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OPINION	:	No. 14-302
of	:	September 18, 2015
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THE HONORABLE DONALD P. WAGNER, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following question:

Does the labor negotiations exception to the open-meeting requirements of the Ralph M. Brown Act permit a community college district's governing board to meet in closed session with its designated representative to discuss the negotiation of a project labor agreement?

CONCLUSION

The labor negotiations exception to the open-meeting requirements of the Ralph M. Brown Act does not permit a community college district's governing board to meet in closed session with its designated representative to discuss the negotiation of a project labor agreement because the contractors and laborers covered by such an agreement are not district employees.

ANALYSIS

A project labor agreement is a "prehire" collective bargaining agreement between an owner of a construction project and one or more labor organizations setting terms and conditions of employment for the construction."[1] "[D]esigned for large and complex construction projects," project labor agreements aim to "eliminate potential delays resulting from labor strife, to ensure a steady supply of skilled labor on the project, and to provide a contractually binding means of resolving worker grievances."[2]

In California, local public entities are permitted to enter into, or require contractors to enter into, project labor agreements that include state-mandated "taxpayer protection provisions"[3] for a specific project. Generally speaking, local legislation is not permitted to bar the local entity from exercising this authority on a project-specific basis.[4] After a public or private entity enters into a project labor agreement with a labor organization, any contractors that the entity selects to do the construction project, and their subcontractors, must accept the agreement's terms and conditions in employing the project's workers.[5]

The board of trustees of a community college district that is undertaking a

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[1] Pub. Contract Code, § 2500, subd. (b)(1); see also 29 U.S.C. § 158(e). Project labor agreements are also sometimes referred to as community workforce agreements, community benefits agreements, or project stabilization agreements.

[2] *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 359 (*Associated Builders and Contractors*). The merits of governmental project labor agreements have been debated at the national, state, and local level. (See, e.g., *Michigan Bldg. and Const. Trades Council v. Snyder* (6th Cir. 2013) 729 F.3d 572, 574-576; Magee, *Study Reignites Debate on School Construction Policy*, U-T San Diego (Jul. 21, 2011) pp. 1-2, at http://www.utsandiego.com/news/2011/jul/21/study-reignites-debate-on-school-construction/?#article-copy.)

[3] See Pub. Contract Code, § 2500, subd. (a) (requiring agreement to provide for non-discrimination in hiring, open bidding, an agreed-upon protocol for drug testing of workers, guarantees against work stoppages, and the neutral arbitration of disputes arising from the agreement).

[4] Pub. Contract Code, § 2501. While a charter city may enact legislation that prohibits, limits or constrains its own governing board from using project labor agreements for specified projects or classes of projects, doing so will result in the unavailability of state funding or financial assistance for such projects. (Pub. Contract Code, §§ 2502, 2503; see also Pub. Contract Code, § 2801; *State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 578, fn. 8 (dis. opn. of Werdegar, J.).)

[5] *Associated Builders and Contractors*, *supra*, 21 Cal.4th at pp. 358-359; *Michigan Bldg. and Const. Trades Council v. Snyder*, *supra*, 729 F.3d at pp. 572, 574.

construction project wishes to hold a closed session with the board's negotiator to discuss the terms of a proposed project labor agreement. The board wants to know whether it may discuss this matter in closed session without violating the terms of the Ralph M. Brown Act, which generally requires local legislative bodies to deliberate in open session. The answer to this question depends primarily on whether the Brown Act's "labor negotiations exception"[6] applies in the given circumstances. The labor negotiations exception authorizes a legislative body to hold closed-session discussions with its negotiating representative about the salaries and benefits of the body's employees. For the reasons set out below, we conclude that the exception does not apply in these circumstances because construction workers covered by a project labor agreement are not district employees. Accordingly, the board must discuss the matter in open session.

The Ralph M. Brown Act[7] is a "public access law" enacted "'to ensure the public's right to attend the meetings of public agencies,' 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.'"[8] In passing the Act, the Legislature found 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" and therefore that their business must be conducted openly."[9] To fulfill this purpose, the Act provides 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," unless a statutory exception applies.[10] For the protection of this purpose, "[s]tatutory exceptions authorizing closed sessions of legislative bodies are construed narrowly, and the Brown Act 'sunshine law' is construed liberally in favor of openness in conducting public business."[11]

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[6] Gov. Code, § 54957.6.

[7] Gov. Code, §§ 54950-54963.

