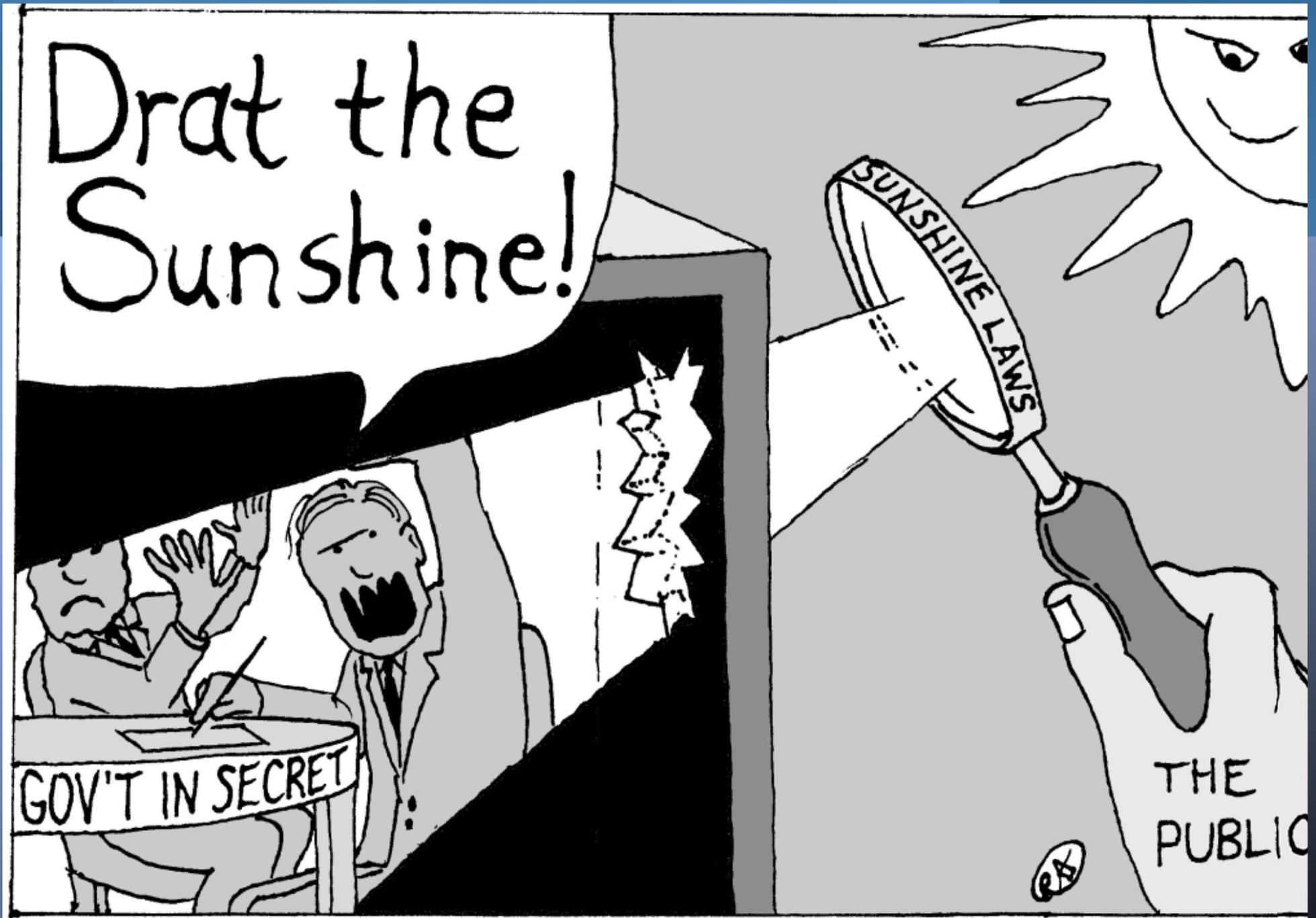


# BRUSHING UP ON THE BROWN ACT

Laws as amended effective January 1, 2023

TULARE COUNTY COUNSEL





# Why does the Brown Act exist?

- To ensure that local governments' *actions and deliberations* be conducted openly
- To allow public to observe, monitor, and evaluate its elected representatives.
- To facilitate public participation in local government.



# Minimum Requirements

**What Does the Brown Act Require?**

# What Does The Brown Act Require?

- All meetings shall be open and public, except when Brown Act authorizes otherwise (i.e., closed session)
- Notice & Opportunity to Participate

# Notice and Opportunity

- **Notice:** Have we given the public enough notice of what the Board is doing?
- **Opportunity to Participate:** Have we given the public enough of an opportunity to participate in what the Board is doing?



