Chapter 596: Solar-Use Easements—Let the Sunshine In

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Code Sections Affected

Government Code §§ 51190, 51191, 51191.1, 51191.2, 51191.3, 51191.4, 51191.5, 51191.6, 51191.7, 51191.8, 51192, 51192.1, 51192.2, 51255.1 (new); Fish & Game Code §§ 2805, 2835, 3511, 4700, 5050, 5515 (amended); Revenue & Taxation Code § 402.1 (amended).

SB 618 (Wolk); 2011 STAT. Ch. 596.

I. INTRODUCTION

During his first two terms as governor of California in the 1970s and early 1980s, Governor Jerry Brown earned the nickname “Governor Moonbeam” by attracting the votes of the “young, idealistic and nontraditional.”1 Following his return as Governor in 2011, Governor Brown has not only signed a law to increase the state’s renewable portfolio standard (RPS)2 from twenty percent to thirty-three percent by December 31, 2020,3 but while signing that legislation into law, he stated that a subsequent increase to “40%, at reasonable cost, is well within our grasp in the near future,”4 making it appropriate to change his moniker to “Governor Sunbeam.”5 In order to reach this high goal, the state must remove barriers to renewable energy,6 especially solar power, “California’s most

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2. See James W. Moeller, Of Credits and Quotas: Federal Tax Incentives for Renewable Resources, State Renewable Portfolio Standards, and the Evolution of Proposals for a Federal Renewable Portfolio Standard, 15 FORDHAM ENVTL. L. REV. 69, 70 (2004) (“An RPS, in effect, imposes a quota, mandating that electric power producers must generate a certain percentage of their power from renewable resources, e.g., biomass, geothermal, solar or wind resources.”). For more information on California’s RPS, see infra Part II.
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abundant natural resource.” In 2011, Governor Brown signed Chapter 596 to remove restrictions from constructing renewable projects on previously protected conservation lands, providing California with additional accessible land to reach the new RPS goal. Chapter 596 balances the often-competing interests of protecting endangered species, conserving land, and increasing clean, renewable energy sources—all important goals to protect our planet for future generations.

While the new RPS promotes harnessing renewable and distributed energy, like solar and wind power, prior laws prevented or discouraged landowners from constructing renewable energy facilities. For example, the Williamson Act encourages landowners to use their land as agricultural preserves by restricting construction and development on the land in return for certain tax benefits. Landowners who breached their Williamson Act contract in order to build solar photovoltaic facilities faced large fines. Kern County, for example, recently incurred over $750,000 in fees for canceling its Williamson Act contract in order to build a solar facility on over 6,000 acres of land. Wind turbines, another source of renewable energy, have faced scrutiny over the years as a result of the harm the turbines pose to species protected by federal or state laws. For example, the approximately 5,000 windmills in the Altamont Pass Wind Resource Area wind farm allegedly kill over 1,000 raptors and over a hundred golden eagles annually, which California’s Natural Community Conservation Planning Act (NCCP) lists as a fully protected species. In addition to Chapter 596, Senator Lois Wolk, along with Senator Michael Rubio, Assemblyman V. Manuel Perez, and many other legislators, while working in conjunction with

8. CAL. GOV’T CODE §§ 51191–51192.2 (enacted by Chapter 596).
9. Id.; CAL. FISH & GAME CODE §§ 2805, 2835, 3511, 4700, 5050, 5515 (amended by Chapter 596).
10. See SENATE APPROPRIATIONS COMMITTEE, COMMITTEE FISCAL SUMMARY OF SB 618, at 2 (May 26, 2011) (explaining that existing law requires that people seeking to rescind a Williamson Act contract must request a cancellation and pay a fee).
11. See GOV’T § 51238 (West Supp. 2012) (explaining what compatible uses are); see also CAL. REV. & TAX. CODE § 423 (West Supp. 2012) (“When valuing enforceably restricted open-space land . . . the county assessor shall not consider sales data on lands . . . but shall value these lands by the capitalization of income method . . . .”).
13. Id.
15. Id.
16. CAL. FISH & GAME CODE § 3511(b)(7) (amended by Chapter 596).
different departments, including the Department of Fish and Game, have made significant strides toward meeting this new RPS.  

Chapter 596 allows landowners to modify contracts under the Williamson Act without large fees, thereby encouraging landowners to allow renewable energy construction.  

II. LEGAL BACKGROUND

A. California’s Renewable Portfolio Standard (RPS)

In 2002, then-Governor Arnold Schwarzenegger signed legislation creating the state’s RPS.  

The RPS mandates that investor-owned utilities (IOUs) produce twenty percent of retail electricity from renewable sources by December 31, 2017.  

Renewable energy facilities include those utilizing “biomass, solar thermal, photovoltaic, wind, [or] geothermal.”  

The law requires the California...
Energy Commission (CEC) to “implement an accounting system to verify compliance”\(^\text{24}\) of IOUs with the RPS and a second system to verify, through an independent audit, the “renewable energy credits”\(^\text{25}\) of the IOUs.\(^\text{26}\)

In response to the early 2001 blackouts, lauded the “biggest electricity and natural gas crisis” in the state’s history, California established the Energy Action Plan in 2003.\(^\text{27}\) The Energy Action Plan accelerated the timeline for meeting the existing RPS by requiring that twenty percent of retail energy sales come from renewable energy by 2010 instead of 2017.\(^\text{28}\) Legislation codified this acceleration in 2006.\(^\text{29}\) The RPS went through numerous additional modifications over the following years.\(^\text{30}\)

In 2011, Governor Brown approved Chapter 1, co-authored by Senators Simitian, Kehoe, and Steinberg, to increase the RPS mandate for renewable energy used in retail sales from twenty percent to thirty-three percent, and required that the new standard be met by December 31, 2020.\(^\text{31}\) The supporters of Chapter 1 believed it would send a “clear signal to financial backers that demand for renewable power will keep growing.”\(^\text{32}\) This aggressive mandate made enhancements to the facility using that technology.” \(\text{Id.}\)

\(^{24}\) \text{PUB. UTIL. § 399.13(b) (West Supp. 2011).}

\(^{25}\) \text{Id. § 399.12(e)(1) (“Renewable energy credit’ means a certificate of proof associated with the generation of electricity from an eligible renewable energy resource, issued through the accounting system established by the Energy Commission pursuant to Section 399.13, that one unit of electricity was generated and delivered by an eligible renewable energy resource.”).}

\(^{26}\) \text{Id. § 399.13(c).}

\(^{27}\) \text{CONSUMER POWER & CONSERVATION FIN. AUTH. ET AL., ENERGY ACTION PLAN 1 (2003), available at http://www.energy.ca.gov/energy_action_plan/2003-05-08_ACTION_PLAN.PDF [hereinafter ENERGY ACTION PLAN] (on file with the McGeorge Law Review); see also CAL. ENERGY COMM’N, STATE OF CALIFORNIA: ENERGY ACTION PLAN, available at http://www.energy.ca.gov/energy_action_plan/index.html (last modified Nov. 16, 2009) (on file with the McGeorge Law Review) (“Energy Resources Conservation and Development Commission (usually called the California Energy Commission), the Public Utilities Commission (CPUC), and the Consumer Power and Conservation Financing Authority (called the CPA—which is now defunct), approved the final State of California Energy Action Plan in 2003, proposed by a subcommittee of the three agencies.”); Brian Orion, Transmission in Translation: Analyzing California’s Proposed Electricity Transmission Regulatory Reforms, 56 HASTINGS L.J. 343, 344 (2004) (“During the California energy crisis, transmission bottlenecks along the single set of power lines that allow electricity to be transmitted between northern and southern California jeopardized security by preventing available power in the south from reaching desperate consumers in the north.”).}

\(^{28}\) \text{ENERGY ACTION PLAN, supra note 27, at 2.}

\(^{29}\) \text{CAL. PUB. RES. CODE § 25740 (amended by Chapter 464); see also CAL. PUB. UTILS. COMM’N, RPS PROGRAM OVERVIEW, http://www.cpuc.ca.gov/PUC/energy/Renewables/overview.htm (last modified Sept. 7, 2011) [hereinafter RPS PROGRAM OVERVIEW] (on file with the McGeorge Law Review) (aggregating statutes and regulations related to the RPS program).}

\(^{30}\) \text{See RPS PROGRAM OVERVIEW, supra note 29 (listing “legislation, executive orders, [and] energy action plans” relating to the RPS). For example, AB 200 in 2005 “modified some requirements for electric corporations that serve customers outside of California and have 60,000 or fewer customer accounts in California” and AB 1969 in 2006 required “electrical corporations to purchase, at a CPUC set price, renewable energy output from public water and wastewater facilities up to 1 MW.” \text{Id.}}

\(^{31}\) \text{PUB. UTIL. § 399.15(b)(2)(B) (enacted by 2011 Cal. Stat. ch. 1).}

\(^{32}\) Adam Weintraub, \text{California Renewable Energy: Brown to Sign ‘Most Aggressive’ Mandate in the}
California’s RPS the highest in the country, exceeding the thirty percent by 2020 goal that Colorado passed just a year before. The California legislation exemplified the goals of its author, Senator Joe Simitian, to improve the environment by decreasing air pollution and the United States’ reliance on foreign oil and to increase employment by creating jobs. The legislation also made California’s RPS the broadest in the nation by amending the RPS to apply not only to IOUs, but also to “local publicly owned electric utilities . . . .”

B. The Williamson Act

California’s legislature enacted the Williamson Act in 1965 in response to “two troubling trends in [the state]: the loss of agricultural land to development and the haphazard growth of suburbia, requiring the ‘extension of municipal services to remote residential enclaves, and interfer[ing] with agricultural activities.’” The legislature founded the Williamson Act upon a two-step strategy: “local government first establishes and regulates agricultural preserves, and then executes land conservation contracts with landowners.” To entice landowners to subject their land to the restrictions of an agricultural preserve, the Williamson Act offers a tax incentive by basing the tax “‘on the value of the land for open space use’” instead of its “‘development potential.’”

