



DENNIS J. HERRERA  
City Attorney

January 16, 2004

### **OPINION NO. 2003-04**

**SUBJECT:** Participation by A Council Member at a Meeting of a Committee of Which the Council Member is Not a Member

**REQUESTED BY:** Emily Rogers  
Secretary, Urban Forest Council

**PREPARED BY:** Amy S. Ackerman  
Deputy City Attorney

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#### **Question Presented**

You have asked to what extent a member of the Urban Forest Council (“Council”) who is not a member of a committee of the Council may participate in a meeting of that committee.

#### **Short Answer**

The answer to your question depends on whether the attendance of the non-committee member at the committee meeting results in the presence of a quorum of the Council at the committee meeting. If a quorum of the Council is present, the non-committee member may attend the committee meeting as an observer. That Council member may not sit on the dais or in seats designated for committee members, engage in any discussion or deliberations with members of the committee, or participate in any votes of the committee.

If the non-committee member’s attendance at the committee meeting does not result in the presence of a quorum of the Council, the member may also attend the meeting of the committee. With some limitations, the Chair or presiding officer of the committee determines the extent of the Council member’s participation in the meeting. At the Chair’s discretion, the non-committee member may sit on the dais with the committee, address the committee and discuss matters with the committee. The noncommittee member may not participate in the exercise of the powers of the committee, in particular, voting.

#### **Background**

In 2001, the Board of Supervisors established the Council by ordinance to “address the whole of the urban forest”. (S.F. Environ. Code §1200.) The Council is composed of 15 voting members. (S.F. Environ. Code §1202.) A quorum of the Council is eight members. You have informed us that the Council has established two committees, consisting of five members each.

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The Brown Act is California's law governing the conduct of meetings of "legislative bodies." (See Govt. Code §54950 et. seq.) Included within the definition of "legislative body" is a "commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body . . . . (Govt. Code §54952(b).) The Board of Supervisors created the Council by ordinance. The Council then formally created its committees. Accordingly, both the Council and its committees are subject to the Brown Act.

The Sunshine Ordinance is the City's law governing the conduct of "policy bodies." (See S.F. Admin. Code ch. 67.) Included in the Sunshine Ordinance's definition of a policy body is "[a]ny board, commission, committee, or other body created by ordinance or resolution of the Board of Supervisors." (S.F. Admin. Code §67.3(d)(4).) Accordingly, the Council and its committees are also subject to the Sunshine Ordinance.

### Analysis

#### **I. Attendance by a Non-Committee Member When a Quorum of the Council is Present.**

In 1996, the California Attorney General issued an opinion that a fourth member of a seven-member legislative body could not attend a meeting of a three-member standing committee of the parent body without violating the Brown Act. (79 Ops. Cal. Atty. Gen. 69 (1996).) The Attorney General reasoned that the meeting violated the Brown Act because the presence of the fourth member converted the meeting of the committee into an unnoticed meeting of the parent body. (*Id.*)

In 1997, the California Legislature responded to this opinion by amending the Brown Act to permit non-committee members to attend meetings of a committee without converting the meeting into a meeting of the parent body. The amendment excepted from the Brown Act's definition of a meeting "the attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend *only as observers*." (Government Code §54952.2(c)(6), emphasis added.) The amendment provides that a non-committee member of a parent body may attend a committee meeting, even if a quorum of the parent body is present, so long as the non-committee member attends only as an observer. The legislation provides no definition of the term "only as observers."

In 1998, the Board of Supervisors added an identical amendment to the Sunshine Ordinance. (S.F. Admin. Code §67.3(b)(4)(C-1).) The amendment to the Sunshine Ordinance also does not define the term "only as observers."

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In a 1998 opinion, then Attorney General Dan Lungren considered the language “only as observers” in the Brown Act amendment. (81 Cal.Ops.Atty.Gen. 156 (1998).) He concluded that the language limited the non-committee member’s participation in committee meetings to “watching and listening.” Attorney General Lungren concluded that the non-committee members could not ask questions or make statements while attending the committee meeting. In addition, Attorney General Lungren concluded that non-committee members must sit in the area designated for members of the public, and not in special chairs on the dais reserved for committee members. (*Id.*)

We agree that a member of the Council who attends a meeting of a committee on which the Council member does not serve, where a quorum of the Council is present, should not sit on the dais or in seats designated for committee members, engage in any discussion or deliberations with members of the committee, or participate in any votes of the committee.

We cannot predict, however, whether a court will agree with former Attorney General Lungren’s interpretation of the language, “attend only as an observer.” Attorney General opinions are advisory only and do not carry the weight of law. (*Jimmy Swaggart Ministries v. Board of Equalization* (1988) 204 Cal.App.3d 1269, 1285; *aff’d*, 493 U.S. 378.). We think a strong argument can be made that the Attorney General’s interpretation of the 1997 amendment is unduly narrow. All members of the public attend meetings as observers, yet they may make comments or ask a question. One could argue that the 1997 amendment to the Brown Act gave a commission or council member attending as an observer should have those same rights. Moreover, San Francisco’s Sunshine Ordinance provides that “[e]very member of a policy body retains the full constitutional rights of a citizen to comment publicly on the wisdom and propriety of government actions, including those of the policy body of which he or she is a member.” (S.F. Admin. Code §67.17.)

The legally safest course is for the non-committee member to not speak at the committee meeting. The Council could, however, choose to disregard Attorney General Lungren’s interpretation of the Brown Act amendment. The Council could then permit non-committee members to speak before a committee *as a member of the public*. If the Council feels such participation enhances the ability of Council members to function in their role, we are ready to defend such a decision, if necessary.<sup>1</sup>

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<sup>1</sup> There is a third option. The Council could notice meetings of committees also as meetings of the Council. The dual notice would permit non-committee members to attend committee meetings and participate. While this option is legally permissible, we recommend against it. Dual notices are confusing to the public and Council members. Members of the public may be uncertain whether the Council or committee is meeting. In addition, dual notices raise procedural issues as to which body should conduct the meeting.

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### **II. Attendance by a Non-Committee Member when a Quorum of the Council is not Present.**

There may also be occasions where a non-committee member attends a committee meeting, but a quorum of the Council is not present. In this situation, the concerns under the Brown Act and Sunshine Ordinance, explained above, are not present, because the presence of the non-committee member does not result in the presence of a quorum of the Council.

In this situation, with some limitations, the extent of the non-committee member's participation in the meeting is within the discretion of the Chair, or presiding officer, of the committee. The Chair conducts the meeting and sees that the rules are observed. (Roberts Rules of Order, Newly Revised (10<sup>th</sup> ed.), p.21, Chapter II. §3.) Thus, the Chair could permit the non-committee member to sit on the dais with the committee, address the committee and discuss matters with the committee. The Board of Supervisors, for example, permits a sponsor of legislation, who is not a member of a committee, to sit on the dais with the committee and discuss the merits of the legislation with the committee. The noncommittee member may not participate in the exercise of the powers of the committee, in particular, voting.

We hope you have found this information to be helpful. If you need any additional assistance or information, please do not hesitate to call on us.

Very truly yours,

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APPROVED:

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