

New Mayors and Council Members Academy

2023



LEAGUE OF
**CALIFORNIA
CITIES**

Strengthening California Cities
through Advocacy and Education

Your Legal Powers and Obligations; Open Government & Conflicts of Interest

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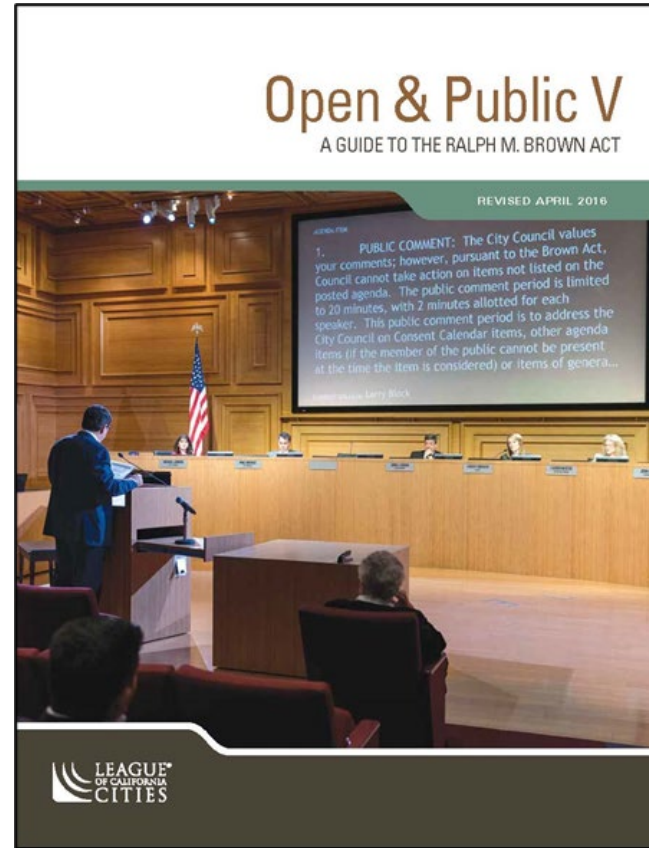
Legal Resources

The People's Business A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT



www.calcities.org/CPRAGuide

Open & Public V A GUIDE TO THE RALPH M. BROWN ACT



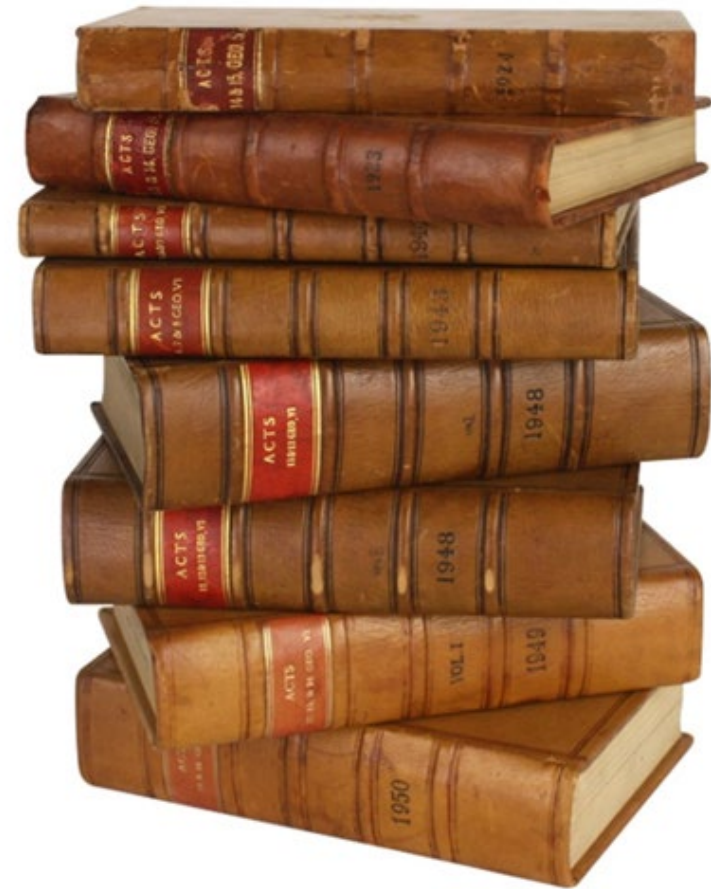
www.calcities.org/BrownActguide

Agenda

- City Powers and Limitations
- General Law Cities v. Charter Cities
- Raising Revenue
- Open Government and Transparency
- Ethics
- Councilmember's Role Concerning City Employees

