"Bry Myown" <brymyown@webuniverse.net>

10/12/2004 04:27 PM

To: "Bry Myown" <brymyown@webuniverse.net>, <district1@longbeach.gov>, <dan.baker@longbeach.gov>, <district3@longbeach.gov>, <district4@longbeach.gov>, <kell@longbeach.gov>, <district6@ci.long-beach.ca.us>, <district7@ci.long-beach.ca.us>, <district8@ci.long-beach.ca.us>, <district9@ci.long-beach.ca.us>
cc: <mayor@longbeach.gov>, <cityattorney@longbeach.gov>, <cityclerk@longbeach.gov>
Subject: LBCVB Form 700, Public Records, Brown Act Compliance

October 12, 2004

The Hon. Beverly O'Neill
Members of the City Council
333 W. Ocean Boulevard, 14th Floor
Long Beach CA 90802

Re: Biennial Conflict of Interest Code, Brown and Public Records Acts
Long Beach Convention and Visitors' Bureau, Inc.

Madam Mayor, Members of the Council:

As you know, for the last 4 years I have urged you to make your award to the Long Beach Convention and Visitors' Bureau, Inc., contingent on compliance with the 1984 Political Reform, Brown and Public Records Acts. I was therefore very gratified to learn that the LBCVB Board has apparently voted that some unspecified members will complete the Forms 700 required by PRA '84 and will file them at some unspecified time and place. I hope that vote signals that this matter will soon be put to rest.

With respect to conflict of interest codes, the Political Reform Act of 1984, passed by over 70% of the California electorate, directs that codes should be adopted at the most decentralized possible level of government. For that reason, the agencies, commissions and corporations that constitute local government agencies under the Act adopt such codes themselves and you, the local code reviewing body, Is charged with ruling on their sufficiency. If there is any question regarding whether a body constitutes a local government agency, the Act specifies that you make that decision in accordance with the Act as it has been interpreted by Fair Political Practices Commission decisions.
I presume that the reported vote signals the LBCVB's concurrence that it is a local governmental agency within the meaning of the Act. What remains to be done is that you, the code reviewing body, must discharge your duties by revising the city's conflict of interest codes so that the public will know you have approved which officers or individuals are required to file and will be guaranteed that their filings will be made according to the time, place and manner specified by the Act. You need *not* wait for the City's next biennial review to revise your code; indeed, if the LBCVB is a local government agency, the code reviewing body should have made that determination and revised its code long ago and the code may now be amended at any time. I strongly urge you to revise the City's code before you renew the LBCVB contract.

The reasons why I believe you should do this have nothing to do with the law and everything to do with appearances. I think that it would send a very troubling message were the public to believe that you intend to allow potentially conflicted bodies or individuals to simply pick and choose whether the law applies to them. I think it would send an equally bad message were the public to believe that you award multimillion dollar contracts that are not put out to bid and allow contractors to name their terms.

But as it regards the law, I know you have been given advice on this matter that conflicts with mine. I think that if there is ever any question in your minds when openness, transparency and ethics should be your

guiding principles, you should err on the side of openness, transparency and ethics.

If you question what I have said about the LBCVB's legal status, I would remind you that regardless of whatever advice you hear in these chambers, it is a matter of public record that the Long Beach city council by voted action in 1969 approved and appointed the agency members that would share in public transient occupancy taxes and in September, 1982, approved formation of the current body and subsequently capitalized its incorporation. It is a matter of public record that one of the principal purposes for which the CVB was formed was to facilitate the leasing of a public tidelands asset in compliance with the city's tidelands trust and that the city has warranted to the state that it is doing so. These facts satisfy two criteria of the attached four *Siegel* opinion tests, and that the LBCVB meets the remaining two tests is beyond dispute. (As the attached *Huntington Beach* decision clarifies, meeting three of the four tests is sufficient to trigger filing.)

If the city has delegated governmental duties to the LBCVB regarding its leasing of a public tidelands asset in accordance with the City's Tidelands Trust, the LBCVB also meets the criteria set forth in the Brown Act concerning public meetings law.
If you disagree in this regard, the Bureau escapes the strict letter provisions of the Brown Act only because its bylaws were allegedly revised to remove a voting city member one month before the law was amended. (The public must take this fact on faith, because the Bureau's meetings and records were not public.) The Bureau also escapes strict letter provisions of the Public Records Act because it is not entirely funded by public dollars.

However, as the attached decisions (*Epstein v. Hollywood Entertainment District* and *ILWU v. LAXT*) document, the 1st Appellate District has issued opinions that those laws must be liberally construed and that agencies meeting lower thresholds must comply with them.

First Appellate District rulings are binding on this jurisdiction, and Attorney General Bill Lockyer has signaled in the attached *Ventura County Cablevision* that he holds all local agencies to the standards of those rulings. I believe that if the LBCVB's status were challenged in this regard, the courts would make similar rulings. But more importantly, I think that you should hold the LBCVB to these standards because it is a matter of openness and transparency for you to do so.

I sincerely hope you will amend the city's conflict of interest codes to reflect that the LBCVB is a local governmental agency that is required to file. I sincerely hope you make compliance with the 1984 Political Reform, Brown and Public Records Acts a condition of the LBCVB contract at its next renewal.

Sincerely,

Bry Laurie Myown

cc: Robert E. Shannon, Esq.

Encl.:
FPPC Siegel Opinion
FPPC Huntington Beach Opinion
Attorney General Ventura County Cablevision Opinion]
Epstein v. Hollywood Business Improvement District


I.L.W.U. v. LAXT

Council Letter2.doc

siegel.pdf

Huntington Beach.doc

Epstein v. Hollywood Entertainment District.doc

International Longshoremen v. LAXT.doc

OPINION of BILL LOCKYER,.htm

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October 12, 2004

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333 W. Ocean Boulevard, 14th Floor
Long Beach CA 90802

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Sincerely,

Bry Laurie Myown

cc: Robert E. Shannon, Esq.

Encl.:

FPPC Siegel Opinion
FPPC Huntington Beach Opinion
Attorney General Ventura County Cablevision Opinion]
Epstein v. Hollywood Business Improvement District
I.L.W.U. v. LAXT

3 FPPC Ops. 62

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	
Opinion requested by: Samuel Siegel, City Attorney, City of Pico Rivera	)	No. 76-054
	)	July 6, 1977
	)	
	)	
	)	

BY THE COMMISSION: We have been asked the following question by Samuel Siegel, City Attorney for the City of Pico Rivera:

Are the members of the Board of Directors of the Pico Rivera Water Development Corporation "public officials" within the meaning of Government Code Section 87100 by virtue of their membership on such Board?

CONCLUSION

The members of the Board of Directors are "public officials" within the meaning of the Political Reform Act.

ANALYSIS

On June 21, 1974, the Pico Rivera Water Development Corporation (hereinafter "the Corporation") was formed pursuant to the California General Nonprofit Corporation Law, Corporations Code Sections 9000, et seq. The City of Pico Rivera provided the impetus for formation of the Corporation, which enjoys tax-exempt status under both Federal [Internal Revenue Code Section 501(c)(4)] and State law [Revenue and Taxation Code Section 23701(f)]. As set forth in the Articles of Incorporation, the purpose for which the Corporation was founded was to "acquire, maintain and operate a water system." More specifically, it appears that the following agreements and arrangements were entered into between the City of Pico Rivera and the Corporation.

The Corporation obtained financing by issuing bonds in the approximate amount of $11 million. The Corporation used the proceeds from the sale of the bonds to pay advance rent to the City for the water system and its related facilities. The City in turn used the advance rent to acquire title to the facilities. The Corporation, having leased the facilities, then subleased the system back to the City, and is presently applying the rent it receives from the City to pay the principal and interest on the outstanding bonds, as well as any incidental costs of maintaining the Corporation. During the term of this arrangement, the City retains ownership of the water system itself, while the Corporation holds title to all improvements, fixtures and equipment. However, once the indebtedness on the bonds issued by the Corporation is satisfied, the Corporation will cease to exist and title to the facilities will vest completely in the City. The City also has the option of purchasing the facilities by accelerating its payments to the Corporation.

There is one class of membership in the Corporation, and the members are the five Directors of the Corporation. Bylaws, Article III, Section 1. The city council does not choose the board but has the right to disapprove, in advance of the election, the name of anyone submitted to serve on the board. Although city council members have a right to attend meetings of the Corporation, none of the members of the city council are members of the Corporation.[1/] The Corporation does not have the power to impose taxes or exercise the power of eminent domain. Nor may it establish the rates to be charged to users of water supplied through operation of the water system. Under the leasing arrangements, the City (city employees) will operate the system.

This manner of accomplishing financing for essentially public purposes is not uncommon in California. It is a convenient method of financing public works projects without exceeding statutory limitations on municipal indebtedness. Accordingly, there are numerous entities similar to the Corporation which possess mixed public and private character-

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1/ However, at least one member of the Corporation is a former city councilman. The names of the persons who became members of the Corporation were suggested by the city council or staff of the City.

istics.[2] The question for resolution is whether one's membership on the board of such a corporation renders one a "public official" within the meaning of Government Code Section 87100.[3]

"Public official" is defined in Section 82048 as:

> ... every member, officer, employee or consultant of a state or local government agency.

"Local government agency" is in turn defined as:

> ... a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of these, but does not include any court or any agency in the judicial branch of government.
>
> Government Code Section 82041

Thus, the question becomes whether the "Corporation" is itself a "local government agency." In analyzing this question we believe several criteria should be considered, and that the true nature of the entity, not merely its stated purpose, should be analyzed in determining whether the entity is public or private within the meaning of the Act. These criteria include:

> (1) Whether the impetus for formation of the corporation originated with a government agency;
>
> (2) Whether it is substantially funded by, or its primary source of funds is, a government agency;

---

[2] This type of arrangement is known as "public leaseback," and is authorized, subject to some limitations, by Government Code Sections 54240, et seq.