A Williams Act contract restricts a contracting owner’s uses of land covered by the contract for generally no less than ten years. Most importantly, landowners’ “use [may] not significantly compromise the long-term productive agricultural capability” of the land. A Williamson Act contract restricts subject land to use that will “not significantly displace or impair current or reasonably


33. Id.
34. See Patrick McGreevy, State Boosts Mandate for Green Power; a New Law Requires 33% of Electricity to come from Renewable Sources by 2020, L.A. TIMES, Apr. 13, 2011, at AA-1 (“Sen. Joe Simitian (D-Palo Alto), author of the legislation, said the 33% benchmark would reduce air pollution and U.S. dependence on unstable foreign sources of oil, while creating more than 100,000 jobs.”).
35. PUB. UTIL. § 399.3; see also Weintraub, supra note 32 (describing California’s RSP as broader than Colorado’s because California’s applies “to all types of power providers”).
37. Id. at 1481–82, 82 Cal. Rptr. 3d at 42.
38. Id. at 1482, 82 Cal. Rptr. 3d at 42 (quoting Sierra Club, 28 Cal. 3d at 851, 623 P.2d at 184).
39. See CAL. GOV’T CODE § 51223(c)(1) (West Supp. 2011) (“The resulting open-space easement agreement shall not permit new development during the period the contract is in effect, except that uses compatible with or related to the open-space uses would be permitted.”); id. § 51244(a) (specifying the ten-year provision); see also id. § 51238(a)(1) (West Supp. 2012) (permitting “the erection, construction, alteration, or maintenance of gas, electric, water, communication, or agricultural laborer housing facilities”).
40. Id. § 51238.1(a)(1).
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foreseeable agricultural operations,"41 as well as use that “will not result in the significant removal of adjacent contracted land from agricultural or open-space use.”42

To cancel a Williamson Act contract, a landowner must “petition the board or council for cancellation of any contract as to all or any part of the subject land.”43 The board or council may grant a petition if it finds that either the “cancellation is consistent with the purposes”44 of the Williamson Act or the “cancellation is in the public interest.”45 After the cancellation of the contract, the landowner is required to pay a fee “equal to 12 percent of the cancellation valuation of the property.”46

C. Federal Endangered Species Act

Congress enacted the federal Endangered Species Act (ESA) in 197347 with the purpose of “provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . .”48 The ESA defines “threatened species” as a species prone to becoming endangered “within the foreseeable future”49 while an “endangered species” is one that “is in danger of extinction throughout all or a significant portion of its range . . . .”50

The ESA requires the Secretary of the Interior to maintain a list of threatened or endangered species.51 Section 9 of the ESA makes it unlawful to “take” any of the listed species “within the United States or the territorial sea of the United States.”52 The ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect, or to attempt to engage in any such

41. Id. § 51238.1(a)(2).
42. Id. § 51238.1(a)(3).
43. Id. § 51282(a). “’Board’ means the board of supervisors of a county which establishes or proposes to establish an agricultural preserve or which enters or proposes to enter into a contract on land within an agricultural preserve pursuant to this chapter.” Id. § 51201(g). “’Council’ means the city council of a city which establishes or proposes to establish an agricultural preserve or which enters or proposes to enter into a contract on land within an agricultural preserve pursuant to this chapter.” Id. § 51201(h).
44. Id. § 51282(a)(1); see also id. § 51282(b) (providing that “cancellation of a contract shall be consistent with the purposes of this chapter only if the board or council makes all of the following findings” in paragraphs [1]–[5]).
45. Id. § 51282(a)(2); see also id. § 51282(c) (providing that “cancellation of a contract shall be in the public interest only if the council or board makes the following findings” in paragraphs [1] and [2]).
46. Id. § 51283(b).
49. Id. § 1532(20).
50. Id. § 1532 (8).
51. Id. § 1533(c).
52. Id. § 1538(a)(1)(B).
However, the ESA does not protect listed species absolutely and at all costs; there are exemptions or off-ramps from its enforcement scheme. Under an amendment to the Act in 1982, if section 1538(a)(1)(B) prohibits the taking of a listed species, the Secretary may authorize an “incidental taking permit” as long as the individual seeking the permit submits a conservation plan and the Secretary approves that plan.

D. California’s Endangered Species Act

California’s Endangered Species Act (CESA) corresponds with the federal ESA. CESA’s definitions for both “endangered species” and “threatened species” follow those definitions set out by the federal ESA; additionally, CESA identifies rare species or those in danger of extinction as “fully protected.” Similar to the federal ESA, the CESA provides that a party may petition the California Department of Fish and Game (DFG) for an “incidental taking permit” of “any endangered, threatened, or candidate species.” The CESA also outlines the process of obtaining state approval of a federally issued “incidental taking permit” through the federal ESA; those issued a permit must notify the Director of the DFG that a federal permit has been issued and provide the Director a copy of the permit. Upon receiving notification of a federally issued permit, the Director has thirty days to determine whether the permit is also consistent with the CESA. If, “based upon substantial evidence, . . . the incidental take

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53. Id. § 1532(19).
54. See id. § 1539 (providing a list of off-ramps or exceptions from ESA enforcement).
55. See id. § 1539(a)(1)(B) (prohibiting the taking of a species “within the United States or the territorial sea of the United States”); see also id. § 1539(2)(A)(i)–(iv) (requiring the plan to show: “the impact which will likely result from such taking,” the plan to “minimize and mitigate such impacts” as well as the available funding for the plan, any alternatives the applicant considered to avoid taking the species and why those alternatives were not chosen, and “such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan”).
57. Compare id. § 2062 (“‘Endangered species’ means a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease.”), with 16 U.S.C. § 1531(b) (2006) (defining “endangered species” with nearly identical language). Compare FISH & GAME § 2067 (“‘Threatened species’ means a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by [the CESA].”), with 16 U.S.C. §1532(a)(20) (defining “threatened species” with nearly identical language).
58. Fully Protected Animals, CAL. DEP’T OF FISH & GAME, http://www.dfg.ca.gov/wildlife/nongame/t_e_spp/fully_pro.html (on file with the McGeorge Law Review). “[M]ost fully protected species have also been listed as threatened or endangered species under the more recent endangered species laws and regulations.” Id.
59. FISH & GAME § 2081.1.
60. Id. § 2080.1(a)(1)–(2).
61. Id. § 2080.1(c).
statement or incidental take permit is not consistent” with the CESA, the Director will not authorize the taking. 62

E. California’s Natural Community Conservation Planning Act

Enacted in 1991, the NCCP addresses the “need for broad-based planning to provide for effective protection and conservation of the state’s wildlife heritage while continuing to allow appropriate development and growth.” 63 The NCCP focuses on balancing the continuous expansion of society with the impact of developing land inhabited by wildlife by providing appropriate planning mechanisms. 64 The NCCP allows the DFG to provide incidental taking permits to developers who have properly shown a plan for mitigation through the NCCP for the covered species. 65

The NCCP defines “conservation” as using appropriate methods and procedures to prevent the listing of a species with the CESA or to use appropriate means to prevent the continued listing of an already “threatened” or “endangered” species. 66 The NCCP defines “natural community conservation plan” as a plan that will “identify and provide for those measures necessary to conserve and manage natural biological diversity within the plan area while allowing compatible and appropriate economic development, growth, and other human uses.” 67 A natural community conservation plan limits parties’ ability to take “covered species,” which may be listed or unlisted with the CESA. 68 The DFG may revoke or suspend a permit provided by the NCCP if the continuance of the plan would heighten the threat to a species’ existence. 69

III. CHAPTER 596

Chapter 596 has two separate focuses: The first purpose is to enable the Department of Conservation (DOC) to allow rescission of Williamson Act contracts by landowners seeking to grant solar easements. 70 The second purpose...
is to allow the DFG to “grant permits to take Fully Protected Species (FPS)” if those species are covered and conserved in a Natural Community Conservation Plan.”71

Chapter 596’s main focus is the rescission of Williamson Act contracts on land suitable for solar easements.72 The legislation presents new and expedited options with which to extinguish a Williamson Act contract “on all or a portion of the parcel,” including “by nonrenewal, termination, or by returning the land to its previous contract” under the Williamson Act.73 The legislature designed these new methods of extinguishing a Williamson Act contract in order to encourage the development of solar photovoltaic facilities on land specifically identified by the DOC.74

Chapter 596 defines “solar-use easement” as a right or interest in land deemed eligible by the DOC, which is restricted to use by a “photovoltaic solar facil[ity] for the purpose of providing for the collection and distribution of solar energy for the generation of electricity, and any other incidental or subordinate agricultural, open-space uses, or other alternative renewable energy facilities.”75 The easements either run perpetually, for a term of years to be no fewer than twenty years,76 or are “annually self-renewing.”77 “Solar-use easements” must contain a covenant mandating that no construction inconsistent with the purposes of Chapter 6.9 of California’s Government Code will occur during the term of the easement.78 Additional covenants or restrictions may be required as necessary to restrict the land to solar photovoltaic facilities.

deed or other instrument granting the right or interest imposes restrictions that, through limitation of future use, will effectively restrict the use of the land to solar photovoltaic facilities for the purpose of providing for the collection and distribution of solar energy for the generation of electricity, and any other incidental or subordinate agricultural, open-space uses, or other alternative renewable energy facilities.  

71. See generally FISH & GAME § 3511 (amended by Chapter 596) (listing the “fully protected birds”); id. § 4700 (amended by Chapter 596) (listing the “fully protected mammals”); id. § 5050 (amended by Chapter 596) (listing the “fully protected reptiles and amphibians”).
73. Id.
74. GOV’T § 51192(a) (enacted by Chapter 596).
75. Id. § 51191(a) (enacted by Chapter 596).
76. Id. § 51190(c) (enacted by Chapter 596).
77. See id. § 51191.2 (enacted by Chapter 596) (with the exception of when a landowner requests a shorter term of years, resulting in no less than ten years).
78. Id. § 51190(c) (enacted by Chapter 596).
79. Id.
80. Id. § 51191.3(a) (enacted by Chapter 596); see also id. § 51191.3(b)(1)-(3) (providing that possible additional restrictions could be: mitigations on the land or beyond the land or “performance bonds or other securities to fund, upon cessation of the solar photovoltaic use, the restoration of the land that is subject to the easement to the conditions that existed before the approval or acceptance of that easement by the time that easement terminates”).
Chapter 596 requires the DOC to ensure landowners comply with a lengthy list of requirements in order to have land classified as eligible for rescission of a Williamson Act contract. While conferring with the Department of Food and Agriculture, the DOC must find that the land either “consists predominately of soils with significantly reduced agricultural productivity for agricultural activities” or has “severely adverse soil conditions that are detrimental to continued agricultural activities and production.” Further, the DOC cannot determine to be “prime farmland, unique farmland, or farmland of statewide importance” without a finding of adequate information to “demonstrate[] that circumstances exist that limit the use of the parcel for agricultural activities.” To aid the DOC, a landowner petitioning to rescind a Williamson Act contract must provide extensive information detailing the land’s reduced “agricultural productivity.” Finally, the landowner must present a proposed management plan for the land while under the easement. This plan must include “how the soil will be managed during the life of the easement, how impacts to adjacent agricultural operations will be minimized, how the land will be restored to its previous general condition, as it existed at the time of project approval, upon the termination of the easement.”

If the DOC finds that the land is eligible to have its Williamson Act contract rescinded, the board or council must determine the “amount of the rescission fee that the landowner shall pay the county treasurer upon rescission.” This fee will be “an amount equal to [6.25%] of the fair market valuation of the property if the land was held under a contract pursuant to Section 51240” or 12.5% percent if the land is in the farmland security zone.