# To Whom Does the Brown Act Apply?

- Governing boards of local agencies
- Subsidiary bodies created by such governing boards (including commissions, subcommittees, advisory committees, etc.)
- Local government bodies created by federal or state law
- Certain governing bodies of private entities



# What is a Meeting?

**Government Code §§ 54952.2 – 54953**

# What is a “Meeting”?

“Meeting” means

1. Any **congregation of a majority** of the members of a legislative body,
2. At the **same time and location**, including teleconference locations as permitted by Section 54953,
3. To **hear, discuss, deliberate, or take action**,
4. On any item that is within the **subject matter jurisdiction** of the legislative body.

(Gov. Code, § 54952.2, subd. (a).)

# Meeting Requirements

- Advanced notice of the meeting date, time and location must be posted (amount of notice required varies);
- Only the business noted in the agenda may be discussed or acted upon;
- Location of the meeting must be within the agency's boundaries
- Must be accessible by the public

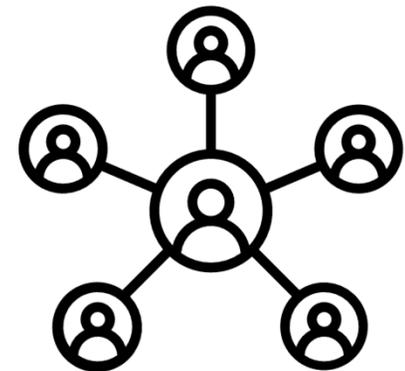
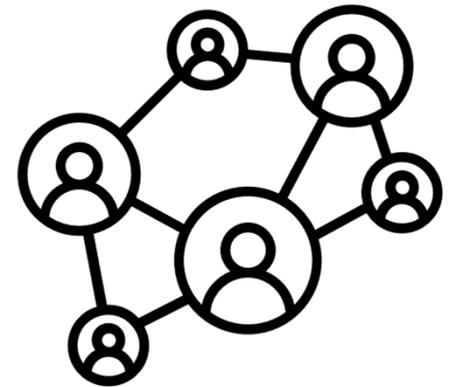
# Exceptions to the “Meeting” Definition

- Conferences.
- Community forums.
- Meetings of other government bodies.
- Social or ceremonial occasions.

**However, even at such events, majority of members generally cannot discuss business within subject matter jurisdiction**

# Meetings Pitfalls

- NO “serial meetings” permitted
  - i.e. series of communications of any kind, directly or through intermediaries, to discuss, deliberate or take action on any item w/in subject matter jurisdiction
  - Ex: Polling for consensus
- Beware of emails, and especially “reply all”!



# What is NOT an illegal meeting?

- Attorney-client communication.
- Communication by staff to solitary board members, or vice-versa, provided there is no further discussion of what other Board members think.
- Social media participation by board members – provided they don't respond to posts by other board members.

An hourglass with white sand is the central focus. The top bulb is filled with a light-colored, frothy beverage, possibly beer. The bottom bulb contains a smaller amount of white sand. The hourglass is positioned over a calendar page, with dates like 19, 20, 21, 22, 23, 29, 30, and 3 visible. The background is a light, neutral color.

# Agendas

**Publication and Notice**

# Notice of Regular Meetings

## ~When and How ~

Notice/ agenda for regular meeting must be:

- Posted 72 hours in advance;
- Posted in a location the public can see at all times;
- Mailed to persons who request notice.

If an agency has a website, it must also post on its website

# Agenda Contents

- Time and place
- Brief, but clear, description of every item to be discussed, including closed session items.
- Time for general public comment about things not on the agenda.
- “Magic words” about:
  - ADA accommodations, and
  - how to obtain documents distributed after packet went out.

# Emergency Items

- “Emergency” means:
- “(1) An emergency, which shall be defined as a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body.
- “(2) A dire emergency, which shall be defined as a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one-hour notice before holding an emergency meeting under this section may endanger the public health, safety, or both, as determined by a majority of the members of the legislative body.” (Gov. Code, § 54956.5, subd. (a).)

# Urgent Item

- Governing body must make findings that both of following conditions met:
  - (1) Need to take immediate action; and
  - (2) No one at agency knew about item until after agenda posted.
- 2/3 vote to add the item to the agenda (or unanimous if less than 2/3 present), before considering merits of the item

# Addendums to the Agenda

A modification to the agenda that occurs **AFTER** it has been posted, but **BEFORE** the 72-hour deadline expires.



