

DUTIES AND RESPONSIBILITIES OF COUNCILMEMBERS

Councilmembers have 2 main duties: (1) their legislative duties; and (2) their adjudicatory duties.

Legislative duties – Establishing rules and policy

One of the main duties of councilmembers is their legislative duty. A legislative act is the formulation of a rule to be applied in all future cases. Strumsky v. San Diego County Employees Retirement Association, 11 Cal.3d 28, 112 Cal. Rptr. 805 (1974); California Aviation Council v. City of Ceres, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992).

Part and parcel of the legislative or rule-making duty is the policy-making duty.

Hence, the very first section of the chapter of the Hawthorne Municipal Code (“HMC”) pertaining to the City council states as follows:

2.06.010 Legislative body.

The legislative body of the city shall consist of five persons elected at large which body shall be known as the city council. (*emphasis added*)

Other sections of the HMC, in conjunction with section 2.06.010 above, prescribe the mode in which the legislative authority (i.e., rule-making or policy-making authority) is to be exercised:

2.06.070 Official action.

The council may take official action only by the passage or adoption of ordinances, resolutions or motions as may be prescribed by the Constitution of the State Legislature. (*emphasis added*)

2.06.060 Meetings – Public.

All regular meetings of the city council, and all meetings at which an ordinance, resolution or motion is acted upon by said council, shall be public. (*emphasis added*)

2.06.080 Quorum and compelling attendance of members.

A majority of the council constitutes a quorum for transaction of business.

Councilmembers thus act as a “body” when exercising their legislature duties,¹ and are known as the “city council.” They take “official action” “only” by the “passage or adoption of ordinances, resolutions or motions.” Ordinances, resolutions or motions can be acted upon by a “quorum” of the city councilmembers (again as a body) only in a “public” meeting.

The scope of the city council’s legislative, i.e., rule-making and policy-making, authority is as broad as police power² reserved by the California Constitution to cities.³

Some examples of the rule-making or policy-making of the city council exercised as legislative acts include ordinances, resolutions, and motions involving the following:

¹ When councilmembers act as a body and within the scope of their legislative – i.e., rule-making or policy-making – duties, the law provides such councilmembers with immunity from litigation called legislative immunity. However, as the attached article notes, the legislative immunity can be lost when the councilmember takes action outside “the sphere of legitimate legislative activity.” This may occur, for example, when a councilmember acts unilaterally regarding an individual employee.

² The word “police” is derived from the Greek word “polis” meaning “city.” E. McQuillin, Municipal Corporations (3d rev. ed.) § 24.02 (1988). The term “police power” in its original and most comprehensive meaning, denotes the power of government in every sovereignty, the power to govern persons and things. Munn v. Illinois, 94 U.S. 113, 125, 24 L. Ed. 77, 84 (1877). The police power of a state is its right to adopt regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. Chicago, B. & O. Railway Company v. Illinois, 200 U.S. 561, 592, 26 S. Ct. 341, 50 L. Ed. 596, 609 (1906).

The police power “is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, ‘there is nothing known to the law that keeps more in step with human progress than does the exercise of this power’ ... “Miller v. Board of Public Works, 195 Cal. 477, 485, 234 P. 381 (1925).

³ “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (*emphasis added*) Cal. Const. Art. XI § 7. “A city’s police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself.” Birkenfeld v. City of Berkeley Cal. 3d 129, 140, 130 Cal. Rptr. 465 (1976).

The City, by and through its council ... shall have and may exercise all powers necessary and appropriate to a municipal corporation and the general welfare of its inhabitants, which are not prohibited by the Constitution of the State and the general laws of the State. (*emphasis added*) HMC Section 2.02.010.

- general plans
- specific plans
- zoning and buildings
- subdivisions
- dedications
- redevelopment and blight elimination
- business and occupations
- personal conduct (including but not limited to disorderly conduct, curfew, trespass, noise, graffiti, nuisance)
- animals
- sewer and storm water
- street and traffic
- housing
- fees
- fiscal matters, including approval of city budget
- awarding of contracts ⁴

City council as “legislative body v. City Manager as “administrative head.”