81. Id. § 51191 (enacted by Chapter 596).
82. See id. § 51191(a)(1)(A) (enacted by Chapter 596) (These deficiencies could result from “chemical or physical limitations, topography, drainage, flooding, adverse soil conditions, or other physical reasons.”).
83. See id. § 51191(a)(1)(B) (enacted by Chapter 596) (“Severely adverse soil conditions may include, but are not limited to, contamination by salts or selenium, or other naturally occurring contaminants.”).
84. See id. § 51191(a)(2) (enacted by Chapter 596) (determined by the “maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Natural Resources Agency”).
85. Id.
86. See id. § 51191(b)(1)–(5) (enacted by Chapter 596) (requiring the landowner to provide: a “written narrative demonstrating that even under the best currently available management practices, continued agricultural practices would be substantially limited due to the soil’s reduced agricultural productivity from chemical or physical limitations,” a “recent soil test,” an “analysis of water quality,” and “[c]rop and yield information for the past six years”).
87. Id. § 51191(c) (enacted by Chapter 596).
88. Id.
89. Id. § 51255.1(c)(2) (enacted by Chapter 596).
90. Id.; see also id. § 51255.1(c)(4) (enacted by Chapter 596) (“It is the intent of the Legislature that fees paid to rescind a contract do not constitute taxes but are payments that, when made, provide a private benefit that tends to increase the value of the property.”).
The assessing agency must assess the land prior to the easement taking effect. Chapter 596 further requires the assessing agency to consider the “effect upon value of any enforceable restrictions to which the use of the land may be subjected.” The assessor bases the assessment on the presumption that the restrictions will not be “removed or substantially modified in the predictable future.” The landowner may rebut this presumption by giving the “past history of like use restrictions in the jurisdiction in question” or showing the “similarity of sales prices for restricted and unrestricted land.”

In the event of proposed or attempted development that is adverse to the easement, the city or county must seek an injunction to prevent it; if the city or county does not seek an injunction, any person or entity may seek an injunction. Under Chapter 596, a landowner may extinguish a solar-use easement by “nonrenewal, termination, or by returning the land to its previous contract.” In order to extinguish the easement, the landowner, city, or county must serve the city or county with written notice of intent not to renew at least ninety days prior to the annual renewal date. The city or county receiving the written notice may, at any time prior to the annual renewal date, provide “written protest of the notice.” The county assessor will determine the fair market value of the land prior to the termination of an easement. The assessor will not consider the easement on the land when determining the value.

Chapter 596 also focuses on encouraging developers to work with the NCCP by modifying the definition of a “covered species” to include species which are “nonlisted, conserved and managed under an approved natural community conservation plan and that may be authorized for take.” By providing that these FPS’s can be “covered species,” the DOC can “permit the taking” of those species once they approve the natural community conservation plan.

91. **CAL. REV. & TAX. CODE § 404 (West 1998)** (“All taxable property, except State assessed property, shall be assessed by the assessing agency where the property is situated.”).
92. **Id. § 402.1(a) (amended by Chapter 596).**
93. **Id. § 402.1(b) (amended by Chapter 596).**
94. **Id. § 402.1(c) (amended by Chapter 596).**
95. **GOV’T § 51191.5(a) (enacted by Chapter 596).**
96. **Id. § 51192(a) (enacted by Chapter 596).**
97. **Id. § 51192(b)(1) (enacted by Chapter 596).**
98. **Id. § 51192(b)(2) (enacted by Chapter 596).**
99. **Id. § 51192.2(b) (enacted by Chapter 596).**
100. **Id.**
101. **CAL. FISH & GAME CODE § 2805(e) (amended by Chapter 596).**
102. **Id. § 2835 (amended by Chapter 596).**
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IV. ANALYSIS

California failed to meet its first RPS deadline of twenty percent renewable energy by 2010. This failure increased the pressure to ensure that IOUs are able to meet future goals, forcing California “to change course and stop doing business as usual.” While ensuring that the RPS goal of thirty-three percent renewable energy is met by the 2020 deadline, California must also ensure that it does not take drastic moves that will harm future generations, such as harming prime farmland. Chapter 596 walks the fine line of balancing the state’s renewable energy needs while protecting the conservation needs for agricultural land. The legislation also amends the NCCP in order to encourage developers to utilize natural conservation community plans in order to increase renewable energy projects while also ensuring appropriate mitigation for “covered species.”

A. Balancing Conservation of Prime Farmland with Meeting the RPS

Following the recent increase of California’s RPS to thirty-three percent by the end of 2020, “utility systems and private investors need[ed] locations to build renewable energy facilities.” Senator Wolk responded to this need by authoring Chapter 596, which enables the construction of solar photovoltaic facilities on land with little agricultural use, without the detriment of high cancellation fees for Williamson Act contracts. The bill garnered much support, but there has

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103. See Deborah Behles, Why California Failed to Meet its RPS Target, 17 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 163 (2011) (providing potential explanations for why California did not make the deadline of twenty percent renewable energy by 2010). Arguably, the real “first” deadline is the initial goal of twenty percent by 2017. See RPS Program Overview, CAL. PUB. UTIL. COMM’N, http://www.cpuc.ca.gov/PUC/energy/Renewables/overview.htm (on file with the McGeorge Law Review) (providing the RPS program’s history).

104. Behles, supra note 103, at 165.


108. ASSEMBLY COMMITTEE ON AGRICULTURE, BILL ANALYSIS OF SB 618, at 6 (June 29, 2011).

109. Id. at 6–7.

been a history of mixed feelings toward building solar photovoltaic facilities on agricultural land.\textsuperscript{111}

The Williamson Act has been a valuable program for organizations concerned with the conservation of land in California, thus it is not surprising that proposed changes to the Williamson Act raise concerns about its future integrity.\textsuperscript{112} While the Act does recognize that the “erection, construction, alteration, or maintenance of gas, electric, water, communication, or agricultural laborer housing facilities”\textsuperscript{113} are compatible uses for contracted land, there are conflicting opinions about whether the construction of a solar photovoltaic facility is within the guidelines for a compatible use.\textsuperscript{114} As a result of those differing opinions, landowners who would like to construct a solar photovoltaic facility on their land will generally cancel their Williamson Act contract instead of risk a lawsuit.\textsuperscript{115} The resulting cancellation fee acts as a deterrent for landowners who would like to cancel their Williamson Act contract in order to construct a solar photovoltaic facility, thereby aiding the state in reaching its RPS.\textsuperscript{116}

If a solar easement would appear more profitable than renewing a Williamson Act contract, Chapter 596 may undermine the intent of the Williamson Act by creating an incentive for landowners to not renew.\textsuperscript{117} Building solar photovoltaic facilities on rural and agricultural land has become increasingly popular, especially following the increased RPS.\textsuperscript{118} Organizations trying to preserve farmland have been met with much push back from organizations trying to preserve the land.\textsuperscript{119} For example, on August 30, 2011 Fresno County unanimously voted to cancel a Williamson Act contract on ninety acres of land in order to construct a solar plant.\textsuperscript{120} This decision was met with opposition from the Fresno County Farm Bureau, stating that “solar projects are
best relegated to less fertile land, not farmland designated as prime." Ryan Jacobsen, the chief executive of the county Farm Bureau, continued by calling for the government to "come up with a distinguishing factor for what’s going to be allowed and what’s not going to be allowed" when deciding to end conservation easements in order to place a solar easement on the land. This example of a proposed solar project on Williamson Act land is not an isolated incident; seventeen out of the thirty-three solar projects currently proposed in Fresno County involve Williamson Act land.

However, supporters of the bill, such as the Nature Conservancy, feel that Chapter 596 adequately addresses the “sensitive issue” of determining when land currently under a conservation easement would be able to end that contract in favor of a solar easement. As introduced, Chapter 596 initially required that land eligible for rescission of Williamson Act contracts must be either “marginally productive” or “physically impaired land.” The Senate amended Chapter 596 to include more extensive requirements for the DOC to consider when determining the eligibility of land. Senator Wolk concluded that this bill would not only ensure that solar projects would be reserved for impaired land, but it would also “encourage job creation, help the state reach its energy and environmental goals and help ensure that California continues to feed the nation by protecting our most valuable agricultural lands—a win-win-win scenario.”

B. Encouraging Developers to Work with the NCCP

By amending the Fish and Game Code, Chapter 596 could also increase the availability of eligible land for renewable energy projects. With the enactment of Chapter 596, the Fish and Game Code provides a clear framework on how to mitigate harm to protected species while still going forward with not just solar photovoltaic facilities but also the production of wind farms. Chapter 596’s

121. Id.
122. Id.
123. Souza, supra note 111.
125. SB 618, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as amended on May 11, 2011, but not enacted) (defined as land with significantly impaired agricultural productivity because of chemical or physical limitations and the land has not been “irrigated for agricultural purposes during the prior six years” and the land’s “topography, drainage, flooding, adverse soil conditions, or other physical reasons” limits its use for agricultural purposes).
126. Id. (defined as land with severely impaired agricultural productivity as a result of “severely adverse soil conditions”).
127. See supra Part III (discussing the effects of Chapter 596).
128. Wolk, supra note 106.
129. CAL. FISH & GAME CODE §§ 2805, 2835, 3511, 4700, 5050, 5515 (amended by Chapter 596).
amendments encourage developers to enter into NCCPs by enabling them to “take” an FPS from a potential solar easement site, conduct not allowed prior to the enactment of Chapter 596. Now, a developer may obtain a permit from the DFG to “take” an FPS as long as the developer has submitted a natural conservation community plan and has properly mitigated any harm to protected species. Therefore, the NCCP’s underlying purposes, including to be a “cooperative effort to protect habitats and species,” survive.

Possibly the greatest incentive to participate in a natural community conservation plan is that such participation allows developers to “take” FPS while avoiding sanctions from both the CESA and the federal ESA. Generally, the Federal Wildlife Service (FWS) treats a natural community conservation plan as “habitat conservation plan,” which allows for the taking of specific species as long as mitigation efforts are in place. As long as the FWS determines a natural community conservation plan to be a proper habitat conservation plan, it will issue an “incidental taking permit,” allowing the developer to escape sanctions from the ESA. Once the FWS approves the issuance of an incidental taking permit, the developer can enter into a binding “implementation agreement” with the DFG and the city in which the developer’s project is located.

While this process allows a developer with a proper natural community conservation plan to avoid sanctions from the ESA and CESA, outside organizations who oppose the “taking” of a species can still challenge the validity of the a natural community conservation plan, implementation agreement, and the ESA issued incidental taking permit. The government has sought out ways

californiaenvironmentallawblog.com/esa/ (on file with the McGeorge Law Review).