# Special Meetings

- If item does not meet criteria for being added to agenda of regular meeting, a special meeting (which only requires 24 hours notice) may still be held
- E.g., for a Tuesday morning regular meeting, on Monday morning can schedule a special meeting to begin after regular meeting ends

# Public Access to Board Agenda Packet

- Open session materials must be available to public as soon as they go to board members.
- Keep at least 1 set of open session packet materials for next meeting available.



# Public Access to Board Agenda Packet

- The Brown Act has long required honoring paid postal mail subscriptions to open session agenda packets.
- Now also requires agencies with websites to honor requests for subscriptions to emails of agenda packets or links to websites where agenda materials are posted.



# *Sierra Watch v. Placer County* (2021) 69 Cal.App.5th 1

- After the 72-hour deadline, routine open session documents may only be given to board if the public can see them in hard copy at the same time.
- Posting online doesn't count.
- This means these open session documents can only be given to board during office hours.

# Gov. Code § 54957.5(b)(2)(B)

- Allows for documents to be given to the board within 72 hours prior to the Board meeting if the documents are simultaneously posted online to the public.
- Specific procedures must be followed.

# Gov. Code § 54957.5(b)(2)(B)

- The original agenda item materials must be available in hard copy at least 72 hours before the meeting.
- The additional document is posted on the County's internet website in a manner highlighting its connection to the existing agenda item.
- Hard copies must be made available to the public during the Clerk's business hours, within 24 hours before the meeting begins

A background image showing several white paper cutouts of human figures holding hands in a line, set against a green background. The figures are slightly out of focus, with the one in the center foreground being sharper.

# Public Accessibility

**Government Code § 54953**

# Facility Restrictions

- Can't meet in a facility that
  - Prohibits the admittance of any person on the basis of a protected class or characteristic;
  - Is inaccessible to disabled persons; or
  - Requires a purchase or fee to be present

# Standard Teleconferencing Rules

- At least majority of body must be within jurisdiction.
- All teleconference locations must be open to public.
- All locations must be identified on agenda.
- Agenda must be posted at each location.
- Public must be able to speak at each location.

# Standard Teleconferencing Rules

- Must be prearranged.
- Board members may only participate long-distance if public can be there too.
- Board members can't simply call in from their cars when they can't make it to the board meeting.

# Additional Rules for Remote Attendance by Board Members

- **AB 361 (2021)** – permits remote attendance by Board members in the event of a declared State of Emergency by the Governor and a recommendation for social distancing.
- **AB 2449 (2022)** – permits remote attendance by less than a majority of Board members in specified circumstances.

# AB 361 – Remote Meetings During State of Emergency

Rules apply only during a “proclaimed state of emergency” (formally declared by Governor), where state or local officials have imposed or recommended measures to promote social distancing.

All board members may attend remotely, and those locations need not be public.

# AB 361 – Remote Meetings During State of Emergency

- Need not provide physical location for public to attend.
- Special rules for voting on whether board needs to meet remotely, and for renewing decision every 30 days.
- Special rules for making sure public has access to view and comment on topics.

# AB 2449 – Remote Attendance by Board Member

- Majority of board must attend in person.
- Remotely attending board member must participate “through both audio and visual technology.”
- Public must be able to both “remotely hear and visually observe the meeting.”

# AB 2449 – Remote Attendance by Board Member

- Board member must have “just cause” or “emergency circumstances.”
- A general description of the need to appear remotely must be given.

# “Just Cause”

- The term “**just cause**” is limited to the following:
  - Childcare or caregiving need of a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner.
  - Contagious illness.
  - Need related to a physical or mental disability.
  - Travel while on official business of the legislative body or another state or local agency.

# “Emergency Circumstances”

- A physical or family medical emergency that prevents a member from attending in person.
- The board may take action on the request as soon as possible
- As soon as possible includes at the beginning of the meeting, even if there was not sufficient time to place the request on the agenda

A hand is raised in the air, signaling participation in a meeting. The background shows a bright room with large windows and other people seated at tables, some with their hands raised. A blue horizontal bar is overlaid on the image, containing the text.

# Public Participation

## **Public Comment and Disruption**

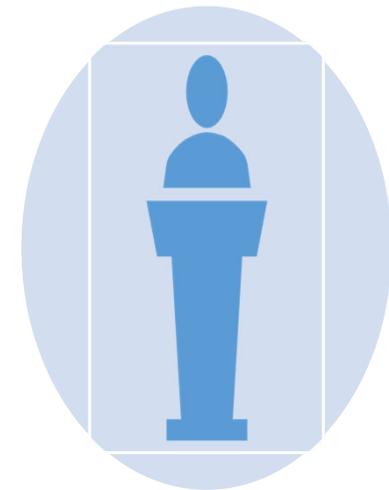
# Public Participation

- All members of public must be allowed to attend and be provided an opportunity to comment on items within the subject matter jurisdiction of the Board, though disruptive attendees can be removed.
- Board can ask, but may not require members of public to identify themselves.
- Must allow audio or video recording and broadcasting unless disruptive (noisy, etc.).
- No secret ballots; Votes must be reported.