The Hawthorne Municipal Code carefully delineates the lines of authority over legislative (i.e., rule or policy-making) duties of the city council versus administrative duties of the City Manager in the provisions of the HMC pertaining to the City Manager:

2.04.050 Administrative agent.

The city manager shall act as the agent for the city council in the discharge of its administrative functions but shall not exercise any policymaking or legislative functions whatsoever nor attempt to commit or bind the city council or any member thereof to any action, plan or program requiring official councilmanic action. (*emphasis added*).

⁴ Award of a public contract, and all of the acts leading up to the award, are legislative in character. Mike Moore’s 24-Hour Towing v. City of San Diego, 45 Cal. App. 4th 1294, 53 Cal. Rptr. 2d 355 (1996).

2.04.040 Powers and duties.

The city manager shall be the administrative head of the city government under the direction and control of the city council. He shall be responsible for the efficient administration of all the affairs of the city which are under his control. In addition to his general powers as administrative head, and not as a limitation thereon, it shall be his duty and he shall have the power:

- A. To see that all laws and ordinance of the city are duly enforced and that all franchises, permits and privileges granted by the city are faithfully observed;
- B. To exercise control over all departments of the city government and over all appointive officers and employees thereof, except the city clerk, city treasurer and city attorney; to appoint, promote, demote, remove and transfer any officers and employees of the city except the city clerk, city treasurer and city attorney; to consolidate and combine offices, positions, departments or units under his direction; providing, however, that said powers are subordinate to and nothing herein shall be construed to supercede the provisions of Chapters 2.18, 2.30 through 2.48, 2.52 and 2.54 of this code establishing a civil service system;
- C. To attend meetings of the city council with the duty of reporting on or discussing any matter concerning the affairs of the departments, services or activities under his supervision, upon which in his judgment the city council should be informed;
- D. To cause to be prepared and submitted to him by each department, division or service of the city government, itemized annual estimates of expenditures required by any of them for capital outlay, salaries, wages and miscellaneous operating costs; to tabulate the same into a preliminary consolidated municipal budget and submit the same to the city council before the fifteenth of June of each year with his recommendations as to such changes which he deems advisable;
- E. To be responsible for the administration of the budget after its final adoption and to keep the city council informed with respect thereto;
- F. As agent for the city council to supervise the expenditure of all departments, divisions or services of the city

government and to act as purchasing agent for the purchase of all supplied, goods, wares, merchandise, equipment and material which may be required for any of such departments, divisions or services. To execute any purchase orders or specialized or professional services agreements that comply with the city's adopted purchasing policy;

- G. To develop and organize necessary public improvement projects and programs and to aid and assist the city council and the various departments in carrying the same through to successful conclusion;
- H. To serve as public relations officer of the city government and to follow through and endeavor to adjust all just complaints filed against any employee, department, division or service thereof;
- I. To cooperate with all community organizations whose aim and purpose it is to advance the spiritual and material interests of the city and its people and to provide them with assistance through the city government;
- J. To make and keep up to date an inventory of all property, real and personal, owned by the city, and to recommend to the city council the purchase of new machinery, equipment and supplies whenever in his judgment the same can be obtained at the best advantage, taking into consideration trade-in value of machinery, equipment, etc., in use;
- K. To receive and open all mail addressed to the city council and give immediate attention thereto to the end that all administrative business referred to in said communications and not necessarily requiring councilmanic action, may be disposed of between council meetings, providing that all actions taken pursuant to such communications shall be reported to the city council at its next meeting thereafter;
- L. To exercise general supervision over all public buildings, public parks and other public property which is under the control and jurisdiction of the city council and not specifically delegated to a particular board or officer;
- M. To execute any contract, agreement, license or lease when expressly authorized by the city council;

- N. To perform such other duties and exercise such other powers as may be delegated to him or her from time to time by ordinance or resolution of the city council.
(*emphasis added*)

Accordingly, while councilmembers acting as the city council are assigned the legislative (i.e., rule-making or policy-making) duty and authority, the city Manager is deemed the “administrative head” of the City government and is assigned the administrative oversight duty over city government.

