	9897
<i>Constitutional Due Process</i>	9897
<i>Required Votes and Tie Votes</i>	9998
<i>Types of Land Use Decisions</i>	9998
<i>Required denials and approvals</i>	102101
TAKINGS AND EXACTIONS (PROJECT CONDITIONS AND FEES).....	103102
<i>Takings</i>	103102
<i>Land Use Exactions (Project Conditions and Fees)</i>	103102
SECTION 11 – LABOR RELATIONS.....	106105
DUTIES OF THE CITY IN EMPLOYEE RELATIONS.....	106105
IMPASSE PROCEDURES.....	106105
MEMORANDUM OF UNDERSTANDING.....	107106
SECTION 12 – GLOSSARY OF MUNICIPAL LAW TERMS.....	108107
SECTION 13 – LIST OF EXHIBITS.....	115115
A NEWSPAPER ARTICLES RE “TICKET FIXING”.....	115115
B CITY COUNCIL RULES AND PROCEDURES.....	115115
C “CAN I VOTE? CONFLICTS OF INTEREST OVERVIEW” PREPARED BY THE FPPC.....	115115
D “LIMITATIONS AND RESTRICTIONS ON GIFTS, HONORARIA, TRAVEL AND LOANS” PREPARED BY THE FPPC.....	115115

SECTION 1 – ADMINISTRATION OF CITY GOVERNMENT

GENERAL LAW CITY

Moreno Valley is a general law city. General law cities derive their legal power and authority from state laws enacted by the legislature, primarily in the California Government Code. State law also establishes the organizational structure of general law cities. The Council also promulgates laws by ordinances codified in the Moreno Valley Municipal Code and by resolution. However, in a general law city, local laws and ordinances may only exercise those powers granted by the State Legislature in state statutes and may not enact ordinances where the state has “pre-empted” or superseded local authority.

COUNCIL-MANAGER FORM OF GOVERNMENT

The powers of City government are vested by Government § 36501 in the city council as a body, the city clerk, the city treasurer, police chief and fire chief. Most cities throughout the state have adopted the council-manager form of government. Pursuant to Government Code sections 34851 *et seq.* the voters of the City of Moreno Valley established the council-manager form of city government at the time of incorporation. The Council-Manager form of government may not be changed without voter approval. In general, under the Council-Manager form of government, the City Council establishes policies and the City Manager has the power to administer the day-to-day affairs of the city, hire and fire city employees and manage the programs, facilities and properties of the City.

The City Council appoints the City Manager and holds him or her accountable for job performance in administering the city organization and implementing the Council-established policies. The City Council also appoints the City Attorney, and the City Clerk. These appointed officers serve at the pleasure of the City Council. While the Council has the authority to hire and fire these officers at will, generally a negotiated, written agreement governs the employment relationship and determines compensation, benefits, and performance review and termination procedures. The City Council may also choose to appoint, or to allow the City Manager authority to appoint, the City Treasurer, Fire Chief and Police Chief. By historical practice, but not law or formal policy, in Moreno Valley the Finance Director hired by the City Manager has been appointed to be the City Treasurer. The City’s contracts with the County of Riverside to provide police and fire services to the City provide for the County to appoint the Police Chief and Fire Chief. Typically, the County consults with the City Manager and City Council with respect to these appointments. The City Council has the authority under the contract to request replacement of a County appointed police or fire chief.

POWERS OF THE CITY

A general law city has only those powers expressly granted by the constitution or the legislature, and those powers necessary to carry out the expressly granted powers and purposes of the City. In

the absence of express legislative sanction, a city has no authority to engage in any independent business enterprise or occupation such as is usually pursued by private individuals.

The City may, subject to state and federal laws and constitutions:

- make and enforce within its limits all local police, public safety, sanitary and other ordinances and regulations.
- regulate the permitted uses of land within its jurisdiction.
- levy taxes to raise revenue for public purposes.
- establish, purchase, and operate public works, such as libraries, government buildings, roads, parks, utilities, etc.
- expend public funds for public purposes.
- acquire and own land, buildings and other property for public purposes.
- own, construct and operate public utilities, including, but not limited to, water, sewer, and electricity. [NOTE: Moreno Valley currently operates an electric utility, but does not operate water, sewer or other utilities.]

POWERS AND DUTIES OF CITY COUNCIL

The powers of the City Council are held by the Council as a body and not by any individual Council member. Other than certain limited and ceremonial powers of the Mayor, members of the Council as individuals have no more power or authority than any other citizen of the City. However, acting as a body, the Council has the following powers:

- To make all laws involving municipal affairs subject to the state and federal laws and constitutions.
- To appropriate money, set investment policy, adopt budgets and otherwise direct the financial affairs of the City.
- To appoint and remove the City Manager, the City Attorney and the City Clerk.
- To appoint or delegate to the City Manager the authority to appoint, the Treasurer, Fire Chief and Police Chief. As described above, by practice the Finance Director has been appointed City Treasurer and the County appoints the Fire Chief and Police Chief by contract. The Council has authority to remove the City Treasurer and to request removal of the fire and police chiefs.
- To direct the City's legal business and proceedings.
- To establish and uniformly apply rules for the conduct of its proceedings
- To evict any member or other person for disorderly conduct at any of its meetings
- To require and administer oaths and affirmations in any investigation or proceeding pending before the Council.

- To make or modify policies for the conduct of city business, subject to state and federal law (including policies concerning the approval and execution of warrants, contracts, conveyances and other documents).
- To appoint boards, commissions and committees to advise them or to exercise delegated powers unless limited by state law. [**Note:** The City Attorney’s Office recommends that the powers and duties of each body, the method of appointment, and the degree to which testimony or evidence will be permitted at the City Council hearing all be clearly established by the Council in its authorizing act, whether ordinance or resolution.]

POWERS AND DUTIES OF MAYOR

The Mayor is the official head of the City for all ceremonial purposes and is the presiding officer at all meetings of the City Council. By ordinance, the Mayor may add items to the agenda for Council meetings. By practice, the Mayor has consulted with the City Manager, City Attorney and/or City Clerk in coordinating agendas for City Council meetings. The Mayor may also nominate persons for appointments to Boards and Commissions advisory to the Council, subject to the approval of the Council. The Mayor may excuse appointed officials from attendance at a City Council meetings, upon request. Other than these limited roles, the Mayor has only the same power and authority as any other member of the Council. At Council meetings, the Mayor may make or second any motion and present and discuss any matter as a member of the council and has one vote.

LIMITATIONS ON POWERS AND DUTIES OF COUNCIL AND MAYOR

Under the Council-Manager form of government, the City Manager, and not the City Council, has the power to administer the day-to-day affairs of the City. The City Manager has the power to hire and fire all city employees (except the City Clerk and the City Attorney and their deputies and the City Treasurer¹) and to direct the workforce of the City and operations of City departments, facilities, buildings, etc.

City Council members as individuals are not empowered to make administrative decisions or to give directions to City employees. The Council, acting in a legal meeting by majority vote, can direct the City Manager to implement changes in policy and procedure and can hold the City Manager accountable for his or her performance. However, acting individually (or even collectively outside of a legal meeting), Council members have no more legal authority than any other citizen of the City. In fact, Council members can create serious and significant personal civil and criminal liability for themselves by attempting to exercise authority they do not possess.

By historical practice, City Managers in Moreno Valley have generally permitted Council members to contact senior staff members (department heads and, in some cases, division

¹ The City Manager appoints the Finance Director, who by practice is appointed the City Treasurer. The City Manager may remove the Finance Director and thereby effectively remove the City Treasurer, but the City Council technically appoints and removes the Treasurer.

managers) with requests for information regarding facts and circumstances and/or timing and status of matters. However, this is at the City Manager's discretion. The City Manager's Office also established a computerized Customer Response Management System (CRM) to facilitate and track Council members' (and the public's) requests. However, neither of these allowable communications may be used to circumvent the limitations on Council members' authority outlined in this section. Council members, individually, cannot give direction to any level of staff.

In particular:

- Council members may not do anything to interfere with any city employee in carrying out official duties of his or her office or employment. Doing so may subject the Council member to criminal charges of interfering with a public officer under the California Penal Code. If a Council member questions the actions of an employee, his or her questions should be directed to the City Manager, not to the individual employee
- Council members must refrain from attempting to influence any City inspector, enforcement officer, police officer, prosecuting attorney, hearing officer, judge or jury with respect to any citation or other code or law enforcement proceeding. Such activities are commonly referred to as "ticket-fixing." They are an illegal abuse of office and can subject the Council member to both political embarrassment and criminal prosecution for obstruction of justice or interference with a public officer.

Council members are frequently approached by members of the community and asked to intervene in a municipal code or other law enforcement proceeding. Council members must refrain from doing so. Even if a Council member believes that the enforcement officer or prosecuting attorney has made a mistake in bringing the enforcement action, the Council member must not attempt to direct a "fix." Attached as Exhibit A is a compilation of newspaper stories from around the country where public officials have become involved in "ticket fixing." These articles show the significant damage done to personal and political lives by engaging in "ticket fixing," and are attached as a resource for public officials to show others when inappropriate requests are made for their intervention.

If a Council member knows about or suspects malfeasance, fraud, corruption or other inappropriate activity on the part of a City employee, he or she should report that suspicion and all known facts to the City Manager, City Attorney, Police Chief and/or District Attorney as may be appropriate. The City Attorney can advise on appropriate reporting actions. However, the Council member must not attempt to interfere directly in the enforcement proceeding. Once a report is made, those officially charged with prosecutorial discretion and the hearing officer, judge or jury must be permitted to carry out their responsibility. A Council member may testify at the hearing or trial if he or she is a direct witness of relevant events, but only as a "percipient" witness (one who actually was present and saw the events first hand), not as an "expert" to give an opinion on whether or not the

actions did or should have constituted a violation, nor as a “Council Member” or representing the Council.

This is not to say that the City Council has no role in setting enforcement policy, but their role is to act as a body in a legal meeting adopting general laws, rules and policies, not in intervening in particular cases. If poor performance or inappropriate activities by City employees are an issue, the Council, as a body, may hold the City Manager accountable to correct it.

- Council members are not authorized to represent to the public, the media, other public agencies or any other person or entity that they speak, write or otherwise communicate on behalf of the City or the City Council unless authorized to do so in that specific matter by majority vote of the City Council at a legal meeting. Council members may communicate on their own behalf, but should avoid giving the impression that they speak for the City or Council without such express authority. Such actions, while normally not criminal, do give rise to confusion and can result in harm to the City’s interests. In turn, the Council member may experience political embarrassment, loss of respect and even public censure by the Council. If the representation is made in official government proceedings such as to a judge, jury, or legislative body, they may be criminally punishable.
- Council members as individuals have no authority to enter into oral or written agreements, contracts or other commitments on behalf of the City or the City Council without express authority by majority vote of the City Council. When a Council member gives assurances of City commitment without such authority, he or she may give rise to accusations of illegal action by themselves or by the City Council (such as a violation of the Brown Act). Further, the City may face and have to expend public funds to defend claims of contractual rights by outside parties. The Mayor and the City Manager are authorized by statute and city ordinance to sign any document approved by the Council, but have no authority to sign any document not so approved unless authority is specifically delegated. The City Council has by ordinance and resolution delegated to the City Manager the authority to sign certain contracts, warrants, etc. in the ordinary course of City business. Any questions in this regard should be directed to the City Attorney.
- Neither Council members nor the Council as a body, has the authority or right to access confidential personnel files of employees other than their own appointees. These files are confidential by state law and may only be shown to those specifically authorized by law.
- No Council member (or employee or other person, for that matter) has the legal authority to disclose attorney-client privileged information to any person or entity without the express authority of the City Council as a body. Unauthorized disclosure of such information is a crime in California. In particular, it is a misdemeanor under state law for any person to disclose confidential information from a closed session of the City Council with its attorney to any person not under the attorney-client privilege.

Any Council member having a question about his or her proper role in a particular matter should contact the City Attorney for legal advice prior to taking any action.

POWERS AND DUTIES OF CITY MANAGER

Under the Council-Manager form of government, the City Manager has the power to administer the day to day operations of the City. The City Manager has the power to hire most city department heads and employees. The City Manager may discipline, suspend or remove such department heads and employees. The City Clerk and the City Attorney are appointed by the City Council. The Fire Chief and Police Chief are typically appointed by the City Manager, but state law and the Municipal Code permit the City Council to retain authority to make those appointments if they so choose. Deputy Clerks and Attorneys are appointed by the City Clerk and City Attorney respectively. The Fire Marshal is appointed by the Fire Chief. The City Manager is responsible to the City Council for the proper administration of all operations of the City. The Council does not have authority to deal directly with employees under the City Manager's authority except through the City Manager.

Under the Council-Manager form of government, the City Manager traditionally has the authority and duty to (among other things):

- Prepare, submit to City Council, and be responsible for the administration of the budget after its adoption.
- Prepare and submit to City Council, as of the end of each fiscal year, a comprehensive report on the finances and administrative activities of the City for such fiscal year.
- Keep the City Council advised of the financial condition and future needs of the City.
- Hire, fire, manage and direct the City staff in carrying out the decisions of the City Council, managing the City's property, facilities and programs, and enforcing the City's laws and ordinances.

Specifically, under 2.08.060 of the Municipal Code the City Manager has power and responsibility to:

- Enforce all laws and ordinances of the city and to see that all franchises, contracts, permits and privileges granted by the city council are faithfully observed;
- Appoint, remove, promote and demote any and all officers and employees of the city except those who are elected or appointed by the city council, subject to personnel rules and regulations adopted by the city council;
- Appoint, with the consent of the city council, the planning director;
- Control, order and give directions to all department heads who are subject to his or her appointment and removal authority, and to subordinate officers and employees of the city under his or her jurisdiction through their department heads;

- Conduct studies and reorganize the city staff in the interest of efficient, effective and economical conduct of the city's business;
- Recommend to the city council such measures and ordinances as he or she deems necessary;
- Attend all meetings of the city council unless excused therefrom by the mayor or the city council;
- Prepare and submit the proposed annual budget and the proposed annual salary plan to the city council for its approval;
- Direct and supervise all the purchasing activities of the city;
- Keep the city council at all times fully advised as to the financial condition and needs of the city;
- Make investigations into the affairs, operations or obligations of the city or its contractors or into complaints concerning the administration of the city government or the service maintained by public utilities in the city;
- Exercise general supervision over all city buildings, parks and other public properties;
- Have the same authority as the mayor, as convenience may dictate, to sign warrants, contracts, conveyances and other documents requiring the city seal which have been approved by the city council.
- Perform such other responsibilities and exercise such other powers as may be delegated to him or her by official action of the city council.

LIMITATIONS ON POWERS AND DUTIES OF CITY MANAGER

The City Manager is the operational manager of the City, but does not have policy making authority. He or she can provide policy advice and recommendations to the City Council, but the City Council sets the policy. Once the Council has adopted a policy, whether by ordinance, resolution or by motion and vote, the City Manager is obligated to follow that direction provided the policy is both legal and within the City Council's jurisdiction and authority. The Manager is not free to disregard a legitimate City Council policy because he or she disagrees with it or believes it would be unfair to apply in a particular case (unless the policy grants that discretion).

The contractual power of the City lies with the City Council. Neither the City Manager nor any other City official or employee has the authority to bind the City to any agreement or obligation of any type unless that authority has been expressly granted by the City Council. Any agreement or obligation purportedly entered into without specific written City Council authority is void and unenforceable against the City.

City Managers have professional ethical rules and obligations. These rules are voluntarily adopted by various professional organizations, such as the International City/County Management Association (“ICMA”). While not having the force of law, most professional City Managers subscribe to these ethical rules. These rules require City Managers to refrain from being involved in political activities in the City in which they serve. They also provide an ethical duty to hire, fire, promote, discipline and otherwise deal with employees on the basis of competence and merit, to stand for and defend the principles of professional management, to act in the best interests of all the people, free of discrimination and on the basis of principle and justice, among other things. These rules are designed to protect the City Manager’s role as an objective professional employed on the basis of expertise and not political affiliations, and to promote honesty and integrity in the profession.

POWERS AND DUTIES OF THE CITY ATTORNEY

PROFESSIONAL ETHICS

The City Attorney is subject to the ethical standards for all California lawyers, which are set forth in the Rules of Professional Conduct of the State Bar of California. Rule 3-600 governs the ethical obligations of a lawyer who represents an entity rather than a natural person. Under that rule, the City Attorney’s “client” is the City, as embodied in “its highest authorized officer, employee, body or constituent² overseeing the particular engagement.” This means that the City Attorney’s duty as a lawyer is to the highest officer or body exercising the City’s authority in a particular matter. Generally, this will be the City Council as a body. However, in administrative matters, it would be the City Manager. In some other matters, where a commission or a city employee might have final authority, the City Attorney’s client would be that commission or employee, but only for that specific matter in which they exercise that highest authority. Therefore, by legal definition there is no attorney-client relationship between the City Attorney and individual employees or individual Council members, except when acting as that “highest authorized officer”.

ATTORNEY-CLIENT PRIVILEGE

Legal advice and analysis provided by the City Attorney is confidential and subject to legal protection under the attorney-client privilege. The attorney-client privilege is held by the City Council as a body, but may sometimes include boards or commissions and officials of the City or individual employees to whom the City legally owes a defense, but *only* in their official capacities. The City Attorney cannot undertake to represent the individual interests of particular employees or Council members. No Council member, employee or other person has the legal authority to disclose attorney-client privileged information to any person or entity without the express authority of the City Council as a body. Unauthorized disclosure of such information is a crime in California. In particular, it is a misdemeanor under state law for any person to disclose confidential information from a closed session of the City Council with its attorney to any person not under the attorney-client privilege.

² constituent here means a part of the City organization, not a voter or resident of the City.

POWERS AND DUTIES

Under 2.16.010 and 2.16.030 of the Municipal Code, the City Attorney has the authority and responsibility to:

- Retain or employ other attorneys, assistants or special counsel as may be needed to take charge of any litigation or other legal matters or to assist the city attorney.
- Advise the council and all city officers in all matters of law pertaining to their offices;
- Furnish legal service at all meetings of the council, except when excused or disabled, and give advice or opinions on the legality of all matters under consideration by the council or by any of the boards and commissions or officers of the city;
- Prepare and/or approve all ordinances, resolutions, agreements, contracts and other legal instruments as shall be required for the proper conduct of the business of the city and approve the form of all contracts and agreements and bonds given to the city;
- Prosecute on behalf of the people cases for violation of city ordinances; and
- Perform such other legal duties as may be required by the council or as may be necessary to complete the performance of the foregoing functions.

LIMITATIONS ON POWERS AND DUTIES OF CITY ATTORNEY

The City Attorney's role is limited to representing the City government as an entity and represents individuals only to the extent that the City owes a duty of legal representation to employees and officers who have acted in the course and scope of their official duties. The City Attorney does not (and cannot) represent individuals in any other capacity and cannot give legal advice to individuals, companies or other entities.

Specifically, some residents of the City have the impression that the City Attorney's Office is a resource for individual residents, citizen's groups, etc. to receive free legal advice or representation in personal and family legal matters, to be advised of their legal rights against City actions or decisions, or to intervene on their behalf with City officials and employees in conflicts with the City. Not only does the City Attorney's Office not provide any such advice or representation, it is legally and ethically precluded from doing so. Individuals needing legal advice or representation for their own benefit should consult a private attorney, not the City Attorney's Office. The City Attorney's Office may from time to time explain to persons its opinions regarding the state of the law on an issue of public concern, but it always represents only the interests of the City as a government entity.

In very rare cases, individual attorneys and/or the City Attorney's Office itself may be required to refrain from providing legal advice to the City Council or Commission because

of a prior involvement in providing advice to City Staff in certain types of prosecutorial or enforcement matters that then come to a public hearing before the Council or Commission.

In such circumstances, the City Attorney's Office will publicly advise the hearing body of the issue and either provide a different attorney or recommend that the City retain competent outside counsel. This rule arises in order to protect certain Due Process of Law rights of affected parties.

The California State Bar Rules of Professional Conduct apply to the City Attorney. These rules do have, in effect, the force of law since lawyers who violate those rules are subject to discipline by the State Bar, which can include fines, suspensions or even revocation of the license to practice law (disbarment). In addition, most City Attorneys in California voluntarily subscribe to the Ethical Principles for City Attorneys adopted by the City Attorneys Department of the League of California Cities, which do not have the force of law, but which, like the ICMA Code of Ethics for City Managers, provide for City Attorneys to refrain from involvement in local political activity and promote honesty and integrity in the profession.

POWERS AND DUTIES OF THE CITY CLERK

The City Clerk is the local official for elections, local legislation, the Public Records Act, the Political Reform Act, and the Brown Act. The City Clerk is the legal Custodian of Records for the City. Before and after the City Council takes action, the City Clerk ensures that actions are in compliance with all federal, state and local statutes and regulations and that all actions are properly executed, recorded, and archived. Generally, the Government Code and the Election Code provide the procedures to follow.

Under the Municipal Code, the primary duties of the City Clerk are to:

- Attend all meetings of the city council and be responsible for the recording and maintaining of a record of all the actions of the council;
- Keep all ordinances and resolutions of the council in such a manner that the information contained therein will be readily accessible and open to the public. The city clerk shall attach to the original copy of each ordinance a certificate which shall state the date the ordinance was adopted and, as to an ordinance requiring publication, that the ordinance has been published or posted in accordance with law;
- Keep all records of the council and of the office of the city clerk in such manner that the information contained therein will be readily accessible and open to the public until such time as any of the records may be destroyed, or reproduced and the original destroyed, in accordance with state law;
- Serve as the official custodian of all city records³;

³ While this duty is set forth in the Municipal Code, in practice there are certain records of the City for which the

- Be the custodian of the seal of the city;
- Prepare the council agendas, in conjunction with and under the direction of the city manager;
- Perform the duties prescribed by the Elections Code of the state in conducting municipal elections;
- Perform the duties imposed upon city clerks by the California Political Reform Act;
- Be responsible for the publication of all the official advertising of the city;
- Be responsible for the maintenance and distribution of the municipal code;
- Process all claims filed against the city and its officers, agents, or employees, pursuant to the provisions of Chapter 1 of Part 3 of Division 3.6 of Title 1 of the Government Code of the state and Chapter 3.16 of this code; and
- Perform such other duties consistent with this code as may be required of the city clerk, by the city council.

LIMITATIONS ON POWERS AND DUTIES OF CITY CLERK

The City Clerk's powers are strictly defined by law. The City Council may delegate additional duties to the City Clerk, but those duties must not be inconsistent with the City Clerk's statutory duties. The City Clerk generally has no discretion in the performance of statutory duties or exercise of powers, but must strictly follow the law. The City Council, even acting as a body, does not have authority to direct the Clerk in the exercise of any statutory duty.

CITY COUNCIL MEETINGS

Government Code section 36805 requires that the City Council hold regular meetings at least once a month at times fixed by ordinance or resolution. It may adjourn any regular or adjourned meeting to a date specified in the order of adjournment. When so adjourned, the adjourned meeting is a regular meeting for all purposes. In Moreno Valley, the City Council has adopted rules and procedures for its meetings. A copy of those Rules and Procedures is attached to this Guidebook for your convenience as Exhibit B. They provide for regular City Council meetings on the second and fourth Tuesdays of each month, a regular closed session meeting on the first Tuesday and a regular Study Session (where by Council rules general direction to staff may be given, but no formal action is taken and no final policy decisions are made), on the third Tuesday.

Clerk cannot act as custodian, either due to the specific nature of the records, such as financial records kept in the Finance Department or plans and specifications for developments and public improvements, kept in the Public Works Department; or because of legal requirements, such as attorney-client privileged documents kept in the City Attorney's Office, or personnel records kept in the Human Resources Department.

