

The Brown Act and BHAB Role

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JANUARY 26, 2022

The Ralph M. Brown Act

- ▶ Codified under Govt. Code §§ 54950 et seq.
- ▶ California's open government "sunshine law"
- ▶ "It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." (Govt. Code § 54950)

Brown Act: Checklist For BHAB

1. Is BHAB a “legislative body”?
2. Is the event a “meeting” of the members of the legislative body?
3. If so, what type of meeting is it? Regular, Special, or Emergency? What are the requirements of that meeting type?
4. AB 361
5. How is the Brown Act enforced?

1. Applies to any “legislative body”

- ▶ “Legislative body” includes any local board created by statute (e.g., BHAB) (Gov’t Code § 54952(a))
 - ▶ It also includes any committee or other body created by “formal action” of a legislative body whether the committee is permanent or temporary, decision-making or advisory. (Gov’t Code § 54952(b))
 - ▶ Committees and Subcommittees
BHAB creates

“Ad Hoc” Committee Exception to Legislative Body

- ▶ *Ad hoc advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not “legislative bodies.”*
- ▶ **Exception to the exception:** However, *standing committees* with either continued jurisdiction or fixed schedules created by formal action, even if composed of less than a quorum of the legislative body, are still subject to the open meeting requirements of the Brown Act.
 - ▶ No continued jurisdiction if (1) limited term and (2) charged with accomplishing a specific task in short period of time. (79 Ops. Cal. Atty. Gen. 69 (1996))

2. Is this a “meeting” of the legislative body?

- ▶ An event is a “meeting” of the legislative body if it meets all of the following elements:
 - ▶ Any congregation of a majority of the members of a legislative body
 - ▶ At the same time and location including a teleconference location
 - ▶ To *hear, discuss, deliberate, or take action* on any item that is within the subject matter jurisdiction of the legislative body. (Gov’t Code § 54952.2(a))
- ▶ Discussion of legislative body’s business by a majority present is a meeting even if body does not vote or otherwise act on the matter (e.g., watch a video, taking a tour, receive a briefing, listen to a presentation)
- ▶ A meeting can occur face to face, by telephone, or through electronic media

“Serial Meeting” is a “Meeting”

- ▶ A majority of the members of a legislative body cannot use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body (Gov't Code § 54952.2(b)(1))
- ▶ However, staff can converse with, answer questions from, and provide information to, individual members of a legislative body regarding the body's business as long as they do not communicate comments or positions from one member to another (Gov't Code § 54952.2(b)(2))

How can “serial meeting” occur?

- ▶ The “hub-and-spoke” scenario
 - ▶ A legislative body member, staff member, or third party who *contacts* (in person, by phone, email, text, social media) other members (constituting a quorum) to convey information obtained from other members to reach a consensus, resolve differences, or exchange opinions and ideas
- ▶ The “daisy-chain” scenario
 - ▶ Without the involvement of staff members or third party, as when one member *contracts* (in person, by phone, email, text, social media) other members (constituting a quorum) conveying information to such members

Exceptions to the definition of “meeting” under Govt. Code § 54952.2(c)

- ▶ Individual contacts or conversations between a member of legislative body and any other person are not “meetings,” of the legislative body, provided that they are not “serial meetings”
- ▶ Attendance of a majority of member of legislative body at a conference or community meeting that is open to the public and involves discussion of issues of general interest to the public or public agencies
- ▶ Attendance of a majority member of legislative body at an open and noticed meeting of another local agency to discuss local community concerns; a majority of member of legislative body cannot discuss among themselves specific business of the body except as part of the scheduled program
- ▶ Attendance of a majority of member of legislative body at a purely social or ceremonial occasion
- ▶ Attendance of a majority of member of legislative body at an open and noticed standing committee meeting of the body, provided that they attend only as observers

3. What kind of “meeting” is it? Regular, Special, and Emergency Meetings

- ▶ The Brown Act provides for “regular meetings,” “special meetings,” and “emergency meetings”
- ▶ Closed sessions may be held at regular, special or emergency meeting, provided a closed session exception applies

Regular Meeting Requirements

- ▶ **Regular meetings:** Each legislative body must provide, by ordinance, resolution, bylaws...for the conduct of business by that body, the time and place for holding regular meetings (Gov't Code § 54954)
 - ▶ Must have formal action, adopting the time and place of these meetings!

Regular Meeting Requirements

- ▶ The Brown Act generally requires that all “meetings” (whether regular, special, or emergency) be open and public (Gov’t Code § 54953)
- ▶ **Public Comments** on Agenda Items
 - ▶ The public has a right to address the legislative body at a regular meeting on any matter appearing on the agenda *before or at the time of the item’s consideration*
 - ▶ Written comments are allowed (but may not be read into the record)
- ▶ **Public Comments** on Non-Agency Items
 - ▶ The public has a right to address the legislative body on any item within the legislative body’s subject matter jurisdiction
- ▶ Public comments on discussion-only items must be before or during the item’s consideration; public comments on non-agenda items can be at any time
- ▶ Legislative body can adopt reasonable regulations limiting (i) the amount of time on particular issues or (ii) disruptive, repetitious or irrelevant speakers
 - ▶ But cannot require sign in or ban criticism.