Sources of Law

- California Constitution
- United States Constitution
- State Statutes
- Federal Statutes
- City Ordinances
- City Charters
- Court Decisions





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City Powers

- Tax
- Eminent Domain
- Public Works
- Corporate
- “Police Power”

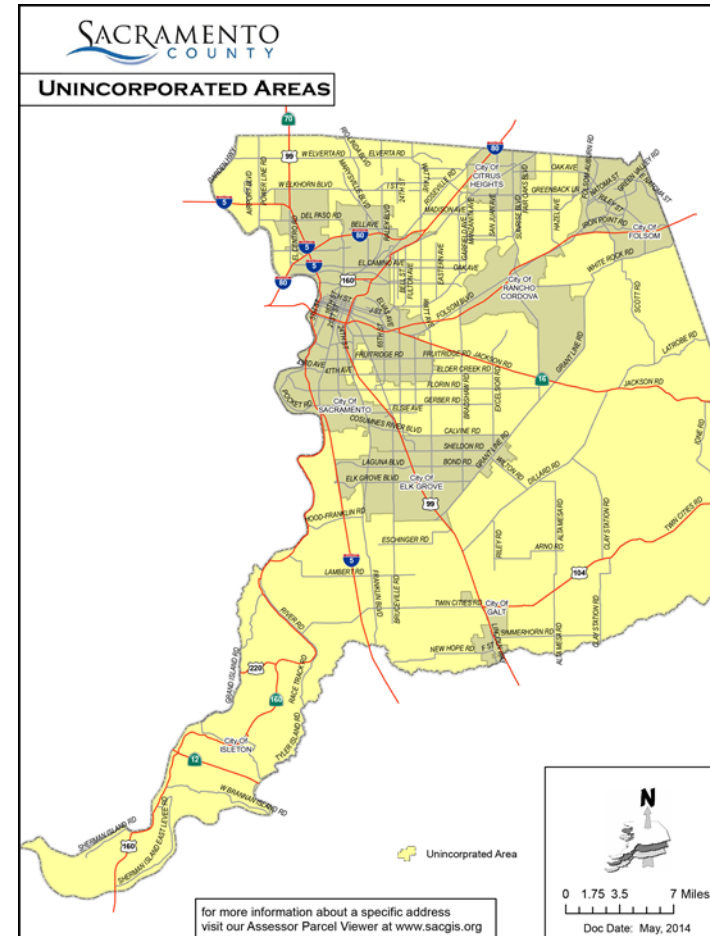


Police Power

- Granted by the California Constitution
- Power to regulate to further the public's health, safety, convenience and general prosperity
- Examples:
 - Land use regulations
 - Fire and safety regulations
 - Fees

Limitations on Powers

- City limits
- No gifts of public funds
 - Expenditures must have a public purpose
- Preemption by state or federal law



Preemption

- Basic Rule: when there is a conflict between laws, the “higher” government wins
- A “conflict” exists when:
 - An ordinance contradicts federal/state law
 - An ordinance duplicates federal/state law
 - An ordinance regulates an area “fully occupied” by federal/state law
- Charter cities have authority over “municipal affairs”

General Law v. Charter Cities

- 121 charter cities
- General law cities are bound by state law
- Charter cities have authority over “municipal affairs”



Raising Revenue

- Taxes
 - General- requires majority approval
 - Special – requires 2/3 approval
 - Proposition 26 broadly defines tax unless an exemption applies
- Fees
- Assessments
- Debt Financing