132. FISH & GAME § 2835 (amended by Chapter 596).


135. 16 U.S.C. § 1539(a)(2)(A)(i)–(iv) (West 2006) (requiring the plan to show: “the impact which will likely result from such taking,” the plan to “minimize and mitigate such impacts” as well as the available funding for the plan, any alternatives the applicant considered to avoid taking the species and why those alternatives were not chosen, and “such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan”).

136. Parker, supra note 134, at 125–26; see also S.W. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 814 (9th Cir. 2001) (outlining the process an NCCP takes in being approved by the FWS).

137. 16 U.S.C. § 1539(a)(2)(B). But see id. §1539(a)(2)(C) (“The secretary shall revoke a permit issued . . . if he finds that the permittee is not complying with the terms and conditions of the permit.”).

138. S.W. CTR. FOR BIOLOGICAL DIVERSITY, 268 F.3d at 815.

139. Id. at 816 (“Southwest challeng[ed] the formulation, approval, and implementation of the IA, the [NCCP], and the City’s ITP.”).
to encourage developers to enter into FWS-approved habitat conservation plans, like the NCCP, to avoid potential conflicts and litigation. One key incentive is the introduction of the “No Surprises” policy for the ESA. This policy states that developers with a habitat conservation plan approved by the FWS “will not be subject to later demands for a larger land or financial commitment if the plan is adhered to even if the needs of the species change over time.”

C. Widespread Support

In supporting Chapter 596, the Nature Conservancy felt that the bill “strikes the appropriate balance between the need to preserve important agricultural and ranch lands while also expediting the development of appropriately sited solar projects in order to meet the state’s renewable energy goals.” Such supporters of the legislation believe that Chapter 596 ensures the construction of solar photovoltaic facilities on appropriate areas of Williamson Act land while not interfering with the intent of the Williamson Act itself. The California Farm Bureau Federation, along with the California Women for Agriculture, commended the bill for providing an alternative for “Williamson Act land that cannot meet the law’s principles of compatibility or the required findings for contract cancellation,” while still protecting prime farmland. The bill also ensures that the placement of the solar-use facilities will “make[] sense and balance[] multiple interests.”

V. CONCLUSION

Chapter 596 has widespread support and, along with other recently enacted legislation, emphasizes California’s commitment to renewable energy, protecting endangered species, and preserving and conserving farmlands for future generations. With the highest RPS in the country, California continues to challenge municipal- and investor-owned utilities to lessen the state’s

140. Parker, supra note 134, at 126.
141. Id.
143. Nature Conservancy Letter, supra note 112.
144. ASSEMBLY COMMITTEE ON AGRICULTURE, BILL ANALYSIS OF SB 618, at 7 (June 29, 2011).
146. ASSEMBLY COMMITTEE ON AGRICULTURE, BILL ANALYSIS OF SB 618, at 7 (June 29, 2011).
147. Id.
dependence on fossil fuel. Chapter 596 allows parties to a Williamson Act contract to modify or rescind their contract in order to enter into a solar easement to build solar photovoltaic facilities, whereas before Chapter 596, high cancellation fees discouraged landowners from terminating Williamson Act contracts. Chapter 596 erases this deterrent to cancellation and provides flexibility to comply with CESA, through the NCCP, to facilitate building renewable energy facilities, thereby opening up significant Williamson Act lands to help meet the state’s ambitious RPS.

148. Weintraub, supra note 32.
149. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 618, at 1 (May 26, 2011).
150. ASSEMBLY COMMITTEE ON AGRICULTURE, BILL ANALYSIS OF SB 618, at 7 (June 29, 2011).
151. Id.
Chapter 261: Prohibiting Discrimination Based on Genetic Information

Allison L. Cross

Code Sections Affected

Business and Professions Code § 23438 (amended); Civil Code § 51 (amended); Education Code § 32228 (amended); Elections Code § 354.5 (amended); Government Code §§ 11135, 12920, 12921, 12926, 12926.1, 12930, 12931, 12935, 12940, 12944, 12955, 12955.8, 12956.1, 12956.2, 12993 (amended); Penal Code § 868.8 (amended); Revenue and Taxation Code §§ 17269, 24343.2 (amended); Welfare and Institutions Code § 4900 (amended).

SB 559 (Padilla); 2011 STAT. Ch. 261.

I. INTRODUCTION

California’s Civil Rights Act prohibits “businesses from engaging in unreasonable, arbitrary, or invidious discrimination” based on protected classes. However, discrimination comes in many forms beyond the typically protected classifications of race, gender, or religion. Technological advances provide an expanding basis for discrimination based on genetic information. While genetic testing is an important medical achievement that allows for earlier diagnoses of illnesses and enables individuals to pursue earlier preventative measures, misuse of the resulting genetic information is a serious concern.

4. Id. at 3.
“Although genes are facially neutral markers,” the misuse of genetic information to discriminate against certain groups is an unfortunate and reoccurring aspect of genetic testing. For example, between 1981 and 1995, Lawrence Berkeley Laboratory (Lawrence) required all employees to submit to a medical examination as a condition of employment. During these examinations, Lawrence tested employees for conditions wholly unrelated to their employment: syphilis, the sickle cell trait, and pregnancy. Lawrence tested for these conditions without the employees’ knowledge or consent. Because Lawrence tested only African-American employees for the sickle cell trait and only women for pregnancy, “the employment of women and blacks at Lawrence was conditioned in part on . . . invasions of privacy to which white and/or male employees were not subjected.” Some employees sued Lawrence for its policies, and the court found that the company’s practice of obtaining unauthorized “medical information on the basis of race or sex” violated the Civil Rights Act of 1964.

Discrimination based on one’s genetic information or genetic defects is not without precedent in California’s legislative history. For example, in 1909 and 1913, California passed nonconsensual-sterilization laws for the sterilization of prisoners and the mentally ill. Additionally, in the 1970s, Congress imposed mandatory sickle cell anemia screening for all African-Americans. As a result,
those carrying the trait experienced discrimination and “had difficulty finding employment and health insurance.”

Prompted by historical abuses of genetic information for discriminatory purposes and by the modern growth in genetic research, Senator Alex Padilla introduced Chapter 261 in an attempt to promote genetic testing to enable earlier disease detection and treatment while deterring discrimination based on the resulting genetic information. While the cases of discrimination based on genetic information are rare, Senator Padilla explained, “the rapid progress in the field of genomics, and the history of early genetic science, compels legislative action in this area.”

II. LEGAL BACKGROUND

The Unruh Civil Rights Act (enacted in 1905) prohibits discrimination in business establishments based on protected characteristics, such as race, sex, and religion. The Fair Employment and Housing Act (enacted in 1980) prohibits discrimination in employment and housing based on similar protected characteristics. Neither California Act prohibits discrimination based on genetic information. However, the Genetic Information Nondiscrimination Act of 2008, a federal law, prohibits discrimination based on genetic information in health insurance and employment.

A. The Unruh Civil Rights Act

The Unruh Civil Rights Act (the Unruh Act) prohibits discrimination in “all business establishments of every kind whatsoever” based on “sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or anemia primarily affects African-Americans, although other ethnicities may also carry the disease. Id. 16

16. Id.
19. CAL. CIV. CODE § 51(b) (West 2007).
21. See, e.g., CIV. § 51; GOV’T §§ 12900–96 (excluding “genetic information” as a protected characteristic). But see GOV’T § 12926(h)(2) (including “genetic characteristics” as a prohibited basis for discrimination under the Fair Employment and Housing Act).
sexual orientation." Courts interpret “business establishments” broadly, thereby ensuring the wide reach of the Unruh Act’s protections. For example, the Unruh Act applies to both for-profit and non-profit entities, provided that the entity “has sufficient businesslike attributes.”

B. The Fair Employment and Housing Act

The Fair Employment and Housing Act (FEHA) prohibits discrimination in employment based on “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.” With regard to housing, FEHA prohibits discrimination for the same bases as in employment, as well as the characteristics of “familial status, source of income . . . or any other basis prohibited by Section 51 of the Civil Code.”

C. The Genetic Information Nondiscrimination Act of 2008

The Genetic Information Nondiscrimination Act (GINA) is a federal law that prohibits discrimination based on genetic information in health insurance and employment. GINA defines “genetic information” as information about an individual’s genetic tests, a family member’s genetic tests, and a family member’s disease or disorder.

Noting the importance of genetic testing for disease detection and prevention, Congress enacted GINA to promote “medical progress” and to allow “individuals to take advantage of genetic testing, technologies, research, and new therapies.” GINA provides that an insurance company may not discriminate against an

23. CIV. § 51(b).
24. See Burks v. Poppy Constr. Co., 57 Cal. 2d 463, 468–69, 370 P.2d 313, 315–16 (1962) (“The Legislature used the words ‘all’ and ‘of every kind whatsoever’ in referring to business establishments covered by the Unruh Act . . . and the inclusion of these words, without any exceptio
26. GOV’T § 12921(a).
27. Id. § 12921(b). But see id. § 12927(c)(2)(A) (providing an exception when the housing is “an owner-occupied single family house”).
individual or adjust a group rate based on genetic information, nor can an insurance company request or require genetic testing.\textsuperscript{31} Regarding employment, GINA provides that an employer may not discriminate against an employee in hiring, firing, and promoting, based on genetic information.\textsuperscript{32} Additionally, an employer may not segregate an employee based on genetic information.\textsuperscript{33} Further, GINA establishes genetic information as health information, making genetic information a protected privacy right.\textsuperscript{34} GINA imposes monetary penalties for noncompliance.\textsuperscript{35} GINA’s applicability is somewhat limited, as it provides exceptions for insurance companies,\textsuperscript{36} employers,\textsuperscript{37} and businesses with fifteen employees or fewer.\textsuperscript{38}