[3] All statutory references are to the Government Code unless otherwise noted.

Government Code Section 87100 provides:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

(3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and

(4) Whether the Corporation is treated as a public entity by other statutory provisions.

An examination of each of these factors in this case leads us to the conclusion that the Corporation is a public entity and, therefore, must be considered a "local government agency" within the meaning of the Act. First, we find it significant that the City Council of Pico Rivera was intimately involved in the creation of the Corporation. We are advised that the idea for the Corporation originated with the city council because of the City's long-range plans to acquire control of its water system. Indeed, there is no reason to believe that the Corporation would have ever come into existence were it not a part of the City's future planning. We are also advised that the city council took an active role in soliciting names of persons to become members of the Corporation.

As we have noted, such arrangements are not at all unusual in cities which are restricted in their ability to raise funds for municipal projects because of limitations on the amount of debt they are allowed to incur. Nonetheless, it is apparent that the Corporation would not have been created were it not for the interest and involvement of the city council. We conclude therefore that the first of our four criteria is satisfied.

With respect to the second criterion, the Corporation initially sold bonds within the private sector just as the City might have. Thus, although there was no initial flow of capital to the Corporation from the City, under the leaseback agreements substantial public monies are flowing to the Corporation to pay the indebtedness on the bonds. Furthermore, the City is required to pay rent to the Corporation even if the receipts from the operation of the system are not sufficient to meet these costs. Thus, the Corporation is assured of a continuing source of capital from the City to retire the bonds it issues.

The obligation of the City to pay rent to the Corporation until the bonds are retired also demonstrates

the public character of the Corporation's involvement in this arrangement and, therefore, relates to our third criterion. The City is, in essence, guaranteeing the bonds of the Corporation. Although the legal form of this arrangement is valid and significant for purposes of the City's legal debt limitations, there is little meaningful difference, so far as the public or private character of the Corporation is concerned, between this leaseback agreement and the City simply issuing the bonds itself to pay for acquisition of the system.

Further evidence that the Corporation is fulfilling a public function under this plan is that the water system is to be operated solely by city employees. Moreover, the city has the option at any time to accelerate the payments due in order to take control of the system completely.

Finally, we consider it significant that the acquisition and operation of a water system is a service commonly provided by municipalities in their public capacities. The Corporation itself apparently recognizes the "public function" it is serving, as evidenced by its effort to qualify its bond offering for tax-exempt status under Section 103(a) of the Internal Revenue Code of 1954, as amended. That provision exempts from federal income tax interest earned on bonds which have been issued by a nonprofit corporation acting "on behalf" of a political subdivision of the state. To determine if bonds have been issued "on behalf" of a government entity, the Internal Revenue Service requires that the issuing corporation meet the following standards:

> ... (1) the corporation must engage in activities which are essentially public in nature ... (4) the state or a political subdivision thereof must have a beneficial interest in the corporation ... (5) the corporation must have been approved by the state or a political subdivision thereof, either of which must also have approved the specific obligations issued by the corporation.
>
> ... Revenue Ruling 63-20 quoted in the Opinion Request

The Corporation considers itself covered by this provision. While that fact may not be determinative of the question presented here, in conjunction with the other factors we have noted, it leads us to conclude that the Corporation serves a public function and that our third criterion is therefore met.

We turn, lastly, to a consideration of whether the Corporation is treated as a public entity in the context of other statutory provisions. We are satisfied that it is. The Corporation enjoys the same legal status as a public body under the tax and securities laws. As we have noted, interest on bonds issued by the Corporation are not taxable under federal law under the exemption generally applicable to bonds issued "on behalf" of a government entity. The Corporation also enjoys tax-exempt status under California Revenue and Taxation Code Section 23701(g). The Corporation's bonds are exempt from California Corporations Code Sections 25110, 25120 and 25130 dealing with the sale and offering of securities by virtue of Section 25100(a) which exempts from regulation:

> ... Any security (including a revenue obligation) issued or guaranteed by ... any city, county, ... public district, public authority, public corporation, public entity, or political subdivision ... or agency or corporate or other instrumentality of any one or more of the foregoing; ...

In addition, under Government Code Sections 5800, et seq., governing the sale of local securities, a nonprofit corporation of this type is given the same protections and responsibilities as joint power agencies and parking authorities, entities clearly public in nature.

Based on all the facts presented we conclude that the Corporation is intrinsically "public" in character. It is an almost fictional entity created by the City to accomplish the City's purposes. We conclude that it is a "department, division, bureau, office, board, commission or other agency" of the City within the meaning of Section 82041 and that, accordingly, its members are "public officials" within the meaning of Sections 82048 and 87100. [4/]

[4/] At the time this opinion was requested, the Corporation had not yet issued any bonds. Since that time, however, all the bonds have been issued and sold. This fact does not alter our conclusion that the members of the Corporation are public officials, but it may have a bearing on whether the Corporation must now adopt a conflict of interest code and, if so, what disclosure the code might require. If, for example, the only functions which the Corporation still performs are purely ministerial, a code may no longer be required. See Section 87302 and 2 Cal. Adm. Code Section 18751. Even if a code is required, the disclosure responsibilities imposed on the Corporation's directors would be limited and specific in light of the limited role the Corporation now plays in operating the water system project. See Section 87302.

Approved by the Commission on July 6, 1977. Concurring: Lowenstein, McAndrews, Quinn and Remcho. Commissioner Lapan abstained.

Daniel H. Lowenstein
Chairman

August 31, 2001

Sarah Lazarus, Deputy City Attorney
Office of the City Attorney
City of Huntington Beach
Post Office Box 190
Huntington Beach, CA 92648

Re: Your Request for Informal Assistance
Our File No. I-01-164

Dear Ms. Lazarus:

This letter is in response to your request for advice on behalf of the Huntington Beach Convention and Visitor's Bureau regarding the provisions of the Political Reform Act (the "Act").[1] As you do not indicate whether the members of the board of directors have requested your assistance in seeking advice on their behalf, we are treating this letter as a request for informal assistance.[2]

QUESTION

Are the members of the Board of Directors of the Huntington Beach Convention and Visitor's Bureau subject to the Political Reform Act and therefore required to annually file a "Form 700"?

CONCLUSION

The members of the Huntington Beach Convention and Visitor's Bureau Board of Directors are considered members of a local government agency and are therefore subject to the Political Reform Act and required to file the annual "Form 700."

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[1] Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

[2] Informal assistance does not provide the immunity conferred by formal written advice. (Regulation 18329(c)(3).)

FACTS

The Huntington Beach Convention and Visitor's Bureau ("Bureau") was created in 1989. It was and is a non-profit tax-exempt corporation organized under Section 501(c)(6) of the Internal Revenue Code. The purpose of the Bureau was and is to create, develop, promote and maintain a visitors and conference industry in a manner that will benefit the City of Huntington Beach. Its functions include representing the city in soliciting conventions and visitors, publicizing the advantages of the city for conventions and vacationing travelers, engaging in lobbying and legislative advocacy germane to the interests of the city's tourism industry and fostering high business standards in the visitor serving community.

The Bureau was not formed by the city, however, until 1994, the bylaws of the Bureau required that one voting member of the Board of Directors be the mayor or an individual appointed by him or her. After the changes made to the bylaws in 1994, there is no longer a requirement that any city official serve on the Board. It also should be noted that city approval is required for any amendment to the bylaws.

Although currently there are no voting members of the board of directors of the Bureau who are also city council members, in the past, council members have served on the Board. The city council does not direct the Bureau either in its day-to-day operation or in its policymaking. The Bureau does not report to the city council. Nevertheless, the Bureau has as its sole source of income money given via grant agreements from the City of Huntington Beach, as directed by the council. It therefore appears that as a practical matter, the city has the power to terminate the Board or control its operations by way of grant conditions.

ANALYSIS

In order to determine whether the Huntington Beach Convention and Visitor's Bureau Board of Directors are subject to the Act and therefore required to file the "Form 700," it must be determined whether the directors are public officials. Section 82048 states: "'Public official' means every member, officer, employee or consultant of a state or local government agency...." A local government agency is defined in Section 82041 as "a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing." Accordingly, the question at issue here is whether the Bureau is considered a local government agency.

To make this determination, the Commission in its *Seigel* opinion provided several criteria to be considered. They are:

1. Whether the impetus for formation of the corporation originated with a government agency;
2. Whether it is substantially funded by, or its primary source for funds is, a government agency;

3. Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
4. Whether the corporation is treated as a public entity by other statutory provisions. (*In re Seigel* (1977) 3 FPPC 62.)

Impetus for Formation

You stated in your letter that the purpose of the bureau is to "create, develop, promote and maintain a visitors and conference industry." The reason for doing so is to publicize the advantages of the city, solicit conventions and tourism, and engage in other activities to benefit the City of Huntington Beach. Although the Bureau was not formed by the city until 1994, the mayor, or the mayor's appointee, was required by the Bureau's bylaws to be a voting member of the board of directors. Additionally, city council members have also participated as voting members of the board. Because the underlying purpose of the Bureau is to represent the business and tourism industry of the city, it can be concluded that the impetus for the formation of the Bureau came from the city, a government agency. Therefore, the first criterion set forth by *Siegel* is met.

Funded by a Governmental Agency

Next, you have indicated in your letter that the city is the Bureau's sole source of income and therefore, the second criterion in *Siegel* is met.

