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OPINION	:	No. 10-206
of	:	December 27, 2011
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THE HONORABLE TONY RACKAUCKAS, ORANGE COUNTY DISTRICT ATTORNEY, has requested an opinion on the following question:

What items may be discussed under the real-estate-negotiations exception to the open meeting requirements of the Ralph M. Brown Act—an exception which states that the legislative body of a local governmental agency may meet in closed session with its real estate negotiator "to grant authority to its negotiator regarding the price and terms of payment" for a proposed purchase, sale, exchange, or lease of identified real property?

CONCLUSION

The real-estate-negotiations exception to the open meeting requirements of the Ralph M. Brown Act permits discussion in closed session of: (1) the amount of consideration that the local agency is willing to pay or accept in exchange for the real property rights to be acquired or transferred in the particular transaction; (2) the form, manner, and timing of how that consideration will be paid; and (3) items that are essential to arriving at the authorized price and payment terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential.

ANALYSIS

The open meetings law known as the Ralph M. Brown Act (Brown Act or Act)[1] was adopted "to ensure the public's right to attend the meetings of public agencies,"[2] as well as "to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation by public bodies."[3] In enacting the Brown Act, the Legislature declared its intent as follows:

> [T]he 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.
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> 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.[4]

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[1] Govt. Code §§ 54950-54963. All further references to sections of the Government Code are by section number only.

[2] *Freedom Newsp. Inc. v. Orange Co. Employees Ret. Sys.*, 6 Cal. 4th 821, 825 (1993).

[3] *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 555 (1994).

[4] § 54950.

As we have recently observed,[5] the Brown Act both implements and furthers the command set forth in the state constitution that "[t]he people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."[6]

To effectuate these purposes, the Brown Act "requires that the legislative bodies of local agencies . . . hold their meetings open to the public except as expressly authorized by the Act."[7] While the Brown Act makes exceptions for specified matters[8]—such as litigation,[9] employee discipline,[10] and negotiations for real estate transactions[11]—these exceptions must be construed narrowly, in favor of the public's right of access to public information.[12]

The courts and this office are occasionally called upon to construe the parameters of a given Brown Act exception. For example, in a recent opinion, we concluded that the Act's real-estate-negotiations exception does *not* justify a closed-session discussion of a rehabilitation agency's proposed loan to a private business.[13] It had been argued that the exception should apply because the proposed loan agreement (1) pertained to the use of

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[5] *See* 93 Ops.Cal.Atty.Gen. 51, 53-54 (2010).

[6] Cal. Const. art I, § 3(b)(1); *see* Cal. Const. art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.").

[7] §§ 54953, 54962; *Kleitman v. Super Ct.*, 74 Cal. App. 4th 324, 331 (1999).

[8] § 54957; *Hamilton v. Town of Los Gatos*, 213 Cal. App. 3d 1050, 1055 (1989).

[9] § 54956.9.

[10] § 54957.

[11] § 54956.8.

[12] *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 917 (2002); *San Diego Union v. City Council*, 146 Cal. App. 3d 947, 954-955 (1983); *see Rudd v. Cal. Cas. Gen. Ins. Co.*, 219 Cal. App. 3d 948, 952 (1990) (statutory language "must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute, and where possible the language should be read so as to conform to the spirit of the enactment"); *see also* Cal. Const. art. I, § 3(b)(2) (legal authority "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.").

[13] 93 Ops.Cal.Atty.Gen. at 55-59.

real property that the redevelopment agency was subleasing to the private business, (2) referred to the sublease, and (3) incorporated certain terms of the sublease. After analyzing the real-estate-negotiations exception, we concluded that the proposed loan agreement did not "effectuate the acquisition, disposal, or modification of any property rights under the existing sublease."[14] Whereas that opinion was tailored to the factual circumstances underlying the question, here we have been asked to provide more general guidance as to what kinds of matters may be discussed under the real-estate-negotiations exception.

The starting point for our analysis is, necessarily, the language of the exception itself, together with related provisions of the Brown Act.[15] The real-estate-negotiations exception provides, in relevant part, as follows:

> Notwithstanding any other provision of this chapter, a legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.
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> However, prior to the closed session, the legislative body of the local agency shall hold an open and public session in which it identifies its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate.[16]

The disclosure requirement set forth in the second quoted sentence mirrors a more general Brown Act provision to the same effect.[17] Both of these notice provisions reinforce the Act's general notice requirement that, "[a]t least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, *including items to be discussed in closed session*."[18]

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[14] *Id.*

[15] *See Shapiro v. San Diego City Council*, 96 Cal. App. 4th at 924.