Regular Meeting Requirements

▶ **Agenda** Requirements

- ▶ At least 72 hours before the regular meeting, an agenda must be posted in a location freely accessible to members of the public
 - ▶ Online if legislative body has an internet website; and at a physical location that is freely accessible 24 hours a day
 - ▶ If teleconference is used, the agenda must be posted at the teleconference location (Exception: AB 361)
 - ▶ If posted less than 72 hours but at least 24 hours before the meeting, the meeting can be noticed and posted as a special meeting and proceed as scheduled but subject to special meeting requirements
 - ▶ If meeting is continued for more than 5 days, a new agenda must be posted
 - ▶ If meeting is continued for 5 days or less, a new agenda does not need to be posted, but within 24 hours after the continuance, notice of the continuance must be conspicuously posted on or near the door of the room where the meeting was held

Regular Meeting Requirements

- ▶ Agenda Requirements (continued)
 - ▶ Except as otherwise provided by law, no action or discussion shall be undertaken on any item not appearing on the posted agenda
 - ▶ The agenda must contain a brief description of each item of business sufficiently detailed to give notice to the public of the subject matter to be considered and of actions that may be taken by the Legislative body
 - ▶ The public may not place a matter on the agenda
 - ▶ After posting the agenda, agenda can be amended if it can be posted 72 hours before the meeting

Regular Meeting Requirements

- ▶ When can an item not appearing on the posted agenda be discussed or acted upon?
 - ▶ Members of legislative body may briefly respond to statements made by a member of public during public comment
 - ▶ A member of legislative body may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities
 - ▶ A member of legislative body, or the body itself, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda

Special Meeting Requirements

- ▶ **Special Meetings:** A special meeting can be called at any time by the chair or a majority of the members of the legislative body
 - ▶ A majority of the legislative body members can communicate for the purpose of calling a special meeting and preparing an agenda without violating the Brown Act, but they cannot discuss the merits or substance of any matter that may be considered at the special meeting
- ▶ Public Comments at Special Meeting
 - ▶ Members of the public must be given an opportunity to comment on special meeting agenda items, but, unlike regular meetings, they are not entitled to comment on non-agenda matters at the special meeting

Special Meeting Requirements

▶ **Notice** of Special Meeting

- ▶ Must be posted at least 24 hours before the meeting
- ▶ Notice, which also serves as an agenda, must state (1) that a special meeting has been called by the chair/a majority vote of the members, (2) the time and place of the special meeting, and (3) the business to be transacted or discussed
- ▶ If after a special meeting notice is posted but at least 24 hours before the special meeting it is determined that another matter needs to be considered at the special meeting, an amended meeting notice can be posted to adding the additional matter to begin immediately after the first special meeting is adjourned

Emergency Meeting Requirements

- ▶ **Emergency Meeting** can be called by a majority of legislative body members
 - ▶ Emergency means a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both
- ▶ **Notice:** Telephonic notice of the emergency meeting must be given at least one hour before the meeting to media outlets that have requested notice of special meetings (in the past)
 - ▶ If dire emergency (a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril immediate and significant) telephonic notice must be given to media outlets at or near the time that the chair/designee notifies the legislative body members of the emergency meeting
- ▶ All other requirements applicable to special meetings, including public comments, apply to emergency meeting except for the 24 hour notice requirements

4. AB 361

- ▶ AB 361 added subdivision (e) to section 54953, an exception to the teleconference requirements.
- ▶ However, for this exception to apply, certain conditions must be met and certain circumstances must exist.
- ▶ There are basically two circumstances that must exist for AB 361 meetings:
 1. The legislative body holds a meeting during a proclaimed state of emergency, and state or local officials have imposed or recommended measures to promote social distancing. (See Gov't Code section 54953(e)(1)(A))
 2. The legislative body holds a meeting during a proclaimed state of emergency and has determined, by majority vote, that, as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees. (See Gov't Code section 54953(e)(1)(B) and (C))

AB 361

- ▶ AB 361 also requires legislative bodies to meet certain requirements described in Gov't Code section 54953(e)(2) and (3). They are, as follows:
 - ▶ The legislative body must give notice of its meetings and post agendas as otherwise required under Brown Act
 - ▶ The legislative body must allow members of the public to access the meeting and the agenda and provide an opportunity for them to address the legislative body directly pursuant to Section 54954.3. The notice must inform of the means by which members of the public may access the meeting and offer public comment. The agenda must identify and include an opportunity for all persons to attend via a call-in option or an internet-based service option. This does not mean that the legislative body must provide a physical location from which the public may attend or comment.