Service which Public Agencies Traditionally Perform

Even though the operation of a convention bureau is sometimes performed by cities, it is performed equally as often by non-governmental entities. Although the services performed by the Bureau benefit the city, they also benefit private tourism and convention-related businesses throughout Huntington Beach. (*See In re Leach* (1978) 4 FPPC Ops. 48.) Thus, the third criterion from *Siegel* is not met.

Treated as a Public Entity by Other Statutes

Because of its non-profit, tax exempt status under Section 501(c)(6) of the IRS Code, the Bureau enjoys tax benefits similar to public agencies. Therefore, the fourth criterion from *Siegel* is met.

The *Seigel* opinion provides that certain criteria must be evaluated when determining whether an entity is a public agency or not. It does not, however, require that all four criteria be met. Therefore, because the Bureau meets three of the four factors from the *Seigel* opinion, we conclude it is a local government agency within the meaning of Section 82041. As such, the board of directors are public officials under section 82048 as members of a local government agency and therefore, must comply with the Act and applicable reporting requirements.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Kevin Hall
Intern, Legal Division

KH:jg
I:\AdviceLtrs\01-164

Filed 11/30/00

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AARON EPSTEIN, Plaintiff and Appellant, v. HOLLYWOOD ENTERTAINMENT DISTRICT II BUSINESS IMPROVEMENT DISTRICT et al., Defendants and Respondents.	B134256 (Super. Ct. No. BC207337)

Appeal from a judgment of the Superior Court of Los Angeles County. Ricardo Torres, Judge. Reversed and remanded with directions.

Moskowitz, Brestoff, Winston & Blinderman, Dennis A. Winston and Barbara S. Blinderman for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton and Andre J. Cronthall for Defendants and Respondents Hollywood Entertainment District Number Two Business Improvement District and Hollywood Entertainment District Property Owners Association.

James K. Hahn, City Attorney, Patricia V. Tubert, Senior Assistant City Attorney and Kenneth Cirlin, Assistant City Attorney for Defendant and Respondent City of Los Angeles.

The Hollywood Entertainment District II Business Improvement District (BID II) is a special assessment district in the City of Los Angeles (City). The Hollywood

Entertainment District Property Owners Association (the POA), a 501(c)(6) non-profit corporation, administers the funds City raises through assessments on businesses within BID II's boundaries.[1] The money is used to contract for such things as security patrols, maintenance, street and alley cleaning, and a newsletter.

Aaron Epstein (plaintiff), who owns property zoned for business purposes within BID II, sued defendants to establish that the POA was required to comply with the Ralph M. Brown Act (the Brown Act or the Act) (Gov. Code, §§ 54950 et seq.)[2] by holding noticed, open meetings and posting its agenda in advance. His motion for a preliminary injunction was denied after the superior court concluded that the Brown Act did not apply because (1) the POA had not been created by City, and (2) the POA had pre-existed the creation of BID II by at least two years.

Plaintiff filed timely notice of appeal. We reverse. The facts of this case come within the parameters of our holding in *International Longshoremen's & Warehousemen's Union* v. *Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287 (*International Longshoremen's*), because City "played a role in bringing" the POA "into existence." The POA was not simply a pre-existing corporation which just "happened" to be available to administer the funds for BID II. Instead, the record indicates that the POA

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1 BID II, City and POA may be referred to collectively as defendants in this opinion.

2 All further statutory references will be to the Government Code, except as otherwise noted.

was formed and structured in such a way as to take over administrative functions that normally would be handled by City.

FACTUAL AND PROCEDURAL BACKGROUND [3]

The Property and Business Improvement District Law of 1994 (Sts. & Hy. Code, §§ 36600 et seq.) authorizes cities to establish property and business improvement districts (BIDs) in order to levy assessments on real property for certain purposes. Those purposes include acquiring, constructing, installing, or maintaining improvements (Sts. & Hy. Code, § 36606), which include such things as parks, street changes, ramps, sidewalks and pedestrian malls. (Sts. & Hy. Code, § 33610, subds. (f), (*i*), and (k).) A prerequisite to the creation of such a BID is a petition filed by property owners who will pay more than 50 percent of the total amount of assessments to be levied. (Sts. & Hy. Code, § 33621, subd. (a).)

On September 3, 1996, City adopted Ordinance No. 171273 (the first Ordinance) to create the Hollywood Entertainment District Business Improvement District (BID I). The first Ordinance incorporated by reference a "Management District Plan" which contained information required by Streets and Highways Code section 36622.[4] The Management District Plan included a "Proposed Annual Program" which included

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[3] We recite facts taken from the Clerk's Transcript.

[4] For example, section 36622 requires a map showing each parcel of property within the district, the proposed district name, the improvements and activities proposed for each year of operation, the proposed amount to be spent to accomplish the activities and improvements each year, and the source of funding.

security, maintenance, marketing, streetscape and administration components. It also included a section on "Governance," which provided, in relevant part, "The Property and Business Improvement District programs will be governed by a non-profit association. Following is a partial summary of the management and operation of the *proposed* association." (Italics added.) The section on Governance made it clear that the non-profit association, which would govern BID I, was not yet in existence.[5]

Articles of incorporation of the Hollywood Property Owners Association (the POA), the non-profit association that did take over governance of BID I, were filed with the California Secretary of State on September 25, 1996. These articles of incorporation were dated September 5, 1996. The POA was a nonprofit mutual benefit corporation, whose specific and primary purpose was "to develop and restore the public areas of the historic core of Hollywood, California, in order to make it a more attractive and popular destination for tourists, shoppers, businesspeople and persons interested in culture and the arts."

On August 18, 1998, City adopted Ordinance No. 172190 (the second Ordinance) to create Hollywood Entertainment District II Business Improvement District (BID II). The second Ordinance incorporated by reference a "Management District Plan" which contained information required by Streets and Highways Code section 36622. The Management District Plan for BID II, which was entitled "Hollywood Entertainment

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[5] Section 36622 does *not* require the management district plan to contain information on governance or management. However, a city council may require the management district plan to contain other items not specifically required by the state law. (§ 36622, subd. (*l*).)

District Property Business Improvement District Phase II," included a copy of the petition used to form BID II, which referred to BID II as an "extension" of BID I. In fact, a comparison of the map of the proposed boundaries of BID II with the map of the proposed boundaries of BID I shows that BID II simply added approximately another 10 blocks down Hollywood Boulevard to the approximately five blocks down the length of the boulevard already covered by BID I.

The Management District Plan for BID II also included a "Program and Budget" which included security, maintenance, marketing and promotion, and administration components. It also included a section on "Governance," which provided, in relevant part, "The Property and Business Improvement District programs will be governed by the Hollywood Entertainment District Property Owners Association, a 501(c)(6) non-profit corporation *which was formed in 1996 to govern Phase I.* Following is a summary of the management and operation of the Association *as it relates to Phase II."* (Italics added.) In addition, unlike the Management District Plan for BID I, the Management District Plan for BID II included the "Amended and Restated Bylaws" of the POA – which were quite detailed.

The POA's monthly meetings were not open to the public, much to the distress of plaintiff, who owns property subject to assessment in favor of BID II. Furthermore, according to plaintiff, the POA's by-laws allow it to do other things which would be prohibited by the Brown Act if it were applicable to the POA, for example, the by-laws

allow meetings to take place anywhere, not solely within the POA's jurisdiction, and to take place without posting notice 72 hours in advance.

Accordingly, on March 18, 1999, plaintiff filed a complaint for declaratory and injunctive relief against defendants, seeking, among other things, a declaration that the Brown Act does apply to the POA and that, in fact, the POA's meetings are required to be open and noticed as required by the Brown Act, and that any contracts let by the POA must comply with the competitive bidding requirements of City's charter. He moved for a preliminary injunction, which the superior court denied, on the ground that because the POA was not created by City, and because it pre-existed the creation of BID II by at least two years, the Brown Act did not apply. The order denying the motion was filed on June 11, 1999, and on August 4, 1999, plaintiff filed notice of appeal.

CONTENTIONS ON APPEAL

Plaintiff contends that the trial court erred by concluding that the POA was not a legislative body under the Brown Act. He further contends that because the POA is a legislative body within the meaning of the Act, and can only exercise the powers that City could delegate to it, it cannot enter into contracts without complying with the City Charter's requirement of competitive bidding. Finally, he contends the trial court erred by denying him injunctive relief against the POA. Defendants dispute these contentions.

DISCUSSION

1. *Public Policy Favors Conducting the Public's Business in Open Meetings*

It is clearly the public policy of this State that the proceedings of public agencies, and the conduct of the public's business, shall take place at open meetings, and that the deliberative process by which decisions related to the public's business are made shall be conducted in full view of the public. This policy is expressed in (1) the Bagley-Keene Open Meeting Act (§§ 11120 et seq.), which applies to certain enumerated "state bodies" (§§ 11121, 11121.2), (2) the Grunsky-Burton Open Meeting Act (§§ 9027-9032), which applies to state agencies provided for in Article IV of the California Constitution, and (3) the Ralph M. Brown Act (§§ 54950 et seq.), which applies to districts or other local agencies, including cities. Under these various laws related to open meetings, a wide variety of even the most arcane entities must give notice of their meetings, and make such meetings open to the public.[6]

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[6] See, e.g., Business and Professions Code section 3325 [meetings of the Hearing Aid Dispensers Advisory Commission must be noticed and open]; Business and Professions Code section 7315 [meetings of the State Board of Barbering and Cosmetology must be noticed and open]; Government Code section 8790.7 [meetings of the California Collider Commission must be noticed and open]; Harbors and Navigation Code section 1153 [meetings of the Board of Pilot Commissioners must be noticed and open] Harbors and Navigation Code section 1202 [meetings for the purpose of investigating pilotage rates shall be noticed and open]; Health and Safety Code section 1179.3, subd. (b) [meetings of the Rural Health Policy Council for comments on projects in rural areas of California must be noticed and open]; Insurance Code section 10089.7, subd. (j) [meetings of the governing board and advisory panel of the California Earthquake Authority must be noticed and open]; Public Resources Code section 33509 [meetings of the governing board of the Coachella Valley Mountain Conservancy must be noticed and open]; Education Code section 51871.4, subd. (g) [meetings of the Commission on Technology in Learning must be noticed and open].