[8] 94 Ops.Cal.Atty.Gen. 33, 34 (2011), brackets added, quoting *Freedom Newspapers Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 825 & *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555.

[9] Gov. Code, § 54950.

[10] Gov. Code, § 54953, subd. (a); see Gov. Code, § 54962; *Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1321.

[11] *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917; see Cal. Const., art. I, § 3, subd. (b)(1), (2). In interpreting provisions of the Brown Act, as with other statutes, we try to determine the Legislature's intent so as to carry out the law's purpose. (*People ex rel. Younger v. Super. Ct.* (1976) 16 Cal.3d 30, 40.) To discern this intent, we "must 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

As a threshold matter, we note that the governing board of a community college district comes within the ambit of the Brown Act. A community college district is a local agency that is governed by a board of trustees,[12] and therefore fits the definition of a "legislative body" within the meaning of the Act.[13] Consequently, the Act's general rule requires the board to conduct open meetings unless a specific exception applies.[14]

Here, we are alerted to the possibility that the Brown Act's labor negotiations exception might permit the board to hold a closed session under these circumstances. However, we find the exception inapplicable.[15] The exception provides, in pertinent part, that the governing body of a local agency may hold closed sessions "with the local agency's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented *employees*, and for

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in pursuance of the legislative purpose." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)

[12] Ed. Code, §§ 70900, 70902, 72000-72682; 84 Ops.Cal.Atty.Gen. 175, 175 (2001); see Gov. Code, § 54951; 66 Ops.Cal.Atty.Gen. 252, 252 (1983); see also *Page v. Mira Costa Community College Dist.* (2009) 180 Cal.App.4th 471, 498-504 (finding that the taxpayer stated a cause of action for a Brown Act violation against the community college district).

[13] Gov. Code, § 54953, subd. (a) (defining legislative body as "[t]he governing body of a local agency or any other local body created by state or federal statute").

[14] Gov. Code, § 54962. Apart from the Brown Act, the Education Code specifies that the meetings of the governing board of a community college district be open to the public, absent enumerated exceptions, and imposes obligations regarding minutes and agendas for these meetings. (Ed. Code, § 72121; see 61 Ops.Cal.Atty.Gen. 323, 325-326 (1978) [separate public agenda requirements of Education Code relating to community college districts are not part of the Brown Act].)

[15] No other Brown Act exception appears applicable in the circumstances, including the so-called "personnel exception" (Gov. Code, § 54957, subd. (b)), which permits a local agency to conduct a closed session "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee . . . ." In any event, as discussed in our extended analysis of the labor negotiations exception, the contractors and workers at issue in a project labor agreement are not employees of the local agency that undertakes and funds a given construction project, so the personnel exception would be inapplicable on that basis as well. Of course, should a particular local agency wish to conduct a closed-session meeting concerning a project labor agreement that rested on the theory that some other Brown Act exception permitted it, that agency would have to specify the exception and demonstrate how it applies.

represented employees, any other matter within the statutorily provided scope of representation."[16] This exception "underscores the Legislature's intent" to give the governing body "the central role of directing the meet and confer process so as to achieve binding labor-management agreements."[17] To fit within the terms of the exception, a closed session must be conducted "for the purpose of reviewing [the governing body's] position and instructing the local agency's designated representatives."[18]

In order to determine whether this exception applies here, we need to determine whether workers hired by contractors or subcontractors under a project labor agreement are "employees" of the community college district.[19] Under the exception, "the term 'employee' shall include an officer or an independent contractor who functions as an officer or an employee, but shall not include any elected official, member of a legislative body, or other independent contractor."[20] In other words, the exception does *not* cover labor discussions relating to the agency's independent contractors, except those functioning as employees (or officers).

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[16] Gov. Code, § 54957.6, subd. (a), emphasis added.

[17] *Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 783, fn. 5; see also Sen. Com. on Gov. Efficiency, Analysis of Sen. Bill No. 592 (1968 Reg. Sess.) (stating that the bill's author and proponents "assert that employee groups have a distinct advantage in matters of negotiation" because they may "develop ideas and proposals" in closed sessions, whereas public employers must respond to these proposals in open meetings).

[18] Gov. Code, § 54957.6, subd. (a). The closed session may take place before or concurrently with consultations and discussions with the employees' labor representatives. (*Ibid*.)

