

EL DORADO LAFCO

LOCAL AGENCY FORMATION COMMISSION

AGENDA OF AUGUST 25, 2021

REGULAR MEETING

TO: John Hidahl, Vice Chair, and
Members of the El Dorado County Local Agency Formation
Commission

PREPARED BY: Mala Subramanian, LAFCO Counsel

AGENDA ITEM #8: DISCUSSION AND CONSIDERATION OF AMENDING POLICY
AND GUIDELINES SECTION 1.3.2 REGARDING ALTERNATE
COMMISSIONERS AND ATTENDANCE IN CLOSED SESSION

RECOMMENDATION

Staff recommends the Commission discuss and consider amending Policy and Guidelines Section 1.3.2 regarding Alternate Commissioners and attendance in closed session.

BACKGROUND

Section 1.3.2 of the Commission's Policy and Guidelines provides in pertinent part:

"However, Alternate Commissioners, when not acting in the absence of a regular member, do not generally participate in closed sessions. The Commission, under the advice of the Executive Officer and Counsel, may invite the participation in closed session on a case-by-case basis."

At the last meeting, Alternate Commissioner Morrison requested that the Commissioners discuss revising the policy to allow Alternate Commissioners to participate in closed session.

ANALYSIS

The Brown Act requires that all meetings of a "legislative body" be open and public, except as expressly provided otherwise in the Brown Act. (Gov. Code § 54953(a).) The Act contains several provisions that permit a "legislative body" to meet in closed session to discuss specific items. (Gov. Code § 54954.5).

Unfortunately, there are no statutes or cases that address whether an alternate can attend and participate in closed session when not serving in the place of a regular member. But

there are several Attorney General opinions that address who may properly attend closed session. The overriding theme of these opinions is that closed session attendance should be limited to those members of the legislative body and those staff members, consultants, or others who have an “official or essential role to play in the closed session.” (86 Ops.Cal.Atty.Gen.210 (2003).) The Attorney General has repeatedly stressed this theme to avoid “semi-executive” sessions “to which only particular members of the public, selected or approved by members of the local agency, are permitted to attend.” (46 Ops. Cal.Atty.Gen. 34 (1965).)

The Attorney General opinion most on point was issued in 1999 and addressed whether a LAFCO alternate member, when not serving in place of a regular member, may attend closed session of the commission. (82 Ops.Cal.Atty.Gen. 29 (1999).) The opinion concluded that an alternate member of the commission could not attend closed session when the member was not serving in place of a regular member. The Attorney General reasoned that unless the alternate was sitting in place of an absent or disqualified regular member, an alternate member may not attend closed session without converting the session into an unauthorized “semi-closed meeting.” The Attorney General used the analogy of an alternate juror, who is excluded from jury deliberations unless that person is seated as juror.

In the same opinion, the Attorney General concluded that alternate members, when not serving in the place of a regular member, may participate in public hearings and deliberations of the commission. Interestingly, the rationale for this opinion is based on fully informed alternates; “[u]ndoubtedly, it would be beneficial for alternate members to be present at all the hearings of a LAFCO since proposals are commonly considered at more than one meeting. Attendance by all alternates members would allow them to be fully informed if and when they must replace the regular members who are absent or disqualified.” The Attorney General analogized this situation to alternate members of a jury, who must hear all evidence so that they may immediately replace any disqualified juror.

Allowing alternates to attend closed session only when a regular member is absent could make it difficult for the alternate to be fully informed, thus limiting meaningful participation. If different regular members are absent, there may be no collective meeting of the minds.

While not binding, Attorney General opinions “are entitled to great weight” and “in the absence of controlling authority, these opinions are persuasive since the legislature is presumed to be cognizant of that construction of the statute.” (Napa Valley Educators' Assn. v. Napa Valley Unified School Dist. (1987) 194 Cal.App.3rd 243, 251.)

Some attorneys and LAFCOs are split about whether the Attorney General opinion discussed above was correctly decided. While the opinion appropriately details the need for alternates to be fully informed by participating in public hearings and other open session discussions, it does not explain why this rationale does not apply for closed session. Instead, the Attorney General relies on previous opinions stating that “persons without an official role in the meeting should not be present.” (46 Ops.Cal.Atty.Gen.34 (1965).

CONCLUSIONS AND OPTIONS

Since there is no controlling authority, the Commission can:

1. Keep the policy as is and allow Alternate LAFCO Commissioners to participate in closed session on the invitation of the Commission on a case by case basis.
2. Alternatively, the Commission can amend the Policy to allow Alternate LAFCO Commissioners to participate in all closed sessions to allow for meaningful participation. Such an amendment could include the following: "An Alternate Commissioner may participate in closed session. However, Alternate Commissioners may not vote or make a motion in closed session when the regular member(s) is (are) present."