2. *The Purpose Behind the Brown Act*

The Brown Act, the open meeting law applicable here, is intended to ensure the public's right to attend the meetings of public agencies. (*Freedom Newspapers, Inc.* v. *Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 825; *International Longshoremen's, supra,* 69 Cal.App.4th at p. 293.)[7] To achieve this aim, the Act requires, inter alia, that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. (§ 54954.2, subd. (a); *International Longshoremen's, supra,* 69 Cal.App.4th at p. 293.) The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies. (*International Longshoremen's, supra,* 69 Cal.App.4th at p.293.)

The Brown Act specifically dictates that "[a]ll meetings of the *legislative body* of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953, subd. (a), italics added.) The term "legislative body" has numerous definitions, grouped together in section 54952. The definition which arguably may apply to the POA is found in subdivision (c)(1)(A) of section 54952. This portion of the Brown

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7 The Brown Act's statement of intent provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950.)

Act states, in relevant part: "As used in this chapter, 'legislative body' means: [¶] . . . [¶] (c)(1) A board, commission, committee, or other multimember body that governs a private corporation or entity that . . . : [¶] (A) Is *created* by the elected legislative body in order to exercise authority which may lawfully be delegated by the elected governing body to a private corporation or entity." (§ 54952, subd. (c)(1)(A), italics added.) Thus, the question before us here, as a matter of law, is whether the POA's board of directors is a legislative body within the meaning of this subdivision because the POA was created by City in order to exercise delegated governmental authority.

In answering this question, we are mindful, as we noted in *International Longshoremen's*, that the Brown Act is a remedial statute, that must be construed liberally as to accomplish its purpose. (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 294; see *People ex rel. Lungren* v. *Superior Court* (1996) 14 Cal.4th 294, 313 ["civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.].)

3. *The POA's Board of Directors Is a Legislative body Within The Meaning of the Brown Act*

Here, just as in *International Longshoremen's*, the pivotal issue is whether City, an elected legislative body, "created" the POA in order to exercise authority that City could lawfully delegate. Therefore, we discuss in some detail the facts of *International Longshoreman's*.

In the *International Longshoremen's* case, the Los Angeles Export Terminal, Inc. (LAXT) was a private, for-profit corporation organized to design, construct and operate a facility for the export of coal. The facility would be on land leased from the Harbor Department of the City of Los Angeles, and the Harbor Department was to be a fifteen-percent shareholder in LAXT. The shareholders' agreement by which LAXT was set up gave the Harbor Department the right to appoint three of LAXT's nineteen board members, plus veto power over the coal facility project. The lease of the Harbor Department's land was also something that had to be, and was, approved by the City Council.

Thereafter, LAXT's board of directors authorized LAXT to enter into a terminal operating agreement with Pacific Carbon Services Corporation (PCS). This decision was made at a meeting that did not comply with the requirements of the Brown Act. The International Longshoremen's & Warehousemen's Union (ILWU) sued to nullify the agreement with PCS, and for an injunction, contending that LAXT was required to comply with the Brown Act.

The trial court agreed with the union, nullified the PCS agreement, and enjoined LAXT from making decisions without complying with the Brown Act. It reached this result because it concluded that LAXT's board of directors was a legislative body within the meaning of the Brown Act. LAXT appealed, and argued, among other things, that it had not been created by the City Council (a legislative body), but only by the Harbor Commission (an appointed body), and hence the Brown Act, by its terms, did not apply.

We disagreed. Although section 54952, subdivision (c)(1)(A), did not, and does not, define what is meant by the term "created by," we relied on the ordinary definition of "to create," which is "to bring into existence." (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 295, quoting Webster's New Internat. Dict. (3d ed. 1986) p. 532.) We concluded that the "City Council was involved in bringing LAXT into existence," because it had the ultimate authority to overturn the Harbor Commission's actions, and could have disaffirmed any steps the Harbor Commission took to become part of LAXT. We also concluded that LAXT had been created to exercise governmental authority, to wit, the development and improvement of a city harbor (§ 37386), and that the City Council had delegated its governmental authority as to this aspect of the City's harbor, to LAXT. Therefore, the Brown Act applied to LAXT's meetings.

In the case here, the issue is whether the POA is a private corporation or entity that was *created* by City, the elected legislative body, to exercise some authority that City could lawfully delegate to a private corporation or entity. We conclude that here, just as in *International Longshoremen's*, the private entity, the POA, was "created" by City to exercise governmental authority over BID I, authority that City otherwise could exercise.

The POA was, in fact, "created" by City, because City "played a role in bringing" the POA "into existence." (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 295.) City specifically provided in the first Ordinance that BID I *would* be governed by a non-profit association, and even set forth a partial summary of the management and operation of such proposed association. Within days of the adoption of the first

Ordinance, the POA's articles of incorporation were prepared, and less than a month later, were filed with the Secretary of State. The POA's sole purpose was to "develop and restore the *public* areas of the historic core of Hollywood." And it was the POA that did, in fact, take over governance of BID I. Obviously, when City adopted the first Ordinance creating BID I that called for the creation of a non-profit association to govern the BID I programs, the City "played a role in bringing the POA into existence."

Defendants, however, would prefer that we ignore the POA's history vis-à-vis BID I, and concentrate instead on the POA's relationship to BID II. This is because the POA's existence preceded the creation of BID II. Defendants would have us look at the POA as simply a "preexisting corporation" that just "happened" to be available to administer the funds for BID II, apparently in reliance on footnote 5 of *International Longshoremen's*. In that footnote, we opined that if LAXT, the private corporation in question there, had been a "preexisting" entity "which simply entered into a contractual arrangement" to exercise authority that the government entity could have exercised, then the private entity "would not have been a creation of the City Council" and the private entity's board of directors would not be subject to the Brown Act. (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 300, fn. 5.)

There is no reason to ignore the history behind the POA, and, in fact, because the issue is the "creation" of the entity whose governing board now wields governmental authority, we *must* look at the circumstances surrounding the POA's birth. The record shows that the POA was formed and structured for the sole purpose of taking over City's

administrative functions as to BID I. Therefore, under the Brown Act, as interpreted by us in *International Longshoremen's and Warehousemen's Union* v. *Los Angeles Export Terminal, Inc., supra,* 69 Cal.App.4th 287, the POA's board of directors, vis-à-vis BID I, was subject to the Brown Act, because the board was a legislative body within the meaning of section 54952(c)(1)(A).

Thereafter, the boundaries of BID I were extended, the new BID was called BID II, and the POA simply continued to administer the assessments collected from property owners in the enlarged District. Obviously, the fact that the POA was already in existence and ready to take over City's legislative functions vis-à-vis BID II cannot change the result we would have reached if this case had been presented after BID I was created and before BID II had come into existence. And the connection between BID I and BID II rationally cannot be ignored in any determination of when and how the POA was "created." City itself, in the Management District Plan for BID II, explicitly recognized that the POA "was formed in 1996 to govern Phase I," that the POA also would govern "Phase II," and that BID II was just an "extension" of BID I.

Under these circumstances, we would improperly elevate form over substance if we were to treat the POA as a "pre-existing" private entity with which City just "happened" to decide to do business when it turned governance of BID II over to the POA. To turn a blind eye to such a subterfuge would allow City (and, potentially, other elected legislative bodies in the future) to circumvent the requirements of the Brown Act, a statutory scheme designed to protect the public's interest in open government. This we

will not do. (*Plumbing, etc., Employers Council* v. *Quillin* (1976) 64 Cal.App.3d 215, 220 [court will not place form above substance if doing so defeats the objective of a statute]; *People* v. *Jackson* (1937) 24 Cal.App.2d 182, 192, *disapproved on another ground*, *People* v. *Ashley* (1954) 42 Cal.2d 246, 262 ["It should be and is an established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit. (Citations.)"]; see also Civ. Code, § 3528 ["The law respects form less than substance"]; *People* v. *Reese* (1934) 136 Cal. App. 657, 672, *disapproved on another ground*, *People* v. *Ashley* (1954) 42 Cal.2d 246, 262 ["The evidence tends to prove, and the jury had the right to find, that the real intention of the defendants was to place upon the market and sell shares of stock in a corporation, and that the form of the certificates issued by them was a subterfuge adopted in order to defeat the purposes of the Corporate Securities Act. The operation of the law may not thus be circumvented"].)

The POA's status as an entity originally "created" to take over City's legislative functions was not somehow negated, annulled, or dissipated simply because its role subsequently was expanded by the geographic expansion of the area over which it exercised such functions. We therefore conclude that the POA is a legislative body within the meaning of the Brown Act and that the trial erred by denying plaintiff's motion for a preliminary injunction.

DISPOSITION

The judgment is reversed and remanded. The trial court is directed to enter a preliminary injunction in favor of plaintiff in accordance with the views expressed herein. Plaintiff shall recover his costs on appeal.

CERTIFIED FOR PUBLICATION

CROSKEY, J.

We concur:

KLEIN, P. J.

ALDRICH, J.