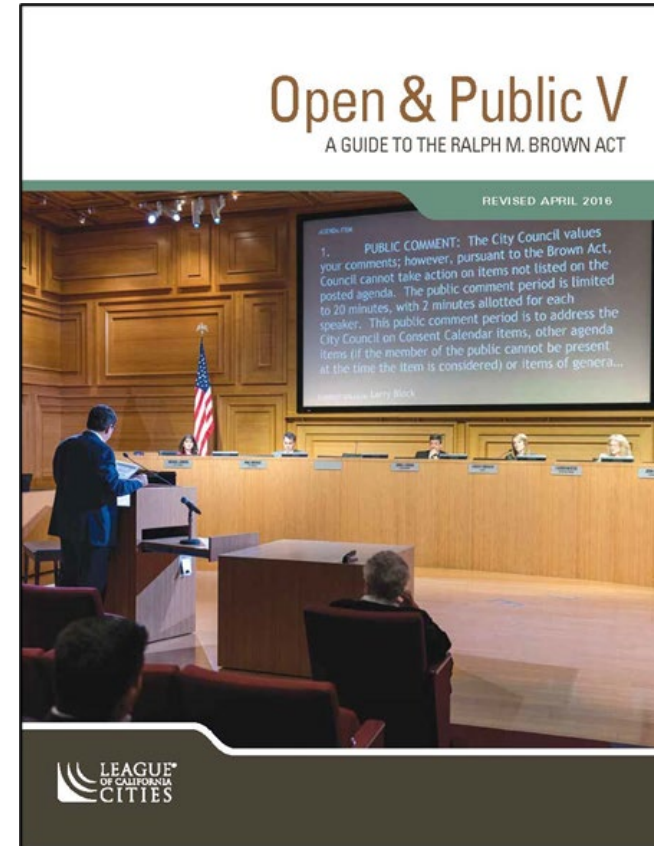


Open Government and Transparency

The People's Business A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT



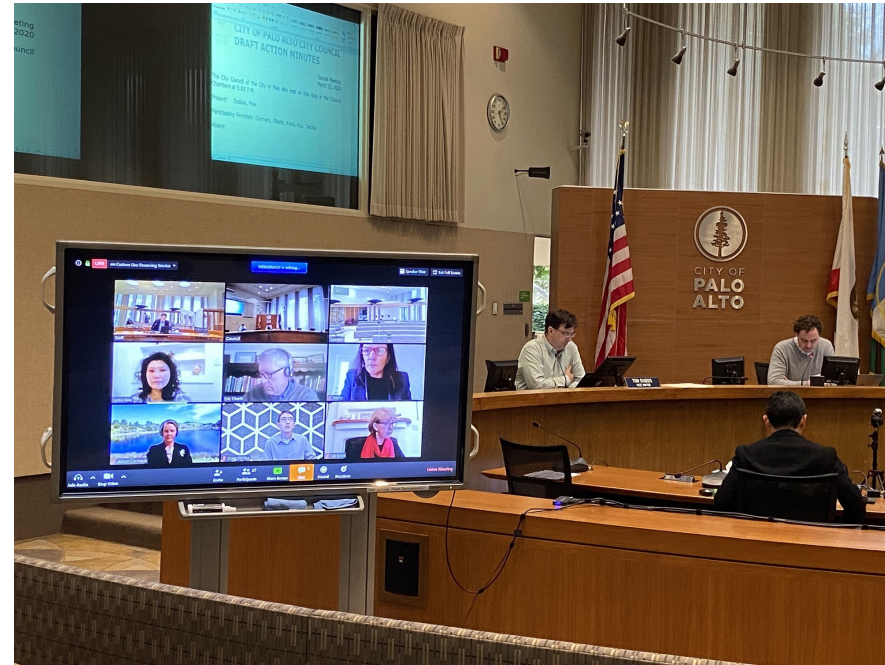
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Brown Act

- Requires “meetings” of a “legislative body” to be “open and public”



“Legislative Body”

- Includes:
 - Governing body (city council)
 - Newly elected members who have not yet assumed office
 - Appointed bodies
 - Standing committees (regardless of composition)
 - Governing body of a private organization in limited circumstances