[19] Gov. Code, § 54957.6, subd. (a) (exception applies to "*its* [the local agency's] employees," emphasis added); 85 Ops.Cal.Atty.Gen. 77, 81 (2002) ("Based upon the plain text of section 54957.6, we believe that the local agency must be the *employer* and have one or more designated representatives conducting labor negotiations on *its* behalf with *its* employees").

[20] Gov. Code, § 54957.6, subd. (b).

Although the terms "employee" and "independent contractor" are not defined in the exception, the Court of Appeal has explained, with respect to similar language in the Brown Act's personnel exception, that "[t]he distinction between employees and independent contractors is well established . . . and presumptively known to the Legislature."[21] This is consistent with California Supreme Court authority instructing that the common law test for employment controls unless the Legislature clearly indicates otherwise,[22] which it has not done in this instance. The principal test for assessing whether an employer-employee relationship exists is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."[23] The California Supreme Court has instructed that "[p]erhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause . . . ."[24]

We have experience in applying this test.[25] In a 2002 opinion, we considered whether a county board of education could hold closed sessions to discuss the employment and compensation of employees of the county superintendent of schools. The dispositive issue was whether the employees of the superintendent's office should also be deemed *the board's* employees. We decided that they should not, reasoning that the decision to employ them "does not require the board's approval or consideration." Rather, "the superintendent, and not the board, is authorized to appoint, discipline, and establish the salaries of certificated and classified employees."[26] Similarly here, the district and its board do not hire, manage, pay, discipline, or fire the construction workers who are covered by a project labor agreement. Rather, it is the contractors and subcontractors who have those powers and responsibilities.[27] If the board is dissatisfied with the work done on the project, it must

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[21] *Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234-235; see Gov. Code, § 54957, subd. (b) (permitting a closed session to consider certain personnel matters regarding "a public employee," which generally includes "an officer or an independent contractor who functions as an officer or employee"); *Cal. Soc. of Anesthesiologists v. Super. Ct.* (2012) 204 Cal.App.4th 390, 403 ("It is a general rule of statutory construction to construe words or phrases in one statute in the same sense as they are used in a closely related statute pertaining to the same subject").

[22] *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1086-1087, disapproved on another ground in *Martinez v. Combs* (2010) 49 Cal.4th 35, 62-66.

[23] *Tiebers v. Unemp. Ins. App. Bd.* (1970) 2 Cal.3d 943, 946.

[24] *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531.

[25] 85 Ops.Cal.Atty.Gen., *supra*, at p. 77.

[26] 85 Ops.Cal.Atty.Gen., *supra*, at p. 79, citing 72 Ops.Cal.Atty.Gen. 25, 29, 31 (1989).

[27] See, e.g., Riverside Community College Dist. Project Labor Agreement, Measure C Facilities (2010) pp. 30-31, at http://laborissuessolutions.com/wp-content/uploads/2012/10/Riverside-Community-College-District-Project-Labor-Agreement-2010.pdf (the

assert its complaints against the contractors, and has no disciplining or discharging power over the workers.

The board does play a part, we realize, in setting the wage rates and benefits of the construction workers under a project labor agreement. But this does not mean that the workers hired by the contractors and subcontractors are employees of the district.[28] Again, the labor negotiations exception of Government Code "section 54957.6 is to be construed narrowly in favor of the Act's general requirement of holding open public meetings."[29] We believe that the workers whose terms and conditions of employment the project labor agreement governs are not the district's employees.[30]

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contractors retain exclusive authority to manage their work forces under the agreement, including controlling the operation of the work, hiring, promoting, disciplining, suspending, and discharging the workers); City of San Fernando Project Labor Agreement, City Public Works Contracts (2005) p. 27, at http://laborissuessolutions.com/wp-content/uploads/2012/10/City-of-San-Fernando-Pro ject-Labor-Agreement-2005.pdf (same); Contra Costa Water Dist. Multi-Purpose Pipeline Project Labor Agreement (2000) pp. 10-11, at http://laborissuessolutions.com/wp-content/uploads/2012/12/PLA-CCWD-MultiPurpose-Pipeline-Project.pdf (same).

[28] 85 Ops.Cal.Atty.Gen., *supra*, at p. 81 (the board's interest in the compensation of the superintendent's employees in evaluating and approving the superintendent's budget did not make the board an employer of the superintendent's employees).

[29] 85 Ops.Cal.Atty.Gen., *supra*, at p. 81.