Filed 1/14/99

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

INTERNATIONAL LONGSHOREMEN'S and WAREHOUSEMEN'S UNION et al., Plaintiffs and Respondents, v. LOS ANGELES EXPORT TERMINAL, INC., Defendant and Appellant.	B112263 (Super. Ct. No. BC145559)

APPEAL from a judgment and postjudgment order of the Superior Court of Los Angeles County. Robert H. O'Brien, Judge. Affirmed.

Jones, Day, Reavis & Pogue, Gerald W. Palmer, Erich R. Luschei and Erin E. Nolan, for Defendant and Appellant.

Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar, Robert Remar, Beth A. Ross, and Arthur A. Krantz, for Plaintiffs and Respondents.

Defendant and appellant Los Angeles Export Terminal, Inc. (LAXT) appeals a judgment and postjudgment order in favor of plaintiffs and respondents International Longshoremen's and Warehousemen's Union (ILWU), three of its affiliated locals, ILWU Local 13, ILWU Local 63 and ILWU Local 94, and three individuals, James Spinosa, John Vlaic and Mike Freese, each of whom is an officer or agent of one of the local affiliates (collectively, ILWU).

The essential issue presented is whether LAXT's board of directors is subject to the open meeting requirements of the Ralph M. Brown Act (the Brown Act or the Act) (Gov. Code, § 549540 et seq.). [1]

For the reasons discussed below, we conclude LAXT, a private corporation in which the Harbor Department of the City of Los Angeles (the Harbor Department) is a shareholder, is subject to the Brown Act. The judgment and postjudgment order are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1981, the Board of Harbor Commissioners, which is entrusted by sections 138 and 139 of the Los Angeles City Charter (City Charter) with power and authority over the Harbor Department and the Port of Los Angeles, adopted Resolution 4531. Said resolution approved in concept the development of a major coal terminal on Terminal Island and set forth a series of steps to expedite related environmental studies and review. The Port commissioned a feasibility study which was to determine the viability of the project.

Thereafter, 28 private companies based in Japan, six domestic companies and the Harbor Department negotiated and reached agreement on a complex contractual arrangement known as the Shareholders' Agreement. Under the agreement, LAXT would be formed as a private, for profit corporation to design, construct and operate a dry bulk

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1 All further statutory references are to the Government Code, unless otherwise indicated.

handling facility for the export of coal on land leased from the Harbor Department. LAXT was to be capitalized with $120 million. The Harbor Department, as a 15 percent shareholder, would contribute $18 million and would be entitled to nominate three of the 19 LAXT board members.

Pursuant to a Charter provision requiring the Los Angeles City Council (City Council) to approve contracts with a payment commitment extending beyond three years, the Shareholders' Agreement was submitted to the City Council for its consideration.

On February 23, 1993, the City Council adopted Ordinance No. 168614, stating: "The Shareholders' Agreement is hereby approved and the Mayor of Los Angeles, or the President of the Board of Harbor Commissioners or the Executive Director of the Harbor Department is hereby authorized to execute said agreement."

On March 31, 1993, articles of incorporation were filed with the Secretary of State by a Los Angeles deputy city attorney.

The corporate entities and the Harbor Department entered into the Shareholders' Agreement on April 12, 1993.

The Shareholders' Agreement contained, inter alia, a condition that the project would not go forward unless the parties unanimously approved the terms of the lease between LAXT and the Harbor Department. The Board of Harbor Commissioners approved the lease on June 14, 1993.

The lease specified a term of 35 years, including a 10-year option. Under the City Charter, leases having a duration exceeding five years require City Council approval. Because of the lease's duration, it was submitted to the City Council, which approved it on July 27, 1993.

The lease then was executed by LAXT and "THE CITY OF LOS ANGELES, by its Board of Harbor Commissioners," effective August 30, 1993.

LAXT's organization, shareholder funding, election of directors, project design and construction then proceeded. On November 16, 1995, LAXT's board of directors

authorized LAXT to enter into a Terminal Operating Agreement with Pacific Carbon Services Corporation (PCS).

1. Proceedings.

Following LAXT's approval of the Terminal Operating Agreement with PCS, ILWU initiated this action on March 4, 1996 by filing a petition for writ of mandate which sought to nullify said agreement as well as injunctive relief. ILWU alleged PCS was a "non-union" or "anti-union" employer which would employ workers at LAXT and its facilities "at substandard wages and under substandard terms and conditions of employment that will severely harm the prevailing standards in the Port of Los Angeles." ILWU alleged LAXT's board of directors was a legislative body within the meaning of the Brown Act and therefore was required to conduct its meetings publicly.

ILWU sought an injunction requiring LAXT's board of directors to conduct its future affairs in accordance with the Brown Act, and a judicial determination that the PCS agreement was null and void because LAXT's board of directors had approved the PCS agreement without complying with the procedural requirements of the Brown Act calling for open public meetings. ILWU also sought an award of attorney fees pursuant to section 54960.5 of the Act.

2. Trial court's ruling.

The matter was tried on briefs, declarations and exhibits. After hearing arguments by counsel, the trial court ruled LAXT's board of directors is a "legislative body" subject to the Brown Act.

The statement of decision provides in relevant part: The construction and operation of the port facility herein would be a pure governmental function, but for the City's arrangement with LAXT. The construction and operation of a port facility is a properly and lawfully delegable activity of the City in that such activity constitutes the performance of administrative functions. (*County of Los Angeles* v. *Nesvig* (1965) 231 Cal.App.2d 603, 616.) The City's actions in forming LAXT "amount to the creation of LAXT by the City's elected legislative body, the Los Angeles City Council." LAXT is a

private entity created by the elected legislative body of a local agency in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity, within the meaning of section 54952, subdivision (c)(1).) Therefore, the Brown Act applies to the LAXT board of directors. On February 2, 1996, ILWU made a proper demand that LAXT comply with the Brown Act. "All actions taken by the LAXT [b]oard of [d]irectors within the 90 days preceding [ILWU's] demand, November 4, 1995 through February 2, 1996, are null and void, . . ." (§ 54960.1, subd. (a).)

Judgment was entered on March 7, 1997.

3. Postjudgment proceedings.

On April 25, 1997, the trial court denied LAXT's motion to vacate the judgment and enter a judgment of dismissal, as well as LAXT's motion for a new trial. In addition, pursuant to section 54960.5, the trial court awarded attorney fees to ILWU, as the prevailing party, in the sum of $60,660.

This appeal followed.

CONTENTIONS

LAXT contends the trial court erred: in determining the LAXT board of directors is a legislative body subject to the Brown Act; in denying LAXT's posttrial motions to vacate the judgment and for a new trial; in awarding attorney fees to ILWU and in the amount awarded.

DISCUSSION

1. Standard of review.

The central issue is the applicability of the Brown Act, specifically, whether LAXT's board of directors is a legislative body within the meaning of section 54952, subdivision (c)(1)(A), so as to be subject to the Act. As an appellate court, "we 'conduct independent review of the trial court's determination of questions of law.' [Citation.] Interpretation of a statute is a question of law. [Citations.] Further, application of the interpreted statute to undisputed facts is also subject to our independent determination.

[Citation.]" (*Harbor Fumigation, Inc.* v. *County of San Diego Air Pollution Control Dist.* (1996) 43 Cal.App.4th 854, 859.)

2. The Brown Act's purpose, scope and broad construction.

The Brown Act (§ 54950 et seq.), adopted in 1953, is intended to ensure the public's right to attend the meetings of public agencies. (*Freedom Newspapers, Inc.* v. *Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 825.) To achieve this aim, the Act requires, inter alia, that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. (§ 54954.2, subd. (a); *Cohan* v. *City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555.) The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies. (*Cohan, supra,* 30 Cal.App.4th at p. 555.)

The Act's statement of intent provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950; Stats. 1953, ch. 1588, p. 3270, § 1.)

The Brown Act dictates that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953, subd. (a).)

The term "legislative body" has numerous definitions, grouped together in section 54952. The question before us *de novo* is whether LAXT's board of directors is a

legislative body within the meaning of subdivision (c)(1)(A) of section 54952. This provision states in relevant part: "As used in this chapter, 'legislative body' means: [¶] . . . [¶] (c)(1) A board, commission, committee, or other multimember body that governs a private corporation or entity that . . . : [¶] (A) Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity." (§ 54952, subd. (c)(1)(A).)

In determining whether LAXT's board of directors is a legislative body within the meaning of the Brown Act, we are mindful that as a remedial statute, the Brown Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed. (*San Diego Union* v. *City Council* (1983) 146 Cal.App.3d 947, 955 [construing open-meeting requirements].) This is consistent with the rule that "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.]" (*People ex rel. Lungren* v. *Superior Court* (1996) 14 Cal.4th 294, 313.)

3. LAXT's board of directors is a legislative body within the meaning of the Brown Act.

As indicated, section 54952, subdivision (c)(1)(A), defines a legislative body as "A board, commission, committee, or other multimember body that governs a private corporation or entity that . . . : [¶] (A) Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity."

There is no question that LAXT's board of directors is a multimember body that governs a private corporation or entity. The dispute concerns the remaining elements of section 54952, subdivision (c)(1)(A). LAXT contends the trial court erred in concluding LAXT's board of directors is a legislative body within the meaning of the statute because: (1) LAXT was not created by an *elected legislative body*, the City Council, but rather, by an appointed body, the Board of Harbor Commissioners; (2) LAXT was not created to

exercise any governmental authority; and (3) LAXT was not granted any authority which could be delegated by the City Council. The arguments are unpersuasive.

a. LAXT was created by an elected legislative body, namely, the Los Angeles City Council.

To be subject to the Brown Act, the private corporation must be "created by the elected legislative body." (§ 54952, subd. (c)(1)(A).)