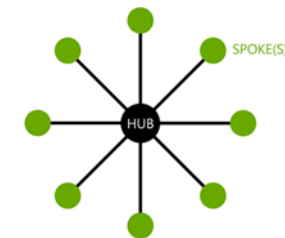
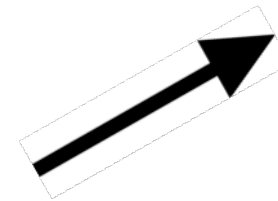
“Legislative Body”

- Does not include:
 - Temporary advisory committees composed of less than a quorum
 - Groups that advise a single decision maker



“Meetings”

- Includes:
 - Any gathering of a majority of the legislative body “to hear, discuss, deliberate, or take action” on a matter within the agency’s subject matter jurisdiction
 - Oral collective briefings
 - Legislative retreats
 - “Serial meetings”
 - Daisy chains or hub-and-spoke meetings
 - Use caution with email/social media



“Meetings”

- Use of email or other technology/media by a majority of a legislative body to discuss, deliberate, or take action on items within the body’s jurisdiction violates the Brown Act
- Recent social media legislation: AB 992
 - Clarifies communications officials can have on social media platforms open to the public
 - Officials can communicate on social media but should not directly respond/react to anything posted/shared regarding city business by another member of the legislative body



“Meetings”

- Does not include:
 - Individual contacts or staff briefings
 - Conferences
 - Community meetings
 - Meetings of other legislative bodies
 - Social and ceremonial gatherings
 - Attending standing committee meeting

“Open and Public”

- Includes:
 - Notice
 - Must post agenda in advance containing brief general description of items to be discussed
 - 72 hours for regular meeting
 - 24 hours for special meeting
 - Also on website
 - Teleconferencing rules
 - Cannot discuss non-agenda items
 - Public Comment



“Open and Public”

- AB 2449 (effective Jan. 1, 2023)
 - Allows use of teleconferencing without identifying each location in notice and agenda and making accessible to public if “just cause” or “emergency circumstances” exist and specified procedures and rules are followed

“Open and Public”

- AB 2449:
 - “Just Cause” defined as:
 - Childcare/caregiving
 - Contagious illness
 - Physical/mental disability
 - Travel for public business
 - Procedures:
 - Notify legislative body at earliest opportunity and provide general description of circumstances
 - Less than 2 meetings per year and other temporal limitations



“Open and Public”

- AB 2449:
 - “Emergency circumstances” defined as:
 - A physical or family medical emergency that prevents a member from attending in person.
 - Procedures:
 - Provide description (no more than 20 words and no personal medical information) and request legislative body allow remote participation
 - Legislative body must approve



“Open and Public”

- AB 2449:
 - Other rules:
 - Use both audio and visual technology for remote participation
 - Remote participants must disclose others over 18 in the room
 - Provide notice and a way for public to remotely hear, visually observe and remotely address the body
 - Call-in, internet-based, and in-person
 - Cannot require advance comments; must provide live option
 - If technology is disrupted, no further action can be taken

“Open and Public”

- Does not include:
 - Closed sessions
 - Examples:
 - Litigation
 - Real Estate Negotiations
 - Public Employment
 - Labor Negotiations
 - Requirements:
 - Agenda – “safe harbor” descriptions
 - Public report of actions and votes
 - Confidentiality



Public Records Act

- “Public records” must be disclosed unless they are “exempt”



“Public Records”

- Includes:
 - Any writing containing information relating to the conduct of the public’s business that is prepared, owned, used or retained by the agency regardless of physical form or characteristic
 - Electronic records
 - *City of San Jose v. Smith*: “writings about public business are not excluded simply because they have been sent, received or stored in a personal account.”