III. CHAPTER 261

Chapter 261 expands the Unruh Act and FEHA to prohibit discrimination based on genetic information.\textsuperscript{39} Specifically, Chapter 261 prohibits discrimination based on genetic information in the following areas: housing,\textsuperscript{40} employment,\textsuperscript{41} education,\textsuperscript{42} elections,\textsuperscript{43} state-funded activities and programs,\textsuperscript{44} emergency-health services,\textsuperscript{45} and mortgage lending.\textsuperscript{46} Chapter 261 defines “genetic information” as

\begin{itemize}
  \item[31.] 42 U.S.C. § 300gg-4(c)(1).
  \item[32.] Id. § 2000ff-1(a)(1).
  \item[33.] Id. § 2000ff-1(a)(2).
  \item[34.] Id. § 1320d-9(a)(1).
  \item[35.] 29 U.S.C. § 1132(c)(10) (Supp. IV 2011) (imposing a $100 per-day fine for noncompliant insurers, up to a maximum of $500,000); 42 U.S.C. § 2000f-6 (citing id. § 1981a(b) (2008)) (imposing fines on noncompliant employers depends on the number of employees).
  \item[36.] 42 U.S.C. § 300gg-4(c)(4). These include a research exception for insurance companies, whereby an insurance company may request (but not require) genetic information, provided that the request is in writing and clearly states that compliance with the request is voluntary and will not affect enrollment. Id.
  \item[37.] Id. § 2000ff-1(b). There are a number of exceptions for employers, such as employers who offer health services, where the affected employee has authorized the employer’s request for genetic testing in writing and individually identifiable information is only shared with the individual and the professional. Id. Other exceptions for employers include family and medical leave certification, monitoring the effects of job-related toxins, when the information is otherwise publicly available, or when testing is conducted for law enforcement purposes. Id.
  \item[38.] 42 U.S.C. § 2000ff(2)(B) (citing Civil Rights Act § 701(f), 42 U.S.C. § 2000e(b) (2008)).
  \item[39.] CAL. CIV. CODE § 51 (amended by Chapter 261); CAL. GOV’T CODE §§ 12900–96 (amended by Chapter 261).
  \item[40.] GOV’T §§ 12900–96 (amended by Chapter 261); see also id. §§ 12955, 12956.1, 12956.2 (amended by Chapter 261) (stating that any restrictive covenant on real property found to discriminate based on a protected characteristic may be removed).
  \item[41.] Id. §§ 12900–96 (amended by Chapter 261).
  \item[42.] CAL. EDUC. CODE § 32228 (amended by Chapter 261).
  \item[43.] CAL. ELEC. CODE § 354.5(g)(2) (amended by Chapter 261).
  \item[44.] GOV’T § 11135 (amended by Chapter 261).
  \item[45.] See CAL. HEALTH & SAFETY CODE § 1317 (West 2008) (prohibiting the denial of emergency services based on “protected characteristics,” which, following Chapter 261’s enactment, include “genetic information”); CAL. CIV. CODE § 51(e) (amended by Chapter 261).
\end{itemize}
information about an individual’s or a family member’s genetic tests, or information about an individual’s or a family member’s disease or disorder. The term also “includes any request for, or receipt of, genetic services” or clinical research including genetic services, by an individual or an individual’s family member. Genetic information does not include information about an individual’s age and sex.

Additionally, the legislature concurrently enrolled Chapter 261 with Chapter 719. Collectively, these Chapters expand the Unruh Act and FEHA by amending the definition of “sex” to include gender identity and gender expression.

IV. ANALYSIS

According to Senator Padilla, GINA’s civil rights protections of genetic information prior to Chapter 261 were “incomplete for Californians.” Padilla further contends that Chapter 261 is necessary because of the history of discrimination based on genetic information in California. Chapter 261 extends existing protections to include forms of discrimination that were legal prior to its enactment, and it applies those protections to a larger number of employers.

46. GOV’T § 12955(e) (amended by Chapter 261).
47. CIV. § 51(e)(2)(A)(i) (enacted by Chapter 261); GOV’T § 12926(g)(1)(A) (enacted by Chapter 261).
48. CIV. § 51(e)(2)(A)(ii) (enacted by Chapter 261); GOV’T § 12926(g)(1)(B) (enacted by Chapter 261).
49. CIV. § 51(e)(2)(A)(iii) (enacted by Chapter 261); GOV’T § 12926(g)(1)(C) (enacted by Chapter 261).
50. CIV. § 51(e)(2)(B) (enacted by Chapter 261); GOV’T § 12926(g)(2) (enacted by Chapter 261).
51. CIV. § 51(e)(2)(C) (enacted by Chapter 261); GOV’T § 12926(g)(3) (enacted by Chapter 261).
52. CIV. § 51 (amended by Chapter 719); GOV’T §§ 12900–96 (amended by Chapter 719).
53. CIV. § 51(e)(5) (amended by Chapter 719) (“'Gender expression' means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”); GOV’T § 12926(q) (amended by Chapter 719) (the Fair Employment and Housing Act defines “sex” to include “gender,” as defined in California Penal Code section 422.56 (amended by Chapter 719)).
55. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 559, at 2 (Apr. 26, 2011) (discussing instances of sterilizing persons with genetic defects, screening African-Americans for sickle cell anemia, and an employer testing for the sickle cell trait and pregnancy—all without the employees’ knowledge or consent).
56. Compare CAL. BUS. & PROF. CODE § 23438 (amended by Chapter 261), and CIV. § 51 (amended by Chapter 261), and CAL. EDUC. CODE § 32228 (amended by Chapter 261), and CAL. ELEC. CODE § 354.5 (amended by Chapter 261), and GOV’T §§ 11135, 12920, 12921, 12926, 12926.1, 12930, 12931, 12935, 12940, 12944, 12955, 12955.8, 12956.1, 12956.2, 12993 (amended by Chapter 261), and PENAL § 868.8 (amended by Chapter 261), and CAL. REV. & TAX. CODE §§ 17269, 24343.2 (amended by Chapter 261), and CAL. WELF. & INST. CODE § 4900 (amended by Chapter 261), with 42 U.S.C. §§ 300gg to -95, 2000ff to -11 (Supp. IV 2011) (protecting genetic testing and information only in the insurance and employment contexts).
Historical cases of discrimination based on genetic information are few in number and occurred prior to GINA’s enactment. Nevertheless, proponents of Chapter 261, like the Council for Responsible Genetics, believe “GINA should be the beginning, not the end of creating comprehensive genetic privacy protections for Americans.”

A. Expanding Prohibited Bases for Discrimination

Chapter 261 expands the Unruh Act and FEHA, thereby increasing the number of prohibited bases of discrimination—sex, race, color, religion, national origin, disability, marital status, or sexual orientation—to include genetic information. In addition to incorporating protection of genetic information into the Unruh Act and FEHA, Chapter 261 also incorporates such protection into the following legal areas: education, elections, state-funded activities and programs, emergency-health services, restrictive covenants, and mortgage lending. Before Chapter 261, GINA’s protection of genetic information only applied to insurance and employment.

While GINA protects individuals from genetic information-based discrimination by employers, this federal law only applies to businesses with fifteen or more employees. Chapter 261 extends this application to any business of five or more employees, thereby providing civil rights protections to a larger

(GINA only applies to employers maintaining fifteen or more employees), with Gov’t § 12926(d) (amended by Chapter 261) (applying FEHA to all employers with five or more employees, excluding nonprofit and religious organizations).

60. E.g., Civ. § 51 (amended by Chapter 261); Gov’t §§ 12900–96 (amended by Chapter 261) (expanding the Unruh Act—among other California Code sections—to include genetic information).
61. Educ. § 32228(b) (amended by Chapter 261) (providing “supplemental resources to combat bias on the basis of” genetic information).
63. Gov’t § 11135 (amended by Chapter 261).
64. See Cal. Health & Safety Code § 1317 (amended by Chapter 261) (prohibiting the denial of emergency services based on protected characteristics under California Civil Code section 51(e), which includes “genetic information” following Chapter 261).
65. Gov’t § 12956.1 (amended by Chapter 261). If a restrictive covenant is based upon genetic information, the discriminatory clause is void and may be stricken. Id. § 12956.2 (amended by Chapter 261). It is a misdemeanor if an individual records a restrictive covenant with the intent to discriminate based on genetic information. Id.
66. Id. § 12955(c) (amended by Chapter 261) (prohibiting discriminatory lending based on genetic information).
68. Id. § 2000ff(2)(B) (citing Civil Rights Act § 701(f), 42 U.S.C. § 2000e(b) (2008)).
employee base. Deborah Doctor, on behalf of Disability Rights California, emphasizes that “without this amendment to state law, small employers could discriminate against employees or applicants for employment on the basis of genetic information.” Despite the increased protection Chapter 261 provides, this protection remains inapplicable to very small businesses.

Chapter 261 applies to an individual or any of an individual’s family members. However, Chapter 261 does not itself define “family member” or amend the existing definition. California law defines a family member as “offspring,” while federal law defines a family member as a first-, second-, third-, or fourth-degree relative. Therefore, the protective reach of “any family member” may include more relatives than GINA’s limit at fourth-degree relatives; however, this is unclear based on the statutory text. Furthermore, while GINA explicitly excludes certain protein analyses from its definition of “genetic test,” Chapter 261 does not define “genetic test.” Therefore, Chapter 261 may apply to more genetic tests than GINA, but this is also unclear based on the statutory text. Despite these differences, Chapter 261’s definition of genetic information largely parallels GINA’s definition.

B. Chapter 261: A Necessary Change in Law?

Chapter 261 does “not break any new conceptual legislative ground. Rather, it [continues] the ongoing and important process, begun by many states (including California) and advanced significantly by GINA, of placing genetic

69. See Gov’t § 12926(d) (amended by Chapter 261) (applying FEHA to all employers with five or more employees, excluding nonprofit and religious organizations).
71. See Gov’t § 12926(d) (amended by Chapter 261) (Chapter 261 does not apply to employers with less than five employees.).
72. Cal. Civ. Code § 51(e)(2) (enacted by Chapter 261); Gov’t § 12926(g)(1) (amended by Chapter 261) (emphasis added).
74. Gov’t § 12926(h)(2) (amended by Chapter 261).
76. Civ. § 51(e)(2)(A) (enacted by Chapter 261); Gov’t § 12926(g)(1) (enacted by Chapter 261).
77. See supra note 29 and accompanying text (discussing the genetic tests covered under GINA).
78. Civ. § 51 (amended by Chapter 261); Gov’t § 12926 (amended by Chapter 261).
79. See supra note 29 and accompanying text (defining genetic information under GINA).
information on a par with other prohibited bases of discrimination.\textsuperscript{80} In granting genetic information the same level of statutory protection as traditionally prohibited bases for discrimination, Chapter 261 serves two purposes: a symbolic purpose of relieving fears of the potential misuse of genetic information, and a preventative purpose of prohibiting actual discrimination based on genetic information.\textsuperscript{81} In turn, individuals will more readily take advantage of genetic testing and pursue preventative measures.\textsuperscript{82}

Additionally, the cases that prompted Chapter 261 are relatively rare, with the most recent example, \textit{Norman-Bloodsaw v. Lawrence Berkeley Laboratory}, from the 1990s.\textsuperscript{83} In that case, Lawrence subjected employees to genetic testing without their knowledge.\textsuperscript{84} The \textit{Lawrence} court—before either Chapter 261 or GINA—held in favor of the employees.\textsuperscript{85} The court, however, based its holding on two already well-established prohibited bases for discrimination—sex and race.\textsuperscript{86} Therefore, had Lawrence tested its employees randomly (rather than testing only women and African-Americans for specific traits), there may have been no judicial recourse for the employees under existing law.\textsuperscript{87} GINA and Chapter 261 would allow recovery in \textit{Lawrence}, whether the genetic testing was random or was limited to the established bases of race or sex.\textsuperscript{88}

According to Senator Padilla, “[d]iscrimination on the basis of genetic information is no less offensive than discrimination based on race, gender or sexual orientation,” indicating his belief that genetic information requires the same statutory protection as any other established prohibited basis for


\textsuperscript{81} See Press Release, Senator Alex Padilla, Feb. 17, 2011, \textit{supra} note 2 (asserting that Chapter 261 relieves “the fear of discrimination by strengthening laws to prevent it”).