[16] § 54956.8.

[17] § 54957.7(a) ("Prior to holding any closed session, the legislative body of the local agency shall disclose, in an open meeting, the item or items to be discussed in the closed session . . . .")

[18] § 54954.2(a) (emphasis added).

With regard to the real-estate-negotiations exception, the Act provides that it is sufficiently specific (or within a "safe harbor") to describe the agenda item as follows:

> CONFERENCE WITH REAL PROPERTY NEGOTIATORS
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> Property: (Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation.)
>
> Agency negotiator: (Specify names of negotiators attending the closed session.) (If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator so long as the name of the agent or designee is announced at an open session held prior to the closed session.)
>
> Negotiating parties: (Specify name of party (not agent).)
>
> Under negotiation: (Specify whether instruction to negotiator will concern price, terms of payment, or both.)[19]

The Act provides that, "in the closed session, the legislative body may consider only those matters covered in its [agenda] statement."[20]

An oft-cited commentator has described the purpose of the real-estate-negotiations exception this way:

> The need for executive [closed] sessions in this circumstance is obvious. No purchase would ever be made for less than the maximum amount the public body would pay if the public (including the seller) could attend the session at which that maximum was set, and the same is true for minimum sale prices and lease terms and the like.[21]

But, as we recently remarked, "[o]bvious though the need for it may be, this is still a narrowly-crafted exception."[22] The question for us now is, how narrow?

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[19] § 54954.5(b).

[20] § 54957.7(a).

[21] Schwing, *Open Meeting Laws* § 7.76, 416-418 (1994); *see also Kleitman v. Super. Ct.*, 74 Cal. App. 4th at 324.

[22] 93 Ops.Cal.Atty.Gen. at 55; *see Shapiro v. San Diego City Council*, 96 Cal. App. 4th at 924 (real-estate-negotiations exception presents a "narrowly defined exception to the rule of open meetings").

To aid our analysis, we employ well established rules of statutory interpretation. Our primary goal is to ascertain the Legislature's intent.[23] In doing so, we look "first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence."[24] Here, we are particularly concerned with what is meant by the phrase "regarding price and terms of payment for the purchase, sale, exchange, or lease," which describes the authority that a local agency may convey to its negotiator in a closed session.

Consulting the dictionary to give the statutory language its "usual, ordinary import,"[25] we believe that the word "price" in this context must be understood as the amount of consideration given or sought in exchange for the real property rights that are at stake.[26] Further, we believe that the phrase "terms of payment" is best understood as the form, manner, and timing upon which the agreed-upon price is to be paid—for example, an all-cash transaction (either up-front or in installments), a seller-financed mortgage, an exchange of property or property rights, or the like.[27] It is significant that the word "terms" is immediately modified by the words "of payment." In our view, this modification rules out any possibility that the statute is meant to authorize closed-session discussions of any and all terms of the transaction as a whole.

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[23] *See Freedom Newsps. Inc. v. Orange Co. Employees Ret. Sys.*, 6 Cal. 4th at 826.

[24] *Dyna-Med Inc. v. Fair Empl. & Hous. Commn.*, 43 Cal. 3d 1379, 1386-1387 (1987).

[25] *Dyna-Med, Inc.*, 43 Cal. 3d at 1387; *see also Smith v. Selma Community Hosp.*, 188 Cal. App. 4th 1, 30 (2010) ("In scrutinizing the words of a statute, courts generally give them their usual, ordinary meaning, which in turn may be obtained by referring to a dictionary.").

[26] "Price" in the economic sense is defined alternately as "the quantity of one thing that is exchanged or demanded in barter or sale for another"; "the amount of money given or set as the amount to be given as a consideration for the sale of a specified thing"; or "the cost at which something is obtained or offered." *Webster's New International Unabridged Dictionary* 1798 (3d ed., Merriam-Webster 2002).

[27] As relevant here, "terms" are defined as "conditions," as in "*terms* of a sale," or "credit granted on liberal *terms* of repayment." *Webster's New International Unabridged Dictionary* 2358. "Payment" is defined simply as "the act of paying or giving compensation," or "something that is paid." *Id.* at 1659.