CITY-RELATED ENTITIES

The City of Moreno Valley, like all cities, is a municipal corporation. However, due to the intricacies of funding public facilities and services, the City is not the only entity that provides services or facilities to the residents of Moreno Valley. There are several other separate and distinct legal entities that are affiliated with the City that provide specific facilities and/or services to the residents. These entities are legally separate from the City and have their own funding, budget and legal liabilities and obligations. They are normally governed by a Board of Directors comprised of the City Council members. The City Manager is typically the Executive Director or Chief Executive Officer, with the City Clerk as Secretary or Clerk, the City Attorney as General Counsel, and the City Treasurer as Treasurer. These entities include:

- Community Redevelopment Agency of the City of Moreno Valley – implements and governs the redevelopment area plan within the City.
- Moreno Valley Community Services District – owns and operates various public facilities and provides services through various “zones”, including Zone A – Parks, Zones B, C and D – street lighting and landscaping, and Zone L – Libraries.
- Moreno Valley Public Facilities Financing Corporation - conduit for certain public financings (bonds, leases and certificates of participation)
- Moreno Valley Public Financing Authority - conduit for certain public financings (bonds, leases and certificates of participation)
- Moreno Valley Industrial Development Authority - conduit for certain public financings (bonds, leases and certificates of participation)

The City Council also acts as the Board of Library Trustees under state public library laws, and as the Board of Directors of the Moreno Valley Community Foundation, a non-government, tax-exempt non-profit organization organized to raise private money for adding or improving certain community and cultural facilities and programs, and in particular, the projected new public library.

In addition, the City has formed and administers a number of assessment districts, community facilities districts and other special districts which build and operate public improvements and facilities benefitting particular areas of the City. These districts are generally financed by assessments or special taxes on the properties that benefit from them. Their funds are strictly limited by law to the purposes for which they are collected and the City has no discretion to use those funds for general City purposes.

This Guidebook is not intended to cover the special laws affecting these related entities. However, City officials must take special care to respect the separate legal status of these entities and not commingle funds, services or ownership of properties. The City Attorney’s Office is available for legal advice concerning these issues.

NON-CITY-RELATED ENTITIES

There are also governmental and non-governmental entities providing services or facilities to City residents that are not affiliated with or controlled by the City. Neither the City nor the City Council has any control or authority over these entities. Each of these entities has its own Board of Directors, officers and employees. They include, but are not limited to:

- Moreno Valley Unified School District
- Rancho Verde Unified School Districts
- Riverside County Regional Medical Center
- Riverside County Flood Control District
- Riverside Transit Agency
- Riverside Community College District and Moreno Valley College
- Eastern Municipal Water District
- Western Municipal Water District
- Various other public and private water agencies and companies – neither the City nor any of its related entities provides water or sewer utility service within the City

SECTION 2 – PUBLIC MEETINGS AND THE BROWN ACT

The Ralph M. Brown Act⁴ is commonly referred to as the "Brown Act" and is also known as the "Open Meetings Law." It applies to all local governmental agencies. The basic principles of the Brown Act were incorporated into the California Constitution by voter approval of Proposition 59 in November of 1994. The Brown Act is the primary procedural guide for conducting City business. It attempts to strike a balance between the public benefit that results from public access to meetings and public participation in government decisions on the one hand, and, on the other hand, the public benefit that results from government leaders' being fully informed and candid in deliberations on sensitive matters where confidentiality protects either the public's best interests or the privacy rights of individuals – such as litigation, certain negotiations, and hiring, firing and discipline of employees.

Since the basic mission of the Brown Act is to ensure that decisions are made in public wherever reasonable to do so, there are very specific rules on how meetings must be noticed and conducted, on agenda requirements, and on public access at Council meetings. The City Clerk and City Attorney work with the Council to ensure that Brown Act requirements are met. The City Clerk is responsible at the agenda and notice stage and the City Attorney is responsible for guiding the Council at meetings.

The Brown Act contains various rules designed to prevent the circumvention of its open meeting requirements. All meetings must be publicly noticed for a specific time and location. All meetings except authorized closed sessions must be open to the public. Any meeting held in violation of Brown Act requirements is illegal. Officials participating in such an illegal meeting may be criminally prosecuted. All actions taken at an illegal meeting can be declared null and void by the Courts.

WHO DOES THE BROWN ACT APPLY TO?

The Brown Act applies to all "legislative bodies" of local agencies in California. It applies not only to the City Council, but also to all standing committees of the Council even if they comprise less than a quorum, to advisory boards, commissions, and committees appointed by the Council, and even to certain non-government corporations or entities where City elected officials have Board of Directors representation or other direct legal authority to participate in corporate decision-making by virtue of their elected office. . For the City of Moreno Valley, this includes the Planning Commission, Traffic Safety Advisory Commission, Library Board, Project Area Committee of the Redevelopment Agency, and all other standing boards and commissions of the City or any of its related agencies. It also includes the boards of the City's private Foundation. Throughout this section of the Guidebook, references to the City Council or to any of its members, include all of these other bodies and their members.

⁴ Gov. Code §§ 54950 *et seq.*

WHAT IS A "MEETING" AND "ACTION TAKEN?"

The term "meeting" is very broadly defined in the Brown Act as any congregation or consultation of a majority of the members of the Council to hear, discuss or deliberate upon any matter which comes under the subject matter jurisdiction of the Council, regardless of the location, timing or method of communication. Thus, two Council members discussing City business one on one becomes an illegal "serial meeting" when either of them discusses the same matter with a third member of the Council, whether in person, on the phone, by email, through an intermediary or otherwise. A quorum of newly elected but not yet seated Council members may not discuss City business together outside a properly noticed and agendized public meeting, nor may one or more Council members-elect participate in discussions with incumbent Council members if a quorum of the future Council would be involved. A Council member's e-mail regarding an item related to a potential Council decision sent to more than one other Council member may be considered an illegal serial meeting.

In a 2001 opinion, the California Attorney General concluded that a majority of the members of the Council may not e-mail each other to develop a collective concurrence as to action to be taken by the Council without violating the Brown Act, even if the e-mails are also sent to the secretary, sent to the chairperson of the agency, posted on the website, and each printed e-mail is reported at the next public meeting.

Brown Act applications are fact intensive, and require a case by case analysis. If any city official is unsure whether a communication or potential communication with other city officials may constitute a "meeting," the City Attorney should be consulted immediately.

"Action taken" is defined in Government Code Section 54952.6 as follows:

“Action taken means 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 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.”

This definition is very broad and includes matters taken up at meetings and away from meetings. Notwithstanding this, the following are not "meetings" subject to Brown Act requirements:

- Individual contacts or conversations between a Council member and any other person provided such a person is not used as an intermediary to convey thoughts and decisions on City business to other Council members.
- Attendance of a majority of the members of the Council at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the Council, provided a majority of

the members of the Council do not discuss among themselves specific business within the Council's subject matter jurisdiction.

- Attendance of a majority of the members of the Council at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the city, provided a majority of the members of the Council do not discuss among themselves specific business within the Council's subject matter jurisdiction.
- Attendance of a majority of the members of the Council at an open and noticed meeting of another body of the local agency provided a majority of the members of the Council do not discuss among themselves specific business within the Council's subject matter jurisdiction.
- Attendance of a majority of the members of the Council at a purely social or ceremonial occasion provided a majority of the members of the Council do not discuss among themselves specific business within the Council's subject matter jurisdiction.
- Members of a legislative body giving testimony in private before a grand jury, either as individuals or as a body.

TYPES OF MEETINGS

There are three types of meetings that can be called under the Brown Act. Those are regular meetings, special meetings and emergency meetings.

REGULAR MEETINGS

Regular meetings are those that are held at a regular time and place established by local rules. At regular meetings, the only items that can be acted upon are those that are listed on an agenda that is posted at least 72 hours in advance, with certain exceptions. The Brown Act requires only a "brief general description" of each item to be acted on. However, the courts have ruled that the descriptions must sufficiently inform the public as to the nature of the action to be taken to allow a reasonable person to determine what interests are at stake in the action. Items, such as status reports and public information, not described in sufficient detail for action, may appear on the agenda so long as there is no action taken at the meeting except to refer the matter to the Council at another meeting or to staff.

At a regular meeting, items can be added to the agenda by majority vote of the Council if there is a true emergency relating to public health and safety requiring immediate action, such as a crippling natural disaster. The definition of "emergency" is so narrow that agenda items are hardly ever added under the invocation of this exception. Items can be added by a 2/3 vote of the Council (or unanimous vote if less than 2/3 of the Council is present) if there is a need to take "immediate action" on an item and the need to take action was not known to the City until after the agenda was posted. If staff or members of the Council were aware of the item prior to the posting of the agenda, this exception may not

be used. The key requirement, the need to take immediate action on the item, must be shown by specific factual findings.

SPECIAL MEETINGS

Special meetings are those called on an "as needed" basis for special purposes. Special meetings require at least 24 hours written notice to each member of the Council. Also, the media must be notified and the agenda must be posted 24 hours in advance. The most important thing to remember about special meetings is that only those items listed in the agenda may be discussed. No other action may be brought in front of the Council at a special meeting except those items noticed 24 hours ahead of time.⁵

EMERGENCY AND DIRE EMERGENCY MEETINGS

Council may call an emergency meeting on less than 24 hours notice. An "emergency" is defined as a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the Council. The media must be given one hour advance notice.

An emergency meeting may also be held for a "dire emergency," defined as a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity with peril so immediate and significant that requiring the Council to provide one hour advance notice may endanger the public health, safety, or both, as determined by a majority of the Council. Notice of the meeting for a dire emergency shall be given at or near the time the presiding officer notifies the members of the Council of the meeting.⁶

NO ACTION OR DISCUSSION OF NON-AGENDA ITEMS

The basic rule under the Brown Act is that "no action or discussion shall be undertaken on any item not appearing on the posted agenda."⁷ (emphasis added) The Brown Act's agenda requirements thus cover not only "action" items but also "discussion" items.

As noted above under "Regular Meetings," the Brown Act does contain exceptions to this rule. In addition to the exceptions regarding emergency situations and the need for immediate action, there are a few other narrow exceptions to the "no discussion on non-agenda items rule." Those exceptions are:

- Members of the Council or staff may briefly respond to statements made or questions posed by persons during public comment periods;

⁵ Gov. Code § 54956.

⁶ Gov. Code §54956.5 -SB 1643.

⁷ Gov. Code § 54954.2 (emphasis added).

- Members of the Council or staff may ask questions for clarification and provide a reference to staff or other resources for factual information;
- Members of the Council or staff may make a brief announcement, ask a question or make a brief report on his/her own activities;
- Members of the Council may, subject to the procedural rules of the legislative body, request staff to report back to the legislative body at a subsequent meeting concerning any matter; and
- The Council may itself as a body, subject to its Rules, take action to direct staff to place a matter of business on a future agenda.

The exceptions are not meant to swallow the rule. Thus, the Council may not engage in any significant discussion of non-agenda items. This means that long presentations, or wide-ranging questions, answers, and comments among the Council members, between Council members and the public, or between Council members and staff are impermissible. The Brown Act requires that comments under these exceptions be “brief.”

Under these exceptions, Council can request information or a report. However, direction to staff to take a specific action is Council “action” which must be placed on the agenda first. When Council is considering whether to direct staff to add an item to a subsequent agenda, these exceptions do not allow Council to discuss the merits of the matter or to engage in a debate about the underlying issue.

In summary, Council can neither take action nor discuss any items unless they are specifically posted on the agenda. Comments under the exceptions to the Brown Act must be brief and non-substantive.

CLOSED SESSIONS

The Brown Act expressly authorizes closed sessions under specific circumstances. Closed sessions are not open to the public, and information acquired during a properly held closed session is confidential and may not be disclosed without authorization by majority vote of the Council. Unauthorized disclosure is punishable as a crime under state law. The City may also address such violations by court-ordered injunction prohibiting disclosure of confidential information, or disciplinary action against an offending employee or Council member. The City may not however, take action against any individual for making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, expressing an opinion as to the propriety or legality of actions taken by Council in closed session, or disclosing information acquired in closed session that is not confidential information.⁸ However, the City Attorney should be consulted before any disclosure of closed session information.

⁸ Gov. Code § 54963 -AB 1945, effective January 1, 2003.

Closed session matters must be noticed on the agenda so that the public can determine why the Council is calling a closed session. In addition, certain final actions taken in closed session must be announced in open session after the vote is taken.

The Brown Act specifies “safe harbor” language for closed session agenda descriptions. An agenda description that follows the “safe harbor” language cannot be challenged as legally insufficient. It is therefore highly recommended that the “safe harbor” language be strictly followed.⁹

The following are the authorized reasons for holding closed sessions:

LITIGATION

The Council may meet in closed session to hear advice from its own legal counsel regarding the handling of active civil or administrative litigation.

The Council may also go into closed session to discuss potential litigation in certain circumstances. Potential litigation may be discussed when:

“a majority of the Council, on the advice of its attorney, based on existing facts and circumstances, believe there is “a significant exposure to litigation” against the City.”¹⁰

This exception requires that the majority of the Council believe that there is an actual threat or a real and substantial possibility of litigation. Also, its attorney must concur in this opinion. A separate section permits closed sessions to discuss liability claims filed with the City. This appears to be a subcategory of potential litigation, and is certainly easier to make the findings for, but requires disclosure of more information. Also, since the Council has delegated to the Risk Manager the authority to consider, grant and deny most claims, this section is unlikely to be used. In most cases, it would be more advantageous to protecting legal strategy to utilize the potential litigation section despite the requirement for specific findings.

The Council may also meet in closed session to decide whether to initiate litigation, or to decide whether the facts and circumstances surrounding a particular issue justify a closed session discussion.

⁹ Gov. Code § 54954.5.

¹⁰ Gov. Code § 54956.9(b)(1).

The “safe harbor” agenda descriptions for litigation matters are as follows:

CONFERENCE WITH LEGAL COUNSEL--EXISTING LITIGATION

(Subdivision (a) of Section 54956.9)

Name of case: (Specify by reference to claimant's name, names of parties, case or claim numbers)

or

Case name unspecified: (Specify whether disclosure would jeopardize service of process or existing settlement negotiations)”

CONFERENCE WITH LEGAL COUNSEL--ANTICIPATED LITIGATION

Significant exposure to litigation pursuant to subdivision (b) of Section 54956.9: (Specify number of potential cases)

(In addition to the information noticed above, the agency may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to subparagraphs (B) to (E), inclusive, of paragraph (3) of subdivision (b) of Section 54956.9.)

Initiation of litigation pursuant to subdivision (c) of Section 54956.9: (Specify number of potential cases)

LIABILITY CLAIMS

Claimant: (Specify name unless unspecified pursuant to Section 54961)

Agency claimed against: (Specify name)

At the end of a closed session regarding litigation, the Council must report in open session at the same meeting:

- Any approval given to its legal counsel to defend a lawsuit, appeal or refrain from appealing a judicial decision, or join a suit as amicus curiae. In the report the parties and the substance of the lawsuit must be disclosed.
- Any approval given to initiate or intervene in a suit, but parties and substance of the litigation need not be disclosed until after actual court filings and even then disclosure can be delayed if it would jeopardize either service of process or conclusion of existing settlement negotiations.
- Acceptance of and substance of a settlement offer already approved and signed by the other parties and not subject to court approval. If a settlement is subject to court or other party approval it must be disclosed to any person asking after it has become final.

At the end of a closed session regarding liability claims, the Council must report the disposition of the claim, the claimant, the substance of the claim and any payment approved and agreed to by the claimant.

THREATS TO PUBLIC PROPERTY; SECURITY THREATS

Closed session may also be held on threats to the security of public buildings or to essential public services or to the public's access to public services or public facilities. Such closed sessions may be held with the Attorney General, district attorney, agency counsel, law enforcement, or a security consultant or security operations manager.¹¹ Emergency meetings for emergency situations may also be held in closed session if agreed to by 2/3 vote of the members present, or if less than 2/3 of the members are present, by unanimous vote.¹²

The “safe harbor” language for threats to public property or security is¹³:

THREAT TO PUBLIC SERVICES OR FACILITIES

Consultation with: (Specify name of law enforcement agency and title of officer, or name of applicable agency representative and title)

PERSONNEL

The Council may call a closed session to discuss “the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee, or to hear complaints or charges brought against the employee.”¹⁴ The item must be listed on the agenda, along with the job title of the affected position and the purpose of the closed session. Personnel closed sessions may only be called to discuss an employee who is directly under Council control and direction. Discussion or action on proposed compensation is prohibited in closed session under this section, except for reduction of compensation as a result of the imposition of discipline. Oblique references to discussion of salaries as part of the performance evaluation appears permissible, so long as the specific discussions as to the amount of salary increase are reserved for a properly noticed, public meeting.¹⁵ However, the Council may also notice a closed session under labor negotiations, discussed below, to negotiate salary with its appointees.

An employee subject to a closed session to hear complaints or charges against him or her has the right to determine whether the session will be held in public or private, and must

¹¹ Gov. Code §§ 54954.5, 54957 -AB 2645, effective January 1, 2003.

¹² Gov. Code § 54956.5 -SB 1643, effective January 1, 2003.

¹³ Gov. Code § 54957

¹⁴ Id.

¹⁵ *San Diego Union v. City Council*, 146 Cal. App. 3d 947 (1983).

receive written notice of the session at least 24 hours in advance. Negative performance evaluations are not “complaints or charges” subject to these rules.

The safe harbor language for personnel matters is:

PUBLIC EMPLOYEE APPOINTMENT

Title: (Specify description of position to be filled)

PUBLIC EMPLOYMENT

Title: (Specify description of position to be filled)

PUBLIC EMPLOYEE PERFORMANCE EVALUATION

Title: (Specify position title of employee being reviewed)

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

(No additional information is required in connection with a closed session to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation.)

At the end of any closed session regarding personnel actions, Council must report in public session any action taken affecting the employment status of an employee. However, if the report is of a dismissal or nonrenewal of an employment contract, the report shall be deferred until the first public meeting following the exhaustion of any applicable administrative remedies.¹⁶

CONFERENCE WITH LABOR NEGOTIATOR

A closed session may be held to discuss issues involving "salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees."¹⁷ At such closed sessions, the purpose is for the Council to give direction to its authorized negotiators. Those authorized negotiators then meet and confer with employee bargaining representatives. The Council may also meet in closed session with a state conciliator who has intervened in the negotiation proceedings. Once agreement is reached, any contract must be approved in public session. The Council may not take final action on the proposed compensation of a non-union represented employee, such as the City Manager, City Attorney or City Clerk, in closed session.

¹⁶ Gov. Code § 54957.1(a)(5).

¹⁷ Gov. Code § 54957.6.

The safe harbor language for labor negotiations is:

CONFERENCE WITH LABOR NEGOTIATORS

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

Employee organization: (Specify name of organization representing employee or employees in question)

or

Unrepresented employee: (Specify position title of unrepresented employee who is the subject of the negotiations)

REAL ESTATE NEGOTIATIONS

The Council may meet in closed session with its negotiator to discuss the purchase, sale, exchange, lease (including modifications, renewals and extensions) of real property by or for the City. Discussion must be limited to price and terms of payment related to specific sites.

The safe harbor language for real estate negotiations is:

CONFERENCE WITH REAL PROPERTY NEGOTIATORS

Property: (Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation)

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

Negotiating parties: (Specify name of party (not agent))

Under negotiation: (Specify whether instruction to negotiator will concern price, terms of payment, or both)

At the end of a closed session on real estate negotiations, the Council must report in open session the approval of and the substance of any agreement concluding the negotiations where the Council's approval renders the agreement final. If final approval rests with another party to the agreement, the fact of approval and the substance of the agreement must be disclosed to any person asking after the agreement has become final.

LICENSE APPLICATIONS

The Council may meet in closed session to determine whether an applicant for a license or permit who has a prior criminal record is sufficiently rehabilitated to obtain the license or permit.

The safe harbor language for a license determination is:

LICENSE/PERMIT DETERMINATION

Applicant(s): (Specify number of applicants)

BROWN ACT VIOLATIONS

Individual citizens may demand that the Council correct actions taken in violation of the Brown Act. Any citizen may make a written demand that the Council either declare an action null and void or cure the Brown Act defect within 90 days of any alleged violation, unless the action was taken in an open session but in violation of the agenda requirements. In those instances, the written demand shall be made within 30 days. The Council must act on the matter within 30 days of receiving the written notice. If no action is taken by the Council, any citizen may file a suit to have the action of the Council declared null and void.

If any action is successfully brought against the City for a Brown Act violation, the City may be required to pay attorneys' fees and costs. In addition, Council members may be individually liable for Brown Act violations under the criminal law. Certain Brown Act violations are misdemeanors and can be punished by up to one year in jail and/or fines. For these reasons, the City Attorney's Office takes particular care in making sure that the City's business is done in the proper manner to prevent any actual or perceived Brown Act violations.

SECTION 3 – PUBLIC RECORDS AND INFORMATION

Unless legally protected as confidential or subject to another exception to the rule, City records are open and available to the public under the California Public Records Act ("PRA").¹⁸ Any person or entity is legally entitled to request, view and receive copies of any public record or document of the City.

It is the responsibility of the custodian of records, normally the City Clerk, but sometimes another employee in a particular department, to gather and review records in response to PRA requests. The City Attorney's office can, of course, provide legal advice relating to requests.

WHAT IS A PUBLIC RECORD?

The PRA concerns the ability of members of the public to have access to public records maintained by various state and local agencies, including the City. The PRA includes in the definition of local agency, any private entity that must comply with the Brown Act.¹⁹ Public records are "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."²⁰ The definition of "writing" includes "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."²¹

PUBLIC POLICY FAVORS DISCLOSURE

The general policy of the PRA, like the federal Freedom of Information Act upon which it is modeled,²² favors disclosure of public records. Indeed, in enacting it, the state legislature found and declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."²³ But, as the court in *Black Panther Party v. Kehoe*²⁴ noted:

¹⁸ Gov. Code §§ 6250 *et seq.*

¹⁹ Gov. Code § 6252 -AB 2937, effective January 1, 2003.

²⁰ Gov. Code § 6252 (e).

²¹ Gov. Code § 6252 -AB 1962, effective January 1, 2003.

²² 5 U.S.C. §§ 552 *et seq.*

²³ Gov. Code § 6250.

²⁴ 42 Cal. App. 2d 645, 655 (1974).

If citizenship in a functioning democracy requires general access to government files, limited but genuine interests also demand restricted areas of nonaccess. Decisional law on the subject accepts the assumption that a statute calling for general disclosure may validly define reasonably restricted areas of nondisclosure, provided that the latter are justified by genuine public policy concerns.

The PRA thus strikes a balance between "the public's right to know" and the need to maintain areas of nondisclosure for certain types of government records.²⁵ The PRA basically provides that, except as otherwise provided, public records are to be open to inspection at all times during the office hours of public agencies,²⁶ and that any person may receive a copy of any identifiable public record upon request and payment of a prescribed fee.²⁷

This general right of public inspection, must be considered together with a number of categories of records that are exempt from disclosure.²⁸ One such category includes records that are exempt from disclosure under federal or state law.²⁹ To assist members of the public and local agencies, the state legislature created a list of state laws that exempts certain records from disclosure. The list is not meant to be exhaustive.³⁰ In addition, there is a "residual category" that permits an agency to withhold a record from disclosure, where "on the facts of [a] particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." This balancing test can be very fact intense and challenging. Records should not be withheld from disclosure based on the balancing test without a legal opinion from the City Attorney's office.

RESPONDING TO PRA REQUESTS

As is apparent, the obligation of the City under the PRA is to produce existing documents (within the meaning of the PRA). Nothing in the PRA requires the City to create documents that do not exist at the time of the request. The PRA requires City staff to assist a member of the public seeking to inspect or copy a public record, to make a focused and effective request that reasonably describes an identifiable record.³¹ By state law, City staff must make reasonable efforts to help the member identify records and information that are responsive to the request, or to the purpose of the

²⁵ 64 Ops. Cal Atty. Gen. 575, 579 (1981).

²⁶ Gov. Code § 6253, subd. (a).

²⁷ Gov. Code § 6253, subd. (b); See 69 Ops. Cal. Atty. Gen. 129, 131 (1986); 64 Ops. Cal. Atty. Gen. 575, 579-580.

²⁸ Gov. Code § 6254; *Black Panther Party v. Kehoe, supra*, 42, Cal. App. 2d at 656.

²⁹ Gov. Code § 6254(k).

³⁰ Gov. Code § 6275.