This bifurcation of duties is typical of general law cities. Because general law cities are governed by part-time council members, such cities are administered by a full-time professional administrator, the City Manager.

Adjudicatory Duties of City Councilmembers

The other main duty of councilmembers acting as a body (as the city council) is their adjudicatory or quasi-judicial duties.

“An adjudicatory act is the application of legislative rule to a specific set of existing facts. Strumsky v. San Diego County Employees Retirement Association, 11 Cal. 3d 28, 112 Cal. Rptr. 805 (1974); California Aviation Council v. City of Ceres, 9 Cal. App. 4th 1384, 12 Cal. Rptr. 2d 163 (1992).”

Pursuant to their adjudicatory duties, councilmembers apply various rules or standards set forth in the HMC to facts and testimony that are submitted as part of an evidentiary hearing, and make findings of fact – much as a judge does in a judicial proceeding.

Councilmembers undertake this adjudicatory or quasi-judicial duty in the context of various appeal hearings or land use permit proceedings under the HMC, including but not limited to the following:

- Appeals relating to issuance or denial of variances under Chapter 17.40.
- Appeals relating to issuance or denial of conditional use permits under Chapter 17.40.
- Appeals relating to the revocation or suspension of business license permits under Chapter 5.16.
- Making of findings in the first instance relating to unclassified permits under Chapter 17.62.

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A City Council Member's Role With Respect to Individual City Employees

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In the public eye, city council members are at the top of the city's government structure, presiding over large and small bureaucracies that may include police officers, firefighters and many other types of employees charged with serving the public interest. Accordingly, when residents are aggrieved by or interested in the conduct of a particular employee, they may view their council member as that employee's ultimate "boss" or de facto CEO of the city, who can cause the employee to be disciplined or even terminated, and who could certainly take such lesser actions as communicating with the employee's direct supervisor or reviewing the employee's personnel file for information relevant to the issue.

City councils often have appointing authority over the city's highest officials, such as the city manager and city attorney. But otherwise, individual council members and the council as a body have virtually no role with regard to individual city employees. In fact, a council member's role with respect to such employees probably has more in common with that of a city resident (who is an interested "outsider" looking at the city employment structure) than with that of a private company's CEO.

This article describes several legal reasons why city council members' roles with regard to individual employees have such substantial limitations and includes some practical approaches for dealing with individual employees.

Why a City Council Member's Role Is So Limited

City council members are meant to act as part of the council, not individually. A primary reason why council members have virtually no role with regard to individual city employees is that applicable law provides that council members will act as a body, not as individuals. Indeed, the law requires that, with limited exceptions, the council conduct city business only through duly convened meetings "in full view of the public."¹ Thus, when an individual city council member takes unilateral action, his or her conduct may well lose the sanction of the law. The council member may then lose certain protections and immunities from liability, and his or her actions may more easily be rescinded or disputed.²

Legislative immunity is limited. Second, city council members may well *not* have legislative immunity with regard to actions toward individual employees. This is particularly true if the council member acts unilaterally. Typically, when a city council member acts as a legislator, he or she has absolute immunity. But that immunity can be lost when the legislator takes actions outside the "sphere of legitimate legislative

activity."³ Accordingly, if a council member takes any unilateral actions concerning an individual employee, he or she could risk loss of legislative immunity. Even actions taken collectively with the full council might conceivably lack immunity if they relate to specific individuals instead of furthering general city policy.

