MEMORANDUM OF LAW

DATE: December 14, 1992

TO: George Loveland, Director, Park and Recreation Department

FROM: City Attorney

SUBJECT: Recreation Council Subject to Brown Act

You have requested that we respond to a memorandum from Roger W. Krauel, dated November 18, 1992, in which he raised a question as to whether the Tierrasanta Recreation Council is subject to the open meeting requirements of the Ralph M. Brown Act, Government Code Section 54950 et seq. (hereinafter referred to as the "Brown Act"). Although the law provides us with little guidance in this area, after researching this issue we have concluded that a court of competent jurisdiction could find that recreation councils are subject to the provisions of the Brown Act. Therefore we believe it would be prudent for recreation councils to follow the provisions of the Brown Act to avoid any legal problems.F

A violation of the Brown Act could result in criminal prosecution (Government Code Section 54959), civil litigation (Government Code Section 54960) and an award of attorney fees (Government Code Section 54960.5).

BACKGROUND

Council Policy 700-42, adopted by the City Council on October 27, 1986 ("Council Policy"), provides that the purpose of recreation councils shall be "to promote the recreation programs in the community through planning administering publicizing, coordination and interpretation." Recreation councils are required to operate in accordance with the policies of the San Diego Park and Recreation Department and the Park and Recreation Board. The Council Policy provides that the bylaws drafted by recreation councils must be approved by the City Manager. Membership in a recreation council is open to anyone meeting the requirements of its bylaws.

The Council Policy cross references Municipal Code Section 26.30 and City Charter Section 43. Municipal Code Section 26.30(d) provides that the Park and Recreation Board may appoint

standing and ad hoc committees as deemed necessary to carry out the Park and Recreation Board's responsibilities. Section 43(a) of the City Charter provides that the City Council may by ordinance create and establish advisory boards. Section 43(b) of the City Charter provides that the City Council or City Manager may create and establish temporary citizen committees for the purpose of advising on questions concerning clearly defined objectives.

DISCUSSION

The Brown Act requires the legislative bodies of local agencies to hold their meetings open to the public unless exempted. (Government Code Section 54953.) Legislative bodies are defined by the Brown Act to include "any advisory commission, advisory committee or advisory body of a local agency created by charter, ordinance, resolution or by any similar formal action of a legislative body of a local agency. (Government Code Section 54952.3.)

The Tierrasanta Recreational Council appears to be an advisory committee in the generic sense. Article II of the Tierrasanta Recreation Council Bylaws provides that the Recreation Council shall advise staff, the Park and Recreation Board and its area committees on matters related to park and recreation programs and facilities. F

It is interesting to note that the Tierrasanta Recreation Council appears to follow some of the concepts of the Brown Act. Article I of the Recreation Council's Rules of Order provide that agendas of its meetings contain the date, time and place of such meetings and shall be mailed one week prior to the scheduled meetings and posted at a central location. The agenda is required to list items of discussion in as much detail as practical.

In addition it is common practice for the recommendations of recreation councils to be presented to the City Council when considering questions regarding recreational matters in their community.

However, the Tierrasanta Recreation Council was not created by the City Charter, ordinance or resolution. Therefore, the question we must address is whether the Tierrasanta Recreation Council was created by formal action of the City Council.

The City Attorney has opined in the past that recreation councils were not created by formal action of the City Council and, therefore, not subject to the provisions of the Brown Act.F

Memorandum of Law to Armand Campillo by Curtis Fitzpatrick, April 28 1983 and Memorandum of Law to Richard J. Enriquez by Rudy Hradecky, May 15, 1987.

However, we have reevaluated our position because of a recent

opinion of the Attorney General which evidences a trend toward the broad application of the Brown Act.

There is only one case which defines "formal action" for the purposes of applying Government Code Section 54952.3 of the Brown Act. The court in Joiner v. City of Sebastopol, 125 Cal. App.3d 799 (1981), held that an interview committee established by the City Council was subject to the Brown Act. The court reasoned that the interview committee met the requirements of Government Code Section 54952.3 because the City Council created the committee by formal action. The court found that the City Council had undertaken formal action in establishing the interview committee because the City Council had "instigated" the establishment of the interview committee, appointed two Council members to the interview committee and adopted the interview committee's agenda (that the group would interview applicants and report back to the City Council).

At first blush this case does not appear to be applicable to committees, such as recreation councils, in which its members are not appointed by the City Council. However, the court stated that the language of Government Code Section 54952.3 evidences a legislative intent that this section be construed broadly to preclude evasion. Joiner at 805 (footnote 5).

Moreover, the court in Joiner relied upon an opinion of the Attorney General (64 Ops. Cal. Atty. Gen. 856 (1981)). The court stated that although it was not bound by the opinion of the Attorney General, such opinion is entitled to "great weight." Joiner at 804.

The Attorney General opined that an academic senate was formed by "formal action" of the district governing board. (The district governing board is considered a legislative body for purposes of the Brown Act, as is our City Council.) The Attorney General reasoned that even though an academic senate is initially formed by a vote of the faculty, the district governing board is required to take certain steps after the faculty vote. (The district governing board was required to "recognize" the academic senate.) In addition, State law required that the district governing board establish procedures which provide the faculty with a means in which to express its opinion.

In September of this year the Attorney General reaffirmed its opinion that the term "formal action" as used in Government Code Section 54952.3 be broadly applied to preclude evasion of the Brown Act. The Attorney General opined that the Brown Act applied to student associations because such associations were created by "formal action" of the district governing board. (75 Ops. Cal. Atty. Gen. 143 (1992).)

The Attorney General reasoned that the district governing board had authorized the organization of student associations and had adopted some of the policies and procedures which provided students with the opportunity to participate in the management of the college.F

Title 5 of the California Code of Regulations required the district governing board to "recognize" the student association and adopt policies and procedures that provide the students with an opportunity to "participate effectively in district and college governance". (75 Ops. Cal. Atty. Gen. 143, 146-147 (1992).)

The Attorney General believed that these acts constituted formal action for purposes of applying the Brown Act.

Although Attorney General opinions are not considered law, the court in Joiner gave the original decision of the Attorney General great deference. The Attorney General does not confine "formal action" to mean that a legislative body of a local agency must appoint the members of a committee or take some other affirmative action in order for the committee to be subject to the Brown Act. In fact, the Attorney General found that the adoption of policies and procedures that state in very general terms that the community should be provided with a means in which to express its opinions or an opportunity to participate in government was sufficient to constitute formal action in the creation of an advisory body.

If we were to apply the Attorney General's logic to the facts before us, it is possible that a court may find that meetings held by recreation councils are subject to the Brown Act. A court could conclude that recreation councils were recognized by Council Policy 700-42. The Council Policy sets forth the purpose for establishing recreation councils. Moreover it outlines the process by which recreation councils are created and how their membership is to be regulated.

CONCLUSION

The Brown Act does not provide us with a definition of "formal action" for purposes of applying Government Code Section 54952.3 and case law provides us little guidance as to the meaning of this term. As a result we can not predict with absolute certainty whether recreation councils are subject to the Brown Act.

However an argument could be made that a court of competent jurisdiction would find that recreation councils are subject to the Brown Act. The court in Joiner believed that the term "formal action" be broadly applied to preclude evasion of the Brown Act and gave the original opinion of the Attorney General great deference. The Attorney General has continually expanded

the concept of formal action. Therefore we believe that given the somewhat uncertain state of the law, the cautious approach would be recreation councils created by Council Policy 700-42 follow the provisions of the Brown Act.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

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