³¹ See AB 1014, amending Gov. Code § 6253, and adding Gov. Code § 6253.1.

request, describe the information technology and physical location in which the records exist, and provide suggestions for overcoming any practical basis for denying access to the records or information sought. These additional duties shall not apply if the City makes the requested records available, the records are expressly exempt from disclosure, or an index of the records is made available. The City is required to take the following actions in response to a PRA request:

- Make available for inspection immediately upon request or as soon as practicable, any and all public records clearly identified in the request which are clearly disclosable in their entirety.
- If the records are not produced for inspection as clearly disclosable in their entirety, determine within ten days after receipt of request (verbal or written) whether the request, in whole or in part, seeks copies of disclosable records and immediately notify the person making the request of such determination and the reasons for it. City staff must make reasonable efforts to assist a member of the public to make a request that reasonably describes an identifiable public record, as described above.
- Make available all documents for inspection or copying that are responsive to the request and not exempt from disclosure. Nothing in the PRA may be construed as permitting the City to delay or obstruct the inspection or copying of public records.³²
- Copy and make available all disclosable responsive documents, including any documents that can be made disclosable by redacting exempt information, upon payment of a fee, which may not exceed the actual cost of copying the record.
- If the person making the request agrees, provide a summary of the information contained in existing documents when these documents are voluminous or in a form that is not easily reproducible.
- If any part of the request is denied, the City must justify withholding any record by demonstrating the record is expressly exempt under the PRA, or the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.³³ Notification of denial of any request for records must set forth the names and titles or positions of each person responsible for the denial.³⁴
- If the request for inspection or copies of public records is in writing, and the request is denied in whole or in part, the response must be in writing.

³² Gov. Code § 6253.

³³ Gov. Code § 6255.

³⁴ Gov. Code § 6253.

The person requesting the public record is obligated to pay for copying costs. The City may only charge a fee to cover the direct cost of duplication.³⁵ City staff time spent in finding, compiling, and/or reviewing the documents may not be charged for. The amount of the fee is designated in the City of Moreno Valley Fees and Charges Resolution.³⁶ We recommend that City staff adhere to the following procedures in responding to PRA requests:

- Acknowledge receipt of the request, and if the request is verbal, ask that person to put the request in writing. (The person is not obligated to put the request in writing.)
- Consult the City Attorney's Office whenever there is a question of whether a document, or any part of a document, is exempt from disclosure, whenever the document is labeled Attorney-Client Privilege or contains any analysis or advice from a lawyer, and/or whenever the document pertains to litigation, claim or threatened litigation.
- After any consultation with the City Attorney under paragraph 2, advise the requesting party of a time and place when the responsive documents will be available for inspection and/or copying. If copies have been requested advise the requesting party of the approximate cost of copying. The time should not be more than 10 days after receipt of the request. If there are any circumstances which lead you to believe that more than 10 days will be required to assemble the documents, consult the City Attorney's Office immediately. Do not wait for the 10 days to pass.
- If the request is likely to produce voluminous documents, be sure to advise the requesting party of the cost of copying the responsive documents before copying, and give them the option of narrowing their request to reduce costs. A deposit against the costs may be collected prior to copying to avoid wasting time and money if the requesting party fails to return for the copies.

RECORDS IN ELECTRONIC FORMAT

If the public record subject to disclosure is in electronic format, the information shall be made available in any electronic format in which the City holds the information. A copy of an electronic record shall be provided in the format requested, if the City uses that format to make copies for its own use or for other agencies.

The cost of duplication is limited to the direct cost of producing the copy of the record in electronic format. However, the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record if (1) the City is required to produce a copy of an electronic record that is produced only at otherwise regularly scheduled intervals; or (2) the request would require data compilation, extraction, or programming to produce the record.

³⁵ Gov. Code § 6253(b); Opinion of the California Attorney General, No. 01-605.

³⁶ The Fees and Charges Resolution is available from the City Clerk.

The City is not required to reconstruct a record in an electronic format if the City no longer has the record in electronic format. If the document is in both electronic and non-electronic format, the City may inform the requester the information is in electronic format. The PRA does not permit the City to make the information available only in electronic format. The requesting party should be given the option of electronic or non-electronic format. The City is not required to release an electronic record in the electronic form held by the City if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained.

PUBLIC RECORDS ACT VIOLATIONS

The California Supreme Court has ruled that a city may not withhold a requested record and then ask the court to determine if it has the right to withhold it.³⁷ If the City refuses to supply records, the requesting person may bring an action in Superior Court to compel disclosure. If the court determines the records must be disclosed, the City is required to pay attorneys' fees and court costs. If the City prevails, it is entitled to attorneys' fees only if the court finds that the request was "clearly frivolous." In general, records are seldom exempted from disclosure and a finding of "clearly frivolous" is very rare. Usually, a valid refusal to disclose is based upon the privacy rights of an employee or applicant, or upon clearly defined legal privileges, such as the attorney-client privilege. The City Attorney's Office should be contacted for advice before denying any request for public records.

³⁷ *Filarsky v. Superior Court*, 28 Cal. 4th 419 (2002).

SECTION 4 – CONFLICT OF INTEREST ISSUES

Conflicts of interest arise in a variety of ways. Because of the myriad of laws in this area, it is sometimes quite difficult to determine if one has a conflict of interest. This section of the Guidebook is intended to assist Council members and the Mayor in recognizing situations that may give rise to a conflict of interest.

The City Attorney's Office is available to discuss conflict of interest issues. However, the duty is on the elected officials to present any information concerning potential conflicts of interest to the City Attorney so that advice can be provided. If we independently know of information that may relate to a conflict of interest, we will endeavor to bring it to the official's attention. However, this policy does not relieve any official of his or her legal or ethical responsibility for reporting any conflict of interest he or she may have. Neither the City Attorney's Office, nor any other City staff member, is, or indeed can be, responsible for raising conflict issues for each elected official.

The City Attorney's professional responsibility is to protect the City organization from legal risk. When asked in advance, the City Attorney will advise Council members as to conflicts of interest issues so that the decisions of the Council will be legal. The City Attorney's role is to protect the City, not to assist any official in avoiding the consequences of a conflict of interest. By seeking advice in advance, Council members can protect themselves from the legal and public consequences of violating conflict of interest laws.

Sometimes, it is tempting for a Council member or employee to either withhold or rationalize away facts, or to argue that a particular interest should not disqualify him or her from participating in a particular decision. However, it is both unethical and not in the Council member or employee's own best interest to do so, or to participate in a decision from which he or she is legally disqualified. Failure to disqualify oneself from a decision subject to a conflict of interest can result in a court overturning the decision and the Council member being fined and/or sent to jail. An incorrect legal opinion, or one based on partial or incorrect facts, will not protect a Council member from prosecution for conflict of interest violations. Therefore it is vital that each Council member be both fully open about facts and circumstances and willing to accept and abide by professional legal advice.

The City Attorney's advice may be all that is necessary in many circumstances. However, in more complex situations, the difficulty and changing nature of the law may require advice from the Fair Political Practices Commission. Only an opinion from the FPPC, based upon fully disclosed facts and circumstances, provides a guarantee of legal safety. The City Attorney can advise you when FPPC advice should be sought.

Conflict of interest opinions are fact intensive and require significant research and analysis. Quality legal work can take time. For this reason, we request that questions be posed as far in advance as possible of any participation on a particular matter or issue which may give rise to a conflict. Questions raised on the dais as a matter is about to be considered by Council will, of necessity, result in conservative advice usually recommending to the elected official that he or she announces a conflict and disqualify himself or herself from the matter. In matters involving

potential conflicts, advance preparation is very important to ensure that participation occurs in an appropriate manner.

The City Attorney serves as legal advisor to the Council and Mayor in their official capacities. It is the City's interests we represent. Because a conflict may affect a decision of the entire Council, our practice is to provide a copy of all legal opinions and memos requested by one elected official to the rest of the elected officials, as we would with any other legal opinion or communication. Furthermore, an official who discloses a conflict of interest to the City Attorney and then chooses not to follow legal advice cannot rely upon confidentiality or attorney-client privilege. The City Attorney would have a legal and ethical duty to disclose such a conflict to the rest of the Council.

COMMON LAW DOCTRINE

In 1928, the California Supreme Court enunciated the common law doctrine³⁸ against conflicts of interest as follows:

A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.³⁹

Against this backdrop of the common law doctrine, a multitude of conflicts of interest laws have been enacted by citizens' initiative and the state legislature. In addition, the FPPC has adopted regulations implementing these laws. However, these laws and regulations do not eliminate the doctrine of common law conflicts of interest. Council members can technically comply with all of the laws discussed below and still be found by a court to have violated the common law doctrine. It is always best for Council members to err on the side of caution in dealing with potential conflicts of interest.

The statutes adopted by the legislature are detailed and complex. The regulations adopted by the FPPC to implement the statutes add additional complexities. Many of these laws apply to staff members and other city officials in addition to Council members. Any Council member, staff member or other city official involved in making any governmental decision should be aware of these laws and should request legal advice in advance whenever there is any possibility of self-interest that could possibly be involved in that government decision.

POLITICAL REFORM ACT

The majority of legislation and regulations relating to conflicts of interest are embodied in the Political Reform Act⁴⁰ that was adopted by a vote of the people in a statewide initiative in 1974.

³⁸ The common law has developed through precedential court decisions. It differs from statutory law which has been created through the legislative process.

³⁹ *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928).

⁴⁰ Gov. Code §§ 81000 *et seq.*

The overall purpose of the Political Reform Act was designed to make sure that public officials perform their duties without bias or personal financial interest. Public officials include officers, employees and certain types of consultants to local government. To accomplish this goal, several levels of regulation have been set up.

DISCLOSURE OF ECONOMIC INTERESTS

The first major area of regulation deals with disclosure of economic interests. The Political Reform Act requires disclosure of economic interests to assure that all economic interests that may color an elected official or employee's judgment in exercising governmental authority are known to public. All incoming elected officials as well as certain City officers and employees must disclose certain types of financial interests on forms provided by the FPPC and which must be available to the public. Those forms must be submitted to the City Clerk within 30 days of assuming office by each new member. Also, on an annual basis, they must update their forms to reflect changes in the previous calendar year. A final disclosure must be made within 30 days of leaving office.

DISQUALIFICATION OF PUBLIC OFFICIALS FROM PARTICIPATING IN GOVERNMENTAL DECISIONS

A second area of regulations deals with the disqualification of public officials from participating in decisions. The Act prohibits any government official from "making, participating in making, or attempting to use his/her official position to influence a governmental decision in which he or she knows, or has reason to know, that he or she has a financial interest." The official is disqualified whether the potential impact on his or her economic interest is positive or negative. The official is legally disqualified from participation even if the official believes that his or her participation can only hurt his or her economic interests.

The Act and the regulations implementing it define a broad range of economic interests that can result in disqualification and contains a series of tests for determining whether or not the interest is material and disqualification is required. The City Attorney's office is available and should always be consulted regarding these matters prior to the decision process beginning.

If the public official has a disqualifying financial interest in a decision, the public official must publicly identify the disqualifying financial interest in detail sufficient to be understood by the public, recuse himself or herself from discussing and voting on the matter, and leave the room until after the discussion, vote, and other disposition of the matter. The public official retains the right to speak on the issue as an affected party during the time that the general public speaks on the issue.⁴¹ However, any such participation should be from the public podium and not the Council dais and only after full disclosure and recusal. After speaking, the official should again remove himself or herself from the meeting room until business on that matter is concluded.

⁴¹ Gov. Code § 87105 -AB 1797, effective January 1, 2003.

If the City Council cannot legally act due solely to multiple disqualifications, a “Rule of Necessity” allows disqualified members to draw lots to determine which disqualified member(s) will be permitted to participate, but only to the extent necessary for a valid action by the Council, and only under the supervision and advice of the City Attorney and in an open and public meeting.

8 Step Analysis for Disqualification

The FPPC has adopted an 8 step procedure for analyzing whether or not a public official or employee is disqualified from participating in a decision. The analysis is complex and not all of the rules involved appear logical or intuitive to an untrained person. It is vital that this analysis be done by a trained professional legal advisor in possession of all of the facts. Council members and employees should refer any potential question about whether or not they can legally participate in a decision to the City Attorney.

Economic Interests

The FPPC regulations spell out numerous types of economic interests that may create a disqualifying conflict of interest. An economic interest exists whether the interest is held directly by the official or by his or her spouse, domestic partner, dependent children or any other person acting on their behalf. The categories of economic interests include:

- **Sources of Income.** Any income and/or promise of income from any person or entity involved in or affected by the decision totaling \$500 or more within 12 months prior to the decision.
- **Personal Finances.** Any effect on the official’s expense, income, assets or liabilities.
- **Real Property.** Any interest worth \$2,000 or more in real property, whether the interest is by ownership, lease, option, lien, mortgage, or otherwise.
- **Investments.** Any investment worth \$2,000 or more in a business entity.
- **Business Employment or Management.** Service as an officer, director, partner, trustee, employee or other management position of a for-profit business entity, even if not compensated.
- **Related Businesses.** Any business that is a parent or subsidiary of or is otherwise related to a business in which there is an investment or Business Employment or Management interest.

- **Business-Owned Property.** Any real property owned by a business in which there is an investment or business employment or management interest.
- **Loans.** Any loan, unless from a commercial lending institution on the same terms as available to any member of the public, or any guarantee of a loan (such as a co-signer).
- **Gifts.** Any gifts and/or promise of gifts totaling \$420 or more in the 12-month period prior to the decision from any one person or entity. [**Note:** the \$420 limit is adjusted every few years to reflect changes in the cost of living.]

If any Council member or employee thinks he or she might have one of the economic interests listed above, he or she should consult with the City Attorney *prior* to any discussion about or participation in a City decision either directly or indirectly affecting that interest.

CAMPAIGN REGULATIONS

The Political Reform Act also has **campaign regulations**. These regulations are not discussed in this Guidebook because the City Attorney's Office does not represent or advise elected officials in their roles as candidates. Each council candidate must consult with the FPPC on their own and/or receive legal advice from their own private attorney regarding campaign regulations.

MASS MAILINGS

The Political Reform Act regulates mass mailings sent at public expense. (See Section 5 of this Guidebook.)

FAIR POLITICAL PRACTICES COMMISSION

The administration of the Political Reform Act is handled by the Fair Political Practices Commission (“FPPC”). It is an independent statewide body that is made up of members appointed by the Governor and the Legislature. The FPPC has a full-time staff which provides assistance to local elected officials. The FPPC has forms, manuals, and related information available on the Website at www.fppc.ca.gov. The FPPC also provides informal assistance over the telephone to any person with a conflict of interest question. This is a valuable tool that can be used by all elected officials to spot conflict issues prior to a matter coming before them. The telephone advice line is available during normal business hours at (916) 322-5660 or 1 (866) ASK-FPPC [(866) 275-3772].

In addition to informal assistance, the FPPC also offers formal written responses. If one seeks a formal opinion, the FPPC staff will respond in writing, but response may take up to 30 days or longer after the request. A person receiving a formal written opinion from the FPPC may use that opinion as a legal defense to charges of conflict of interest violation if

they fully disclosed all relevant facts to the FPPC in their request for the opinion. In some cases, the City Attorney may recommend an FPPC opinion as the only way to provide a reliable answer to a conflicts of interest question.

In the case of a conflict of interest, the elected official in question has the duty to disqualify himself or herself. This duty cannot be delegated to staff members or to an attorney. The duty rests with the officials in question because only they know the extent of their own personal financial dealings.

Attached as Exhibit C is a pamphlet entitled, “*Can I Vote? Conflicts of Interest Overview*” prepared by the FPPC to assist public officials in determining whether a disqualifying conflict or interest exists. Also attached as Exhibit D is a fact sheet prepared by the FPPC entitled, “*Limitations and Restrictions on Gifts, Honoraria, Travel and Loans*” for local officers and employees. These resources provide further guidance on this very complex and important area of law.

CIVIL AND CRIMINAL ENFORCEMENT

The district attorney, the California Attorney General or the FPPC may bring an action, either civil or criminal to enforce the Political Reform Act where a conflict of interest exists. Also, any person residing in the City may bring a civil action to enjoin violations or compel compliance with the Political Reform Act. Finally, a local agency may discipline persons who violate provisions of the Political Reform Act.

A knowing violation of the Political Reform Act is a misdemeanor punishable by a fine and/or imprisonment. A violator may be fined up to \$10,000 or three times the amount not properly disclosed, unlawfully contributed, expended, given, or received, for each violation. Finally, any person convicted of a criminal violation of the Act is barred from being a candidate for any elective office or acting as a lobbyist for four years following the conviction.

An official action by the Council with the participation of a disqualified member may also be set aside by a court.

INTERESTS IN CONTRACTS (GOV'T CODE §1090)

California Government Code § 1090 prohibits City officers or employees from having any financial interest in any contract made by them in their official capacity, or by the body of which they are members, or by the City if they are considered to have “an opportunity to influence” the contractual decision. This means that even officials and employees who do not make the contractual decision itself, or who may not even be part of the decision-making process can be found to have violated this law. For example, Planning Commissioners are deemed by their status as direct appointees of the City Council, to have “an opportunity to influence” any contract approved by the City Council. Therefore, the City is legally precluded from entering into any contract in which any City Council member or planning commissioner has an economic interest. This is true even if the contract is entered into under the delegated authority of the City Manager or

a department head without requiring Council approval. Any contract made in violation of § 1090 is void.

The penalties for any public official found to have violated § 1090 are severe. He or she must forfeit any benefit they would receive from the contract while still having to provide the benefit to the City. In addition, he or she is subject to fine and imprisonment and is disqualified from holding public office in the State of California forever.

It is the responsibility of each elected and appointed official to monitor, report and disclose their own economic interests and to take all steps necessary to avoid violating §1090. This should include, but not be limited to, informing any employers, business partners, etc. that they are a public official with the City and that all contracts with the City in which they have an interest must be avoided and keeping City officials and staff apprised of their business and economic interests involved in any potential contract with the City, in addition to honest completion and timely filing of the required financial disclosure documents.

PASSES OR DISCOUNTS FROM TRANSPORTATION COMPANIES; FORFEITURE OF OFFICE

The California Constitution contains a very strict prohibition against the acceptance of passes or discounts from transportation companies by public officers. California Constitution Article XII, Section 7 provides that the acceptance of a pass or discount "shall work a forfeiture" of the office held by the recipient. This means that any Council member who accepts such a pass or a discount is removed from office. This prohibition can be innocently violated with disastrous results. For example, if a flight attendant on an airplane notices that there is an empty seat in first class and offers it to a city official sitting in coach as a courtesy, the Council member must decline or risk being deemed to have resigned from office. If a taxi driver says "it's on me, Mr. Mayor" the Mayor must insist on payment or will have forfeited his or her office.

The prohibition applies to "transportation companies" providing any form of commercial transportation. It does not include publicly owned transportation systems. It also does not include discounts that are offered to the public, such as newspaper coupons or "buy one get one free" sales promotions publicly advertised.

INTERESTS IN PROPERTY WITHIN REDEVELOPMENT PROJECT AREAS

While we have devoted a section to California Redevelopment Law (Section 11), it is important to note here that the California Redevelopment Law requires disclosures in addition to the annual disclosure forms required by the FPPC and filed with the City Clerk.

We must emphasize the importance of disclosure. The general rule is that persons who have direct or indirect financial interests in a project area may not participate in any decision that affects the project area. Participating in the decision can render the decision invalid. Failure to disclose a

financial interest constitutes misconduct in office under Health and Safety Code Section 33130. Sanctions may include removal from office, disqualification from future public office, and fines or imprisonment.

Furthermore, with very limited exceptions, persons who are in policy making positions with regard to a redevelopment area (City Council, Project Area Committee, senior level staff, etc.) are prohibited by law from acquiring any interest in any real property within the project area while in such a position. The prohibition includes any type of property interest - ownership, lease, mortgage security, option to purchase or lease, etc.

SECTION 5 – COMPENSATION, REIMBURSEMENT OF EXPENSES FOR ELECTIVE OFFICERS, AND USE OF PUBLIC FUNDS

COMPENSATION OF ELECTIVE OFFICES

Under Government Code section 36516, a city council may enact an ordinance providing a salary for each Council member with the amount determined by the population of the city. Subsection (a)(5) provides that in cities over 150,000 up to and including 250,000 in population, based on the last U.S. Census or California Department of Finance estimate, the salary may be up to \$800 per month as of January 1, 2006. The voters may set a higher or lower salary by initiative measure at a municipal election. Compensation of council members may also be increased by an ordinance in an amount not to exceed 5% for each calendar year from the operative date of the last salary adjustment. However, this means that if an adjustment is made which is less than the full 5% per year allowable at that time, future 5% increases are calculated based on the actual adjusted salary and not the maximum salary that could have been approved.

No ordinance may be enacted which provides for automatic future increases in salary for elected officials. No increase in salary adopted by the Council may take effect until after at least one council member has been elected (or reelected) at a regular election and seated for a new term. Any amounts paid by the city for retirement and health benefits are not included for purposes of determining salary, but council members may not receive any such benefits in excess of other employees. Reimbursements for actual and necessary expenses are also not to be included for purposes of determining salary.

In addition to the salary set by ordinance, each Council member may receive a stipend of not more than \$150 for each meeting of a board, commission or committee (other than the Council itself or the Redevelopment Agency Board) he or she attends as a member of that body, not to exceed two meetings of each board in any calendar month. For meetings of the Redevelopment Agency Board, where there is no housing authority (as is the case in Moreno Valley), Council members may receive a stipend of up to \$75 per meeting, not to exceed two meetings per calendar month.⁴²

REIMBURSEMENT FOR EXPENSES

Council members may be reimbursed for “actual and necessary” expenses incurred in conducting City business⁴³. However, there are a number of restrictions on such reimbursements.⁴⁴

- Expenses must be both actually incurred and reasonably necessary for the public purpose of the activity involved.

⁴² Health & Safety Code § 34130.5

⁴³ Government Code § 36514.5

⁴⁴ Government Code §§ 53232.2 & 53232.3

- The Council must adopt a written reimbursement policy, specifying the types of occurrences that qualify for reimbursement relating to travel, meals, lodging and other “actual and necessary” expenses.
- The policy must set reasonable reimbursement rates for such expenses or the City must use the Internal Revenue Service’s published rates.
- Lodging for conferences or educational activities is limited to the group rates offered by the sponsor, if available.
- Council members must use government and group rates when available.
- Expenses not covered by the adopted travel reimbursement policy must be approved by the Council in advance in a public meeting.
- Council members may pay in excess of legally reimbursable rates only at their own expense.
- Council members must report all reimbursable expenses within “a reasonable time after incurring the expense” on a form which must be provided by the City, which must document that the expenses meet the existing policy. The receipts documenting the expenses must be filed with the report.
- Council members must briefly report on any meetings attended at the expense of the City at the next regular meeting of the Council.

USE OF PUBLIC FUNDS

The use of public funds by elective officers begins with the premise that public funds must only be used for authorized public purposes. In an early case, the California Supreme Court stated: “officials are not free to spend public funds for any ‘political purpose’ they may choose, but must use appropriated funds in accordance with the legislatively designated purpose.”⁴⁵

In addition the California Constitution prohibits the use of public funds for private benefit, whether it benefits an elected official or any other private person or entity. This is commonly referred to as a “gift of public funds.” Government expenditures may incidentally benefit private parties, but the motivating purpose for the expenditure must be for the benefit of the public or the City. This is referred to as a “public purpose.” Public funds may not be used for campaign or personal purposes. In fact, unlawful expenditures of public funds can be punishable by fine, imprisonment and/or removal from office.

Once a public purpose is established for the expenditure, there must be legal authority to expend the money. This means that there must be an appropriation of the funds by the Council by formal action in a public meeting. No funds may ever be appropriated in closed session or otherwise private actions. Normally, most appropriations for the regular expenses of the City are made in the

⁴⁵ *Mines v. Del Valle*, 201 Cal. 273 (1927).

formally adopted annual budget. Expenses not authorized in the budget must be approved by a special appropriation by the Council.

MASS MAILINGS AT PUBLIC EXPENSE

Elected officials must necessarily communicate with their constituents. However, the Political Reform Act discussed above in the Conflict of Interest Section has stringent rules regarding mass mailings (large numbers of substantially similar letters, flyers or other mailings) sent at public expense. “Mass mailing” is somewhat misleading. The prohibition applies to any tangible object or written document distributed in any manner (not just by mail) to homes, businesses or post office boxes

The Political Reform Act provides: “No newsletter or other mass mailing shall be sent at public expense.”⁴⁶ The FPPC adopted Regulation 18901 to implement the statutory provision. California Code of Regulations Title 2, § 18901(a)⁴⁷ provides that a mailing is prohibited if all the following apply:

- An item is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box.
- The item is a tangible object, such as a videotape, CD, DVD, refrigerator magnet or button, or a written document, such as a letter, memo, flyer, information sheet, or newsletter.
- The item either features a Council member (or Mayor) or includes the name, office, photograph, or other reference to a Council member (or Mayor).
- Any of the costs of distribution is paid for with public moneys; or costs of design, production, and printing exceeding \$50.00 are paid with public moneys.
- More than two hundred substantially similar items are sent within a single calendar month.