“Public Records”

- Does not include:
 - Statutory list of exemptions
 - “Catchall” allows nondisclosure where the public interest in nondisclosure clearly outweighs the public interest in disclosure



Ethics

- Political Reform Act
 - Prohibits official from making, participating in, or influencing a governmental decision in which he or she has a financial interest
 - Reporting obligations
- Government Code section 1090
 - Prohibits official from having a financial interest in their agency's contract
- Incompatible Offices
 - Prohibits public official from holding multiple offices that are incompatible with one another

Councilmember's Role with Respect to City Employees

- May have appointing authority over the city's highest officials (e.g., city manager)



City Council-City Attorney Relationship

- City is the client
- Consult the city attorney early and often
- Relay all pertinent facts and objectives
- Recognize that a concrete answer is not always possible

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Disclaimer: This paper is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised in this paper.

Legal Issues: The Law and Making Things Happen in Your Jurisdiction

Summary and Overview

Legal considerations frequently affect how you are able to pursue the goals that you and your colleagues set for your community. A basic understanding of the legal structure that governs cities will help you provide more effective community service.

This paper highlights some of the laws and legal principles that may impact your decision-making on the city council. It is not comprehensive by any means. You will want to forge a positive relationship with the city attorney in your city, who can help navigate the relevant laws and legal principles and assist in avoiding legal mistakes that could be costly for your city.

SECTION I: Sources of the Law and Municipal Powers

What are the Sources of Law for Cities?

The “law” affecting California cities can be found in a number of places:

- **The California Constitution** specifies the relationship among the various levels and branches of government, and establishes a number of individual rights. Cities derive a number of their powers directly from the California Constitution. Changing the Constitution requires a vote of the people. Proposals to change the Constitution may be placed on the ballot by either the Legislature or by initiative petition.
- **City Charters**, in those cities where citizens have elected to have charters, determine how a city is organized and, in some circumstances, give cities certain home rule prerogatives even in the face of conflicting state statutes. There are two types of cities in California: “charter cities,” which operate under the city's local charter, and “general law cities,” which operate under the general laws of the state.¹ Charters can also contain (self-imposed) limitations on city activities.
- **State Statutes** are typically enacted by the State Legislature and are printed in a series of “codes.” The California Government Code, for example, contains a number of provisions relating to the organization of general law cities, as

¹ See Cal. Gov. Code, §§ 34101 and 34102.

well as land use, planning and employee relations matters. Voters can also amend state statutes through the initiative process.

- **Local Ordinances** represent local agencies' exercise of law-making powers within their respective jurisdictional boundaries.
- **The Federal Constitution and Statutes** apply nationwide and typically act as restrictions on the exercise of power by state and local governments.
- **Judicial Decisions** interpret all of the above, frequently resolving ambiguities or conflicts among them.

What Powers Do Cities Have and How Are They Limited?

This section provides a brief overview of the sources of city authority and the factors that may constrain a city's ability to exercise that authority. A relevant consideration is whether your city is a charter or general law city since charter cities may retain local authority even when their enactments conflict with state law.

The "Police" Power

The California Constitution provides that a city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws.² This is commonly known as the "police power," and is often referred to as the city's regulatory authority to protect the public health, safety and welfare.

Preemption

A city's regulatory authority may be restricted if the proposed local ordinance or regulation conflicts with federal or state general laws. This is a concept known as "preemption." Federal or state law may preempt a city's ability to legislate in a particular area, either explicitly or by implication.

The test for preemption of local law by federal or state laws is similar. A local ordinance will be preempted by state law when it is in express conflict with state law.³ Preemption may also occur even when there is no express conflict if the state law has fully "occupied the field" of regulation.

² Cal. Const., art. XI, § 7.

³ Cal. Const., art. XI, § 7. Note, however, that charter cities are exempt from this restriction in regard to "municipal affairs." *Johnson v. Bradley*, 4 Cal.4th 389, 397 (1992).

Determining what constitutes a “conflict with general laws” is not always easy. Sometimes the Legislature expressly declares its intent to preempt local regulation. Oftentimes, the courts may be called upon to make the final determination.⁴

Charter City Powers

Perhaps the strongest expression of home rule or local control in California’s Constitution relates to a charter city’s authority over municipal affairs.⁵ If a matter is a “municipal affair” (and not a “matter of statewide concern”), a charter city has power to act, even to the extent that the city’s action may be at odds with a state statute. The chief restriction on local action under these circumstances is whether the action would be inconsistent with the city’s charter or the California or United States Constitutions.