The City Charter vests the Harbor Commission, an *appointed* body, with power and authority over the operation and development of the Port of Los Angeles. (L.A. Charter §§ 138, 139.) LAXT asserts it was the Harbor Commission, not the City Council, which created LAXT, and the acts of the Harbor Commission in creating LAXT cannot be attributed to the City Council without disregarding the explicit allocations of power under the Charter.

Section 54952, subdivision (c)(1)(A), does not define what is meant by the term "created by." The ordinary definition of " to create" is "to bring into existence." (Webster's New Internat. Dict. (3d ed. 1986) p. 532.) Here, the City Council, as well as the Harbor Commission, played a role in bringing LAXT into existence.

Specifically, on February 23, 1993, the City Council adopted Ordinance No. 168614, stating: "The Shareholders' Agreement is hereby approved and the Mayor of Los Angeles, or the President of the Board of Harbor Commissioners or the Executive Director of the Harbor Department is hereby authorized to execute said agreement."

Following this formal action by the City Council, on March 31, 1993, articles of incorporation were filed by a deputy city attorney with the Secretary of State, and the corporate entities and the Harbor Department entered into the Shareholders' Agreement on April 12, 1993.

Thus, the City Council was involved in bringing LAXT into existence. The contention LAXT was entirely a creature of the Board of Harbor Commissioners is without merit.

Of particular significance is a provision of the City Charter expressly authorizing the City Council to review any matter originally considered by the Board of Harbor Commissioners, effectively usurping the Commission's role. Section 32.3 of the Charter provides in relevant part: "Notwithstanding any other provisions of this Charter, actions of commissions and boards shall become final at the expiration of the next five (5) meeting days of the City Council during which the Council has convened in regular session, unless City Council acts within that time by two-thirds vote to bring such commission or board action before it for consideration and for whatever action, if any, it deems appropriate, . . . If the Council asserts such jurisdiction, said commission or board will immediately transmit such action to the City Clerk for review by the Council and the particular action of the board or commission shall not be deemed final and approved. . . . *If the Council asserts such jurisdiction over the action, it shall have the same authority to act on the matter as that originally held by the board or commission*, but it must then act and make a final decision on the matter before the expiration of the next twenty-one (21) calendar days from voting to bring the matter before it, or the action of the commission or board shall become final." (Italics added.)

Thus, the City Council, an elected legislative body with ultimate responsibility to the voters, retains plenary decision-making authority over Harbor Department affairs and has jurisdiction to overturn any decision of the appointed Board of Harbor Commissioners. Here, by adopting an ordinance which approved the Shareholders' Agreement to form LAXT, as well as by acquiescing in the Board of Harbor Commissioners' activity in establishing LAXT, the City Council was involved in bringing LAXT into existence. Without the express or implied approval of the City Council, LAXT could not have been created. Accordingly, LAXT was created by an elected legislative body within the meaning of the statute, and the trial court properly so found.

Nonetheless, in an attempt to characterize LAXT as entirely a creature of the Board of Harbor Commissioners, LAXT emphasizes the Shareholders' Agreement was submitted to the City Council for its approval *only because* section 390 of the City

Charter required that contracts with a payment commitment extending for a period longer than three years be approved and authorized by ordinance of the City of Los Angeles. LAXT also stresses the 35-year lease between LAXT and the Harbor Department was submitted to the City Council for its approval *only because* section 140(e) of the City Charter required City Council approval for leases having a duration exceeding five years. These arguments are unpersuasive. Irrespective of the length of the payment commitment or the duration of the lease, the City's elected legislative body, namely, the City Council, inherently was involved in the creation of LAXT. Even assuming the payment commitment would have extended for less than three years, or the lease extended for less than five years, the City Council would have been involved in LAXT's creation.

As explained, under section 32.3 of the Charter the City Council is vested with the power to assert jurisdiction over any matter before the Board of Harbor Commissioners and the Council then has the same authority to act on the matter as was originally held by that board. Obviously, if the City Council is in agreement with the action taken by the Board of Harbor Commissioners, there is no need for the Council to usurp that board's role. In such a situation, the City Council, with full knowledge of the Harbor Commissioners' action and with the power to disaffirm the action, simply can acquiesce and thereby ratify the action taken by the Board of Harbor Commissioners. It is only when the City Council disagrees with the action taken by the Board of Harbor Commissioners that there is a need for the City Council to intervene.

Therefore, LAXT's attempt to depict itself as purely a creature of the appointed Board of Harbor Commissioners is unavailing. Irrespective of the level of the City Council's active involvement in the creation of LAXT, in view of the City Council's ultimate authority to overturn an action of the Harbor Commission, the trial court properly found LAXT was created by the City's *elected legislative body*. (§ 54952, subd. (c)(1)(A).)

b. LAXT was created to exercise governmental authority.

Section 54952, subdivision (c)(1)(A) requires the private entity be created by the elected legislative body "in order to exercise authority" which may be delegated. LAXT contends it was not created to exercise any governmental authority. The argument is not persuasive.

By way of background, a public body may delegate the performance of administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest. (*County of Los Angeles* v. *Nesvig, supra,* 231 Cal.App.2d at p. 616.) Case law delineates the permissible scope of delegation of governmental authority. For example, *Irwin* v. *City of Manhattan Beach* (1966) 65 Cal.2d 13, 23, upheld a city's grant of authority to private parties to build and operate an overpass as a lawful delegation. *County of Los Angeles* v. *Nesvig, supra*, 231 Cal.App.2d at page 617, upheld the County of Los Angeles's contract with a private company to operate the Music Center as a lawful delegation of governmental authority. *Haggerty* v. *City of Oakland* (1958) 161 Cal.App.2d 407, 415-417, upheld the Oakland Board of Port Commissioners' lease of a port facility to a private company as a lawful delegation. In contrast, *Egan* v. *San Francisco* (1913) 165 Cal. 576, 583-584, invalidated a contract between San Francisco and a private corporation formed to build an opera house on public land, where the city had not retained sufficient control over operation of the opera house for the delegation to be valid. [2]

Here, Tay Yoshitani, who served as LAXT's president and as an LAXT director representing the Harbor Department, acknowledged in a letter to a taxpayers' organization: "*All major facilities at the Port of Los Angeles are totally built and paid for by the port and subsequently leased to a tenant with the exception of LAXT.* In other words, the port typically assumes 'all of the risk' of building a major marine facility. In

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[2] There is no contention here there was an excessive delegation of public authority to LAXT.

the case of LAXT, the port structured the project so that other parties besides the City [of Los Angeles] assumed the bulk of the risk." (Italics added.)

Thus, LAXT's own president recognized the Board of Harbor Commissioners had delegated to LAXT its own authority to construct and operate a port facility. This is consistent with Government Code section 37386, which provides: "A city may lease such tide and submerged lands and uplands for: [¶] (a) Industrial uses. [¶] (b) Improvement and development of city harbors. [¶] (c) Construction and maintenance of wharves, docks, piers, or bulkhead piers. [¶] (d) *Other public uses* consistent with the requirements of commerce or navigation in city harbors." (Italics added; see also Gov. Code § 37385; Civ. Code, § 718.) Here, the City created LAXT to develop a coal facility on land leased from the Harbor Department, instead of developing the facility directly.

Accordingly, LAXT's contention it was not created to exercise any governmental authority must be rejected.

c. The delegation to LAXT was effected by the City Council.

To be subject to the Brown Act, the private corporation must be created to exercise governmental authority "that may lawfully be delegated by the elected governing body to a private corporation or entity." (§ 54952, subd. (c)(1)(A).) LAXT asserts the authority which was delegated to it was delegated by the Board of Harbor Commissioners, not by the City Council. LAXT contends only the Board of Harbor Commissioners had the authority to delegate the authority at issue herein, i.e., to construct and operate a port facility.

The contention fails. LAXT is correct insofar as sections 138 and 139 of the City Charter vest the Board of Harbor Commissioners with power and authority over the Port of Los Angeles. However, the Board of Harbor Commissioners was powerless to delegate any authority to LAXT without the express or implied approval of the City Council. As indicated, the City Council retains the power to assert jurisdiction over any action and has the same authority to act as that originally held by the Board of Harbor Commissioners, including the power to disapprove any decision of that board. (L.A.

Charter § 32.3.) Thus, the delegation of authority to LAXT could not have occurred without, at a minimum, the implied approval of the City Council.

Therefore, the trial court properly found the delegation of authority to LAXT was effected by the City Council as the duly elected legislative body, so as to bring LAXT within the Brown Act. [3]

d. Conclusion re applicability of Brown Act to LAXT's board of directors.

The trial court properly held LAXT's board of directors is subject to the Brown Act because it is a legislative body within the meaning of section 54952(c)(1)(A). This interpretation is informed by the broad purpose of the Brown Act to ensure the people's business is conducted openly. Under LAXT's constrained reading of the Brown Act, the statute's mandate may be avoided by delegating municipal authority to construct and

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[3] In support of LAXT's contention the City Council lacked power to delegate authority held by the Board of Harbor Commissioners, LAXT invokes section 32.1(a) of the City Charter, which states in relevant part: "Notwithstanding the powers, duties and functions of the several departments, boards or bureaus of the City government as set forth in this Charter, the Mayor, subject to the approval of the Council by ordinance, adopted by a two-thirds vote of the whole of the Council, may transfer any such powers, duties or functions from one department, board or bureau to another, or consolidate the same in one or more of the departments, boards or bureaus created by this Charter or in a new department, board or bureau created by ordinance. . . . *The power of the Mayor and Council so to act as provided in this section shall not extend to the Harbor Department,* Department of Airport, the Department of Water and Power, the City Employees' Retirement System or the Department of Pensions." (Italics added.)