Section 18901 (b) provides for a limited number of exceptions, they are:

- Any item in which the elected officer's name appears only in the letterhead or logotype of the stationery, forms, and/or envelopes of the City or in a roster listing containing the names of all elected officers of the City, provided that, the names of all elected officers appear in the same type size, typeface, type color, and location, and the item does not include the elected officer's photograph, signature, or any other reference to the elected officer.
- A press release sent to members of the media.
- An item sent in the normal course of business from one governmental entity or officer to another.
- An intra-agency communication sent in the normal course of business to employees, officers, deputies, and other staff.

⁴⁶ Gov. Code § 89001.

⁴⁷ 2 Cal. Code Regs. § 18901.

- Tax bills, checks, and similar documents, where use of the elected officer's name, office, title, or signature is necessary to the payment or collection of the funds, but it may not include the elected officer's photograph, signature, or any other reference to the elected officer if not necessary to the payment or collection.
- Any item sent by an agency responsible for administering a government program, to persons subject to that program, in any instance where the mailing of such item is essential to the functioning of the program, where the item does not include the elected officer's photograph; and where use of the elected officer's name, office, title, or signature is necessary to the functioning of the program.
- A legal notice or other item required by law, court order, or administrative agency order where use of the elected officer's name, office, title, or signature is necessary in the notice or other mailing.
- Inclusion of an elected officer's name on a ballot as a candidate for elective office, or inclusion of an elected officer's name and signature on a ballot argument.
- A telephone directory, organization chart, or similar listing or roster which includes the names of elected officers as well as other individuals in the City, where the name of each elected officer and individual listed appears in the same type size, typeface, and type color, as long as it does not include an elected officer's photograph, signature, or other additional reference to an elected officer.
- An announcement of a public meeting which is directly related to the elected officer's incumbent governmental duties, which is to be held by the elected officer, and which the elected officer intends to attend, but only where the announcement does not include the elected officer's photograph or signature, nor more than one mention of the officer's name.
- An announcement of any official agency event or events for which the agency is providing the use of its facilities or staff or other financial support, but which does not include the elected officer's photograph or signature, nor more than one mention of the officer's name.
- An agenda or other writing that is required to be made available pursuant to sections 11125.1 and 54957.5 of the Government Code.
- A business card which does not contain the elected officer's photograph or more than one mention of the elected officer's name.

We urge you to be extremely careful with your distributions and contact the FPPC or the City Attorney's Office if you have any doubt or question as to whether a distribution is appropriate.

MISUSE OF PUBLIC FUNDS

Violations of the laws prohibiting misuse of public funds or other public resources may subject a violator to criminal and civil sanctions, including imprisonment and a bar from holding elective office. They may be required to reimburse the City for the value of the resources used and may have to pay their own attorney's fees, in addition to the attorney's fees of the individual challenging the use of resources.⁴⁸ Misuse of public funds for campaign or political purposes may

⁴⁸ *Tenwolde v. County of San Diego*, 14 Cal. App. 4th 1083 (1993).

also give rise to reporting requirements under the Political Reform Act, and additional penalties for failure to comply with such reporting requirements. In addition, misuse of public funds can also result in the public funds being treated as reportable personal income to the violator, who may then be charged with tax evasion under state and federal tax laws.

SECTION 6 – LIABILITY OF CITY OFFICIALS FOR CIVIL RIGHTS VIOLATIONS

This section discusses the potential civil rights liability of City officials for their own acts and the operations of local governmental entities. The emphasis is on potential liability under federal law and the principal immunities available to local officials from federal civil rights liability. It is not a complete treatment on the subject. It does not substitute for professional legal advice based on actual facts and circumstances.

Civil rights liability can arise from virtually any area of City government operations, from animal control and code compliance to land use decisions and police operations. We hope that this brief discussion assists you to understand when decisions and policies may raise federal civil rights issues. Hopefully, you will then be able to know when you should consult your human resources and legal staffs to minimize the risk of potential civil rights liability for the City and for yourself.

GIST OF A CIVIL RIGHTS VIOLATION

Essentially, a civil rights violation may arise when a municipality, or its officials or employees, deprive a person of a constitutional or federally protected right, while acting under color of law.⁴⁹ Acting under “color of law” means acting by state or local authority, rather than as a private person.⁵⁰ A city is created by virtue of state law and therefore anyone acting “under color” of a city’s authority acts under “color of state law” for purposes of Section 1983.⁵¹ Action under color of state law may encompass implementation or enforcement of a municipal law, regulation, policy or custom.⁵² A person need not specifically intend to deprive another of a federal or constitutional right to be liable - he or she need only have intended to do the act.⁵³

Although not discussed in detail, California has its own constitutionally protected rights and its own statutes prohibiting various forms of discrimination. Some of these mirror the federal law but in several areas, California law is stricter than federal law.

⁴⁹ 42 U.S.C. § 1983 (sometimes cited as “§ 1983” or “section 1983”). See generally, CALIFORNIA CONTINUING EDUCATION OF THE BAR (CEB), CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE (4th Ed.) Chapter 13.

⁵⁰ *Lugar v. Edmonson Oil*, 457 U.S. 922, 102 S. Ct. 2744 (1982).

⁵¹ *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744 (1982).

⁵² See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE, *supra*, at §§ 13.20 and 13.21.

⁵³ *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961) (overruled on other grounds 436 U.S. 658 (1978)); *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F. 3d 470 (9th Cir. 1998).

PERSONAL LIABILITY AND IMMUNITIES OF CITY OFFICIALS FOR CIVIL RIGHTS VIOLATIONS

Ordinarily, Council members acting within the traditional legislative capacity, and city prosecutors acting as advocates in the criminal process, are absolutely immune from liability for damages under Section 1983. Legislators act within the traditional legislative capacity when they formulate laws and policies to be applied in all future cases (e.g., adopt ordinances, rezone property, adopt budgets, levy taxes, adopt broad policies, adopt general plans, etc.), within lawful procedures.⁵⁴

However, legislators and prosecutors can be sued for court orders prohibiting or undoing violations. Government officials performing discretionary functions generally have a “qualified immunity.” This means that they cannot be sued as long as a reasonable person would have believed that their conduct did not violate clearly-established statutory or constitutional rights.⁵⁵ An act is “discretionary” if the actor is free to exercise judgment in determining the manner in which a duty is to be performed. When little or nothing is left to the individual’s judgment as to the manner in which to perform the duty, the duty is “ministerial.” Qualified immunity applies to officials, but not their governmental entities.

Although legislators are entitled to absolute immunity for legislative acts, this immunity does not apply when acting in an administrative or executive capacity. In other words, Council members only have absolute immunity against civil suits when acting within their legislative roles.⁵⁶

ACTS WHICH MIGHT RESULT IN A CIVIL RIGHTS VIOLATION

The following are some of the situations that can result in civil rights liability:

EMPLOYMENT DISCRIMINATION

Discrimination in hiring, firing, promotion, retention, work assignments of certain classifications of persons, including actions or procedures that have a disproportionate impact on protected classes of persons. Tests must be job related or justified by business

⁵⁴ *Strumsky v. San Diego County Employees Retirement Assn.*, 11 Cal. 3d 28, 520 P. 2d 29 (1974); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171 (1979); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976).

⁵⁵ *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982).

⁵⁶ *San Pedro, supra*, 159 F. 3d at 482.

necessity (i.e., a valid measure of job performance).⁵⁷ Tests may not be scored or biased on the basis of race, religion, national origin or color.⁵⁸

Title VII of the Civil Rights Act of 1964 is applies to local governments⁵⁹ and prohibits discrimination on the basis of race, color, religion, national origin, sex, and certain retaliatory acts. It also applies to job applicants as well as employees.⁶⁰

California Constitution, Article 1, Section 8, prohibits employers from discriminating against any employee, potential employee or contractor because of sex, race, creed, color, national origin or ethnic origin.

The California Fair Employment and Housing Act (“FEHA”) applies to all cities and prohibits discrimination on the basis of actual or perceived race, color, national origin, ancestry, sex, pregnancy, childbirth, or related medical condition, marital status, religious creed, physical and mental disability, medical condition (cancer-related or genetic characteristics), age (40 and over), and sexual orientation. It is also unlawful to discriminate against an individual because he or she is associated with a person who has, or is perceived to have, any of these characteristics.⁶¹

PREGNANCY, CHILDBIRTH, AND RELATED MEDICAL CONDITIONS

The Pregnancy Act of 1978 is part of Title VII and prohibits discrimination on the basis of pregnancy, childbirth, pregnancy disability and related medical conditions.⁶²

SEXUAL HARASSMENT

Unwelcome sexual advances or requests for sexual favors, or verbal or physical conduct of a sexual nature which interferes with a person’s work performance or creates an intimidating or hostile work environment is a form of discrimination under both California and federal law.⁶³

⁵⁷ *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849 (1971) (overruled on other grounds, as recognized in 914 F. Supp. 1257 (1996)).

⁵⁸ 42 U.S.C. § 2000e-2(1).

⁵⁹ 42 U.S.C. § 2000e-2, 2000e-3.

⁶⁰ 42 U.S.C. § 2000e-2(a).

⁶¹ Gov. Code §§ 12920 - 12927, 12940 - 12948. The FEHA applies to public employers pursuant to Government Code section 12926(d). Implementing regulations have been adopted by the Fair Employment and Housing Commission. See 2 Cal. Code of Regs. §§ 7285 *et seq.*

⁶² 42 U.S.C. § 2000e-(k).

⁶³ 29 U.S.C. § 2000e-(a)(1); Gov. Code §§ 12940(h) and (i), and 12950.

AGE DISCRIMINATION

The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age for persons age 40 and over.⁶⁴

DISABILITY DISCRIMINATION

The Rehabilitation Act of 1973 applies to local governments receiving certain kinds of federal financial assistance and prohibits discrimination against the handicapped in programs or activities receiving federal financial assistance.⁶⁵

In addition, the Americans with Disabilities Act (“ADA”) prohibits discrimination on the basis of disability against a qualified individual with a disability in regard to virtually every aspect of the employment relationship.⁶⁶ It also prohibits discrimination in government “programs.” The ADA and California law require government facilities to be accessible to individuals with disabilities. A qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.⁶⁷

Title I generally prohibits discrimination against a qualified individual with a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.⁶⁸

NATIONAL ORIGIN AND CITIZENSHIP

The Immigration Reform and Control Act of 1986 prohibits discrimination based upon national origin and citizenship by employers with more than three employees.⁶⁹

⁶⁴ 29 U.S.C. §§ 621, *et seq.*

⁶⁵ 29 U.S.C. §§ 701-7961.

⁶⁶ 42 U.S.C. §§ 12101 *et seq.* The ADA supplements the Rehabilitation Act of 1973 (29 U.S.C. §§ 791 *et seq.*).

⁶⁷ 42 U.S.C. §§ 12131, *et seq.*

⁶⁸ 42 U.S.C. § 12112. The effective date for Title I of the ADA was July 26, 1992.

⁶⁹ 8 U.S.C. § 1324b, *et seq.*

PROTECTED SPEECH

There is some protection for employees (although not absolute constitutional protection) who speak out on matters affecting public concern, or who are “whistleblowers”, meaning that they report to certain government authorities illegal activities of their employers.⁷⁰

LAND USE DECISIONS AND ACTIONS AFFECTING PRIVATE LAND

City decisions and actions regulating the development and permissible uses of land can result in liability under the Fifth and Fourteenth Amendments if they go beyond the legitimate exercise of the regulatory powers of the City. The City may not “take” property for public use without payment of just compensation and Due Process of Law. Such a “taking” can happen by the City directly taking possession or ownership of the land or an interest in the land. If the City occupies or uses property it does not own or requires dedications in excess of what is needed to mitigate the impacts of the development project, the City can be found to have condemned the property and be required to pay damages. On the other hand, if the City regulates beyond its constitutional powers and thereby impermissibly diminishes the value of the land, or regulates without due process of law, it can be liable for “inverse condemnation” and be required to pay damages to the landowner. If the City regulates in a way that discriminates on the basis of race, religion, gender or other impermissible grounds, such regulations can be overturned as unconstitutional and the City can be liable for damages under various civil rights laws.

IMPROPER PRE-CONDEMNATION BEHAVIOR

The City and its officials must take care when contemplating the use of eminent domain powers. If the City announces its intent to condemn property and then unreasonably delays the eminent domain action thereby hurting the property value or the owner’s business, or if it otherwise acts unreasonably to diminish the value of the property before condemnation, it may be liable for damages in inverse condemnation. Such unreasonable actions could be decisions affecting zoning or other regulations, enforcement actions or decisions regarding public improvements nearby.

CITY ACTIONS IMPERMISSIBLY SEEKING TO REGULATE CONDUCT

Ordinances, resolutions, executive orders, regulations, and other actions may be set aside on civil rights grounds if they are too vague to enforce, or if they are overbroad and limit both protected (freedom of speech, press and religion, etc.) as well as unprotected conduct. This is sometimes the case with certain vagrancy, curfew, public assembly, and other ordinances.⁷¹

⁷⁰ *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968); *Chico Police Officers Association v. City of Chico*, 232 Cal. App. 3d 635, 283 Cal. Rptr. 610 (1991).

⁷¹ *Connally v. General Construction*, 269 U.S. 385, 46 S. Ct. 126 (1926); *Coates v. Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686 (1971).

ENFORCEMENT OF PERMISSIBLE ORDINANCES IN AN IMPERMISSIBLE MANNER

Similarly, otherwise valid ordinances may not be enforced in an arbitrary manner against classes of people, particularly protected classifications such as race, religion, gender, national origin, etc. Ordinances must bear a rational relationship to a legitimate state purpose. Where protected classifications or fundamental rights are affected ordinances must be “narrowly tailored to promote a compelling state interest,”⁷² which is a very difficult standard to meet.

ILLEGAL SEARCH AND SEIZURE

When an enforcement or other city officer or employee enters private real property or searches or seizes private personal property to find evidence for an enforcement action, but does so without Constitutional authority, the officer and the City may be liable for violation of Constitutional rights. Officers must obtain a warrant or other court order, permission from the property owner or resident, or be within certain very specific and narrow exceptions to those requirements prior to entering, searching or seizing any property

FAILURE TO (ADEQUATELY) TRAIN

The failure to train or adequately train employees which results in discriminatory acts showing deliberate indifference to the rights of persons with whom the employee comes in contact may give rise to liability.⁷³ This situation most often arises in the case of enforcement personnel such as police officers, rangers, guards, etc.

FAILURE TO (ADEQUATELY) SUPERVISE

The failure to supervise or adequately supervise which amounts to deliberate indifference to the rights of persons with whom the employee comes in contact may give rise to liability.⁷⁴ When a history of widespread abuse puts the responsible supervisor on notice of the need for improved training or supervision and the official fails to take corrective action, the supervisor may be liable if the failure causes “constitutional” injury to others.⁷⁵

FAILURE TO INTERVENE OR PREVENT AN ACT (INACTION)

A local governmental entity may be liable under Section 1983 “if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights.”⁷⁶

⁷² *Weber v. City Council of Thousand Oaks*, 9 Cal. 3d 950, 513 P. 2d 601 (1973).

⁷³ *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989).

⁷⁴ *Davis v. City of Ellensburg*, 869 F. 2d 1230 (9th Cir. 1989).

⁷⁵ *Johnson v. Duffy*, 588 F. 2d 740 (9th Cir. 1978); *Fundiller v. City of Cooper City*, 777 F. 2d 1436 (11th Cir. 1985).

⁷⁶ *Oviatt v. Pearce*, 954 F. 2d 1470, 1474 (9th Cir. 1992).

To impose liability on a local governmental entity for failing to act to preserve constitutional rights, a Section 1983 plaintiff must establish that he or she possessed a constitutional right of which he or she was deprived, that the municipality had a policy that “amounts to deliberate indifference” to the plaintiff’s constitutional right, and that the policy is the “moving force behind the constitutional violation.”⁷⁷

A person may be liable for a wrongful act by a person he or she supervises of which he or she was aware, but which he or she failed to prevent,⁷⁸ or for the wrongful act of another which he or she is capable of preventing, but fails to intervene to prevent.⁷⁹

FEDERAL FAIR HOUSING ACT

The Federal Fair Housing Act (“FFHA”) of 1968, as amended, contains broad language barring housing practices that discriminate on the basis of race, disability, handicap, and other factors. In addition, the FFHA requires housing providers, including entities like the City who make housing rehabilitation and Community Development Block Grant (“CDBG”) loans and grants, to make reasonable accommodations when necessary to afford handicapped and other persons equal opportunity to housing programs. The FFHA further prohibits discrimination in the processing review or making denial of loans.⁸⁰

ACCESS TO FACILITIES AND SERVICES

The ADA (discussed above), has broad implications for potential local government liability if its requirements are not observed. For example, with certain exceptions, the ADA requires that: a) programs and services be provided in an integrated setting, unless separate or different measures are needed to ensure equal opportunity; b) reasonable modifications in policies, practices, and procedures that would otherwise have the effect of denying equal access to disabled individuals be made; c) auxiliary aids and services be provided when needed to ensure effective communication; and d) city programs be operated so that, when viewed in their entirety, they are readily accessible to and usable by individuals with disabilities.⁸¹ Under Title II of the ADA, public entities may not discriminate against or deny access or services to any “qualified individual with a disability” when providing services, including public transportation.⁸² Title II of the ADA establishes detailed

⁷⁷ *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197 (1989).

⁷⁸ *Taylor v. List*, 880 F. 2d 1040 (9th Cir. 1989).

⁷⁹ *Meehan v. County of Los Angeles*, 856 F. 2d 102 (9th Cir. 1988).

⁸⁰ 42 U.S.C. §§ 3600, *et seq.*

⁸¹ See generally, U.S. Department of Justice, Civil Rights Division, Title II Highlights, <http://www.usdoj.gov/crt/ada/t2hlt95.htm>.

⁸² 42 U.S.C. §§ 12131 *et seq.*

requirements for accessibility and usability of public transportation vehicles, trains, or commuter rail cars and for transportation facilities or stations.⁸³

Title II of the ADA also prohibits local governmental agencies from excluding qualified individuals from participating in or receiving the benefits of the entity's services, programs or activities on the basis of a disability.⁸⁴ The regulations prohibit discrimination on the basis of disability in employment under any service, program or activity conducted by a public entity.⁸⁵

Local government agencies, including cities, are prohibited from purchasing rapid transit equipment which is not accessible to individuals with disabilities.⁸⁶ If state law prescribes higher accessibility standards than federal law, state law requirements must be followed.⁸⁷

FIRST AMENDMENT ACCESS TO PUBLIC FACILITIES

The First Amendment precludes a local government from taking sides in any political or social debate or election by making public facilities available to only one side. Once a public forum has been established, free speech and equal protection principles prohibit discrimination based solely on content or subject matter.⁸⁸ Reasonable restrictions on the time, place and manner of the speech or other expressive activity (such as picketing, parading, art, performance, etc.) may be imposed so long as they are not content-based, provide adequate alternative means of reaching the intended audience and are “narrowly tailored” to protect a legitimate governmental interest, such as public safety, traffic circulation, etc.

The law related to speech, signs, art, performance, etc. on public property is very complex and requires professional analysis and advice. There are different sets of rules for different types of City property. If any questions in this area or any challenges to existing City policies are made by members of the public, the City Attorney’s Office should be contacted immediately and before any decision or action by City officials or employees.

⁸³ 42 U.S.C. §§ 12131 *et seq.*; see also 28 C.F.R. §§ 35.101 - 35.190.

⁸⁴ 42 U.S.C. § 12132.

⁸⁵ 28 C.F.R. § 35.140.

⁸⁶ Gov. Code § 4500(a).

⁸⁷ Gov. Code § 4500(b).

⁸⁸ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 315-316, 94 S. Ct. 2714 (1974).

THE CONSEQUENCES TO AN OFFICIAL OR A CITY OF BEING FOUND LIABLE FOR A CIVIL RIGHTS VIOLATION

If the City loses a civil rights lawsuit, it may be liable to the successful plaintiff for compensatory damages. Where the harm is continuing or will take place in the future, the court may issue an injunction and/or a declaration that the local governmental action, policy or decision violates the civil rights law. Money damages may also be awarded, including punitive damages in some cases.⁸⁹ Finally, plaintiffs are typically awarded attorneys' fees, often in very large amounts.⁹⁰

A public official or employee who is found liable for a civil rights violation is entitled to indemnification for compensatory damages.⁹¹ To receive indemnification, the official or employee must request indemnification in writing before trial, obtain the City's defense of the claim and reasonably cooperate in good faith in the defense of the action.⁹² Even where a conflict between the City and the official may arise, the City may be required to indemnify the employee or official subject to a written reservation of rights. However, where defense of the official would create "an actual and specific conflict of interest," then the City may refuse to provide a defense.⁹³ The City may even indemnify the official or employee for punitive damages, if the Council makes findings that it is in the best interests of the City to do so.⁹⁴ The findings may only be made after a judgment has been rendered in the case.

In addition to potential civil liability for a violation of civil rights, any evidence found through an illegal search is inadmissible in Court to prove to the crime alleged to have been committed. Often such an exclusion from evidence results in the dismissal of the underlying enforcement action or a reversal of any conviction obtained by the City officer's prosecution.

⁸⁹ *Martinez v. Procnier*, 354 F. Supp. 1092 (1973), aff'd 416 U.S. 396 (1974) (overruled on other grounds, as recognized in 802 F. Supp. 606 (1992)).

⁹⁰ 42 U.S.C. § 1988.

⁹¹ Gov. Code §§ 825 *et seq.*; *Williams v. Horvath*, 16 Cal. 3d 834, 843, 548 P. 2d 1125 (1976) (distinguished on other grounds 105 Cal. App. 3d 876 (1980)).

⁹² Gov. Code § 825(a). Public entities must defend employees and former employees in civil actions if the employee's act or omission was within the scope of his employment, the employee did not act with actual fraud, corruption or actual malice and the defense of the action would not create a specific conflict of interest between the entity and the employee. (Gov. Code §§ 995 and 995.2.) Special rules regarding indemnification of elected officials who tortiously interfere in a judicial proceeding, commit an intentional tort not directly related to the official's performance of official duties or violate specified Government Code and Penal Code sections relating to official misconduct are found in Government Code §§ 815.3, 825(f) and 825.6.

⁹³ Gov. Code § 995.2.

⁹⁴ Gov. Code § 825.

SECTION 7 – PROCUREMENT AND PUBLIC WORKS CONTRACTS

This section is intended as general legal guidance to assist in contracting for the procurement of goods and public works projects.

COMPETITIVE PROCUREMENT

PURCHASE OF GOODS

The Moreno Valley Municipal Code establishes rules and procedures for the procurement of supplies, materials and equipment. Competitive open market bidding is required for all such procurements above \$50,000. City Council approval is required to award a contract for goods exceeding \$100,000. The Code permits sole source contracts only in limited circumstances. The code also permits “piggyback” contracts in certain circumstances, where the City uses the results of a purchasing arrangement already completed by another governmental agency to receive a competitive price.

PUBLIC WORKS CONTRACTS

By state law, public works contracts must be awarded to the lowest responsible and responsive bidder. Public works include construction and renovation of buildings, roads, pipelines, power lines, parks, and related facilities and installation of major equipment and fixtures. It also includes painting, carpet installation and other forms of work sometimes thought to be maintenance. The Moreno Valley Municipal Code provides that all contracts for work on a public project shall be advertised, bid, and awarded in conformity with the Uniform Public Construction Cost Accounting Act, commencing with Government Code section 22000. City Council approval is required to award a public works contract exceeding \$100,000. The Council may reject all bids and either cancel the project or re-bid the project where circumstances indicate it is not in the City’s best interest to award a contract.

QUALIFICATIONS-BASED PROCUREMENT

Architectural, engineering, or other professional consultant services (“Professional Services”) are procured through a qualification-based selection. Professional Services contracts are awarded on the basis of a firm’s demonstrated competence and professional qualifications and fair and reasonable prices per section 4526 of the Government Code.