This view is bolstered by the legislative history of the exception,[28] which reveals that the phrase "terms of payment" came about after a series of amendments incorporating other possible wordings. As introduced, the statute would have allowed a county board of supervisors to conduct a closed session "with other persons for purposes of negotiations for the purchase, sale or lease of property."[29] An early amendment applied the exemption more broadly to "the legislative body of a local agency," but simultaneously narrowed the scope of discussion to a "meeting with [the local governing body's] designated negotiator to give instructions" concerning the "terms or price, or both" of a specified *real* property transaction.[30] Next, the language was amended to limit the scope of discussion to only the "price" of the proposed transaction.[31] A final amendment settled on "price and terms of payment" for the particular purchase, sale, exchange, or lease of real property.[32] From this history, we can see that the Legislature considered and rejected the broader phrase ("terms" of the proposed transaction) in favor of the narrower phrase ("terms *of payment*"). Moreover, the reported appellate decisions in which the phrase "terms of payment" appears reveals a consistent understanding that it is meant to describe how and when the price is to be paid.[33]

Thus, we see that the real-estate-negotiations exception includes two topics that a local agency may discuss in closed session: (1) the negotiator's authority regarding the price, and (2) the negotiator's authority regarding the terms of payment. Well established rules of statutory construction hold that "the expression of some things in a statute necessarily means the exclusion of other things not expressed,"[34] and that we "may not rewrite a statute by inserting thoughts that have been omitted . . . ."[35] Applying those

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[28] "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citation.]" *Dyna-Med, Inc.*, 43 Cal. 3d at 1387. The real-estate-negotiations exception was enacted in 1984. 1984 Stat. ch. 1126 §§ 2, 3 (Sen. 2216).

[29] Sen. 2216, 1983-84 Reg. Sess. (Feb. 17, 1984).

[30] Sen. 2216 (as amend. Apr. 23, 1984).

[31] Sen. 2216 (as amend. May 7, 1984).

[32] Sen. 2216 (as amend. Aug. 16, 1984); *see* 1984 Stat. ch. 1126 § 2; Govt. Code § 54956.8.

[33] *See Segura v. McBride*, 5 Cal. App. 4th 1028, 1034 (1992); *E & H Wholesale, Inc. v. Glaser Bros.*, 158 Cal. App. 3d 728, 735 (1984); *Kawasho Intl. v. Lakewood Pipe Serv., Inc.*, 152 Cal. App. 3d 785, 792 (1983).

[34] *Gikas v. Zolin*, 6 Cal. 4th 841, 852 (1993); *Dyna-Med*, 43 Cal. 3d at 1391 n. 13.

[35] *Gillett-Harris-Duranceau, etc. v. Kemple*, 83 Cal. App. 3d 214, 219 (1978); 78

rules to this statute leads us to reject the argument that closed-session discussions may extend to issues that might *affect* "the economic value of the transaction,"[36] or what might be called "the price that the local agency is willing to pay or accept." It is undoubtedly true that any number of issues might fall into this broad category—for example, the availability of easements on the subject property, or credit worthiness of the buyer or seller, or the financial condition of the local agency itself. But we cannot agree that collateral matters of this sort fall within the meaning of the statutory exception such that they may be discussed out of public hearing. We believe that such an expansive reading of what is meant by "price" would render virtually meaningless the phrase "terms of payment," because payment terms themselves commonly affect the price that a party may be willing to pay or accept.[37] We are not free to construe a statute in a manner that would render any words or phrases redundant.[38]

Moreover, the California Court of Appeal has rejected an argument that the real-estate-negotiations exception implies a "rule of reason" that would allow closed-session consideration of items "reasonably related to the purpose of giving direction to a legislative body's negotiator."[39] In *Shapiro v. San Diego City Council*, a city council was considering a development project that included the construction of a new baseball stadium for the San Diego Padres. The city council argued that the complexity of the proposed transaction justified closed-session discussion of various matters "reasonably related" to the ballpark deal.[40] Among these matters were: briefing on land acquisition

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Ops.Cal.Atty.Gen. 192, 194 (1995); 66 Ops.Cal.Atty.Gen. 217, 222 (1983); *see* Code Civ. Proc. § 1858.

[36] Ltr. from League of Cal. Cities to Dep. Atty. Gen. Marc J. Nolan (Aug. 6, 2010) 3-4.