LAXT's reliance on City Charter section 32.1(a) is misplaced. Section 32.1(a) empowers the Mayor and City Council to transfer powers, duties and functions from one department to another and specifies the power of the Mayor and Council so to act does not extend to the Harbor Department, among others. However, there is no issue here as to a transfer by the Mayor or Council of the powers of the Harbor Department to another municipal department. Further, nothing in section 32.1(a) negates the power of the City Council under section 32.3 to revisit any action taken by the Board of Harbor Commissioners. Thus, in allowing the delegation by the Harbor Department to LAXT to proceed, the City Council acted within its power by effectively ratifying the delegation.

operate a port facility to a private corporation. While there is no indication LAXT was structured in an attempt to avoid the Brown Act, LAXT's narrow reading of the statute would permit that to occur. Surely that is not what the Legislature intended. [4]

4. Trial court properly denied LAXT's posttrial motions.

Based on the above contentions, LAXT argues the trial court should have granted its motion to vacate the judgment and enter a judgment of dismissal, as well as its motion for new trial. This contention necessarily fails in view of our rejection of LAXT's underlying contentions.

In addition, LAXT asserts the trial court abused its discretion in denying the motion for new trial based on newly discovered evidence after trial. The newly discovered evidence showed that one of the three directors who had been nominated by the City Council in accordance with the Shareholders' Agreement had resigned, leaving only two city nominees sitting among 17 directors. Further, due to the subsequent issuance of new shares, the Harbor Department's stake in LAXT has decreased to 13.6 percent, and because the Shareholders' Agreement allocates one nomination for each five percent share, the City Council would not be able to nominate a third director. LAXT argues this new evidence demonstrates LAXT is a private corporation engaged in commerce, not an instrumentality of government.

The argument is unavailing. The issue here is whether LAXT's board of directors amounts to a "legislative body" within the meaning of section 54952, subdivision

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[4] We emphasize our holding is a narrow one. LAXT's board of directors is subject to the Brown Act pursuant to section 54952, subdivision (c)(1)(A), because, inter alia, LAXT was created by an *elected legislative body*, i.e., the Los Angeles City Council. Had LAXT been a *preexisting* corporation which simply entered into a contractual arrangement with the Harbor Department to develop the coal facility, LAXT would not have been a creation of the City Council and LAXT's board of directors would not be subject to the Brown Act pursuant to section 54952, subdivision (c)(1)(A).

(c)(1)(A). The dilution of the Harbor Department's stake in LAXT does not alter the conclusion that LAXT's board is a legislative body within the meaning of the statute.

Therefore, we reject LAXT's contention the trial court abused its discretion in denying the motion for new trial.

5. Award of attorney fees to ILWU was proper.

LAXT contends the trial court erred in making an award of attorney fees to ILWU and in the amount awarded. Its arguments are unpersuasive.

a. LAXT's board of directors is a "legislative body" within the meaning of section 54960.5.

Section 54960.5, which was the basis for the trial court's award of attorney fees and costs, states in relevant part: "A court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to Section 54960 or 54960.1 where it is found that a *legislative body* of the local agency has violated this chapter." (Italics added.)

The Brown Act violation herein was committed by the board of directors of LAXT, not by the City Council. Obviously, LAXT's board of directors is *not* a "legislative body" within the ordinary definition of the term. Therefore, the question arises whether LAXT's board is subject to the attorney fees provision of section 54960.5.

Admittedly, the statutory scheme is not a model of drafting. Nonetheless, it would appear the extensive definition of "legislative body" set forth in section 54952 applies to the use of that term in section 54960.5. It is a fundamental principle of statutory interpretation that statutes are not construed in isolation, but rather, with reference to the entire scheme of law of which they are part so that the whole may be harmonized and retain effectiveness. (*Brown* v. *Superior Court* (1984) 37 Cal.3d 477, 484; *People* v. *Ledesma* (1997) 16 Cal.4th 90, 95.) Further, it is internally inconsistent to suggest that a governing board subject to the open meeting requirements of the Brown Act pursuant to the definition of "legislative body" contained in section 54952 is exempt from the Act's attorney fees provision on the ground it is not a "legislative body" within section 54960.5

Accordingly, we conclude LAXT's board of directors is a legislative body subject to the attorney fees provision of section 54960.5 of the Act.

b. Award of attorney fees was within trial court's discretion.

LAXT argues the trial court abused its discretion in awarding any attorney fees to ILWU due to the lack of any benefit to the general public. (*Common Cause* v. *Stirling* (1983) 147 Cal.App.3d 518, 524.) LAXT argues ILWU's purpose in bringing this litigation was to advance the union's parochial goal of preserving the level of the prevailing wage and voiding the approval by LAXT of a contract with a nonunion employer.

By way of background, a trial court is not required to award attorney fees "to a prevailing plaintiff in every Brown Act violation. A court must still thoughtfully exercise its power under section 54960.5 examining all the circumstances of a given case to determine whether awarding fees under the statute would be unjust with the burden of showing such inequity resting on the defendant." (*Common Cause* v. *Stirling* (1981) 119 Cal.App.3d 658, 665.) Considerations which the trial court should weigh in exercising its discretion include "the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit." (*Ibid.*)

The public benefit from ILWU's action was sufficient to support an award of attorney fees. As discussed, LAXT asserted it was a private entity beyond the reach of the Brown Act, and it continues to adhere to that position. Therefore, had ILWU not brought this action, LAXT would have engaged in recurring violations of the Brown Act, to the detriment of the public generally. Clearly, the outcome of the lawsuit was not exclusively for the benefit of ILWU.

Accordingly, we reject LAXT's contention an award of attorney fees to ILWU is unjust.

c. Trial court did not err in basing the attorney fees award on market rates.

LAXT contends the $60,660 attorney fees award to ILWU is excessive. The record reflects ILWU paid its attorneys an hourly rate of $125 per hour and later, $140 per hour. However, in moving for attorney fees, ILWU requested reasonable attorney fees based on market rates, which ranged from $125 per hour to $275 per hour for the attorneys who worked on this matter. LAXT contends the trial court erred in awarding fees in excess of those actually charged by ILWU's counsel. The argument fails.

In *Serrano* v. *Unruh* (1982) 32 Cal.3d 621, 642, which involved a claim for attorney fees under Code of Civil Procedure 1021.5, the private attorney general statute, our Supreme Court cited with approval the view of the First Circuit, which earlier held: " 'We do not think . . . that compensating a public interest organization . . . on the same basis as a private practitioner results in . . . a windfall . . . . Indeed, we are concerned that compensation at a lesser rate would result in a windfall to the defendants.' (*Palmigiano* v. *Garrahy* (1st Cir. 1980) 616 F.2d 598, 602, cert. den. . . .)" *Serrano* concluded "[s]ervices compensable under section 1021.5 are computed from their reasonable market value. The trial court was entitled to use the prevailing billing rates of comparable private attorneys as the 'touchstone' for determination of that value. Cost figures bore no reasonable relevance to calculation of the 'touchstone' figure. [Fn. omitted.]" (*Id.*, at p. 643.)

The private attorney general statute is analogous to the Brown Act's attorney fees provision in that both authorize compensation for private actions which serve to vindicate important rights affecting the public interest. (*Serrano, supra*, 32 Cal.3d at p. 632; *Common Cause, supra*, 147 Cal.App.3d at p. 524.) In *Common Cause*, a case involving attorney fees under the Brown Act, the court was guided, inter alia, by decisions involving fees under the private attorney general theory. (*Common Cause, supra*, 147 Cal.App.3d at p. 522, citing *Marini* v. *Municipal Court* (1979) 99 Cal.App.3d 829 and *Woodland Hills Residents Assn., Inc.* v. *City Council* (1979) 23 Cal.3d 917.) Therefore, the rationale for basing an award of attorney fees on reasonable market value is equally

applicable to section 54960.5. Accordingly, the trial court was not required to base the attorney fees award on the fees actually incurred by ILWU.

6. ILWU is entitled to reasonable attorney fees on appeal.

In the respondent brief, ILWU requests reasonable attorney fees incurred in the defense of this appeal.

The issue presented is whether section 54960.5 authorizes an award of attorney fees at the appellate level. The statute provides a court may award attorney fees and costs "to the plaintiff" or "to a defendant." (§ 54960.5.) The statute does not use the terms "appellant" or "respondent." Nonetheless, we conclude section 54960.5 authorizes compensation for all hours reasonably spent, including those necessary to defend the judgment on appeal.

In *Serrano,* defendants contended no fees were recoverable for defending the fee award on appeal because the appeal did not independently meet the requirements of Code of Civil Procedure section 1021.5. (*Serrano, supra,* 32 Cal.3d at p. 637.) *Serrano* disagreed, reasoning a contrary rule "would permit the fee to vary with the nature of the opposition." (*Id.*, at p. 638.) A defendant " 'cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.' [Citation.]" (*Ibid.*) Therefore, *Serrano* held that "absent circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." (*Id.*, at p. 639.)

By a parity of reasoning, we conclude ILWU is entitled under section 54960.5 to recover reasonable attorney fees incurred in defending this appeal. [5]

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[5] If our interpretation of various aspects of the Brown Act is not what the Legislature intended, the statutory scheme could use clarification. (See *Malibu Committee for Incorporation* v. *Board of Supervisors* (1990) 222 Cal.App.3d 397, 410, review den.; *Mir* v. *Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1487, fn. 7, review den.; *Las Tunas Beach Geologic Hazard Abatement Dist.* v. *Superior Court*

DISPOSITION

The judgment and postjudgment order are affirmed. ILWU shall recover costs and reasonable attorney fees on appeal.

CERTIFIED FOR PUBLICATION

KLEIN, P.J.