EXECUTION OF CONTRACTS; PERSONS AUTHORIZED; LIMITATIONS

According to state law and Moreno Valley Municipal Code section 3.12.025, the City is not bound by any contract unless the contract is in writing, approved by the City Council and signed on behalf of the City by the mayor or by such other officer or officers as shall be designated by the City Council and attested by the city clerk. The City Council (by ordinance or resolution) may authorize the city manager or other senior managers to bind the City. The City Council has delegated to the City Manager by resolution the power to execute and bind the City to contracts of \$100,000 or less. No person is legally entitled to enforce any “agreement” with the City that does not meet these requirements. The City cannot be required to honor any representation or promise of any City official or employee that does not comply with these requirements.

All contracts must be approved as to form by the City Attorney.

REDEVELOPMENT AGENCY CONTRACTS

Article 43.1 of the Local Agency Public Construction Act⁹⁵ sets forth the competitive bidding requirements for contracts awarded by redevelopment agencies. Section 20688.2 provides:

Any work of grading, clearing, demolition, or construction undertaken by the agency shall be done by contract after competitive bids if the cost of such work exceeds the amount specified in Section 20162 as that section presently exists or may be hereafter amended. With respect to work of grading, clearing, demolition, or construction which is not in excess of that amount, the agency may contract the work without competitive bids, and in contracting such work may give priority to the residents of such redevelopment project areas and to persons displaced from such areas as a result of redevelopment activities.

Public Contract Code Section 20162 sets the amount at \$5,000. Thus, work of grading, clearing, demolition, or construction undertaken by the Redevelopment Agency of the City of Moreno Valley (“Agency”) requires competitive bidding if the cost of such work exceeds \$5,000.

The authority to establish a redevelopment agency and the authority for the agency to function as a redevelopment agency is granted by the Community Redevelopment Law of the State of California.⁹⁶ Redevelopment agencies are, therefore, creations of the state and must abide by state law.

⁹⁵ Public Contract Code §§ 20688.1 - 20688.4.

⁹⁶ Health and Safety Code §§ 33000 *et seq.*

Community redevelopment is of statewide concern and preempted by the state legislature. Community Redevelopment Law specifically states that:

For these reasons it is declared to be a policy of the state:

. . . (c) That the redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are governmental functions of state concern in the interest of health, safety, and welfare of the people of the State and of the communities in which the areas exist.⁹⁷

Consistent with the state's intention to preempt the field in the area of redevelopment, the \$5,000 limit for redevelopment agency contracts as set forth in Public Contract Code Section 20688.2 is the controlling statutory limit.

⁹⁷ Health and Safety Code § 33037 (emphasis added).

SECTION 8 – CODE ENFORCEMENT

The City’s Code Compliance Division, a division of the Community Development Department, is primarily responsible for enforcing the Moreno Valley Municipal Code to maintain and improve the safety, cleanliness, and aesthetic attractiveness of Moreno Valley neighborhoods. The major code enforcement effort over the years has been driven by citizen complaints, with proactive project areas as determined from time to time. Although a majority of Municipal Code violation cases are investigated by the Code Compliance Division, cases may be initiated by any department including Police, Building and Safety, Fire Prevention, Public Works and Animal Services within their respective areas of authority.

CODE ENFORCEMENT AUTHORITY

Cities are granted a broad police power by the California Constitution which authorizes the City Council to enact laws to protect the local health, safety and welfare so long as those laws are not in conflict with state laws.⁹⁸

The Moreno Valley Municipal Code provides that it is unlawful to violate any provision of the code or any condition of any approval or permit issued pursuant to the code and that any such violation constitutes a misdemeanor.⁹⁹ The City Attorney has authority to prosecute cases as infractions rather than misdemeanors when appropriate. In addition the Municipal Code declares all conditions existing in violation of the code to be public nuisances.¹⁰⁰

ROLE OF THE CITY ATTORNEY

In general, City staff investigates reports of alleged violations and attempts to resolve matters with the property owner. The City is usually successful in obtaining compliance at the administrative level. However, there are a number of violations each year which are not quickly resolved and are referred to the City Attorney’s Office for resolution. While the City Attorney’s Office also tries to obtain voluntary compliance where appropriate, these cases may result in the institution of legal action to obtain compliance, including warrants for abatement, injunctions to restrict or prohibit certain actions, receiverships to place the property in the hands of a professional manager to renovate certain problem properties and/or criminal prosecution of the persons responsible.

The City Attorney’s Office has undertaken a number of Municipal Code revisions to aid in code enforcement. These have been for the purpose of streamlining the process, updating the Code to comply with state and federal law, and adding additional subject areas for enforcement.

The City Attorney’s Office also provides staff training and is available to provide advice and counsel to staff and to Council members concerned about code enforcement issues.

⁹⁸ Cal. Const. art XI, §7.

⁹⁹ MVMC §1.01.200(A).

¹⁰⁰ MVMC §1.01.250(A).

PROSECUTORIAL DISCRETION

Once a matter is referred to the City Attorney's Office, its character changes. In the City of Moreno Valley, the City Attorney is the prosecutor for all violations of city ordinances¹⁰¹ and the Riverside County District Attorney is the prosecutor for all state offenses (except where the City Attorney has been designated specific authority). By operation of State law, when functioning as a prosecutor, the City Attorney no longer represents the City of Moreno Valley, but the People of the State of California. As such, the prosecutor of a criminal case must remain independent of the governing body of the jurisdiction in the prosecution of any offense. The City Attorney, while acting as prosecutor, cannot take direction on the handling of the case from any other person, employee or Council Member. The City Council has no authority to access case files, determine if a criminal case should or should not be filed, or decide the terms on which a criminal case will be resolved short of trial or otherwise direct prosecutorial decisions. As a courtesy, the City Attorney endeavors to keep the Council informed where cases are likely to receive publicity or cause public concern, but the Council is not briefed on the details of prosecutions or asked for direction. This preserves the City Attorney's independence as a prosecutor and protects the Council from accusations of ticket fixing or other inappropriate involvement with enforcement matters.

State law provides that a local prosecutor has broad discretion in charging and managing criminal cases.¹⁰² The prosecutor can choose which charges to file or not to file at all; to set up an office conference or reach a civil compromise; to file as a misdemeanor or an infraction; and to negotiate and execute a plea bargain. The City Attorney also has the discretion to reduce or waive fines, including civil citations, as part of a settlement.¹⁰³

As a body, the Council can decide to repeal or modify existing laws, budget enforcement resources, etc.; however, even if the Council changes the law alleged to be violated in a particular case, the prosecutor retains the sole discretion to either dismiss or amend the charges in light of the legislative action, or prosecute under the law applicable at the time of the criminal act.

TYPES OF CODE ENFORCEMENT CASES

Code Enforcement Cases can originate from several different sources, and involve many different factual issues and various codes. Any violation of the Municipal Code or any state law adopted by the Municipal Code or any condition of any permit or approval required by the Municipal Code is a potential code enforcement case. Once the violation is investigated by the proper department and attempts at voluntary compliance have failed, these cases may be referred to the City Attorney's Office for further enforcement. The following list is just a sampling of the most common types of code enforcement cases.

STATE LAWS

Some state laws provide that the City shall be the enforcement agency and authorize the City to prosecute violations of such laws. Examples of these include the abatement of

¹⁰¹ MVMC §2.16.010.

¹⁰² Cal. Govt. Code §26500-26501.

¹⁰³ MVMC §6.04.120(H).

drug¹⁰⁴ or prostitution¹⁰⁵ houses; state housing laws¹⁰⁶; or certain unfair competition or deceptive business practices¹⁰⁷.

PROPERTY MAINTENANCE

Typically enforced by the Code Compliance Division, these violations include landscaping, accumulations of junk, trash or debris, faulty weather protection and other property maintenance related offenses prohibited by the Municipal Code.¹⁰⁸

BUILDINGS AND STRUCTURES

Whether hazardous or simply unpermitted, these offenses are generally investigated by the Building and Safety Division. Cases include illegal patio covers and room additions or hazardous or unpermitted electrical, plumbing or remodeling.¹⁰⁹

PUBLIC WORKS/LAND DEVELOPMENT

These cases typically involve illegal grading or storm water system violations and are typically investigated by the Public Works Department.

PLANNING/ZONING

When individuals are engaging in a use of land that is either prohibited or contrary to permits or approvals issued for the use, the Planning Division may investigate and initiate a case. Examples include businesses operating illegally in a residential zone or businesses that have expanded their use beyond their current approvals or permits.

FIRE

Violations of local fire prevention ordinances and the state fire code may be investigated by the Fire Prevention Division. Cases may include occupancy violations, locked doors, dry or dead vegetation, and obstructing required fire lanes.

ANIMAL CONTROL

The Animal Services Division investigates cases involving animals and may initiate cases for violations ranging from dogs at large to animal cruelty.

POLICE

The Police Department may investigate violations of the municipal code that are more transitory in nature, such as trespass, drinking in public, illegal vending, illegal dumping or off-road vehicle riding. These cases are generally handled by both the Police Department and the City's Code Compliance Division.

¹⁰⁴ Cal. Health & Safety Code §11570 et seq.

¹⁰⁵ Cal. Penal Code §11225 et seq.

¹⁰⁶ Cal. Health & Safety Code §17920.3.

¹⁰⁷ Cal. Bus. Prof. Code §17200 et seq.

¹⁰⁸ MVMC §6.04.040.

¹⁰⁹ MVMC 6.04.040(A).

BUSINESS LICENSE

The Business License Division investigates violations of the Municipal Code related to failure to obtain a business license, to file the required returns or fraud in reporting and payment of business license taxes. The Business License Division may also be involved in investigating highly regulated businesses such as massage parlors, street vendors, or taxis.

INVESTIGATIONS

INITIAL COMPLAINT

Most code enforcement investigations are reactive, rather than proactive. That is, most cases begin with the filing of a complaint by a member of the public. This complaint may be anonymous. Some targeted enforcement is proactive, such as the City's foreclosure team targeting abandoned or vacant houses, or illegal vendor sweeps. Cases may also be initiated by inspectors noticing a violation while on a property for a different reason. However, a majority of all code enforcement cases are initiated through the complaint process.

IDENTIFICATION OF RESPONSIBLE PERSONS

Before any notices, citations or orders can be issued, the person responsible for the violation must be identified. For certain offenses, like illegal dumping or drinking in public, this is as simple as obtaining identification from the individual. When the offenses are property related, however, additional research is required.

The Municipal Code defines a 'Responsible Person' as "the owner of record of real property, any occupant, agent, custodian, lessee, manager, user or interested holder in property or premises, including, but not limited to, a trustee or beneficiary who holds a deed of trust to abandoned property; or any other person determined to have caused, committed, or permitted a violation of this code, or any other law, statute, regulation or rule regulating public nuisances."¹¹⁰

The enforcement official must determine any and all such responsible parties and attempt to make contact and send notice to each person or entity. In a foreclosure scenario, a bank or other institution becomes a 'responsible party' when they have begun the foreclosure process by issuing a Notice of Default and/or Notice of Trustee's sale and the owners have vacated the property. A financial institution need not complete the foreclosure and take possession to become a responsible party.

SEARCHES AND INSPECTION WARRANTS

Once a complaint has been received, enforcement officers will investigate the allegation by visiting the subject property. If the violations are visible from the public right-of-way, they will take photos of the violation. If, however, the violations are not readily visible, enforcement officers will need to get consent from the property owner or tenant to enter the

¹¹⁰ MVMC §6.04.020.

property. This consent is often given voluntarily. When consent is refused, the enforcement officer, with the assistance of the City Attorney's Office, prepares an administrative inspection warrant¹¹¹ which is then served on the property owner. This warrant is similar to a search warrant and authorizes officials to enter private property to inspect for regulatory violations.

In order to obtain an inspection warrant the enforcement officer prepares a declaration of probable cause describing the facts known to the officer that lead them to believe that a violation of local building, health or safety laws exists on the property. An inspection warrant application must also set forth that an attempt was made to get consent to inspect and that consent was withheld.¹¹² If the judge feels that there is probable cause to inspect the property, a warrant will issue setting forth the areas that may be inspected and that the inspection must occur between 8:00 am and 6:00 pm.¹¹³ The property is posted with the warrant typically 48 hours in advance of the actual inspection. Inspection warrants are valid for fourteen (14) days from the date signed by the judge.¹¹⁴ Due to the lack of consent, it is customary for enforcement officials to be accompanied by sworn police officers when serving and executing a warrant. After completing the inspection, enforcement officers prepare a report, called a Return on Warrant describing their findings. This return must be filed with the court.

STRICT LIABILITY

Many crimes involve both a prohibited act and criminal intent to commit the act.¹¹⁵ However, in the code enforcement context, most violations do not depend on criminal intent. It is irrelevant if the responsible party had any intent to violate the City's codes. This is particularly true when it comes to violations related to conditions on real property. This is known as "strict liability". Therefore, property owners do not escape liability for the conditions of their property because they were unaware of the unlawful condition, or because they cannot afford to remediate a substandard condition or because they never meant to break the law. However, except in egregious cases or special circumstances, the City Attorney's office by prosecutorial discretion does not criminally prosecute a property owner who accepts responsibility for the violations and cooperates in correcting them.

NOTICE OF VIOLATION

After a violation has been confirmed, enforcement officers issue a Notice of Violation, detailing the code section being violated, a course of correction and a time period for correction. These Notices may be personally delivered to the property owner but are more commonly mailed to the address recorded on the property deed where tax statements are to be mailed and posted on the subject property.¹¹⁶ Although the Notice of Violation is a requirement before any city abatement [direct physical action to eliminate the condition

¹¹¹ Cal. Civ. Proc. Code §1822.50 et seq.

¹¹² Cal. Civ. Proc. Code §1822.51.

¹¹³ Cal. Civ. Proc. Code §1822.56.

¹¹⁴ Cal. Civ. Proc. Code §1822.55.

¹¹⁵ Cal. Penal Code §20.

¹¹⁶ MVMC §6.04.080(C).

causing the nuisance or code violation] can occur, it is not required before issuing a civil citation or filing of a civil action or criminal complaint.¹¹⁷

STOP WORK ORDER

Whenever unpermitted or hazardous construction is found, the Building Official or City Engineer can issue a Stop Work Order preventing any additional work from being done until approved and permitted by the Department of Building and Safety. A violation of a Stop Work Order is a misdemeanor and contractors or homeowners can be arrested or cited immediately upon commencing work after such an Order has been issued. This helps stop illegal work in progress and makes it easier to get the property back on course before additional work is completed.

OFFICER NOTES AND REPORT

Enforcement Officers are encouraged to take notes of inspections and to place those notes into the City's code and permit tracking system. Photos should be taken of all violations and those photos retained and date stamped. Photos should include wide shots of the property as a whole, as well as close up shots of any alleged violations. If the case needs to be referred to the City Attorney's Office for further enforcement action, these notes and photos are used to help the officer write a City Attorney Case Referral Report, which is used as the basis for any future court action.

CITY ATTORNEY REFERRAL

When an enforcement officer is unable to gain voluntary compliance through notices or administrative citations, the case may be referred to the City Attorney's Office. At that point, the officer must gather all photographic evidence and write a report detailing the dates of inspection and the officer's observations along with a listing of the relevant Municipal Code Sections being violated. If a violation is particularly egregious or a property has been the subject of repeat violations, the Enforcement Officer may, if properly trained¹¹⁸, issue a misdemeanor notice to appear in court at any point in the investigation. This citation is then sent to the City Attorney's office for processing.

The City Attorney's Office reviews cases and citations which have been referred by Enforcement Officers and determines what the most effective and appropriate action would be for that particular matter. Some cases may need immediate filing in criminal court, where others may be resolved through a simple office conference. The City Attorney retains discretion on handling those matters but continues to work with the Enforcement Officer for follow-up inspections or courtroom testimony.

¹¹⁷ MVMC §6.04.080(E).

¹¹⁸ Cal. Penal Code §836.5.

PUBLIC RECORDS ACT

In Moreno Valley, Code Enforcement cases may begin administratively but when compliance is not achieved, the City Attorney routinely files criminal charges against violators. For this reason, code enforcement investigations are like police investigations in that they are criminal investigatory files. Such files are exempt from disclosure under the Public Records Act. Accordingly, investigatory files are not available to the public or Council Members while the investigation is pending. Note, however, that once the case is closed the files become public records. Likewise, once a case is filed in court, those documents are also available to the public.

CODE ENFORCEMENT ALTERNATIVES

ADMINISTRATIVE ENFORCEMENT

The first step in most code compliance cases is an attempt to gain voluntary compliance through administrative means. In Moreno Valley, this includes a warning notice and/or Notice of Violation letter issued to the violator and a time period to correct before additional remedies are sought. Although this warning notice is not legally required for all remedial actions, some legal remedies do require that proper notice first be given. Accordingly, we encourage City staff to issue warning notices and Notices of Violation on most code violation cases to ensure that the City has the widest selection of alternative enforcement options. If attempts to gain voluntary compliance are unsuccessful, the investigating department may issue civil citations.

LIENS

When a code violation is related to a particular parcel of real property, it is common for the City to record an informational lien known as a “Notice of Substandard Property.” This lien places all future purchasers or lenders of the property on notice that the parcel is in violation of the Municipal Code. In order to complete the transfer or refinance of the property, this lien will need to be removed. The lien may be removed when the property owner pays all outstanding fines and fees and has remediated the code violations on the property or, alternatively, the lien may be removed upon the execution of a Nuisance Abatement Agreement by the prospective purchasers and the payment of all fines and fees through escrow.

CIVIL CITATIONS

Chapter 1.10 of the MVMC authorizes the issuance of civil citations by an enforcement officer to any person violating a provision of the code.¹¹⁹ These citations are similar to a traffic ticket in that the failure to pay results in civil collection efforts. Civil Citations are issued in escalating amounts, the first violation being \$100.00, the second \$200.00 and the third \$500.00. Failure to pay the citation within thirty (30) days also results in a penalty

¹¹⁹ MVMC §1.10.020(A).

equal to 100% of the base fine amount.¹²⁰ If citations remain unpaid they may be collected through court proceedings or through collection on lien releases.

Any person issued a civil citation may appeal that citation by depositing the fine amount and requesting a hearing in writing within thirty (30) days of issuance of the citation.¹²¹ In such an event, a hearing is conducted by a neutral hearing officer to either uphold or cancel the citation.

MISDEMEANOR CITATIONS

If administrative attempts at compliance fail or the violations are severe or recurring in nature, an individual may be issued a misdemeanor citation or a Notice to Appear in court to answer to a misdemeanor complaint. Misdemeanor charges carry a maximum penalty of \$1000.00 per charge and/or up to six months in jail.¹²² Individuals charged with misdemeanor offenses are entitled to a public defender if they cannot afford an attorney as well as a trial by a jury of their peers.

Misdemeanor charges are particularly effective and efficient in gaining code compliance. The criminal court process is much swifter than the civil court process. Typically, the costs of correcting a violation are less than the cost of hiring an attorney to defend the case. The City Attorney's Office frequently offers to dismiss the charges upon correction of the violation (if correctable) and payment of any outstanding fines and/or fees. The result in 99% of misdemeanor cases is voluntary compliance and a dismissal of the complaint by the second or third court appearance.

The misdemeanor process begins with the filing of a complaint and the setting of a hearing date for the defendant to enter a plea. This first appearance is known as the arraignment. The defendant is entitled to have a trial within 45 days of their arraignment, unless they waive that right. In a typical code enforcement prosecution, there may be two or three additional hearings, known as trial readiness conferences or pretrials to determine if the defendant has met all the City's requirements and paid all fines and fees. For those misdemeanor defendants that do not voluntarily comply with City codes, a trial date is set. Upon conviction, the City Attorney seeks fines, restitution (to collect all the City's costs of enforcement) and a term of probation. Probation is a term of court supervision accepted by the defendant in lieu of jail time. In code violation cases, that term is typically three (3) years and includes orders to correct any outstanding violations within agreed upon time periods. Failure to obey court orders of probation could result in actual jail time for the defendant.

INFRACTION CITATIONS

Although all violations of the Municipal Code constitute misdemeanors, there is discretion allowing for those charges to be reduced by the City Attorney to an infraction in the interest

¹²⁰ MVMC §1.10.080(C).

¹²¹ MVMC §1.10.140.

¹²² MVMC §1.01.230(A).

of justice.¹²³ Infraction citations carry a maximum penalty of \$500¹²⁴ and cannot result in jail time. Individuals charged with infractions may challenge these citations in traffic court and are not entitled to a public defender or a jury trial. Infraction reductions are particularly suited to those violations that are transitory in nature and not recurring such as trespass, drinking in public, animals at large, illegal vending, or illegal dumping.

ABATEMENT

For certain property-related offenses, abatement is an effective tool. The Municipal Code authorizes the abatement, or removal, of a public nuisance condition when certain procedures are followed.¹²⁵ In order to perform an abatement, proper notice of the nuisance condition must be given to the property owner.¹²⁶ The property owner then has a right to an appeal hearing on whether or not the condition on their property constitutes a public nuisance as defined by the code.¹²⁷ If the owner has failed to correct the violation pursuant to the Notice and has not been successful on appeal, if appealed, the City may enter the property, with either consent or a warrant, and remove the nuisance condition at City expense.¹²⁸

Abatement is obviously a very effective tool in that it provides for a speedy resolution to the nuisance condition on the property. The City frequently uses abatement to remove hazardous weed growth from vacant parcels, or to demolish dangerous or illegal structures. Although the City pays for the contractors and expenses involved in abatement, the Code authorizes the City to recover all costs and expenses of the abatement from the responsible party by placing a lien on the property and a special assessment on the tax roles for the parcel.¹²⁹ Abatement is, however, limited to budgeted and available funds for abatement during the fiscal year.

CIVIL INJUNCTION

California statutes¹³⁰ and case law¹³¹ provide that violations of local ordinances may be enforced by a civil injunction, or court order, requiring the abatement of the nuisance condition. This process includes the filing of a petition in civil court and a series of hearings. If the City is successful in proving to the court that a nuisance condition exists, the court may issue an injunction ordering the property owner to take remedial action within a specified time period or prohibiting the individual from engaging in unlawful conduct. Individuals violating a court order are subject to contempt proceedings subjecting them to fines of up to \$1,000.00 and/or up to six months in jail.¹³²

¹²³ MVMC § 1.01.200(D).

¹²⁴ MCMV §1.01.230(B).

¹²⁵ MVMC §6.04.050.

¹²⁶ MVMC §6.04.080.

¹²⁷ MVMC §6.04.090.

¹²⁸ MVMC §6.04.100.

¹²⁹ MVMC §6.04.120.

¹³⁰ Cal. Code Civ. Proc. §731.

¹³¹ See, e.g. *City of Stockton v. Frisbie & Latta*, 93 Cal. App. 277, 289-90.

¹³² Cal. Penal Code §166(a)(4) for criminal contempt; Cal. Civ. Proc. Code §1218 for civil contempt.

The ultimate punishment of an individual violating a civil injunction or a misdemeanor probation order is the same. However, the civil injunction process requires a great deal more time and expense to litigate, resulting in higher cost assessments against the violator. Because the criminal system is much more efficient for handling multiple cases, results in quicker compliance, and results in lower expenses to the City, and lower restitution costs to the defendant, civil injunction cases are rarely filed in the City of Moreno Valley.

RECEIVERSHIP

Complex cases involving properties requiring extreme rehabilitation where the responsible parties are unable or unwilling to correct the problems themselves or where the property owner is unknown, are candidates for receivership.¹³³ In a receivership case, the City files a petition with the court requesting that a trustee be appointed to take over the property. Once granted, the receiver is empowered to rehabilitate the property in accordance with the court's instructions and is granted the power to borrow against the property to pay contractors. Once the rehabilitation is complete, the property owner either pays the costs of rehabilitation, including attorney fees and receiver fees, or the property is sold at auction to pay off all costs.

Receivership petitions require a significant amount of attorney time to file and monitor; however, they do typically result in significant rehabilitation of problem properties. Because the contractors, attorneys and the receiver must be compensated for their efforts, the end result is almost always the sale of the property. For this reason, receiverships are only used on the most difficult code enforcement cases.