Courts, rather than the Legislature, are the ultimate arbiters of whether a subject is a municipal affair or a matter of statewide concern.⁶ This determination is made on a case-by-case basis, which means that it frequently takes litigation to vindicate a charter city’s exercise of its authority. More information on charter cities can be found at www.cacities.org/chartercities.

Operation of Public Works

The California Constitution provides that a city may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication.⁷ It may furnish those services outside its boundaries, except within another municipal utility’s boundaries that furnishes the same service and does not consent. Persons or corporations supplying those services may operate within cities upon conditions and under regulations that the city may prescribe.⁸

⁴ For example, one court ruled that a city could not enact housing occupancy standards more stringent than the uniform standards contained in state housing law. *Briseno v. City of Santa Ana*, 6 Cal.App.4th 1378, 8 Cal.Rptr.2d 486 (1992). Another court held that a city could not regulate the storage of firearms. *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 67 Cal. Rptr. 2d 420 (1997). On the other hand, courts have found local ordinances allowing mobile home rent increases to fund capital improvements, prohibiting boisterous conduct in card clubs, and regulating nuisances related to the sale of alcoholic beverages not to be preempted by state law on related subjects. *Robinson v. City of Yucaipa*, 28 Cal. App. 4th 1506, 34 Cal. Rptr. 2d 291 (1994); *Lowe v. City of Commerce*, 59 Cal. App. 4th 1075, 69 Cal. Rptr. 2d 356 (1997); *City of Oakland v. Superior Court*, 45 Cal. App. 4th 740, 53 Cal. Rptr. 2d 120 (1996).

⁵ See generally Cal. Const., art. XI, § 5.

⁶ The threshold inquiry is whether a conflict exists between a charter city law and state law. If no conflict exists, the charter city law stands. If a conflict exists, the court will find the matter is a municipal affair unless it qualifies as a matter of statewide concern. Even if the subject matter is of statewide concern, the state law must be reasonably related and narrowly tailored to address that statewide concern. See *Johnson v. Bradley*, 4 Cal. 4th 389, 14 Cal. Rptr. 2d 470 (1992); see also *State Building and Construction Trades Council of California, AFL-CIO v. City of Vista*, 54 Cal. 4th 547, 279 P. 3d 1022 (2012).

⁷ Cal. Const., art. XI, § 9(a).

⁸ Cal. Const., art. XI, §9(b).

State and Federal Constitutional Limitations

Local officials' actions must also comply with the United States Constitution and federal law. Areas of federal law that frequently arise for cities include:

- The First Amendment establishment of religion, free exercise of religion and free speech clauses.
- The Fourth Amendment prohibition against unreasonable search or seizure.
- The Fifth Amendment right to remain silent (for example, in police interrogations) and the requirement of just compensation for the taking of property.
- The Fourteenth Amendment's protections of due process, equal protection and property rights.

California's Constitution also contains similar declarations of rights, as well as other provisions that may place limits on city actions. Some examples include provisions relating to water rights,⁹ workers compensation,¹⁰ alcoholic beverage regulation,¹¹ public housing projects¹² and the non-partisan nature of municipal government.¹³

City officials should also be aware of the various federal civil rights laws which prohibit public agencies from discriminating against individuals based on a number of protected characteristics (for example, race, gender, physical disability and age). The state also has a number of laws that contain similar—but not always the same—protections.

Indemnity and Immunity

When acting within the bounds of their authority, city council members, as public officials, enjoy a number of statutory immunities that shield them from personal liability and provide immunity under most circumstances.

Except as otherwise provided by law, the city must pay any judgment or any compromise or settlement so long as the following are true: (1) the claim or action arose from an act or

⁹ See Cal. Const., art. X.

¹⁰ See Cal. Const., art. XIV, §4.

¹¹ See Cal. Const., art. XX, §22.

¹² See Cal. Const., art. XXXIV.