\textsuperscript{82} ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 559, at 3 (June 14, 2011).

\textsuperscript{83} 135 F.3d 1260 (9th Cir. 1998).

\textsuperscript{84} \textit{Id.} at 1264.

\textsuperscript{85} \textit{Id.} at 1264–73.

\textsuperscript{86} \textit{Id.} at 1272–73.

\textsuperscript{87} \textit{Id.} at 1271–73 (finding that Lawrence violated the Civil Rights Act of 1964 by gathering unauthorized information based on race and sex). A privacy claim may have been available to the employees, but the court did not reach that issue. \textit{Id.} at 1270–71.

\textsuperscript{88} \textit{See} 42 U.S.C. §§ 300gg to -95, 2000ff to -11 (Supp. IV 2011) (prohibiting discrimination based on genetic information in employment and insurance); CAL. GOV’T CODE §§ 12900–96 (amended by Chapter 261) (prohibiting discrimination based on genetic information in employment and housing).
V. CONCLUSION

Chapter 261 expands the existing prohibited bases for discrimination to include genetic information. Chapter 261 serves this purpose by extending civil rights to individuals and promoting scientific expansion and widespread use of genetic testing.

Chapter 261 expands the existing prohibited bases for discrimination to include genetic information. Before Chapter 261, the prohibited bases for discrimination included characteristics more traditionally associated with discrimination, including race, sex, and religion. However, modern technological advances provide an expanding basis for discrimination based on genetic information. Genetic testing allows for earlier detection and treatment of diseases, thereby serving an important public interest in promoting health and disease-management. The Genetic Information Nondiscrimination Act of 2008 offers some protection against discrimination based on genetic information, but has limited applicability. Recognizing the importance of promoting genetic testing and the need to curtail discriminatory misuse of the resulting information, Senator Padilla authored Chapter 261 to expand existing civil rights protections to include genetic information. While the cases involving discrimination based on genetic information are few in number, placing genetic information on a par

91. CAL. BUS. & PROF. CODE § 23438 (amended by Chapter 261); CAL. CIV. CODE § 51 (amended by Chapter 261); CAL. EDUC. CODE § 32228 (amended by Chapter 261); CAL. ELECT. CODE § 354.5 (amended by Chapter 261); GOV’T §§ 11135, 12920, 12921, 12926, 12926.1, 12930, 12931, 12935, 12940, 12944, 12955, 12955.8, 12956.1, 12956.2, 12993 (amended by Chapter 261); CAL. PENAL CODE § 868.8 (amended by Chapter 261); CAL. REV. & TAX. CODE §§ 17269, 24343.2 (amended by Chapter 261); CAL. WELF. & INST. CODE § 4900 (amended by Chapter 261).
92. See CIV. § 51(b) (West 2007) (noting that the protected bases in business establishments are: “sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation”); GOV’T § 12921(a) (West 2011) (noting that the protected bases in housing and employment are: “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation”).
93. See generally Press Release, Senator Alex Padilla, Feb. 17, 2011, supra note 2 (discussing instances of sterilizing persons with genetic defects, screening African-Americans for sickle cell anemia, and an employer testing for the sickle cell trait and pregnancy—all without the employees’ knowledge or consent).
94. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 559, at 1 (Apr. 26, 2011) (discussing the technological advances and the potential misuse of genetic information).
95. See 42 U.S.C. § 2000ff(2)(B) (Supp. IV 2011) (citing Civil Rights Act § 701(f), 42 U.S.C. § 2000e(b) (2008)) (extending the prohibition only to employers maintaining fifteen or more employees); id. §§ 300gg to -95, 2000ff to -11 (applying only in the insurance and employment contexts).
97. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 559, at 2 (Apr. 26, 2011) (discussing sterilization of persons with genetic defects, screening for sickle cell anemia in African-Americans, and an employer testing for the sickle cell trait and pregnancy—all without the employees’ knowledge or consent).
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with other prohibited bases of discrimination” is an important step towards protecting civil rights, and does so without drastically changing existing law.\textsuperscript{98}

\textsuperscript{98} Vorhaus, \textit{supra} note 80.
Chapter 91: The Bell Tolls for Local Government Corruption

Mark Freeman

Code Section Affected

Government Code § 54952.3 (new).
AB 23 (Smyth); 2011 STAT. Ch. 91.

I. INTRODUCTION

In July 2010, the Los Angeles Times reported that the city manager of Bell, California, a small and relatively poor city in Los Angeles County, earned close to $800,000 a year.¹ The city manager’s pay jumped to over $1.5 million with benefits added.² Bell’s police chief earned more than the head of the Los Angeles Police Department.³ These revelations sparked widespread public backlash and probes of the city’s compensation practices.⁴ The Los Angeles District Attorney charged the city manager and several Bell officials with misappropriating $5.5 million from the city; the District Attorney described their behavior as “corruption on steroids.”⁵

Bell’s city manager and other officials also billed the city for abnormally brief meetings of various legislative bodies such as the planning commission or housing authority.⁶ In 2009, city council members received eight thousand dollars a month for these types of meetings.⁷ The Los Angeles Times reported that the city council sometimes held planning commission meetings that lasted only a few minutes.⁸ For example, on July 31, 2006, the city council held meetings for five different legislative bodies, each lasting no more than three minutes, but was paid

³ Gottlieb & Vives, City Manager Worth, supra note 1, at A1.
⁴ See Corina Knoll, Residents of Bell Unhappy over High Salaries for City Employees, L.A. TIMES, July 16, 2010, at AA1 (“If [the city council is] making that much money . . . it should be a better city.”).
⁷ Id.
⁸ Id.
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for each meeting. In response to the corruption scandal, Assembly Member Cameron Smyth introduced Chapter 91 to increase transparency of local government compensation practices and prevent further abuses. Chapter 91 requires a legislative body that convenes simultaneous or serial meetings of separate legislative bodies to publicly announce each member’s compensation.

II. LEGAL BACKGROUND

Part A of this section summarizes the law on open meetings existing prior to Chapter 91. It first looks at the general requirements of the Ralph M. Brown Act, California’s open government statute. Part B explores statutory limits on city council compensation. Part C discusses the various exceptions to the open meeting laws existing prior to Chapter 91. Finally, Part D discusses AB 1344, which the legislature also passed in response to the Bell scandal.

A. The Ralph M. Brown Act

The Ralph M. Brown Act (Brown Act) requires a legislative body of a local agency to conduct its actions in an “open and public” manner. A local agency is defined as “a county, city . . . town, school district, municipal corporation, district . . . or any board, commission or agency thereof, or other local public agency.” A legislative body includes a “governing body of a local agency” and a “commission, committee, board or other body of a local agency.” The Brown Act gives California citizens an opportunity to watch and participate in local government.


B. Existing Restrictions on City Council Compensation

In general, the legislature sets salary schedules for city council members.\(^21\) The city’s population determines compensation rates.\(^22\) For example, a city of thirty-five thousand people—roughly the size of Bell—would pay each council member four-hundred dollars a month.\(^23\) A city can raise its compensation rates above these levels, but each raise cannot exceed five percent of the previous increase.\(^24\) Likewise, a city cannot pass an ordinance that authorizes automatic, future pay increases.\(^25\) Finally, city council members, unless “specifically authorized by statute,” cannot earn more than one-hundred fifty dollars a month for serving on a committee or similar legislative body.\(^26\)

C. The Charter City Exemption

There are two types of cities in California: general law cities and charter cities.\(^27\) A general law city is organized under the general laws of California and must follow statutes that concern city governance.\(^28\) In contrast, the general laws do not govern a charter city, which may generally “make and enforce all ordinances and regulations in respect to municipal affairs” subject to restrictions in its charter.\(^29\) A charter city can set the compensation levels of its officers and employees and must describe such compensation in its charter.\(^30\) Charter cities enjoy this relative freedom because of “the principle that [the charter city] itself [knows] better what it want[s] and need[s] than the state at large” and that such municipalities should have the “exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.”\(^31\)

\(^21\) See id. § 36516(a) (West Supp. 2011) (listing salary schedules for city council members).
\(^22\) Id.
\(^23\) Id. § 36516(a)(2)(A). Bell’s population is roughly thirty-seven thousand. Gottlieb & Vives, City Manager Worth, supra note 1.
\(^24\) Id. § 36516(a)(4).
\(^25\) Id. § 36516(a)(4).
\(^26\) Id. § 36516(c).
\(^27\) Id. §§ 34101–02 (West 2008).
\(^28\) See City of Orange v. San Diego Cnty. Emps. Ret. Ass’n, 103 Cal. App. 4th 45, 52, 126 Cal. Rptr. 2d 405, 410 (2d Dist. 2002) (citing G.L. Mezzetta, Inc. v. City of Am. Canyon, 78 Cal. App. 4th 1087, 1092, 93 Cal. Rptr. 2d 292 (1st Dist. 2000)) (noting that a general law city is limited by powers “expressly conferred upon it by the Legislature, together with such powers as are ‘necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation’”).
\(^29\) CAL. CONST. art. 11, § 5(a).
\(^30\) Id. § 5(b). “[P]lenary authority is hereby granted . . . to provide therein or by amendment thereto, the [procedures, times, and term limits of city officials], and for their removal, and for their compensation . . . .” Id.
D. When Is a State Law Governing Municipal Affairs Enforceable Against a Charter City?

California courts developed an exception to the general rule that charter cities are exempt from state laws that govern municipal affairs. This exception allows a state law to override a municipal rule in certain circumstances.

If a state law conflicts with a municipal rule, courts follow a two-element test to determine which rule governs. First, a court determines if the state law is a matter of “statewide concern.” Second, if a court finds that a statewide concern exists, it must see if the state law is “reasonably related to the resolution of that concern” and the state law is “narrowly tailored to limit incursion into legitimate municipal interests.” If the state law fails this test, the municipal rule governs. The courts apply this test on a case-by-case basis. Notably, California courts have “repeatedly held that . . . attempts by the Legislature to set the salaries of other public agencies and charter cities are not matters of statewide concern.”