COST RECOVERY

Whenever a person creates, causes, commits or maintains a public nuisance in the City of Moreno Valley, and fails to correct the condition, that person is responsible for all costs and expenses incurred by the City.¹³⁴ Costs include direct costs of abatement, salaries and benefits, operational overhead, rent, interest, fees for experts or consultants, research fees, legal costs or expenses or costs of collection.¹³⁵ Furthermore, the City is entitled to its reasonable attorneys fees in any action in any court, including criminal, where the City is the prevailing party.¹³⁶

Costs and expenses may be recovered by recording a lien on the property and collected at the time of sale or refinance. This method is ineffective in a declining market where the City's lien priority is subservient to 1st and 2nd mortgages. Therefore, costs are routinely collected when the City places a special assessment on the County tax rolls for the parcel and collects the unpaid amount when taxes are collected.¹³⁷ This method is preferred since it becomes a higher priority during time of sale. Finally, the City could collect by filing a civil court case for the unpaid amounts due and

¹³³ Cal. Health & Safety Code §17980 et seq.

¹³⁴ MVMC §6.04.120(A).

¹³⁵ MVMC §6.04.120 (B).

¹³⁶ MVMC §6.04.120 (C).

¹³⁷ MVMC §6.04.120(E).

owing to the City as a debt.¹³⁸

¹³⁸ MVMC §6.04.120(I).

SECTION 9 – REDEVELOPMENT AGENCY LAW

This section describes the general powers of any California redevelopment agency, describes the City of Moreno Valley Redevelopment Agency (“Agency”), describes the redevelopment plan adoption process, and some basic redevelopment activities, such as selecting developers, assisting private and public redevelopment projects, acquiring and disposing property, financing redevelopment, and meeting low and moderate-income housing responsibilities.

AGENCY INCOME AND FINANCING (DEBT)

TAX INCREMENT

The Agency’s primary source of income and primary financing tools is called “tax increment.” Tax increment is the increased property tax revenue generated by increases in property values within a Redevelopment Project Area.

Conditions To Receiving Tax Increment

For the Agency to receive tax increment from a Project Area, the redevelopment plan must specifically provide for tax increment financing and the Agency must incur debt. The Agency incurs debt by borrowing money or committing funding to development or redevelopment projects within the Project Area. This can occur by issuing bonds, accepting advances, entering into various types of agreements with business or property owners, letting public works contracts and/or incurring other debt to carry out the redevelopment plan.

Spending Tax Increment

The Agency must expend tax increment for redevelopment purposes that primarily benefit the Project Area. The Agency may not use tax increment to pay for employee or contractual services of any local governmental agency, unless these services directly relate to redevelopment purposes.

Housing Set-Aside Funds

The Agency is required to “set aside” 20% of its tax increment revenue for projects that increase, enhance and/or preserve housing affordable to persons of low and moderate family income. These funds may be spent only for these purposes. Under SB 211 effective January 2002, the percentage went up to 30 percent for any plan, adopted before December 31, 1993, if the Agency amends the plan to expand the plan’s effect or to extend the time to receive tax increment and pay debt.

ASSESSMENT OR COMMUNITY FACILITIES DISTRICTS

Notwithstanding the Agency’s power to help with public improvements, it may not form an assessment district or community facilities district to provide infrastructure. The Agency may agree to help pay the special taxes levied against benefited private lands and

developments under an agreement with property owners or developers. For the Agency to pay or reimburse special taxes, it must follow the same procedures that apply to public improvements, and the expenditure is subject to the same limitations.

BOND FINANCING

The Agency may sell bonds, such as tax allocation bonds, secured by the pledge of net tax increment (net of certain obligations such as Housing Set-Aside, and the County's tax administration fees). The Agency may finance activities through lease revenue bonds or certificates of participation where the lease payments from the City or the Agency equal or pay the debt service.

OTHER

Other sources of redevelopment financing may include, without limitation, borrowing from lenders and developers, developer advances, land sale proceeds, and loans from the City or other public resources.

GENERAL POWERS OF A REDEVELOPMENT AGENCY

REDEVELOPMENT AGENCY IS A STATE AGENCY

A redevelopment agency is a creature of statute - a state agency exercising local governmental functions. It is a legal entity distinct from its sponsoring community, having its own assets, income, and obligations. Its authority and powers are derived from the California Community Redevelopment Law (the "CRL").¹³⁹ Its jurisdictional boundaries are the same as its sponsoring community.

An agency must account to the local legislative body and to the state, and is subject to many of the same laws and regulations as other public entities. It must prepare an annual financial report, present it to the local legislative body, and file the report with the State Controller that describes the agency's financial condition and a summary of its activities during the prior year, including its use of Housing Set-Aside Funds.

Agency activities are subject to many of the same laws and regulations that apply to other public entity activities. An agency is also subject to local laws and regulations that may be unique to the sponsoring community. An agency must present its proposed activities and transactions to certain reviewing bodies for recommendation, approval, or adoption. Reviewing bodies include the agency's governing body, the local legislative body, project area committees ("PACs"), and the planning commission.

POWERS

An agency has general corporate or business powers, powers to assist public and private

¹³⁹ Health and Safety Code §§ 33000 - 34160, and related statutes.

redevelopment projects, and broad powers for increasing, improving, and preserving low and moderate income housing.

An agency may appoint officers, acquire, sell, and lease property to private parties, contract for public works projects in a redevelopment project area, prepare redevelopment sites, rehabilitate property, manage acquired property until it disposes of it for redevelopment, and review development actions for consistency with redevelopment plans. It is obligated to use Housing Set-Aside Funds to increase, improve, and preserve the community supply of low and moderate income housing.

PROJECT AREAS

The primary objective of redevelopment agencies is to eliminate blight. An agency generally carries out its powers within the geographical confines of survey areas covered by redevelopment plans (“Project Areas”) that the local legislative body adopts by ordinance. Project Areas must be in urbanized areas and be blighted, as that term is defined in the CRL. Agency activities outside Project Areas primarily relate to low and moderate income housing and to public improvements that benefit the project area.

THE CITY OF MORENO VALLEY REDEVELOPMENT AGENCY

CITY COUNCIL IS GOVERNING BOARD

An agency’s governing board may be a separate agency, the sponsoring community’s legislative body, or a separate community development commission. For the Agency, the Council serves as the governing board. All matters of business associated with or required for administering a redevelopment project, or which are within the Agency’s powers, require final Agency board action.

In addition to state law, the Agency is governed by its bylaws, City ordinances, Council resolutions and ordinances, and administrative orders that do not conflict with the CRL. The CRL is the primary body of law governing the Agency. The Agency is also subject to local law, regulations, and rules that are consistent with the CRL. Bylaws, adopted by the Agency Board, require the Agency to conduct all its business according to the rules and regulations that govern City business, whether in the Moreno Valley Municipal Code, in Council resolutions, or other applicable law.

SEPARATE BUDGET

The Agency prepares an annual budget that the Agency Board reviews and adopts. This budget is separate from the City budget.

ADOPTING REDEVELOPMENT PLANS

REDEVELOPMENT PLAN ADOPTION

The CRL establishes a process for adopting redevelopment plans. The Council initiates the process by resolution and ultimately adopts the ordinance approving a redevelopment plan. The primary focus is blight elimination. The initial process includes the following:

- Designating a survey area for a feasibility study.
- A feasibility study that focuses on blighted conditions within the survey area boundaries, potential land uses, market demand, and financial feasibility.
- Determining blight - the survey area must have physical and economic blighting conditions, and be predominantly urbanized.
 - Physical blight includes unsafe buildings, adjacent incompatible uses, and subdivided lots of irregular shape and inadequate size.
 - Economic blight includes depreciated or stagnant property, abnormally high business vacancies, a lack of necessary commercial facilities, residential overcrowding, and a high crime rate.
 - “Predominantly urbanized,” means that at least 80 percent of the land in the survey area, must either be developed or have been developed for urban uses, or be an integral part of one or more areas developed for urban uses and surrounded or substantially surrounded by land that has been developed for urban uses.

STAKEHOLDER PARTICIPATION

If a feasibility study determines that a redevelopment project area is feasible, the Planning Commission designates the survey area, the Agency and Planning Commission prepare a preliminary plan that the Agency Board accepts, and a lengthy review and comment review period begins, that includes the following:

- The Agency notifies affected taxing agencies, and the State Board of Equalization of its intent to adopt a redevelopment plan.
- The County’s fiscal officer and the State Board of Equalization prepare a report to the Agency on the assessed valuation of taxable property within the proposed project area.

- The Agency prepares a preliminary report to all affected taxing agencies, identifying the blighting conditions, the scope and purpose of the redevelopment plan, and how the Agency will alleviate the blighting conditions.
- A PAC may be required.
 - *If* the proposed plan gives the Agency eminent domain authority applicable to property on which anyone resides, and a substantial number of low or moderate income persons live within the project area, a PAC is required.
 - *If* the proposed plan contains one or more public projects that will displace a substantial number of low or moderate income persons, a PAC is required.
- If a PAC is required, the Council calls on the residents, tenants, and existing community organizations in the proposed project area to form a PAC, and establishes procedures governing PAC formation and member selection.
- [NOTE: Moreno Valley is currently under a court order that requires its PAC to remain in existence for the life of the Project Area, even though state law permits the PAC to be dissolved earlier in the life of the Plan.]
- The Planning Commission reviews the plan and submits a report and recommendation to the Council.

PUBLIC HEARING PROCESS

After receiving the reports and recommendations of the reviewing bodies, the Agency Board and Council consider the plan at a noticed joint public hearing,¹⁴⁰ and the Council adopts the approving ordinance. The process includes the following:

- At the hearing, the Agency presents a report to Council that includes, among other things, an environmental impact report, and a five-year implementation plan showing how the Agency intends to carry out the redevelopment plan. The report explains why private enterprise acting alone or the Council, using financing other than tax increment, cannot reasonably be expected to accomplish redevelopment in the project area and eliminate blight.
- If affected property owners or taxing entities submit written objections, the Council must address the objections in detail and give reasons for not accepting the objections.

¹⁴⁰ In addition to noticing the hearing, if any property in the project area would be subject to acquisition whether by purchase or condemnation, the Agency must send a statement to that effect to each property owner with the notice of hearing. The Agency may attach a list or map of the properties that will be subject to acquisition or condemnation under the plan.

- Council adopts the approving ordinance by a majority vote, unless the Planning Commission or the PAC recommends against approval, then adoption requires a two-thirds vote of the entire Council.
- After adoption, the City Clerk sends a copy of the ordinance to the Agency, and records notice of the adopted plan, with a legal description of the Project Area, in the Official Records of Riverside County.¹⁴¹

After plan adoption, and using substantially the same process, the Council and Agency may amend the redevelopment plan and, for financial purposes, may merge the redevelopment Project Area with one or more other redevelopment Project Areas. The Agency is charged with carrying out the adopted plan.

IMPLEMENTING THE REDEVELOPMENT PLAN

OWNER/TENANT PARTICIPATION

Property owners may participate in redevelopment (“owner participation”) within the Project Area. The Agency must extend reasonable preferences to displaced businesses who wish to reenter business within the Project Area. Participation and preferences are governed by Agency-adopted owner participation and preference rules that define participants, methods of participating, limitations on participation, factors given priority in considering participation, and the procedure for submitting participation proposals.

PROPERTY ACQUISITION

Voluntary Acquisition

The Agency may acquire property within a Project Area by any voluntary means, such as negotiated purchase, gift, or bequest. If the Council approves the action, the Agency may begin acquiring property after the Planning Commission formulates the preliminary plan and before the Council adopts the redevelopment plan. All property acquisitions must be for redevelopment purposes.

In negotiated purchases, the Agency usually appraises the property first, and offers to purchase the property at fair market value (not less than the appraised value). If an owner offers to sell property to the Agency for a price, even a price less than fair market value, the Agency may acquire the property at the offered price. An appraisal is still beneficial to ascertain that the Agency is not paying too much for the property and therefore making a gift of, or wasting, public funds. The Agency

¹⁴¹ This puts all property owners within the project area on record notice of the plan.

may not acquire property from its members or officers, unless the acquisition is by eminent domain.

Eminent Domain (Condemnation)

The Agency may acquire property by eminent domain (condemnation) if the adopted redevelopment plan provides for eminent domain. Moreno Valley's adopted redevelopment plan does not provide for eminent domain, and therefore the Agency may not acquire property by condemnation. However, in common practice, a plan will limit any eminent domain authority to a 12-year period that may be extended by a plan amendment. In exercising its eminent domain powers, the Agency must strictly comply with the California Eminent Domain Law¹⁴² and the CRL. Its eminent domain powers may be restricted by the redevelopment plan.

The Agency, like the City, must take care when exercising eminent domain powers to avoid inverse condemnation charges. It may not take unreasonable action that diminishes property value before condemnation. In certain circumstances where the Agency has condemnation powers, it may be subject to inverse condemnation charges for failing to timely respond to an owner's offer to sell his/her property to the Agency for fair market value.

RELOCATION

When the Agency displaces persons or businesses it generally must provide state mandated relocation assistance and pay relocation benefits to persons displaced from the property.¹⁴³ This can occur when the Agency acquires occupied property, transfers occupied property to a developer, or subsidizes a project on occupied property by agreement with a developer, or in some cases where it uses City code enforcement or nuisance abatement powers to displace occupants. By agreement, however, the Agency may require the developer to reimburse the Agency for relocation payments.

State regulations generally require the Agency to prepare a relocation plan specific to the project soon after the Agency initiates negotiations to acquire property and before proceeding with any phase of a project that will displace persons. The relocation plan determines the needs of the persons being displaced and the available replacement housing. It projects the dates that persons will be displaced, and estimates the Agency's costs for providing relocation assistance and payments.

¹⁴² California Code of Civil Procedure §§ 1230.010 *et seq.*

¹⁴³ Gov. Code §§ 7260 *et seq.* and California Health & Safety Code § 33415. If the project involves any federal money, then the Agency must also comply with federal relocation assistance and payment requirements.

REPLACEMENT HOUSING PLAN

When a project will cause removal of low and moderate income housing from the market, the Agency must also adopt a replacement housing plan. The plan must include the general location of replacement housing, show how the housing will be financed, contain a finding that the replacement housing does not require voter approval under State Constitution Article XXXIV, state the number of replacement dwelling units planned, and provide the time table for carrying out the plan.

PROPERTY DISPOSITION

Generally, Agency disposal of acquired property must be for redevelopment purposes. Disposition may include selecting a developer or an owner participant, entering an exclusive negotiations agreement, entering an owner participation or a disposition and development agreement, and obtaining Council and/or Agency Board approval of the transaction. Approval may include hearings, reports,¹⁴⁴ resolutions, and findings. The Agency may dispose of property for less than its acquisition costs, and for less than fair market value. If it does, it must justify the land write-down.¹⁴⁵ When the Agency sells or leases property it must also obligate the purchaser or lessee to comply with nondiscrimination laws and limitations or restrictions of the CRL.

Selecting A Developer

The Agency need not use a competitive process to select a developer or owner participant. The Agency may negotiate with a single developer, or may send out requests for qualifications or requests for proposal. The Agency may choose to use a master developer or to use multiple developers.

If a project requires land assembly, the Agency must comply with its owner participation and business preference rules. Failure to comply with these rules can have serious legal consequences.

Agreements With Developers

The agreement between the developer and the Agency for a project will depend on the circumstances, the developer, and the project. Before the Agency Board and/or

¹⁴⁴ For example, see Health & Safety Code § 33433. To sell or lease property for development that the Agency acquired directly or indirectly with tax increment, the Agency must prepare a report, and make the report and the proposed agreement with the developer available for public review under § 33433. The Council considers the agreement and the property disposition at a noticed public hearing and must make certain findings, including that the consideration for the property is not less than the fair reuse value of the property, considering the use, the covenants, conditions, and criteria imposed under the agreement. Agency controls that affect property value may include imposing a specific use, limitations on design, a requirement that the project be begun and completed within a specific time, or other limitations or affirmative acts specific to the project.

¹⁴⁵ Land write-down can be viewed as an indirect use of public monies, triggering prevailing wage requirements.

Council approve it, the agreement may be subject to review by the PAC, other community organizations, and to other public review, noticed hearings,¹⁴⁶ reports, findings, and compliance with CEQA.

If the Agency sells or leases property, the agreement must obligate the purchaser or lessee to comply with nondiscrimination laws and must contain limitations or restrictions set forth in the CRL. Developer-Agency agreements may include the following:

- Exclusive negotiations agreement. Used to identify benchmarks, requirements, and conditions that each party must meet, establishes time lines, permits terminating negotiations upon certain performance failures, and may require the developer to put up a good faith deposit.
- Disposition and development agreement. Used when the Agency will acquire and/or transfer property to the developer. It defines the developer's obligations to construct a project, and the time within which the developer must complete the project.
- Owner participation agreement. Used when the developer is a property owner, agreeing to improve or develop the owner's property.
- A development lease. Usually long-term agreements where the Agency leases improved property for substantial rehabilitation, or leases vacant property for development.

¹⁴⁶ For instance, if the Agency is agreeing to dispose of property it acquired directly or indirectly with tax increment, it must comply with Health & Safety Code § 33433, including preparing a special report, and present evidence to Council on which it will make certain findings

Agency Assistance¹⁴⁷

The Agency may assist private and public developers in a variety of ways,¹⁴⁸ including site assembly, land write-down, site preparation, relocation, demolition, off-site public improvements,¹⁴⁹ shared use facilities, public financing, commercial rehabilitation loans, industrial/manufacturing equipment loans, and cleaning up contaminated property.¹⁵⁰

PUBLIC IMPROVEMENTS¹⁵¹ AND OTHER ASSISTANCE

The Agency may assist or provide public improvements and other improvements within a Project Area, and subject to the limitations and procedural requirements of the CRL. Some of the circumstances, limitations, and procedural requirements are as follows:

- Public improvements.
 - The public improvement must be generally or specifically described in the redevelopment plan if the plan or plan amendment adding territory was adopted after October 1, 1976.¹⁵²

¹⁴⁷ Under Health & Safety Code § 33333.10, redevelopment agencies with “significant remaining blight” may extend their time limits 10 years under certain qualifying conditions. During the 10-year extension an agency may spend tax increment only in that part of the project area identified in the report to council as having blighted parcels, and any area identified as containing necessary and essential parcels for plan purposes. (Health & Safety Code § 33333.10(e).) The State Department of Finance, Department of Housing and Community Development and the Attorney General have oversight authority.

¹⁴⁸ The passage of SB 975 in 2001 significantly expanded the definition of public works and the application of the state prevailing wage requirements. The bill expanded the definition of public funds to cause more public/private projects to be subject to prevailing wages. SB 972 (2002) excluded certain housing projects from some public works and prevailing wage laws.

¹⁴⁹ With some limitations, the Agency may pay all or part of the land value or cost of installing or constructing any building, facility, structure or other improvement that will be publicly owned, if it follows the procedures, obtains the consent, and the Council makes the findings required in Health & Safety Code § 33445. If the public improvements are improvements that a developer would otherwise be required to provide, the Council must consent to the Agency installation. (Health & Safety Code § 33421.1.)

¹⁵⁰ Redevelopment agencies have certain authority to clean up or pay for cleaning up contaminated sites within a Project Area under the Polanco Act (the “Act”). Subject to following the Act’s complex provisions, the Agency may clean up contaminated property and in return the Agency, the property developer, and subsequent owners may receive limited immunity from further clean up liability

¹⁵¹ The Agency is subject to the provisions of the Public Contract Code requiring competitive bidding if the Agency spends in excess of \$5,000. If the contract is less than \$5,000, the Agency need not competitively bid the contract, and may give priority to residents within the Project Area or to persons displaced from the Project Area as a result of redevelopment activities.

¹⁵² Health & Safety Code § 33445(b).

- It must be linked to blight elimination.
- It must primarily benefit the Project Area.
- If the Agency is paying any land value for, and the cost of installing or constructing, any facility, structure or other improvement that will be publicly owned, the action is subject to Council determinations or findings,¹⁵³ and a report and noticed public hearing may be required.¹⁵⁴
- If the owner or operator of the site would otherwise be obligated to provide the public facilities, the Council must consent to the Agency expenditure, and the public improvements must be necessary for carrying out the redevelopment plan.
- Other Improvements. The Agency may do the following:
 - Construct and lease school buildings to a school district, with title vesting in the school district at lease termination.
 - Construct foundations, platforms or other structures that provide for using sites for structures or buildings, the uses of which are permitted under the redevelopment plan.
- The Agency may not do the following:
 - Pay the normal maintenance and operations costs of public improvements.
 - Use tax increment, directly or indirectly, to pay for constructing or rehabilitating a building that will be used as a city hall or county administration building.¹⁵⁵
 - Provide any direct assistance to an automobile dealership on land not previously developed for urban purposes.
 - Assist a development on five acres or more if the land has not been previously developed for urban use and, after development, the property will generate sales taxes, unless the principal use is for office, hotel, manufacturing, or industrial.

¹⁵³ Health & Safety Code § 33445.

¹⁵⁴ Health & Safety Code § 33679.

¹⁵⁵ Some very limited exceptions exist.

- Acquire property by eminent domain (condemnation), unless the redevelopment plan was amended to add such a power, after public hearings.

SECTION 10 – LAND USE LAW AND ENVIRONMENTAL REVIEW

INTRODUCTION

Along with streets and public safety services, land use control is often seen as among a city's most important functions. The City has power to regulate the use of land to protect public health, safety and welfare. This means that the City Council can set standards for what types of businesses and housing are permitted in various areas of the City and for building setbacks, ingress and egress, landscaping, public improvements, etc. However, land use review also represents a very complex area of the law. State and federal laws and constitutional restrictions are frequently involved in land use decisions by local governments. In addition, both state and federal case law and local ordinances and regulations previously adopted govern and limit the City's land use powers.

CONSTITUTIONAL LIMITATIONS

UNITED STATES CONSTITUTION

The United States Constitution places restrictions on the powers of the City by virtue of the Fourteenth Amendment, which has been deemed by the Supreme Court to incorporate the protections of the Bill of Rights and make them applicable to the States and local governments. The most important provisions for land use law are the First, Fifth and Fourteenth Amendments.

First Amendment – Free Speech And Other Expressive Activity

The First Amendment prohibits the federal government (and by "incorporation", state and local governments) from infringing rights of freedom of speech, press, and religion. Because of First Amendment law, cities are limited in their ability to regulate land uses involving speech and expressive activities or religion. In particular, the regulation of art, theatre, adult entertainment, churches, religious use of homes and related uses is subject to significant limitations and strict scrutiny by the courts.

Fifth Amendment – Inverse Condemnation Liability

The Fifth Amendment protects the right of due process of law and just compensation for taking of property. Due process requires fair and unbiased processes and decision-making, hearings before depriving persons of liberty or property rights and similar guarantees of fairness. The just compensation clause not only prohibits the government from taking possession of property without paying for it (as by condemnation), but has been interpreted to prohibit the government from "inverse condemnation" - making decisions that have the effect of diminishing a property owner's reasonable expectations of value for

purposes unrelated or disproportionate to the impacts on the community of developing the property. Thus, even decisions which merely regulate the use of the land, but do not transfer ownership to the government, may create liability to pay for decreased property value under the Fifth Amendment in certain circumstances. This is particularly true if the government regulation or decision eliminates all economically viable uses of the land, but can also occur where dedications for public improvements are disproportionate to the impact of the project on public facilities, or where the regulation diminishes value but has no legitimate governmental purpose. This doctrine of “inverse condemnation” requires that cities study and document the nexus between fees, exactions and dedications required of developers of real property and the impacts those requirements are meant to address.

Fourteenth Amendment – Equal Protection of the Laws

The Fourteenth Amendment provides that no state shall deny any person due process of law or equal protection of the law, or abridge the privileges or immunities of any citizen of the United States. This provision protects equal rights and has been the basis for the adoption of federal civil rights legislation prohibiting discrimination on the basis of race, gender, ethnicity, religion or national origin. In addition, this provision of the Constitution has been held by the courts to limit the authority of cities to regulate based upon marital status or family relationships. These principles apply to local governments making land use decisions. For example, cities are limited in trying to regulate what forms of relationships may constitute a “family” for purposes of residential habitation.¹⁵⁶

CALIFORNIA CONSTITUTION

The California Constitution contains provisions that essentially parallel the federal Constitutional protections outlined above. However, there are additional limitations on local authority in the state constitution.