[30] Nor does the amplification of the term "employee" in Government Code section 54957.6, subdivision (b), change our view. As mentioned, this provision states that "the term 'employee' shall include an officer or an independent contractor who functions as an officer or an employee" of the public agency. Assuming that some construction workers hired for a particular project or projects under the terms and conditions of a project labor agreement could be properly classified as "independent contractors," the district does not control them, so they do not function as the district's employees. (See *Tiebers v. Unemployment Ins. App. Bd.*, *supra*, 2 Cal.3d at pp. 946-947 ["If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established"]. Also, a construction worker under a project labor agreement is not, and does not function as, an "officer" of the district because the worker does not hold a public office with authority to perform a specific function within the district, make policy or operate independently on behalf of the district, or carry out the board's day-to-day business. (See Black's Law Dict. (10th ed. 2014) p. 1257; see also *Hofman Ranch v. Yuba County Local Agency Formation Com.* (2009) 172 Cal.App.4th 805, 807, 810-811; 94 Ops.Cal.Atty.Gen. 1, 2-3, fn. 10 (2011).) And since the board does not hire, fire, or otherwise control the workers used under a project labor agreement, it also

Before we leave this subject, we should consider the theory that, if the contractors were considered "employees" of the district, then the contractors' workers, by extension, might also be the district's "employees."[31] Evaluating the premise of this theory—that the contractors themselves might be considered employees of the district—we derive assistance from an opinion of the Legislative Counsel.[32] That opinion concludes that "[a] local governmental entity may not negotiate and discuss a project labor agreement in closed session under the Ralph M. Brown Act."[33] The opinion reasons "that the contractors entering into project labor agreements are generally independent contractors, and that those contractors would not function as officers or employees." It goes on to explain that "contractors do the construction work on that particular project, but the local agency that entered into the project labor agreement would not generally have the right to direct the manner or means by which the construction contractors do their work; instead, the relationship focuses only on the result accomplished—that is, the completed construction project."[34] We agree with this reasoning and conclude that construction contractors are not, and do not function as, officers or employees of the local public entities under project labor agreements.[35]

Because the construction workers whose employment terms are determined by the project labor agreement are not employees of the community college district, the terms of the Brown Act's labor negotiations exception are not satisfied.[36] Consequently, we

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is not a "joint employer" of such workers—i.e., along with the contractors and subcontractors. (See *In-House Supportive Services v. Workers' Comp. App. Bd.* (1984) 152 Cal.App.3d 720, 732 ["Joint employment occurs when two or more persons engage the services of an employee in an enterprise in which the employee is subject to the control of both"].)

[31] Because discussions regarding the terms and conditions of a project labor agreement relate to the wages and benefits of the workers, the ultimate issue remains whether the workers, not the contractors, would be the district's employees under the exception. (See Gov. Code, § 54957.6, subd. (a).)

[32] Ops. Cal. Legis. Counsel, No. 1407872 (May 21, 2014); see *Cal. Assn. of Psychological Providers v. Rank* (1990) 51 Cal.3d 1, 17 (the Legislative Counsel's opinions, although not binding, are entitled to great weight).

[33] Ops. Cal. Legis. Counsel, No. 1407872, *supra*, at p. 1.

[34] *Id.* at p. 4;

[35] See California Attorney General, Brown Act, Open Meetings for Local Legislative Bodies (2003) p. 35, at http://ag.ca.gov/publications/2003_Intro_BrownAct.pdf.

[36] We observe that another statute, Government Code section 3549.1, contains a similar open-meetings exception for labor negotiations, but we find this exception inapplicable for the same reasons set forth above. Section 3549.1, subdivision (d) exempts from the open-

conclude that the Brown Act's labor negotiations exception does not permit a community college district's governing board to meet in closed session with its designated representative to discuss the negotiation of a project labor agreement.

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meeting requirements of the Brown Act "[a]ny executive session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives." Although a community college district is a "public school employer" under section 3549.1, subdivision (d) (*United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119, 1123-1124; see Cal. Const., art. IX, § 6), this exception is part of the Educational Employment Relations Act, which governs collective bargaining solely for *employees* of public schools (Gov. Code, § 3540; *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 855). And, because the Educational Employment Relations Act does not use a different definition of "the term 'public employee,' except by way of exclusion" (*Rowen v. Santa Clara Unified School Dist.*, *supra*, 121 Cal.App.3d at p. 234; see Gov. Code, § 3540.1, subd. (j)), the common law employment test controls (*Reynolds v. Bement*, *supra*, 36 Cal.4th at pp. 1086-1087). As discussed, under this test, the workers covered in the project labor agreement are not employed by the community college district.