[37] For example, a party's agreement to make a full lump-sum payment at the outset would typically bring about a lower total payment price than would a series of installment payments made over time. *See*, *e.g.*, *E & H Wholesale, Inc. v. Glaser Bros.*, 158 Cal. App. 3d at 735 ("cash discount" is "discount granted in consideration of immediate payment or payment within a prescribed time" [citation]).

[38] *Metcalf v. Co. of San Joaquin*, 42 Cal. 4th 1121, 1135 (2008); *Cooley v. Super. Ct.*, 29 Cal. 4th 228, 249 (2002); *see Commn. on Peace Officer Stands. & Training v. Super. Ct.*, 42 Cal. 4th 278, 294 (2007) (quoting *Moore v. Cal. State Bd. of Accountancy*, 2 Cal. 4th 999, 1011-1012 (1992)) (restrictive meaning must be adopted "'if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant . . . .'").

[39] *Shapiro v. San Diego City Council*, 96 Cal. App. 4th at 922.

[40] *Id.* at 923.

matters; design work of architects and engineers; infrastructure and parking developments; capping interim expenses; environmental impact report considerations; issues of alternative sites, traffic, stadium naming rights, expert consultants, and staff; and such policy considerations as the impact of the ballpark project on the homeless.[41] The *Shapiro* court acknowledged the "perceived value of confidentiality" in negotiations and did not "denigrate [this] important consideration."[42] Nevertheless, it concluded that the council's closed-session discussions exceeded the scope of the "safe harbor notice provisions" on the council's agenda (which stated that closed-session discussions would be conducted as to *price* and *terms of payment*), and that the topics ranged "far afield of a specific buying and selling decision."[43]

We note that the city council in *Shapiro* failed to identify a specific parcel of property in its agenda when it referenced the closed-session item of business,[44] and we are aware that an argument may be made that the *Shapiro* case is distinguishable on that basis. But we believe that *Shapiro*'s reasoning is robust enough to support the point we make here, which is that the real-estate-negotiations exception (like the safe harbor notice provision) simply cannot be read so broadly as to incorporate any and every topic that might have a bearing on a public real estate transaction.

We do not mean to say that a closed session must be absolutely limited to the specification of a particular dollar amount (or other specified consideration) that the local agency is willing to pay or accept in a given real estate transaction. While exceptions to the Brown Act must be given a narrow construction,[45] they must still be interpreted in a manner that gives effect to the underlying purposes of the law.[46] Among the purposes at play in this situation is the need to conserve scarce public resources through effective negotiation of real estate transactions. In our view, therefore, a closed-session discussion regarding price or terms of payment must allow a public agency to consider the range of

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[41] *Id.* at 923-924.

[42] *Id.* at 924.

[43] *Id.*

[44] *Id.* at 908 (agenda merely specified "real property interests in the East Village area of downtown San Diego, and at Qualcomm Stadium in the City of San Diego" or, on other occasions, "real estate interests in the Centre City East area of downtown San Diego").

[45] *Shapiro*, 96 Cal. App. 4th at 917.

[46] *See Duval v. Bd. of Trustees*, 93 Cal. App. 4th 902, 909-911 (2001) (eschewing overly narrow reading of "evaluation of performance" as used in Brown Act's personnel exception).

possibilities for payment that the agency might be willing to accept, including how low or how high to start the negotiations with the other party, the sequencing and strategy of offers or counteroffers, as well as various payment alternatives. Information designed to assist the agency in determining the value of the property in question, such as the sales or rental figures for comparable properties, should also be permitted, because that information is often essential to the process of arriving at a negotiating price.[47]

Ultimately, of course, each case must be decided on its own facts. But, for the reasons stated, we cannot accept the view that the real-estate-negotiations exception permits the closed-session discussion of any and all aspects of a proposed transaction that might have some effect on price and payment terms. The purpose of the exception is to protect a local agency's bargaining position, not to keep confidential its deliberations as to the wisdom of a proposed transaction.

For the reasons stated, we conclude that the real-estate-negotiations exception to the open meeting requirements of the Brown Act permits the closed-session discussion of: (1) the amount of consideration that the local agency is willing to pay or accept in exchange for the real property rights to be acquired or transferred in the particular transaction; (2) the form, manner, and timing of how that consideration will be paid; and (3) items that are essential to arriving at the authorized price and payment terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential.

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[47] In this connection, we note that section 6254(h) exempts from public disclosure under the Public Records Act (§§6250-6276.48) the "contents of real estate appraisals . . . made for or by the state or local agency relative to the acquisition of property" until after the property has been acquired.