Proposition 218 Limitation on Taxes

Proposition 218 amended the state constitution to require voter or landowner approval for taxes, assessments and property-related fees. Such exactions are often a part of the conditions placed on new development, which may include participation in assessment districts or payment of parcel fees for public services under the Moreno Valley Community Services District. The requirements of Prop 218 must be complied with in establishing such conditions.

Prohibition Against Gifts of Public Funds

The state constitution prohibits gifts of public funds. This means public funds cannot be given to private parties or spent for private benefit unless the primary

¹⁵⁶ Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977); Cities may, however, regulate “boarding houses” where unrelated persons live together in a for-profit business relationship.

motivation is public benefit. Cities facing land use decisions are sometimes presented with requests for subsidies, private use of public parks, streets or other facilities, etc. These requests must be examined in light of the gift of public funds restrictions.

Prohibition Against Unreasonable Restraint on Alienation of Real Property

The state constitution prohibits government actions that place unreasonable limitations on the right of a landowner to transfer his or her property rights. Cities sometimes find that in making land use decisions they are favorably inclined to a use by the proposed developer, but would not trust other future owners to act responsibly. They wish to limit the right of the landowner to transfer the property in the future. The state constitution severely limits the authority to impose such regulations. Where subsidies are given cities can by contract impose a requirement of a right to review and approve any transfers based on reasonable criteria, but may not eliminate the right to sell, lease, mortgage or otherwise transfer real property rights.

Right to Privacy

California's constitution contains an express right of personal privacy. In some cases, this right can affect certain land use decisions and limit City authority to regulate, particularly regarding residential land uses.

STATUTORY LAW

STATUTORY PREEMPTION

Before discussing the adoption and implementation of plans and zoning ordinances, it is important to know that while cities have some rather broad areas of discretion in land use law, there are also many areas that are "preempted" by state and/or federal law. Local control is preempted wherever the state or federal law regulates the same area significantly enough that it shows an intent to control that area of law. Sometimes preemption is specifically stated by the state or federal law. Other times it is inferred from the comprehensive nature of the regulation. Where the City is preempted, it cannot regulate and its ordinances are unenforceable and void.

FEDERAL LAWS

Federal law preempts local decision-making authority on several specific issues, including, but not limited to:

- Telecommunications facilities such as radio and cellular telephone towers, satellite dishes, cable television facilities, telephone lines, etc.
- Federal facilities such as post offices, military bases, federal office buildings, etc.

- Fair employment and housing regulations prohibiting discrimination
- Accessibility standards under the Americans With Disabilities Act
- Storm water quality facilities
- Indian lands

STATE LAWS

The power of cities to regulate land use within their jurisdictions is highly regulated by state law. A number of statutes set forth procedures that must be followed, required actions, time frames and regulations the City must follow. Among the more important of these state laws are:

- The California Environmental Quality Act, commonly referred to as “CEQA”, which requires study and review of the environmental impacts of proposed development projects (including the City’s own projects) prior to approval, and which can be used by the Courts to overturn the City’s land use decisions if not complied with.
- The Cortez-Knox annexations laws, which govern the addition of land to the City’s jurisdiction.
- The State Planning Act which requires cities to adopt and adhere to a General Plan and procedures and requirements for specific plans, development agreements, zoning ordinances, etc.
- The Subdivision Map Act, which regulates the division of land into parcels by recording of maps, and the conditions and requirements cities can place on their development, as well as providing time frames for the procedures and for the effective life of the map approvals
- The Permit Streamlining Act, which sets strict time limits on the time the City may take to make certain discretionary land use decisions, or else the project is deemed to be automatically approved. Its provisions interplay with CEQA provisions which also set times for taking action on environmental review of discretionary project approvals, and which preclude automatic approval of projects subject to certain levels of environmental review.
- Numerous laws pertaining to fair and affordable housing, which require:
 - Density bonuses and other incentives for low income housing projects
 - Second dwelling units for senior housing in single family zones
 - Approval of certain multi-family and low-income housing projects where cities would otherwise have discretion to deny approval
- Laws governing various kinds of group homes and treatment facilities

- Require permitting certain drug, alcohol and mental health rehabilitation facilities in residential areas
- Require group homes with 6 or fewer residents to be treated as single family homes
- Fire, Building and Housing codes, which set the standards for the actual construction of buildings and other improvements on the land, and regulate the handling of toxic and flammable materials, and numbers of legal occupants of both residential and non-residential structures, etc.

Some of these state laws will be discussed in greater detail below.

LOCAL ORDINANCES AND POLICIES

While the City has power to adopt its own ordinances and policies where permitted under state and federal law, once it does so, it must follow those ordinances and policies. Cities cannot selectively choose to apply them in one case and not in another. Doing so has been found to violate the constitutional guarantees of Due Process of Law.

Certainly a city can amend or change its ordinances and policies, but such changes must also be applied equally to all affected persons. In some cases, it might be desirable for various reasons to change a policy or waive an ordinance in a particular case. Doing so brings legal risk to the City and may result in the City being unable to apply such a policy or ordinance in future cases where it might wish to.

CEQA AND ENVIRONMENTAL REVIEW

The California Environmental Quality Act (CEQA) requires that prior to the City approving either a private or a public project that has any potential impact on the physical environment, the potential environmental impacts of the project must be thoroughly reviewed, except in the case of certain small scale projects that are expressly exempted from CEQA review. That environmental review must be documented and the document approved by the decision-making body prior to approving the project itself. If the appropriate environmental document is not adopted prior to the approval of the project itself, the City's approval of the project can be challenged in court and the court can overturn the decision of the City, and award attorneys' fees to the successful challenger.

CEQA requires review not only for physical projects, such as buildings, streets, etc., but also prior to adoption of ordinances, regulations or policies that will change the way land is used or will otherwise govern or impact changes to the physical environment in the future. Every "potentially significant" environmental impact must be analyzed. The project must be conditioned to mitigate such impacts to a level of insignificance. Likewise, cumulative impacts of the proposed project and other reasonably foreseeable projects must be analyzed and mitigated. In certain cases, alternatives to the project must be analyzed as well. If an impact cannot be mitigated to a level of insignificance, the City Council must make specific findings, called a "Statement of Overriding Considerations," that spells out why the project is more

beneficial to the City than the detriment caused by its environmental impacts.

There are four basic levels of environmental review documents under CEQA: a finding of exemption, a negative declaration, a mitigated negative declaration, or an Environmental Impact Report.

FINDING OF EXEMPTION

If the project qualifies for one of the narrow and limited statutory exemptions, or if the project clearly has no potential to impact the physical environment, then the City can simply make a written finding to that effect and proceed with the project.

NEGATIVE DECLARATION

If the project is not exempt, but after an initial study of all potential environmental impacts of the proposed project it is clear that there are no potentially significant impacts to the environment from the proposed project, the City may approve a Negative Declaration. However, notice must be given to the public, to affected property owners, affected public agencies and to persons who requested notice. There must be an opportunity for them to comment on or challenge the conclusions of the proposed Negative Declaration.

MITIGATED NEGATIVE DECLARATION

If the initial study shows that the project may have potentially significant environmental impacts, but it is clear that specific mitigation measures would reduce those impacts to a level of insignificance, a Mitigated Negative Declaration may be adopted for the project. The necessary mitigation measures must be compiled into a Mitigation Monitoring Plan that provides for implementation and monitoring of those mitigation measures as the project proceeds. Again notice and hearing are required prior to adoption.

ENVIRONMENTAL IMPACT REPORT

If the project may have potentially significant environmental impacts that cannot be mitigated to a level of insignificance, an Environmental Impact Report (“EIR”) must be prepared. An EIR is required even if the City believes there is a significant chance that adequate mitigation measures can be constructed. All that is necessary for an EIR to be required is for there to be a “fair argument” that there may be a potentially significant impact that cannot be mitigated to insignificance.

An EIR is generally a much bigger undertaking than a Negative Declaration or Mitigated Negative Declaration and the time frames for notice, comments and hearings are expanded. In addition to potentially affected persons and agencies, notice of EIRs must be sent to the state Environmental Clearinghouse for review by other state agencies and environmental groups. While a Mitigated Negative Declaration can usually be done in a few months, an EIR generally takes a year or more for preparation, processing and hearing.

INDEPENDENT JUDGMENT TEST

The City is required to exercise “independent judgment” in making CEQA determinations. The City may not defer to the developer’s consultants in compiling determining the scope or adequacy of an environmental document or mitigation measures. For this reason, many cities require the developer to pay to the city the cost of developing the environmental review, and then directly hire the necessary expert consultants, rather than allowing the developer to select and employ the experts. However, if a city allows the experts to be employed by the developer, it must still retain the authority to approve or disapprove of the consultants, and must thoroughly review their work and exercise independent judgment in approving or disapproving it. The courts look very closely at the level of independent review and judgment exercised by the city in such cases, and have overturned project approvals for lack of sufficient independence by the city.

ANNEXATION OF LAND

The process of changing the boundaries of the city to include land not previously in the City is called “annexation.” Annexations are a locally important urban planning-related area preempted by State law. The rate at which the City expands geographically is determined pursuant to processes under state law. All annexations of land to the City are reviewed and approved by the Local Area Formation Commission (“LAFCO”). Each county has its own LAFCO. In Riverside County, both the board composition and annexation proposal processes are statutorily established. LAFCO is important to planning in Moreno Valley because LAFCO must approve not only annexations, but the City’s “sphere of influence”, or the area planned to be annexed to the City over time and over which it has some limited statutory land-use authority before annexation.

STATE PLANNING ACT

The State Planning Act sets statewide procedures and standards for land use planning. It specifies the notice and hearing requirements for each land use procedure and outlines the various types of land use decisions cities may make.

GENERAL PLAN

Each city must have a General Plan¹⁵⁷, consisting of specified required elements, including land use, traffic circulation, housing, public safety, noise, conservation and open space¹⁵⁸. In addition, cities may add other elements to address local goals and concerns. The General Plan becomes the “constitution” for land use planning within the City. Every other land use and public infrastructure decision must be “consistent” with

¹⁵⁷ Gov. Code §§ 65300, *et seq.*

¹⁵⁸ Gov. Code § 65300.

the General Plan.¹⁵⁹ Certain elements, in particular the housing element, must be updated every few years and must be reviewed and approved by certain state agencies or the City's eligibility for state funding and certain legal protections are lost.

Plan amendments may be initiated by any one of four mechanisms: Council or Planning Commission action; the Planning Department Director's written action; or, by application of the property owner or representative. The Planning Commission must then hold a hearing on the amendment and make a recommendation on the same to the Council. The Council's decision on the plan amendment is final. The City cannot amend any element of its General Plan more than four times in any one year.

SPECIFIC PLANS

Cities may also adopt Specific Plans for large projects or areas of the city. These specific plans may be more detailed than the General Plan but cannot be inconsistent with it.

ZONING ORDINANCES

Zoning is a tool to implement adopted plans. Under the most basic definition of zoning:

Zoning is simply the division of a city into zones and the prescription and application of different regulations in each district.

These zoning regulations are generally divided into two classes: (1) those which regulate the height or bulk of buildings within certain designated zones --- in other words, those regulations which have to do with structural and architectural design of the buildings and (2) those which prescribe the use to which buildings within certain designated zones may be put.¹⁶⁰

General and specific plans normally set categories of land uses for areas of land, but specific permitted uses are established by zoning ordinances. For example, the General Plan may specify that a certain area should be residential. A specific plan for that area may specify that it should be low density residential. The zoning ordinance may then divide that area into smaller pieces and designate some as R-1 (one acre minimum lot size), some as R-2 (half-acre minimum), some as R-5 (5 units per acre), etc. In addition, zoning ordinances set the development standards, permitted uses and other regulations for each type of land use permitted in each zone classification.

Each parcel in the City limits is assigned a zone. The term "rezone," as applied to any given parcel, technically refers to any change in the zone which is reflected for the given

¹⁵⁹ *Friends of B Street v. City of Hayward*, 106 Cal. App. 3d 988 (1980).

¹⁶⁰ Longtin, CALIFORNIA LAND USE, § 3.02[1], summarizing *Miller v. Board of Public Works*, 195 Cal. 477, 486 (1925) (emphasis added).

parcel on the Zoning Map. The Zoning Ordinance, with the associated map, sets forth regulations which are legally enforceable against land uses.

Development Standards

Development standards include, but are not limited to, setback, building height, landscaping and minimum parking space requirements. The MVMC also provides for a large number of zones organized into general use categories (such as residential or industrial), which are then broken into separate zones (such as R-5, R-10).

Listed Uses

Each zone contains separate identified uses which enumerate permitted, conditionally permitted, or prohibited uses or activities.

Permitted Uses

The core character of each zone is defined by its list of permitted uses.

Conditional Uses

The second type of listed uses in each zone is conditionally permitted uses. These uses and activities are permitted only where the City has issued a conditional use permit. They are uses which the Council has found may, but only on a case-by-case basis, be found to be consistent with a particular zone and neighborhood.

Prohibited Uses

Some uses and activities, called “prohibited uses,” are expressly prohibited in each zone.

Police Power

The Council’s authority to zone is based on the City’s police power. This authority is very broad and empowers the City to determine what the City will look like, what types of amenities there are, and how activities are arranged in the urban landscape. Numerous cases could be cited to illustrate the breadth of the Council’s authority in zoning. To give just one important example, a land use restriction with no purpose other than to improve the appearance of the streetscape, has been repeatedly upheld as a substantial government goal; it is only in the manner in which such restriction is applied that is subject to the court’s review.¹⁶¹

¹⁶¹ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)

Plan consistency

Zoning actions must be generally consistent with the General Plan or any applicable community or specific plan. Any zoning action - - whether it be a rezone or a text amendment - - must be consistent with an operable plan, including maps, diagrams, and textual goals and policies.

Zoning Procedures

Like plan amendments, rezones affecting particular parcels may be initiated by Council or Planning Commission action, by the Planning Director's written action, or by application of the property owner or representative. The Planning Commission must then hold a hearing and make a recommendation to the Council, which the Council is required to consider as a part of its deliberations. The Council's decision on a rezone application is final.

OTHER LAND USE DECISIONS

The Planning Act also sets procedures and standards for Variances, Development Agreements, and development moratoria. Each of these land use regulatory devices will be discussed further below.

Variances

Variances are exceptions to development standards. Variances can be granted where a property cannot be developed under existing standards due to a difference between the size, shape, or topography of the property compared to neighboring properties similarly zoned. Variances may not be granted to permit a different use of the property, but only to allow a relaxation of a physical restraint on the development of the property for the uses for which it is zoned. Changing the use requires a zone change.

Development Agreements¹⁶²

State law permits cities to enter into development agreements with property owners and developers. Under a development agreement, a developer receives "vested" development rights (rights that the city cannot change during the term of the agreement) in exchange for providing the city with additional benefits (public improvements, financial contributions, etc.) beyond those which the City could otherwise require.¹⁶³ A development agreement must be adopted by

¹⁶² California Government Code §65864 et seq.

¹⁶³ California Government Code §65865.2 provides:

A development agreement shall specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. The development agreement may include conditions, terms, restrictions, and requirements for subsequent discretionary actions, provided that such conditions, terms, restrictions, and requirements for subsequent discretionary actions shall not prevent development of the land for the uses and to the density or intensity of development set forth in the agreement. The agreement may provide that construction shall be commenced within a specified time and that the project or any phase thereof be completed within a specified time.

ordinance after a public hearing process.

Development Moratoria

The City may adopt a “moratorium” temporarily prohibiting particular types of development while it studies the impacts and appropriateness of such development. While commonly called a moratorium, the state law actually refers to such an enactment as an “interim ordinance adopted as an urgency measure.” An interim urgency ordinance may be adopted without following the normal notice and hearing procedures and time frames for zoning or other ordinances, but must be adopted by a four-fifths vote. It becomes effective immediately upon adoption. However, it is effective only for 45 days. It may, during the 45 days, be extended after proper notice and hearing for an additional 10 months and 15 days and then again for an additional year. If proper notice and hearing took place prior to initial adoption, it may be extended within the initial 45 day period for 22 months and 15 days all at one time. No further extensions are permitted. In order to adopt such an ordinance, the City Council must make findings based on evidence that “to protect the public health, safety and welfare” it is necessary to prohibit

“uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time.”¹⁶⁴

SUBDIVISION MAP ACT

Subdivision mapping is a process whereby large parcels of land are divided into smaller parcels, or smaller parcels are combined into larger ones for purposes of transferring legal title to land or building on the land. It is a highly technical subject area involving a complex interplay of land use and real property law and civil engineering. State law preempts many of the procedures and substantive requirements for subdivisions through the Subdivision Map Act.

MAP REQUIRED FOR ALL SUBDIVISIONS

As a general rule, the California Subdivision Map Act requires that either a parcel map or tentative tract map is required before undertaking any real estate transaction which will result in the division of land into separate units, or parcels, for the purpose of sale, lease, financing and/or building. An approved map divides the landscape into different parcels which are delineated by a subdivision map which memorializes the official lots of record for title purposes at the County Recorder’s office.

The agreement may also include terms and conditions relating to applicant financing of necessary public facilities and subsequent reimbursement over time.

¹⁶⁴ California Government Code §65858.

Land Use Planning Tool

The courts have declared that an overriding purpose of the Subdivision Map Act is to give local authorities maximum control over the design of subdivisions and uses of land. Subdivision maps are one of the main vehicles the City uses to implement its various planning policies and regulations. As with special permits, each map is accompanied by detailed conditions of approval which define the extent of which the City chooses control over the land use. Also as with both rezones and conditional use permits, every subdivision map must be consistent with the operable plans.

Types of Maps

Subject to limited exceptions, both a tentative tract map and a final tract map are required for every subdivision which creates five or more parcels. However, only a single parcel map is required for any subdivision of four parcels or less. Sometimes applicants opt for both a tentative and final parcel map. Vesting tentative maps and vesting tentative parcel maps are also authorized and allow the developer to “freeze” development standards and conditions of approval for a certain period of time.

Exemptions

There are several exemptions, the most significant of which are conveyances of land to and from the City and agricultural, industrial, commercial and residential apartment building leases (in practice, this means most leases are exempt). Condominium and cooperative developments are, however, subject to mapping requirements. Lot line adjustments are allowed without a map because they do not create new parcels.

SUBDIVISION REVIEW PROCESS

Hearings and Appeals

The Planning Commission reviews all parcel maps and tentative maps, which are then subject to appeal to the Council. Like conditional use permits, subdivision map proceedings entail quasi-judicial decision-making and can be either approved or denied only when supported by findings based on substantial evidence.

Scope of Final Map Approval

Once a tentative map is approved, a final map package is assembled for Council approval. Final maps are ordinarily placed on the consent calendar. The only issue before the Council when acting on a final map is whether the final map is in substantial compliance with the tentative map and its conditions of approval. It is important to remember that the Council can *almost never* impose additional conditions on a final map that were not imposed at the tentative map stage.

Generally, provided the final map is substantially compliant with the conditions of approval of the tentative map, the Council must approve the final map.

LAND USE PROCESS, GENERALLY

The following is a brief summary of some of the more significant procedural issues that regularly arise.

RULES GOVERNING HEARING PROCESSES

Four sources of law generally govern the conduct of Council and Planning Commission hearings on land use matters: the Zoning Ordinance, the Brown Act, Council meeting rules, Planning Commission Rules and Regulations, and Constitutional Due Process.

CONSTITUTIONAL DUE PROCESS

In addition to Planning Commission Rules and Regulations and the Brown Act, Constitutional Due Process applies at public hearings in certain land use matters.¹⁶⁵ A significant consideration is the type of project application which is being considered. Generally, legislative actions (general or specific plan amendments and rezones) do not implicate due process procedures. In contrast, quasi-judicial actions, such as the conditional use permits described above, do. The California Supreme Court has stated that conditional use permits “involve entirely different constitutional considerations” from rezones.¹⁶⁶

Notice and Opportunity to Be Heard

Where a conditional use permit or subdivision map is to be heard, due process, including a reasonable opportunity to be heard, must be provided to project neighbors.¹⁶⁷ Generically, the formula for adequate constitutional due process entails the following: 1) notice of pending action; and 2) a reasonable opportunity to be heard at a public hearing.

¹⁶⁵ *Horn v. Ventura County*, 24 Cal. 3d 605, 619 (1979).

¹⁶⁶ *Horn, supra*, 24 Cal. 3d at 619.

¹⁶⁷ *Horn, supra*, 24 Cal. 3d at 619.

Unbiased Decision Maker

Another key consideration in any land use proceeding is the need to remain unbiased. This is especially the case for quasi-judicial actions, such as conditional use permits. Due process requires, generally, that the decision maker approach each hearing with an open mind, and that the decision be based on the information and facts discussed at the hearing. To accomplish this requirement, decision makers must not have a personal, financial interest in the outcome of a matter, nor should the decision maker become embroiled in the controversy of a matter. Additionally, ex parte contacts -- that is, off-the-record discussions between the decision maker and one interested party -- are, in principle, prohibited in quasi-judicial proceedings. In practice, this principle does not bar Council members or Planning Commissioners from visiting a project site or otherwise investigating the facts of a project first-hand. However, facts which are crucial to decision -- such as might form the decision maker's basis for approving or denying a conditional use permit -- should be stated on-the-record. As a general rule, every decision should be approached with a fresh mind, free of influences which might affect objectivity. One rule of thumb for assuring consistency and objectivity in decision-making is to adhere to the facts, to required Code findings, to applicable plan policies, and to the law.

REQUIRED VOTES AND TIE VOTES

With only a few exceptions, a land use action is accomplished by a motion supported by a majority of those decision makers present to act on the matter. If a motion is made to approve the project, and that motion fails, the project is disapproved and matter is concluded. The issue of tie votes occasionally arises. The general rule is that a tie vote results in the failure of Council or the Planning Commission to enact, grant, or approve a Project and therefore, constitutes a denial of the matter. However, under City Council rules, a tie vote when less than all members of the Council are present results in the matter being automatically continued to the next regular meeting of the City Council, unless otherwise ordered by vote of the City Council.

TYPES OF LAND USE DECISIONS

There are four basic types of land use decisions:

- Legislative
- Discretionary
- Quasi-Judicial
- Ministerial

Each type of decision has a different set of rules and procedures that must be followed.

Legislative Decisions

Legislative decisions are broad policy decisions and regulations of general application. Legislative decisions are not specific to individual development proposals. The City Council is always the final decision maker. Applicants generally do not have a legal right to compel a legislative decision and the City Council has broad discretion.

The City Council's discretion on legislative decisions is limited by the State and Federal Constitution, State and Federal Laws, and the requirement of consistency with the General Plan, but these limitations are relatively weak and general.

With respect to legislative decisions, the City professional staff's role is to provide factual information, technical advice and analysis and to propose policy alternatives and professional advice. The Planning Commission's role is purely advisory. The final decision must be made only by the Council.

Legislative decisions include:

- General Plan and amendments
- Specific Plans and amendments
- Zoning Ordinances & Zone Changes
- Development standards
- Development Agreements

Discretionary Decisions

A discretionary decision is one where the City is granted discretion by a statute or ordinance with regard to a specific development project rather than a broad policy issue or regulation of general application.

Again, the City's discretion is limited by the State and Federal Constitutions and statutes and the requirement for General Plan consistency, but these limitations are stronger and the statutory limitations can be quite specific. In addition, the City may be limited by its own Municipal Code in the exercise of its discretion.

The Planning Commission is generally the decision maker, but any party may appeal to the City Council. The staff's role is again technical and professional analysis and advice and factual information. However, in some cases, the Municipal Code may actually delegate decision-making authority to a staff member, generally the City Manager, a department head or the City Planning Official. In those cases, generally any appeal is first to the Planning Commission and then to the City Council. The City Council generally only hears appeals, unless the discretionary decision is dependent upon an accompanying legislative decision, such as a rezone or plan amendment.

Discretionary decisions include:

- Conditional Use Permits. The City has discretion to permit or deny the proposed use of the property, but may not use that discretion to deny constitutionally protected uses without complying with constitutional standards.
- Variances. The City has discretion to waive or modify development standards on individual parcels, but the decision must be based on unusual size, shape, geology or topography of the parcel which denies benefits of a use similarly situated landowners have without a variance.
- Plot Plans (with hearing). The City has discretion to approve or condition design and layout of a permitted use, but may not deny a permitted use itself.