We concur:

CROSKEY, J.

ALDRICH, J.

(1995) 38 Cal.App.4th 1002, 1016, fn. 10, review den.; *United Farm Workers of America* v. *Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, 321, review den.; *Denny's, Inc.* v. *City of Agoura Hills* (1997) 56 Cal.App.4th 1312, 1329, fn. 9.)

OPINION of BILL LOCKYER,

Attorney General;

MARJORIE E. COX, Deputy Attorney General

No. 01-401

Office of the Attorney General of the State of California

Filed March 14, 2002

THE HONORABLE TONY STRICKLAND, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following questions:

Do the open meeting requirements of the Ralph M. Brown Act apply to the meetings of the governing board of a private, nonprofit corporation formed for the purpose of providing programming for a cable television channel set aside for educational use by a cable operator pursuant to its franchise agreement with a city and subsequently designated by the city to provide the programming services?

Do the records disclosure requirements of the Public Records Act apply to such a corporation?

CONCLUSIONS

The open meeting requirements of the Ralph M. Brown Act apply to the meetings of the governing board of a private, nonprofit corporation formed for the purpose of providing programming for a cable television channel set aside for educational use by a cable operator pursuant to its franchise agreement with a city and subsequently designated by the city to provide the programming services.

The records disclosure requirements of the Public Records Act apply to a private, nonprofit corporation formed for the purpose of providing programming for a cable television channel set aside for educational use by a cable operator pursuant to its franchise agreement with a city and subsequently designated by the city to provide the programming services.

ANALYSIS

In 1995, the City of Thousand Oaks ("City") granted Ventura County Cablevision ("Cablevision") a franchise to install and operate a cable television system within the City. Cablevision agreed to set aside a channel for educational use and to operate the channel until such time as the City designated a nonprofit corporation to assume operational control. Cablevision also agreed to grant $25,000 for the purchase of television production equipment to a consortium of educators to be designated by the City.[FOOTNOTE 1]

In 1996, a nonprofit public benefit corporation ("Corporation") was organized with the stated purpose of "join [ing] together the area' s schools, universities, and colleges and other educational organizations in order to establish and implement policies for the management, utilization, programming and scheduling of one or more dedicated educational access community cable TV channels. . . ." The City designated the Corporation as the entity responsible for programming the educational access channel ("Channel 21") to be set aside under Cablevision' s franchise agreement. The City also designated the Corporation as the recipient of Cablevision' s $25,000 production equipment grant and similar grants, thereby providing the Corporation with an initial capitalization of $57,000.

The Corporation currently has five directors, three of whom are appointed by the Conejo Valley Unified School District ("School District"); the other two directors must be approved by the School District. One of the Corporation' s directors is a School District trustee. The School District provides $200 annually towards the

Corporation' s franchise fees.

Insofar as we have been advised, no City officer has served as a director of the Corporation, and the City has not directly contributed money to the Corporation since the original grants of $57,000. However, the City has the right to review and approve any guidelines the Corporation has or might adopt concerning the use of Channel 21 and has the right to terminate the authority previously delegated to the Corporation to provide programming for the channel.

1. Public Meeting Requirements

The first question to be resolved is whether the meetings of the Corporation' s board of directors are subject to the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § § 54950-54962; "Brown Act"). [FOOTNOTE 2] We conclude that they are.

The Brown Act generally requires the legislative body of a local public agency to hold its meetings open to members of the public. (§ § 54951, 54952, 54953, 54962.) Agendas of the meetings must be posted (§ § 54954.1, 54954.2), and the public must be given an opportunity to address the legislative body on items of interest (§ 54954.3).

The evident purposes of the Brown Act are to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. Not only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions taken. (§ 54950; see *Roberts v. City of Palm*dale (1993) 5 Cal.4th 363, 373, 375; *Frazer v. Dixon Uni*fied School Dist. (1993) 18 Cal.App.4th 781, 794-798; *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 100; *Sacramento Newspaper* Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41, 45.)

Subdivision (a) of section 54953 provides for meetings of local agencies to be open to the public:

" All meetings of the legislative body of a lo
cal agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

A "local agency" is defined in section 54951 as follows:

" As used in this chapter, ' local agency'
means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency."

The term "legislative body" is defined in section 54952 to include the board of private corporations in specified circumstances:

" As used in this chapter, ' legislative body'
means:

"......"

"(c)(1) A board, commission, committee, or
other multimember body that governs a private corporation or entity that either:

"(A) Is created by the elected legislative body
in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity.

"(B) Receives funds from a local agency and
the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency.

".....

Under the language of section 54952, subdivision (c)(1)(A), the board of directors of the Corporation would constitute a "legislative body" subject to the Brown Act if the Corporation was created by an elected legislative body to exercise authority lawfully delegated by such elected legislative body. (See *Epstein v. Hollywood Entertainment* Dist. II Bus. Improvement Dist. (2001) 87 Cal.App.4th 862, 868-873; *International Longshoremen' s & Ware*housemen' s Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal.App.4th 287, 293-300.)

In the present circumstances, the city council of the City (an elected legislative body of a local agency) played a role in bringing the Corporation into existence by (1) granting a franchise to Cablevision, (2) requiring Cablevision to set aside an educational channel, (3) designating the Corporation as the entity to operate the channel, and (4) indirectly providing the Corporation with an initial capitalization of $57,000. The term "created by" in section 54952, subdivision (c)(1)(A), means that the "City ' played a role in bringing' the [private corporation] ' into existence.' [Citation.]" (*Epstein v. Hollywood Entertainment Dist. II Bus.* Improvement Dist., supra, 87 Cal.App.4th at p. 870, citing *International Longshoremen' s & Warehousemen' s Union* v. Los Angeles Export Terminal, Inc., supra, 69 Cal.App.4th at p. 295.)

The authority to operate the educational access channel was lawfully delegated to the Corporation by the city council of the City. (See § 53066; 47 U.S.C. § § 521, 531; see also *International Longshoremen' s & Warehousemen' s* Union v. Los Angeles Export Terminal, Inc., supra, 69 Cal.App.4th at p. 297 ["a public body may delegate the performance of administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest"].) Here, the City has reserved the right to review and approve any guidelines the Corporation has concerning the use of Channel 21 and has reserved the right to terminate its authority previously delegated to the Corporation.

Both of the conditions of section 54952, subdivision (c)(1)(A), have therefore been met, resulting in the Corporation' s board coming within the meaning of a "legislative body" for purposes of the Brown Act' s requirements.

Moreover, the Corporation' s board also constitutes a "legislative body" under the terms of section 54952, subdivision (c)(1)(B). The Corporation receives funds from the School District, a local agency (§ 54951). Not only does the School District appoint three of the Corporation' s five directors, it must approve the appointments of the other two directors as well. One of the School District' s trustees is a Corporation director with full voting rights. Hence, the Corporation' s board constitutes a "legislative body" as defined in section 54952, subdivision (c)(1)(B).

We conclude that the open meeting requirements of the Brown Act apply to the meetings of the governing board of a private, nonprofit corporation formed for the purpose of providing programming for a cable television channel set aside for educational use by a cable operator pursuant to its franchise agreement with a city and subsequently designated by the city to provide the programming services.

2. Public Records Requirements

The second question to be resolved is whether the records of the Corporation are subject to the requirements of the Public Records Act (§ § 6250-6276.48). We conclude that they are.

Under the Public Records Act, a state or local public agency is generally required to allow any member of the public to inspect the records in its custody. (§ § 6250, 6252, 6253; *Register Div. of Freedom Newspaper, Inc. v. County* of Orange (1984) 158 Cal.App.3d 893, 901.) "[A]ccess to information concerning the conduct of the people' s business is a fundamental and necessary right of every person in this state." (§ 6250; see *Times Mirror Co. v. Superior* Court (1991) 53 Cal.3d 1325, 1338; *Wilson v. Superior* Court (1996) 51 Cal.App.4th 1136, 1141.)

Local public agencies (see § 6252, subd. (d)) that are subject to the public disclosure of their records are defined in section 6252, subdivision (b), as follows:

" ' Local agency' includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; other local public agency; or nonprofit entities that are legislative bodies of a local agency pursuant to subdivisions (c) and (d) of Section 54952."

The Corporation meets the test for being a local agency as that term is defined in section 6252. As found in answer to the first question, the Corporation is a nonprofit entity whose board of directors constitutes a "legislative body" pursuant to section 54952, subdivision (c).[FOOTNOTE 3] Our answer to the first question thus answers the second question.

We conclude that the disclosure requirements of the Public Records Act apply to a private, nonprofit corporation formed for the purpose of providing programming for a cable television channel set aside for educational use by a cable operator pursuant to its franchise agreement with a city and subsequently designated by the city to provide the programming services.

March 18, 2002 CALIFORNIA

:::::::::::::::::::::::::::::: FOOTNOTE(S) ::::::::::::::::::::::::::::::

FN1. The Cable Communications Policy Act of 1984 (47 U.S.C. § § 521-573) authorizes local governments to require cable operators to enter franchise agreements governing the operation of their cable systems and to set aside channels for "public, educational, or governmental use" (47 U.S.C. § § 521, 531) "as part of the consideration an operator gives in return for permission to install cables under city streets and to use public rights-of-way" (*Denver Area Ed. Telecommunications Consortium, Inc. v. FCC* (1996) 518 U.S. 727, 734 (plur. opn. of Breyer, J.). (See also Gov. Code, § 53066; 46 Ops.Cal.Atty.Gen. 22, 24 (1965).)

FN2. All references hereafter to the Government Code are by section number only.

FN3. Subdivision (d) of section 54952 refers to the lessees of certain hospitals.