E. Related Legislation

In the wake of the Bell scandal, the legislature proposed over three dozen bills to address the problem. Assembly Member Mike Feuer authored AB 1344, one of the more comprehensive bills. AB 1344 (Feuer), prevents a local agency

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33. Id.
34. Id.
35. Id. (quoting Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles, 54 Cal. 3d 1, 16–17, 812 P.2d 916, 925 (1991)). The California Supreme Court has defined “statewide” as “all matters of more than local concern and thus includes matters the impact of which is primarily regional rather than statewide.” Id. at 605, 93 Cal. Rptr. 3d at 124 (Irion, J., dissenting) (quoting Comm. of Seven Thousand v. Super. Ct., 45 Cal. 3d 491, 505, 754 P.2d 708 (1988)). For example, the protection of “financial institutions from undue tax burdens [is] a matter of statewide concern.” Id. at 579, 93 Cal. Rptr. 3d at 103. Even if a statewide concern does not exist on the surface, a court should determine if the legislature has made a “fact-bound justification” that would allow it to enforce the law in question against a charter city. Id. at 581, 93 Cal. Rptr. 3d at 104 (quoting Cal. Fed. Sav. & Loan Ass’n, 54 Cal. 3d at 18, 812 P.2d at 926). Although the legislature may declare that a certain subject matter is a statewide concern, this declaration is not enough; courts must use their “independent judgment” but should give “great weight to legislative statements of purpose where they exist.” Id. at 581, 93 Cal. Rptr. 3d at 105 (quoting Cal. Fed. Sav. & Loan Ass’n, 54 Cal. 3d at 24, 812 P.2d at 930). In State Building & Construction Trades Council, the court held that a state law which set prevailing wages for city contractors was not a matter of statewide concern even though the legislature had declared otherwise. Id. at 594, 596, 93 Cal. Rptr. 3d at 115, 117.
36. Id. at 580, 93 Cal. Rptr. 3d at 103–04 (quoting Johnson, 4 Cal. 4th at 404, 841 P.2d at 1000).
37. Id.
38. Id. at 582, 93 Cal. Rptr. 3d at 105.
39. Id. at 589, 93 Cal. Rptr. 3d at 111.
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executive from receiving an automatic pay increase “that exceeds a cost-of-living adjustment.” The bill also requires a municipality wishing to become a charter city to indicate on the ballot measure creating the charter city whether the charter city can raise the compensation rates for city officials without voter approval. Governor Brown signed AB 1344 into law in October 2011.

III. CHAPTER 91

Chapter 91 permits a legislative body to convene simultaneous or serial meetings of another legislative body only if the public knows how much each member of a legislative body earns per meeting. Chapter 91 applies to legislative bodies “whose membership constitutes a quorum of any other legislative body.”

The law requires city officials who are currently meeting as one legislative body to follow a new procedure before they can convene simultaneous or serial meetings of a different legislative body. It requires a “clerk or a member of the convened legislative body” to publicly disclose “the amount of compensation or stipend, if any, that each member will be entitled to receive” as a result of convening the other meetings. The announcement can be oral or written and must be made before the other meetings begin. The clerk or member of a legislative body does not have to announce the compensation levels if statute prescribes the amount “and no additional compensation has been authorized by a local agency.” The announcement excludes expenses such as travel, meals, and lodging.

IV. ANALYSIS

This section explores the implications of Chapter 91. Part A notes how Chapter 91 furthers the purpose of the Brown Act. Part B, it examines whether Chapter 91 will be effective given low public turnout at city council meetings.

42. 2011 Cal. Stat. ch. 692, § 3.
45. Gov’t § 54952.3(a) (enacted by Chapter 91).
46. Id. Such bodies could include a city council which also serves as a planning commission or a library’s governing board. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 23, at 2 (June 28, 2011).
47. Gov’t § 54952.3(a) (enacted by Chapter 91).
48. Id.
49. Id.
50. Id.
51. Id. § 54952.3(b).
52. See infra text accompanying note 57.
53. See infra Part IV.B.
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Part C analysis discusses whether Chapter 91 is enforceable against charter cities. Part D observes that Chapter 91’s ambiguous language may increase a city’s risk of litigation. Finally, Part E describes the challenges the legislature faces as it tries to prevent another Bell-type scandal.

A. The Brown Act Marches Forward

The purpose of the Brown Act is to facilitate “public participation in local government decisions and [curb] misuse of the democratic process by secret legislation.” Chapter 91 furthers this purpose by making the compensation of a legislative body—in the context of serial or simultaneous meetings—a matter of public record. Indeed, Chapter 91 “provides a mechanism to prevent the type of abuse that led to the former members of the Bell City Council receiving thousands of dollars in inappropriate payments for meetings that may have been legally established but for which no business was conducted.” In theory, if Chapter 91 had been in place during the Bell scandal, a clerk or member of the Bell City Council would read the compensation of each member aloud before the start of a simultaneous or consecutive meeting of another legislative body, such as the planning commission. Thus, if Bell held five meetings over the course of a few minutes, its residents would learn the council was earning an exorbitant amount of money for very little work. Because Bell residents pay the second highest tax rates in Los Angeles County, outrage at the city council’s exorbitant compensation would probably be swift.

B. Does Public Notice Exist if the Public Does not Show Up?

Even if Chapter 91 had been law during the Bell scandal, the corruption may have continued because Bell’s city council meetings were “sparsely attended”

54. See infra Part IV.C (applying Chapter 91 to case law and determining it is likely enforceable).
55. See infra Part IV.D (discussing the conflict a city may face if it adopts a narrow reading of Chapter 91).
56. See infra Part IV.E (discussing how Chapter 91 fixes only one aspect of the Bell scandal).
58. CAL. GOV’T. CODE § 54952.3(a) (enacted by Chapter 91).
59. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 23, at 2 (June 24, 2011).
60. See GOV’T § 54952.3(a) (requiring a clerk or legislative body member to read the compensation of all members aloud before the legislative body can engage in a serial or simultaneous meeting of a different legislative body); see also Gottlieb et al., supra note 6 (describing how the city council earned thousands of dollars by holding several meetings concurrently but conducting little work).
61. Gottlieb et al., supra note 6.
before the *Los Angeles Times* broke the story. Indeed, low attendance at local government meetings is common in California and other states. The Federal Highway Administration acknowledges that “[f]or many agencies, getting people to attend meetings is challenging, if not daunting.” However, Chapter 91 may help reduce corruption if just one journalist attends a meeting; the public is more likely to get information about local government from a newspaper than other forms of media. After all, the *Los Angeles Times*, not a government regulator or law-enforcement agency, uncovered the Bell scandal.

C. Is Chapter 91 Enforceable Against Charter Cities?

Even if Chapter 91’s notice requirement effectively alerts the public, an unscrupulous municipality might convert to a charter city in an attempt to evade the law’s requirements; Bell evaded caps on city council pay when it converted to a charter city in 2009. But this tactic will not work if Chapter 91 is enforceable against charter cities. Chapter 91 is enforceable against a charter city if notice of a legislative body’s compensation is a matter of statewide concern and the state law is “reasonably related to the resolution of that concern” and “narrowly tailored to limit incursion into legitimate municipal interests.”

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64. See *SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 23*, at 3 (June 2, 2011) (observing that Chapter 91’s effectiveness “will be constrained by weak attendance at public meetings”); *see also Empty Rooms Too Common at Public Meetings*, N.E. GEORGIAN (July 22, 2011), http://www.thenortheastgeorgian.com/articles/2011/07/22/news/opinions/01opinion.txt (on file with the *McGeorge Law Review*) (arguing that more people should attend public meetings because “[a]ll too often, elected officials face empty rooms when voting on multi-million dollar budgets”).


70. *See id.* at 580, 93 Cal. Rptr. 3d at 103–04 (quoting Johnson v. Bradley, 4 Cal. 4th 389, 404, 841 P.2d 990, 1000 (1992)) (describing the elements of the test).
Chapter 91 Is a Matter of Statewide Concern

The compensation rates of local legislative bodies are generally only matters of local, not statewide, concern. But even if notice of a legislative body’s compensation rates is not generally a statewide concern, courts have interpreted statewide concerns to include “matters the impact of which is primarily regional rather than statewide.” Thus, the statewide concern element can be satisfied if “a convincing basis for legislative action originating in extramunicipal concerns” arises.

The legislature enacted Chapter 91 in response to the Bell scandal, an event described as “corruption on steroids.” The scandal raised serious concerns about local government accountability, leading the state controller to order all local governments to submit “salary information for elected officials and other employees.” The details of the Bell scandal and the serious concerns it raised about local governments in general would convince a court that the legislature properly addressed a statewide concern when it enacted Chapter 91. Thus, Chapter 91 would pass the first element of the test.

Chapter 91 is Reasonably Related to the Resolution of Local Government Accountability Problems

Chapter 91 will pass the first prong of the second element if it is “reasonably related to the resolution” of the statewide concern—in this case, the lack of notice regarding a legislative body’s compensation when it engages in

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71. Id. at 589, 93 Cal. Rptr. 3d at 111.
72. Id. at 605, 93 Cal. Rptr. 3d at 124 (Irion, J., dissenting) (quoting Comm. of Seven Thousand v. Super. Ct., 45 Cal. 3d. 491, 505, 754 P.2d 708 (1988)).
73. Id. at 581, 93 Cal. Rptr. 3d at 104 (quoting Cal. Fed. Sav. & Loan Ass’n v. City of L.A., 54 Cal. 3d 1, 18, 812 P.2d 916, 926 (1991)).
74. Leonard et al., supra note 5.
75. See infra note 103 (describing the efforts to collect this data and the authority that grants the Controller this power).
76. See Leonard et al., supra note 5 (noting the immensity of the Bell scandal). A creative attorney might argue that the purpose of Chapter 91 is not the mere notice of a legislative body’s compensation but the preservation of “fiscal integrity and stability of local governmental agencies in this state.” 2011 Cal. Stat. ch. 692. Notably, the legislature declared that AB 1344’s purpose was a statewide concern. Id. § 10. Because Chapter 91 and AB 1344 both arose out of the Bell scandal, an attorney may argue that AB 1344’s purpose—and its declaration of statewide concern—applies to Chapter 91 as well. See id. (“[T]he provisions of [AB 1344] are an issue of statewide concern, and that, therefore, all counties and cities, including . . . charter cities and counties would be subject to the provisions of the bill.”). Although the legislature’s declaration does not automatically make AB 1344 (and possibly Chapter 91) a matter of statewide concern, the courts will give this declaration “great weight.” State Bldg. & Constr. Trades Council, 173 Cal. App. 4th at 581, 93 Cal. Rptr. 3d at 105 (quoting Cal. Fed. Sav. & Loan Ass’n, 54 Cal. 3d at 24, 812 P.2d at 930).
77. See supra text accompanying notes 74–75 (discussing why Chapter 91 is an extramunicipal concern).
simultaneous or serial meetings. Here, Chapter 91’s notice requirement is a direct response to the Bell City Council’s abuse of its legislative powers. A court will likely find that Chapter 91 is reasonably related to concerns about local government accountability because the law furthers the principle of open government.