Quasi-Judicial Decisions

Quasi-judicial decisions involve weighing evidence presented by parties on both sides of an issue, determining the facts, and then applying existing law or regulations to those facts. The decision maker is not exercising discretion in the decision. If the facts support it, the proposal must be approved. If the facts do not support it, it must be denied. A court can review the decision and overturn it if it is not based on adequate factual evidence in the record of the decision-making proceeding.

Generally, the Planning Commission will be the decision maker, unless the proposal is coupled with a legislative decision. The staff's role is generally technical and professional analysis, but can be the decision maker by ordinance or statute, such as for some plot plans and parcel maps.

The Council's role is generally to hear appeals.

Quasi-Judicial decisions include:

- Tentative Tract Maps
- Parcel Maps
- Plot Plans (without hearing)

Ministerial Approvals

Ministerial approvals are those which the City is required to grant upon the applicant making a basic showing of certain specific facts. The City has no discretion, but is legally compelled to grant the approval if the required factual showing is made. In most cases, ministerial approvals are granted at the Staff level. The Council's role is to set the policies and procedures for granting the approvals, within the requirements of state and federal law, and to grant the approval of final maps under the Subdivision Map Act. The Planning Commission has no role at all in ministerial approvals. Examples of ministerial approvals include:

- Final Maps

- Grading Permits
- Building Permits
- Sign Permits
- Certificates of Occupancy
- Home Occupation Permits
- Temporary Use Permits
- Accessory Dwelling Units

REQUIRED DENIALS AND APPROVALS

There are certain basic rules that either prohibit the City from approving a project or require it to approve a project. The most common ones are summarized below:

City cannot legally approve any project if:

- Environmental documents, studies and mitigation measures are not legally adequate
- Project is not consistent with General Plan
- Land is not properly zoned for the proposed use

City cannot legally deny any project if:

- The decision is ministerial and the project meets requirements
- The project is an affordable housing project and it meets state requirements
- Local authority is preempted by state or federal law, such as for certain group homes
- The project is for a Constitutionally protected use and it meets requirements
- The decision is quasi-judicial and the applicant proves facts at hearing that justifies approval
- The decision is discretionary and the grounds for denial are improper under federal or state law or constitution
- The decision is legislative and denial would be made on a discriminatory or illegal basis

TAKINGS AND EXACTIONS (PROJECT CONDITIONS AND FEES)

TAKINGS

The United States and California Constitutions prohibit the government from “taking” property for public purposes without “just compensation.” This means that government cannot use its zoning authority to inversely condemn property in order to avoid the expense of instituting eminent domain proceedings and paying for the property. This is a very complex area of constitutional law. The essential test is whether the government’s actions deprive an owner of substantially all economically viable use of the subject property. The underlying philosophy is that the constitution bars government from making a private property owner suffer the burdens of a public improvement which the public as a whole should shoulder. Of course, merely restricting allowable uses or development on a site, or the amount of profits an owner can make, will not, in and of itself, amount to a taking. For this reason, keeping property zoned at the very low-density residential zoning found in the rural parts of a city does not amount to a taking; economically viable use can still be made by developing the property at the allowable, rural density. There is also no taking where development is prohibited because to allow it would create a public nuisance. At the other end of the spectrum, however, barring all development on a site – such as by downzoning property to an “open space” district without allowing any development – may amount to a taking because under such a district the owner may not be able to make any economically viable use of the site.

LAND USE EXACTIONS (PROJECT CONDITIONS AND FEES)

Land use exactions - - in the form of project conditions or mitigation fees -- are the chief means by which the City assures that land uses are consistent with the surrounding community. These exactions are subject to takings rules.

“Nexus”

As a general rule, with respect to project-specific conditions, there must be a reasonable relationship between the project’s impacts and the condition imposed to address it. A reasonable relationship is defined by what the courts call the essential nexus (the condition must have some actual relationship to the type of requirement imposed by the condition) and rough proportionality between a condition and project impacts.

Dolan Test

Any requirement that the land be reserved or set aside for a specific purpose amounts to a possessory dedication of real property which the United States Supreme Court has held is subject to heightened scrutiny under a particular test devised by that court.¹⁶⁸ In *Dolan v. City of Tigard* (“*Dolan*”),¹⁶⁹ the essence of the U.S. Supreme Court’s test was set forth as follows:

¹⁶⁸ *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483

. . . we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. [Citation omitted.] If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.¹⁷⁰ . . . We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development . . . [n]o precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication¹⁷¹

U.S. 825 (1988); *Ehrlich v. Culver City*, 12 Cal. 4th 854 (1996). In *Ehrlich*, the California Supreme Court explained the Supreme Court's rationale for imposing "heightened" judicial scrutiny as follows:

[T]he heightened standard of scrutiny is triggered by a relatively narrow class of land use cases—those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation. Neither *Nollan* nor *Dolan* is, after all, a conventional regulatory takings case. Rather, as the court's rationale for its result in *Nollan* demonstrates, both are cases in which the local government attached a condition to the issuance of a development permit which, but for the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property.

As Justice Scalia's opinion in *Nollan*, *supra*, 483 U.S. 825, makes clear, such a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation. In such a context, the heightened *Nollan-Dolan* standard of scrutiny works to dispel such concerns by assuring a constitutionally sufficient link between ends and means. It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*. (*Ehrlich*, 12 Cal. 4th at 868-869.)

¹⁶⁹ 512 U.S. 374, 129 L. Ed. 2d 854, 114 S. Ct. 2309 (1994).

¹⁷⁰ 512 U.S. at 380.

¹⁷¹ *Dolan*, *supra*, 512 U.S. at 391 and 395.

Development Fees

Fees can be imposed only by following procedures set forth in the Mitigation Fee Act,¹⁷² which the California Supreme Court has held requires as much constitutional scrutiny by the courts as do land dedications.

The Test

For any project exaction, regardless of form, there must be:

- (i) A legitimate city interest in the purpose of the condition;
- (ii) An essential nexus between the city’s interest and the condition;
- (iii) A roughly proportionate connection between the condition imposed and the project’s impacts.

Fact-Based Analysis

Before imposing any condition, the decision maker must be assured that the facts in the record support the determination. Conditions imposed in connection with rezones are not necessarily quasi-judicial. Nonetheless, decision makers are advised to support any condition imposed in connection with a rezone with substantial evidence of the rough proportionality between the project’s impacts and the conditions. Assuming the City is able to find the essential nexus, the City must make an individualized determination that the specific condition being imposed is implicated by the project.¹⁷³ Under *Dolan*, rough proportionality requires that there be more than just the essential nexus, but also enough facts demonstrating that the value, size, amount or degree of the condition is caused by the specific proposal being reviewed. In *Dolan*, the U.S. Supreme Court struck down a requirement that a hardware store owner dedicate land for a bicycle path in order to offset what the city in that case found “could” be traffic impacts generated by the development; the Court dismissed the city’s general recitation of project traffic trip figures and street capacities, calling such analysis “conclusory.”

Legislative Property Development Standards

The California Supreme Court has upheld requirements cities impose upon developers to adhere to basic development standards, such as requirements to build sidewalks or to adhere to setbacks.¹⁷⁴ If the conditions apply to all property owners in a district, no rough proportionality analysis is required.

¹⁷² Government Code §§ 66000, *et seq.*

¹⁷³ *Dolan, supra*, 512 U.S. at 391.

¹⁷⁴ *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

SECTION 11 – LABOR RELATIONS

The vast majority of City employees are represented by employee organizations or unions. A limited number of top level management and confidential employees along with officials appointed by the Council are not represented by employee organizations. Generally, labor relations between City employees and Council are governed by the Meyers-Milias-Brown Act (“MMBA”) which is found in Government Code Sections 3500 *et seq.*

The purpose of the MMBA is to grant employees the right to form, to join, and to participate in the activities of the employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. The MMBA also gives employees the right to refuse to join or participate in employee organizations.

DUTIES OF THE CITY IN EMPLOYEE RELATIONS

When dealing with employee organizations, the City has a requirement to "meet and confer" with recognized bargaining groups. This meet-and-confer requirement mandates that the City sit down and discuss in good faith, issues regarding wages, hours and other terms and conditions of employment with representatives of recognized employee organizations. Prior to taking any action, the City must fully consider presentations made by the employee organization on behalf of its members. This full consideration must be done prior to deciding policy or a course of action on wages, hours or other terms and conditions of employment.

In order to meet and confer in good faith with employee organizations, the Council must designate its representative to meet with those representatives of recognized employee organizations. Both sides have the obligation to meet and confer promptly upon request of the other party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals. Each party must attempt to reach agreement on matters within the scope of representation (wages, hours and other terms and conditions of employment). The process must include adequate time for resolution of impasses where specific procedures for such resolution are contained in local rules or by mutual consent of the parties. If either side refuses to bargain in good faith, the other side can file an unfair practice charge with the Public Employment Relations Board prior to seeking judicial action to enforce the good-faith bargaining requirement.

IMPASSE PROCEDURES

In the meet-and-confer process, the parties may be unable to resolve issues and reach an agreement. One method of impasse resolution is called mediation. Mediation procedures are non-binding and at times are used when the parties have trouble finding a middle ground in an area in which they feel a settlement could be reached.

After impasse procedures are completed, the Council may take a final step without agreement called unilateral action. Unilateral action allows the Council to implement its "last, best and final offer." Unilateral action is a step that is rarely taken and should only be considered after a long negotiating process followed by failure of impasse procedures to allow agreement to be reached. If

the “last, best and final offer” is implemented, it must be implemented in its entirety. The Council may not choose to implement only parts of that offer.

MEMORANDUM OF UNDERSTANDING

Once agreement is reached by the negotiators, the agreement is put into writing in a document called a Memorandum of Understanding (“MOU”). The MOU is the basic contract between the employee organization and the City. Its term is subject to negotiation but usually covers one, two or three years.

During the term of the agreement, the City and employee organization must follow the agreements reached in the MOU in their labor negotiations. To the extent that procedures are specified in the MOU, the parties are bound by those procedures. During the term of an MOU, negotiations cannot be reopened without following the procedures set out in the MOU.

Once the agreement is reached between the negotiating teams, the MOU is then submitted to the respective bodies for approval. The employee organization usually holds a vote of its membership on the agreement. In addition, Council will be asked to approve the final document. Until the Council approves the final document, it will not be effective.

SECTION 12 – GLOSSARY OF MUNICIPAL LAW TERMS

In order to provide a helpful reference form for the meanings of some of the words and phrases which are most often used in municipal law, we have prepared the following glossary.

Abuse of discretion. The legal basis for a judicial overturning of a Council decision. It is established in one of three ways: (1) Council failure to proceed in a manner required by law; (2) Council fails to support its decision by findings where required; or (3) Council findings are not supported by substantial evidence.

Adjourn, adjournment. Action terminating and closing a meeting entirely. If another and subsequent meeting has been previously set to take place (or is set to take place with the motion to adjourn), the adjournment may act to continue business to the subsequent meeting.

Affected taxing entity. An entity which levied property taxes within a redevelopment project area before the redevelopment plan was adopted, which may include one or more cities, counties, school districts, and/or other special purpose agencies.

Affordable Housing has the meaning set forth at Cal. H. & S. C. § 50052.5.

Agreement. A coming together or meeting of the minds creating an obligation respecting some property right or benefit, or the performance of an act.

Annexation. The completion of an administrative process that brings about the attaching, joining or adding of an area of land (usually contiguous) to a City's existing territory.

Answer. A pleading filed with a court by which the defendant responds to a complaint by denying facts, alleging facts, and raising defenses and immunities to the matters or claims alleged.

Assessment. In a general sense, the process of ascertaining and adjusting the costs respectively to be contributed by several persons towards a common beneficial object (such as a park, street, landscaping service) according to the benefit received or burden created.

Attorney Work Product, work product. "General" work product is the work or result of efforts by an attorney (including those persons engaged by the attorney) on behalf of a client on a matter, whether in litigation or not. "Classic" work product is any writing that reflects an attorney's impression, conclusions, opinions, or legal research or theories. General work product is conditionally privileged, while classic work product is absolutely privileged. The attorney by law is regarded as the holder of the work-product privilege.

Attorney Client, Attorney-Client Communication. Information transmitted between a client and his/her lawyer. Every communication in the course of the attorney client relationship is presumed to be in confidence. The communication must be made by a means which, so far as the client is aware, does not disclose the information to any third parties other than those who are present to further the interests of the client in the consultation, or to whom disclosure is reasonably necessary

for the accomplishment of the purpose for which the lawyer is consulted. It includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. The communication is confidential even if transmitted by fax, telephone, e-mail or other electronic means.

Blight. For redevelopment purposes, blight is established by certain physical and economic conditions within the survey area for which the plan is adopted, and by meeting the urbanization requirement.¹⁷⁵

City. An incorporated town or municipality. A municipal corporation deriving its powers from the state. In California, there are two types: general law city and charter city. The City of Moreno Valley is a general law city.

Claim, tort claim, claim for damages. A writing demanding payment of monetary compensation or reimbursement, for an act, omission or occurrence by a public entity or its employee. Claims must contain the information required by law, and must be presented within the time and in the manner provided by law (in writing and sufficient to apprise the public entity of the nature of the claim).

Code. A compilation of existing ordinances systematically arranged into chapters, subheads, table of contents, indices, and revisions. It serves to clarify and make a complete body of laws designed to regulate completely the subjects to which they relate. The City of Moreno Valley has compiled its codified ordinances in the Moreno Valley Municipal Code (“MVMC”).

Codification. The process of collecting and arranging the laws or ordinances of a governmental body into a code or adding new enactments to the code. (See Code.)

Complaint. The first document initiating a civil action and filed with a court. The document is a pleading wherein a plaintiff alleges facts entitling him/her to some relief, which is typically money damages, an injunction, a declaration of rights, cancellation of a contract or other document, etc.

Condemnation. (See eminent domain and inverse condemnation.)

Cross-complaint. A complaint brought by a defendant against a plaintiff or against a third party. It concerns matters reasonably related to questions, facts, or matters raised in the initial complaint, and seeks contribution or indemnification in the defense of the initial action; or it brings in parties necessary or desirable for the full determination of the controversies raised in the initial complaint or to resolve all disputes between the parties to the initial complaint.

Declaration. Statements of fact or opinion over a disputed fact or issue, and concerning a lawsuit or proceeding, sworn or attested to under penalty of perjury. A declaration is not normally notarized.

¹⁷⁵ Health & Safety Code § 33031.

Dedication. The transfer of title to land to a public agency, giving or devoting the land to a specific public use by some action of the owner, normally done in exchange for rights to develop the property.

Deed. A transfer of title to, or an interest in, real property by a writing signed by a person with an interest in it.

Defendant. The person named in, and against whom, a complaint has been filed.

Discovery. The ascertainment of facts and documents by a party to a lawsuit through the use of interrogatories, requests for production, and depositions, and similar devices provided for in state and federal codes of civil procedure. The phase in litigation to gather relevant evidence for a case. Such evidence may or may not be admissible as evidence at a hearing or at trial.

Discretionary. An act which requires exercise in judgment and choice as to what is just and proper under the circumstances.

Eminent domain. The power of the government to take private property for public use. Private property cannot be taken except for fair compensation, and only under strict compliance with the letter of the law.

Fair argument. A determination under the California Environmental Quality Act (“CEQA”) which, when made, requires that an Environmental Impact Report (“EIR”) must be prepared before a project can proceed. An agency must consider the entire record and decide whether it can be fairly argued on the basis of substantial evidence in that record that the project may have a significant environmental impact on the environment. This process requires a weighing of the evidence on both sides of a question, and if substantial evidence of a significant environmental impact exists, evidence to the contrary does not dispense with the need for an EIR when it can still be fairly argued that the project may have an environmental impact. The mere expression of project opponents' fears and desires lacking any objective basis for a challenge does not constitute substantial evidence supporting a fair argument. (See substantial evidence.)

Fee. Generally, the requirement for the payment of a monetary amount. Fees are generally imposed in exchange for a service or the processing of an application. Fees are of a broad range and when imposed are a legislative act. When imposed in connection with a land use development, they are subject to state law requirements concerning prior notice to the public, written justification, reasonableness of the amount, segregation and/or accounting, etc. Fees cannot exceed the estimated reasonable cost of providing the service for which they are charged, otherwise they are subject to challenge as a tax.

Findings. The determinations of fact supporting the approval or denial of a project; an explanation of how the City processed raw evidence to reach its decision. The subconclusions that support the City's method of analyzing the facts and regulations, and of applying its policies. Findings are not generally required for legislative acts, unless required by statute or ordinance. Findings are usually required as to administrative (quasi-judicial) acts.

General law city. A municipal corporation existing under the general laws of the state, without a charter. A general law city is required to comply with all state laws. Moreno Valley is a general law city.

Gift of public funds. An unreasonable, destructive or improper use of property, or mismanagement or omission of duty as to the use of public funds by a public body or official.

Hearing. A proceeding with some degree of formality for the determination of issues of fact or law or both. Parties responding to it generally have a right to notice, to be heard at or prior to it, and to introduce evidence or argument or both.

Immunity, immunity from suit. The right to be free from suit for taking, or failing to take, certain action.

Implementation plan. A plan that the Redevelopment Agency must adopt every five years, and that identifies the methods and means by which it intends to achieve its goals and objectives for the redevelopment project area in the ensuing five years. It describes programs and expenditures and explains how the Redevelopment Agency will achieve its goals and objectives, eliminate blight, and achieve its housing objectives.

Interrogatories. A form of discovery. Written questions, from one party to a lawsuit to another party, which must be answered under oath, using due diligence in preparing the answers. Appropriate objections are permitted.

Inverse condemnation. A remedy for the breach of the constitutional requirement that property not be taken or damaged for public use unless just compensation has first been paid to the private property owner. Inverse is often described as the "reverse" side of eminent domain, as a procedural device for ensuring that the constitutional proscription is not violated. There are many theories which can support a claim of inverse condemnation, the most common being a zoning or land use regulation that denies a property owner all viable economic use of his/her property and physical damage to, or invasion of, property.

Legislative. Pertaining to the function of determining what the laws shall be, relating to subjects of permanent or general character. A legislative act refers to an act which applies generally. The opposite of a legislative act is a judicial act (in a municipal context called a "quasi-judicial" act). The distinction is important because it controls what kind of due process is required for the action, whether findings are required, and what kind of standard of review a court will apply to the action in reviewing it.

License. Authority granted to do or refrain from doing any act. The certificate itself which gives permission.

Lien. A charge or security or encumbrance upon property, usually evidencing a debt, obligation or duty.

Low Income Person/Household has the meaning set forth at Cal. Health & Safety Code § 50093.

Mandatory. An obligatory law which is required to be performed. A law is usually considered mandatory where its operation affects a third party. The opposite of mandatory is directory.

Ministerial. A governmental decision which does not require discretion but only the application of already established standards to given facts.

Minutes. A written summary record of all the proceedings of Council by the City Clerk.

Moderate Income Person/Household has the meaning set forth at Cal. Health & Safety Code § 50093.

Motion. A formal proposal of a Council member at a Council meeting that the Council take action or not take action.

Move, moving an item. (See also, Motion.) The act of making a motion, or that a specific motion be acted upon.

Negligence. The failure to use ordinary or due care. The breach of a duty of care by acting, or failing to act, as would a reasonable person in the same or similar circumstances.

Nuisance. In the sense of code enforcement, a continuing or unabated violation of a code provision; in a broader legal sense, everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs reasonable and comfortable use of property.

Ordinance. The enactments of the legislative body of a municipality (Council) having the force and effect of law within its boundaries.

Plaintiff. A person filing a complaint seeking some relief provided under law.

Preemption, state preemption. The preemptive authority of the state. The supervening power of the state exercised by legislating on a subject or in a field with the intent to preclude municipalities from acting on the same subject. State law supplants municipal ordinances.

Prima facie case. Evidence presented in favor of a claim or argument that would be sufficient to support a judgment or order if the opponent cannot provide evidence to rebut it, and which therefore places the burden of proof on the opponent.

Privileged communications. Communications, whether oral or written, by or between persons (including the Council) which the law protects as confidential as to all other persons.

Proceeding. Any action, hearing, investigation, or inquiry (by a court, administrative agency, hearing officer, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be given.

Project area committee (“PAC”). A PAC is an organized group comprised of property owners, tenants, business owners, and representatives of community organizations, that reside within a redevelopment project area, and are elected by project area property owners, tenants, business owners, and community organizations. The Agency must consult with the PAC during and after plan adoption on specified matters affecting the project area.

Public purpose. A motivation or intent to promote the public health, safety, morals, general welfare, security, prosperity, and contentment of its residents and inhabitants, which justifies a city decision or action.

Rezoning. Changing the zoning classification of property from one to another, affecting the types of uses and structures permitted on it.

Recess. A brief intermission within a meeting which does not end it or destroy its continuity as a single gathering, and after which business is resumed.

Request for Production. A form of Discovery. A written request to a party to a lawsuit by another party that it produce described documents or categories of documents.

Resolution. An expression of opinion, a declaration of will or intent by the Council which can have the effect of law. It usually relates to matters of special and temporary character, while an ordinance prescribes a permanent rule of conduct or government. The document reflecting such action by the Council.

Risk Manager. The position created to investigate, manage and compromise certain claims, claims adjustment and related functions of the City.

Statute. An act of the legislature declaring, commanding, or prohibiting something; a particular law enacted by the legislature according to the forms necessary to constitute the law of the state.

Subpoena. A process to cause a witness to appear and give testimony.

Subpoena duces tecum. (“SDT”). A subpoena which also requires the witness to bring with him or her, at the time of giving testimony, specified documents or other objects relevant to the lawsuit.

Substantial evidence. Enough relevant information and reasonable inferences from this information to support a finding or conclusion. Evidence is staff reports, written testimony and oral testimony. Substantial evidence may be present to support a conclusion even though other conclusions may be reached from the same evidence. Under federal and California case law, whether substantial evidence exists is determined by looking at the whole record, and, if the contrary evidence is sufficiently strong, then it can overcome other evidence which may be

substantial but for the other evidence. The substantial evidence test is considered a deferential one for purposes of judicial review. One modification of the substantial evidence test is less deferential which applies to decisions to prepare a negative declaration instead of an environmental impact report. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment, is not substantial evidence. Substantial evidence includes facts, reasonable assumptions predicated upon facts and expert opinion supported by facts. Uncorroborated opinion or rumor is not substantial evidence.

Summons. The document advising a person that a legal proceeding has been filed against him or her and requiring a response within a prescribed period.

Supremacy. The highest level of authority of the sovereign; the paramount authority of the federal government to act in specified situations, to which state and local authority must yield.

Taking. When local government adopts regulations or takes action which amount to appropriating or denying to the owner all economic use of the property. The taking of action or application of regulations that deny a property owner all economically viable use of his/her property or that cause physical damage to, or invasion of, property.

Tax. A pecuniary burden laid upon individuals or property to support the government, and is payment exacted by a legislative authority. There are many types of taxes, but two major categories under the California Constitution. “General taxes” are taxes which are imposed to provide revenue for general governmental purposes with no legal restrictions as to which governmental purpose they must be expended for. “Special taxes” are imposed to fund specific programs and purposes and may only be legally expended for the specified purposes. General taxes must be approved by a majority of the voters of the jurisdiction imposing the tax. Special taxes must be approved by a two-thirds vote of the voters of the jurisdiction.

Tax Increment. Generally means the increase in property tax revenue caused by increases in property value over the life of a Redevelopment Plan, and has the more specific legal meaning set forth at Health & Safety Code § 33334.2.

Text amendment. An ordinance adding, repealing or changing the text of the Moreno Valley Municipal Code.

Tort. The violation of a duty created, imposed or recognized by the law which gives the wronged party a right to be awarded money for damages.

Ultra vires. An act beyond the scope of the legal power or authority of person or entity.

Very Low Income Person/Household has the meaning set forth at Health & Safety Code § 50105.

Waiver. An act intentionally waiving, relinquishing, or abandoning a known right, claim or privilege.

SECTION 13 – LIST OF EXHIBITS

- A *NEWSPAPER ARTICLES RE “TICKET FIXING”***

- B *CITY COUNCIL RULES AND PROCEDURES***

- C *“CAN I VOTE? CONFLICTS OF INTEREST OVERVIEW”
PREPARED BY THE FPPC***

- D *“LIMITATIONS AND RESTRICTIONS ON GIFTS, HONORARIA,
TRAVEL AND LOANS” PREPARED BY THE FPPC***