¹³ See Cal. Const., art. II, §6.

omission occurring within the scope of employment; (2) a request for defense is made in writing at least 10 days before trial; and (3) the employee reasonably cooperates in good faith in the defense of the claim or action.¹⁴ For purposes of this discussion, council members are considered city employees, regardless of whether they are compensated or not.

But the city's duty to defend or indemnify a council member does not apply in the context of alleged conflicts of interest in violation of the Political Reform Act or other conflict of interest laws. Liability for conflicts of interest is personal to the council member. However, a council member is entitled to seek an opinion on conflict of interest issues from the Fair Political Practices Commission ("FPPC"). A written advisory letter from the FPPC will provide immunity to a public official who has requested and obtained such a letter. The same is not true for conflict advice a council member may have received from the city attorney, or for informal advice received from FPPC staff by telephone.

Exercising Power

Taking Legislative Action

Cities usually exercise their regulatory authority by adopting ordinances or resolutions. For general law cities, state law requires that the city attorney draft all ordinances.¹⁵ Further, state law requires that the mayor of a general law city sign the ordinances and that the city clerk attest the ordinances.¹⁶ The city clerk must, within 15 days after its passage, cause the ordinance to be published at least once in a newspaper of general circulation, or post the ordinance if no newspaper of general circulation is published in the city.¹⁷

After the ordinance has been introduced, it cannot be finally passed until the expiration of at least five days. The only exception is an urgency ordinance, which can be finally passed at the same meeting at which it is introduced.¹⁸ An ordinance in general law cities must be passed by a majority of the entire city council.¹⁹ The voting requirement also applies to resolutions.

Acting in a Quasi-Judicial Capacity

The city council is primarily a legislative and administrative body, but often sits in a quasi-judicial capacity. Quasi-judicial matters may include variances, use permits, annexation protests, and personnel disciplinary actions. Quasi-judicial proceedings tend to involve the

¹⁴ Cal. Gov. Code, § 825(a).

¹⁵ Cal. Gov. Code, § 41802.

¹⁶ See Cal. Gov. Code, § 36932.

¹⁷ See Cal. Gov. Code, § 36933.

¹⁸ See Cal. Gov. Code, § 36934.

¹⁹ See Cal. Gov. Code, § 36936.

application of generally adopted standards or rules to specific fact situations, much as a judge applies the law to a particular set of facts.

Those persons subject to a quasi-judicial proceeding must be given meaningful notice and an opportunity to be heard. A record should be kept of the witnesses and their testimony, the evidence introduced on both sides, and the council's findings.

"Findings" are the city council's explanation for its action. Findings are not only important to those interested in the council's decision, but to courts reviewing the council's action in the event of a legal challenge.

To satisfy due process obligations, the decision-maker must be fair and impartial.²⁰ Council members should be careful to listen to the testimony in such hearings if they vote on the matter, leaving biases, prejudices and pre-conceived ideas outside the hearing.²¹

SECTION II: The Money to Make Things Happen

California cities raise revenue to pay for public facilities and services in a variety of ways, including through taxes, fees, assessments, and debt financing. There are numerous laws and regulations related to raising revenue, including requirements for notice to and approval by the public and affected property owners. During this conference, you will participate in a financial responsibilities and city revenues workshop, in which you will receive training and educational materials that will assist you in complying with the complex laws that govern revenue-raising activities in your city.

SECTION III: Ethics, Conflicts of Interest and Open Government

As part of your participation in this conference, you will also receive what is commonly referred to as "AB 1234 training." Enacted in 2005, AB 1234 requires local elected officials to receive training every two years on the laws related to ethics, conflicts of interest and open government. The Institute for Local Government, in conjunction with the Attorney General's office and other stakeholders, has developed educational materials that will assist you in understanding these important, but often complicated, areas of the law.

²⁰ See *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (1996) (explaining basic requisites of due process in the context of a council's quasi-judicial action on a zoning appeal); *cert. denied*, 520 U.S. 1167, 117 S. Ct. 1430, 137 L. Ed. 2d 538 (1997).

²¹ See *Mennig v. City Council of City of Culver City*, 86 Cal. App. 3d 341, 150 Cal. Rptr. 207 (1978).