3. Chapter 91 Is Narrowly Tailored

Chapter 91 will pass the second prong of the second element if it is “narrowly tailored to limit incursion into legitimate municipal interests,” Generally, city compensation issues are municipal affairs. But Chapter 91 does not infringe on a charter city’s right to set its own compensation, nor does it set compensation limits for a legislative body that engages in serial or simultaneous meetings. Rather, Chapter 91 only applies when one legislative body wishes to begin a serial or simultaneous meeting of another legislative body. Thus, a court will view Chapter 91 as narrowly tailored because it does not substantively impact municipal control over compensation issues. Ultimately, Chapter 91 will pass both elements of the test, and thus is likely enforceable against charter cities.

79. See Gottlieb et al., supra note 6 (discussing how the Bell city council members used serial and simultaneous committee meetings to enhance their income); CAL. GOV’T CODE § 54952.3(a) (enacted by Chapter 91) (prohibiting a legislative body from convening a serial or simultaneous meeting of a different legislative body unless a clerk or legislative body member reads aloud the legislative body’s compensation); see also SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 23, at 2 (June 2, 2011) (“AB 23 provides a mechanism to prevent the type of abuse that led to the former members of the Bell City Council receiving thousands of dollars in inappropriate payments for meetings that may have been legally established but for which no business was conducted.”).
80. See supra Part IV.A (discussing how Chapter 91 furthers the purpose of the Brown Act).
82. Id. at 589, 93 Cal. Rptr. 3d at 111.
83. See CAL. GOV’T CODE § 54952.3 (enacted by Chapter 91) (enacting only a notice requirement).
84. Id.
85. See supra text accompanying notes 81–84 (discussing Chapter 91’s limited, incidental role in relation to municipal control of compensation).
86. See State Bldg. & Constr. Trades Council, 173 Cal. App. 4th at 580, 93 Cal. Rptr. 3d at 103–04 (determining that a state statute which passes the test will override a conflicting municipal rule and thus be enforceable against a charter city). “When a court invalidates a charter city measure in favor of a conflicting state statute, the result does not necessarily rest on the conclusion that the subject matter of the former is not appropriate for municipal regulation. It means, rather, that under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city.” Id. at 580, 93 Cal. Rptr. 3d at 104 (quoting Cal. Fed. Sav. & Loan Ass’n v. City of L.A., 54 Cal. 3d 1, 17–18, 812 P.2d 916, 925–26 (1991)).
D. Chapter 91’s Ambiguity May Create Litigation Risks

Chapter 91 requires a clerk or member of a convened legislative body to announce each member’s compensation prior to the start of simultaneous or serial meetings of a different legislative body. However, Chapter 91 does not describe how much time must pass between meetings before they are no longer simultaneous or serial and thus could avoid the notice requirement. The city of Concord, for example, holds meetings for two boards, the Commission on Aging and the Planning Commission on the third Wednesday of each month, at 1:30 p.m. and 7:00 p.m., respectively. If “serial” is defined broadly—meaning it encompasses multiple meetings in one day—then Concord would have to provide notice of each member’s compensation rates. But if “serial” is defined narrowly—meaning it only encompasses meetings within a few minutes of each other—then Concord would not have to provide notice. Litigation may arise if a city in Concord’s situation defines “serial” narrowly and refuses to release compensation records, but a citizens’ watchdog group or media organization contends that “serial” is defined broadly and demands those records. The risk of litigation—or a desire to avoid Chapter 91’s notice requirement—may cause cities to deliberately schedule meetings on separate days, which would decrease a city’s efficiency.

E. Chapter 91 Fixes One Problem but Others Remain

Although Chapter 91 combats corruption in the committee meeting process, it will not single-handedly prevent another Bell-like scandal. While existing law...

87. Gov’t § 54952.3(a) (enacted by Chapter 91).
88. See id. (describing the notice requirement for serial or simultaneous meetings but not providing further guidance on timing issues definitions for serial or simultaneous meetings).
90. See Gov’t § 54952.3(a) (enacted by Chapter 91) (requiring a clerk or legislative body member to read aloud each member’s compensation before any serial meeting).
91. See id. (requiring notice only if a serial or simultaneous meeting is to occur).
92. Transparency-related lawsuits are nothing new for local agencies. See, e.g., Matt Krupnick, Bay Area News Group Sues Peralta over Public Records, CONTRA COSTA TIMES, Oct. 19, 2009 (Section: Local) (noting how a media organization sued a community college because the college did not release certain public records).
93. See SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 23, at 2 (June 2, 2011) (“The bill discourages local agencies from efficiently convening concurrent or serial meetings, and could create hardship for residents interested in monitoring multiple public meetings.”).
94. See id. at 3 (“Like AB 11 in 2005, AB 23 addresses a specific concern, but may simply result in new approaches to profiteering.”).
sets schedules for city council members, charter cities are free to set their own compensation limits.\footnote{95} Bell evaded those salary schedules when it converted to a charter city in 2009.\footnote{96} The ballot measure that authorized the conversion did not mention that the city would be exempt from salary caps.\footnote{97} After the conversion, “salaries for council members’ part-time jobs . . . jumped more than 50%, from $61,992 a year to at least $96,996.”\footnote{98} 

In addition, Chapter 91 alone would not have stopped the Bell officials who openly discussed profiting at the city’s expense.\footnote{99} In fact, Bell’s city manager ordered the city clerk to falsify data about his salary.\footnote{100} The legislature would have to enact more expansive reforms if it wants to completely address the problems that lead to the Bell scandal.\footnote{101} Some action has already begun. On October 9, 2011, the governor signed AB 1344, a more comprehensive bill than Chapter 91.\footnote{102} In addition, the state controller now requires cities to clearly identify how much each employee is paid.\footnote{103}

\footnote{95. CA\textsc{. Const. art. 11, § 5(b); see also State Bldg. & Constr. Trades Council v. City of Vista, 173 Cal. App. 4th 567, 589, 93 Cal. Rptr. 3d 95, 111 (4th Dist. 2009) (noting that city compensation measures are consistently held as not a statewide concern).}

\footnote{96. Gottlieb, supra note 68.}

\footnote{97. Id. The measure passed with eighty-six percent approval. Id. This problem might not have occurred if AB 1344 had been law at the time. See 2011 Cal. Stat. ch. 692 (requiring prospective charter cities to discuss compensation issues on their ballot measures).}

\footnote{98. Gottlieb, supra note 68.}

\footnote{99. See Jack Leonard et al., In E-Mails, Bell Official Discussed Fat Salaries, L.A. TIMES, Feb. 15, 2011, at A1 (quoting the e-mail correspondence between Bell’s incoming police chief and the city’s assistant manager: “I am looking forward to seeing you and taking all of Bell’s money”). In another e-mail between the two officials, the assistant city manager described city officials as “pigs” that would “all get fat together.” Id. The assistant city manager, in further e-mails, noted that compensation agreements “were crafted ‘carefully so we do not draw attention.’” Id.}

\footnote{100. Jeff Gottlieb & Corina Knoll, Rizzo Had Pay Data Falsified, Clerk Says, L.A. TIMES, Feb. 11, 2011, at AA1.}

\footnote{101. See SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 23, at 3 (June 2, 2011) (noting that “the committee may wish to seek more sweeping reforms, including putting a limit on the total compensation that local officials can receive”). AB 1344 addresses some of these concerns as it reforms charter city ballot measures and eliminates automatic raises beyond cost of living expenses. 2011 Cal. Stat. ch. 692. The committee’s suggestion of compensation limits may be difficult to implement given that courts have held that city compensation measures are not statewide concerns. State Bldg. & Constr. Trades Council v. City of Vista, 173 Cal. App. 4th 567, 589, 93 Cal. Rptr. 3d 95, 111 (4th Dist. 2009).}

\footnote{102. Complete Bill History of AB 1344, http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml (last visited July 13, 2012) (on file with the McGeorge Law Review); see also supra text accompanying notes 42–43 (discussing AB 1344’s provisions).}

\footnote{103. Rich Connell, In Wake of Bell Salary Scandal, State Controller to Require that Cities Disclose Pay in Financial Reports, L.A. TIMES (Aug. 3, 2010), http://latimesblogs.latimes.com/lanow/2010/08/in-wake-of-bell-scandal-state-controller-to-require-that-cities-disclose-pay-in-state-financial-repo.html (on file with the McGeorge Law Review). The Controller is authorized to collect salary data by statute; the Controller “shall compile and publish reports of the financial transactions of each county, city and special district . . . together with any other matter he or she deems of public interest.” CAL. GOV’T CODE § 12463(a) (West 2011); see also id. § 53892(h) (West Supp. 2011) (requiring the financial reports include “[o]ther information that the Controller requires”). This information can be found on the controller’s website. CAL. STATE CONTROLLER’S OFFICE, GOVERNMENT COMPENSATION IN CALIFORNIA, http://lgcr.sco.ca.gov/ (last visited July 6, 2012) (on file}{721}
V. CONCLUSION

The aftermath of the Bell scandal was an exercise in democracy. The public recalled the city council, and the disgraced city manager now works at a parking lot. The city now faces a new challenge—rebuilding its reputation. Assembly Member Smyth introduced Chapter 91 to prevent a similar crisis. Chapter 91, enacted by unanimous vote, represents another step towards more open government by shedding light on how much a legislative body earns when it conducts meetings of various commissions or boards. It thus furthers the Brown Act by providing additional access to government. In addition, because Chapter 91 is likely enforceable against charter cities, it prevents an unscrupulous municipality from evading the public eye simply by becoming a charter city. But Chapter 91’s ambiguous language may decrease city efficiency because municipalities—for good or ill—may schedule their meetings to avoid the notice requirement and avoid the risk of lawsuits. Moreover, Chapter 91 only addresses one avenue of corruption and the legislature will probably have to pass more comprehensive reforms, like AB 1344, if it wants to prevent similar scandals.

with the McGeorge Law Review) (providing a database that lists compensation information for California city officials).


105. Id.


107. See Ruben Vives, Bell Finds Reform Is Harder than It Looks, L.A. TIMES, July 16, 2011, at A1 (noting that Bell has not found a new city manager in the wake of the scandal and that "Bell’s reputation is its biggest problem").

108. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 23, at 3 (June 28, 2011).


110. See supra text accompanying note 57 (discussing the purpose of the Brown Act).

111. See supra text accompanying note 86.

112. See supra text accompanying note 93.

113. See SENATE GOVERNANCE & FINANCE COMMITTEE, COMMITTEE ANALYSIS OF AB 23, at 3 (June 2, 2011) (noting the need for additional reform).