AB 361

- ▶ The legislative body must conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties and the public appearing before the legislative body.
- ▶ In the event of a disruption which prevents the legislative body from broadcasting the meeting to members of the public using the call-in option or internet-based service option, or in the event of a disruption within the legislative body's control which prevents members of the public from offering public comments using the call-in option or internet-based service option, the legislative body must take no further action on items appearing on the meeting agenda until public access to the meeting via the call-in option or internet-based service option is restored.

AB 361

- ▶ The legislative body must not require public comments to be submitted in advance of the meeting and must provide an opportunity for the public to address the legislative body and offer comment in real time.
- ▶ A member of the public that desires to provide public comment through the use of an internet website, or other online platform, not under the control of the legislative body, that requires registration to log in to a teleconference may be required to register as required by the third-party internet website or online platform to participate.

AB 361

- ▶ If the legislative body provides a timed public comment period, there are two rules that apply depending on whether the timed public comment period is for each agenda item or in general. If the former, i.e., public comment is as to each item, the legislative body may not close public comment period for the agenda item until that timed public comment period has elapsed. In the latter case, i.e., public comment in general and not tied to each agenda item, the legislative body may not close the public comment period until the timed general public comment period has elapsed.

AB 361

- ▶ The legislative body must, not later than 30 days after teleconferencing for the first time, and every 30 days thereafter, make the following findings by majority vote:
 - ▶ The legislative body has reconsidered the circumstances of the state of emergency; AND
 - ▶ Either of the following of findings:
 - ▶ The state of emergency continues to directly impact the ability of the CoC Board members to meet safely in person.
 - ▶ State or local officials continue to impose or recommend measures to promote social distancing.

5. How is the Brown Act enforced?

- ▶ **Criminal Penalties:** where the member *intends* to deprive the public of information which he *knows or has reason to know* the public is entitled to receive
- ▶ **Injunction:** Initiated by the district attorney or any interested person to prevent violations or threatened violations or for reviewing past actions of the body
- ▶ **Nullification:** a court declares “null & void” action taken in violation of the Brown Act where board does not comply with 30-day “cure or correct” demand
- ▶ **Attorneys Fees and Costs:** A prevailing plaintiff can obtain recovery of attorney’s fees and court costs.

BHAB Role

- ▶ In accordance with the Welfare and Institutions Code, §§ 5604, 5604.2, 5848, and the Health and Safety Code, § 11805, the BHAB's role is:
 - ▶ Advise the Board of Supervisors and the Behavioral Health Director as to any aspect of the County's behavioral health and substance use treatment programs
 - ▶ Review and evaluate the County's public behavioral health and substance use treatment needs, services, facilities, and special problems in any facility within the County where mental health and/or substance use treatment evaluations or services are being provided, including, but not limited to, schools, emergency departments, and psychiatric facilities

BHAB Role

- ▶ Request assistance from the local patients' rights advocates when reviewing and advising on behavioral health and substance use treatment evaluations or services provided in public facilities with limited access
- ▶ Review and evaluate the public behavioral health system and substance use treatment programs, as set forth in this Article III, Section A, and advise the Board of Supervisors on community behavioral health and substance use treatment services delivered by the Orange County Health Care Agency
- ▶ Review and approve the procedures used to ensure citizen and professional involvement in all stages of the County's behavioral health and substance use treatment planning process

BHAB Role

- ▶ Review and comment on the County's performance outcome data regarding behavioral health and substance use treatment programs, and communicate findings to the California Mental Health Planning Council
- ▶ Review and evaluate the community's public mental health needs, services, facilities, and special problems in any facility within the county or jurisdiction where mental health evaluations or services are being provided, including, but not limited to, schools, emergency departments, and psychiatric facilities
- ▶ Pursuant to WIC § 5604.2(a)(8), assess the impact of the realignment of the provision of behavioral and substance use treatment services from the State to the County.

BHAB Role

- ▶ Review any County Performance Agreement, entered into pursuant to WIC § 5650, and make recommendations to the Board of Supervisors regarding concerns identified within the Agreement
- ▶ Review and make recommendations regarding applicants for the appointment of the Behavioral Health Director. The BHAB must be included in the selection process prior to the vote by Board of Supervisors
- ▶ Submit an annual report to the Board of Supervisors reflecting the needs and performance of the County's behavioral health and substance use treatment system

BHAB Role

- ▶ Conduct a public hearing on the draft three-year Mental Health Services Act (MHSA) program and expenditure plan and annual updates at the close of the 30-day comment as required by WIC 5848(a)
- ▶ Review the adopted three-year MHSA program and expenditure plan and annual updates and make recommendations to the Behavioral Health Director for revisions