Under California law, city council members can be liable for invasion of privacy, among other things. Third, the threat of liability presents another factor that limits council member roles toward individual employees. One potential type of liability is for invasion of privacy. In one case, *Braun v. City of Taft*, a city council member was subject to censure by the council for removing documents from a city employee's personnel file and revealing them to the press. Although the court ultimately determined that the particular documents were public records that could legally be disclosed, the court remanded the case to the council to allow it to decide whether the member should suffer censure for other reasons. These possible reasons included his "unilateral decision regarding [the documents'] suitability for disclosure."⁴ Other courts have articulated that public employees can have limited privacy rights in their personnel files.⁵ Employees can thus argue that improper review and/or disclosure should result in personal liability for invasion of privacy.⁶

Other officials, such as city managers, are charged with overseeing city employees. Fourth, council member actions with regard to individual employees may be considered suspect because other high-level city officials are officially charged with supervising and/or overseeing individual employees. Most cities appoint city managers to provide overall supervision to a city's human resources function. Because a designated official already has this responsibility, there should be little need for city council members to become involved with individual employees.⁷

Practical Advice for Dealing With Individual Employees

Refrain from doing so, unless it is a part of one's obligations to the city. The most prudent course for a city council member is to refrain from taking action or otherwise becoming involved in any supervisory role, with respect to individual city employees.

Proceed as part of properly convened city council meetings and not individually. If a council member must become involved in decisions with respect to an individual employee, the member should not act unilaterally but should instead act as part of the council. The member should also act pursuant to the requisite formalities that will ensure legislative immunity applies.

The city manager or other appropriate city employee should interface with employees. Tasks such as reviewing employee personnel files, gathering information from supervisors and providing instruction as to particular employees should be done by the city manager or other official charged with overseeing the city's employment structure. This is true even for matters of public interest. If city residents object to the conduct of particular employees, the council can respond by asking the city manager to investigate and take appropriate action regarding the objections. For example, in a

small city experiencing resident complaints about rude police officers, the council should itself refrain from taking direct action as to those officers. Instead, it can ask the city manager to investigate and respond to the issue globally. The city manager can then, as part of his or her comprehensive response, take appropriate employment action as to the officers in question.

Comply with the Brown Act. The Ralph M. Brown Act provides that certain official bodies, including city councils, may only act through duly called and regularly held meetings that are open to the public. A city council can conduct closed meetings to discuss certain personnel matters. These include meetings in which the council discusses the "appointment, employment, evaluation of performance, discipline, or dismissal of a public employee..."⁸ This closed meeting exception, however, may apply only to the council's consideration of employees over whom the council has appointing authority (for example, city managers, city attorneys and others). A California attorney general opinion describes that the closed meeting exception does *not* apply to a body's consideration of an employee over whom it does not have appointing authority.⁹ Lack of compliance with the Brown Act may lead to adverse legal consequences, which include voiding the actions that the council takes.

Consult with legal counsel. These issues can be complex. Also, situations where council members must take a role with regard to city employees will be rare. Council members should obtain legal advice when such circumstances arise to ensure they undertake their role appropriately.

[1] *Wolfe v. City of Fremont*, 144 Cal. App. 4th 533, 541, 543 (2006); see also *Moreno v. King*, 127 Cal. App. 4th 17, 20 (2005) (city council's termination of finance director was ineffective because of failure strictly to comply with notice provisions of Brown Act).

[2] See *Braun v. City of Taft*, 154 Cal. App. 3d 332, 338-40, 347-48 (1984) (considering council member's censure for unilaterally disclosing personnel records to the public).

[3] *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S. Ct. 966, 140 L.Ed.2d 79 (1998) (council members have immunity from civil rights liability for all actions taken "in the sphere of legitimate legislative activity"). For legislative immunity under federal law, courts apply a four-part test: "(1) whether the act involves *ad hoc* decision-making, or the formulation of policy; (2) whether the act applies to a few individuals, or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation." *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Bogan*, 523 U.S. at 54.

[4] *Braun*, 154 Cal. App. 3d at 338-40, 347-48.

[5] *Id.* at 346-48.

[6] See *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35-38 (1994).

[7] Indeed, at least one Attorney General Opinion describes that the Brown Act closed meeting exception does not apply to a body's discussion of employees over whom the body does not have appointing authority. See 85 Ops. Cal. Atty. Gen. 77 (2002). This supports the position that a council should delegate decision-making over such employees, since it would otherwise have to consider their performance in open session.

[8] Cal. Gov. Code § 54957(b)(1).

[9] 85 Ops. Cal. Atty. Gen. 77 (2002).