# Public Comment



**MUST GIVE PUBLIC OPPORTUNITY  
TO COMMENT ON EACH AGENDA  
ITEM, AND ON ITEMS NOT ON  
AGENDA.**



**MAY ADOPT REASONABLE  
REGULATIONS TO LIMIT COMMENTS  
BY INDIVIDUAL SPEAKERS OR ON  
PARTICULAR TOPIC.**

# Public Comment – Use of Interpreter



Allocated time must be doubled for anyone using an interpreter

# Removing Disruptive Individuals

- Clarifies the ability to remove attendees who are engaging in disruptive conduct.
- Must warn individual that their behavior is disrupting meeting and they may be removed if they don't stop.
- Definitions in new statute of what constitutes "serious disruptive behavior."

# “Disruptive Behavior”

- Engaging in behavior during a meeting of a legislative body that actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting
- Includes:
  - Failure to comply with reasonable and lawful regulations adopted by a legislative body or any other law.
  - Engaging in behavior that constitutes use of force or a true threat of force.

# “True Threat of Force”

A threat that has sufficient indicia of intent and seriousness, that a reasonable observer would perceive it to be an actual threat to use force by the person making the threat.



# Off-Agenda Comments by Board Members

Board members or staff may:

- Briefly respond to public.
- Ask questions for clarification
- Make brief announcements
- Provide brief reports of individual activities
- Refer speaker to staff or other resources
- Ask staff to report back at future meeting  
Ask for item to be placed on future agenda.



# Closed Session

**When Meetings Can Be Held In Private**

# Closed Session

- Special rules allow to meet and discuss outside of public purview (See Government Code §§ 54956.7-54957.2)
- Closed session is authorized when the public's interest in confidentiality that outweighs its interest in seeing and hearing board work

# Closed Session

- Narrowly authorized for specific matters.
- Special disclosures must be made before/after holding a closed session.
  - Brief description on Published agenda
  - Must publicly report out certain actions
- Discussions in closed session must not go beyond the limited scope of the meeting

# Topics Which May Be Discussed in Closed Session

- Litigation
  - Existing litigation,
  - Significant exposure to litigation
  - Initiation of litigation
- Labor Negotiations (can be with individual)
- Real Property Negotiations
- Personnel
- Public Safety

# Less Common Closed Sessions

- License applications (Gov. Code, § 54956.7)
- Response to confidential final draft audit report from Bureau of State Audits (Gov. Code, § 54956.75)
- Body that invests pension funds to consider purchase or sale of particular, specific pension fund investments (Gov. Code, § 54956.81)
- JPA bylaw permitting closed session by participating agency (Gov. Code, § 54956.96)

# Confidentiality of Closed Session

- Closed sessions are confidential
- Agency holds the privilege
- Penalties – violation can result in a lawsuit to enforce confidentiality, disciplinary action against an employee, or referring the matter to a grand jury for possible findings of misconduct in office.



# Enforcement of the Brown Act

**Government Code §§ 54960 et seq.**

# Civil Enforcement

A civil action may be filed to:

- Stop or prevent violations or threatened violations of the Brown Act,
- Determine whether the Brown Act applies to past, continuing or future actions
- Determine whether any rule or action to penalize or discourage expressions by a member is valid or invalid

Government Code § 54960

# Civil Enforcement

## Penalties for violations:

- Court can declare board actions void, if not cured.
- Agency can be liable for costs and attorneys' fees.
- Court may compel audio recordings of closed session if it determines there has been a closed session violation

# Criminal Enforcement

A violation of the Brown Act may be a misdemeanor if a member participates in board action with the “wrongful intent to deprive the public of information.”

Government Code § 54959

# Verifying Brown Act Compliance

## **Notice:**

Have we given the public enough notice of what the Board is doing?

## **Opportunity to Participate:**

Have we given the public enough of an opportunity to participate in what the Board is doing?

# TULARE COUNTY COUNSEL



**Disclaimer:** These materials and all discussions of these materials are for instructional purposes only and do not constitute legal advice.

**Copyright © 2020 Tulare County Counsel**

All rights reserved. No portion of this work may be copied, or sold or used for any commercial advantage or private gain, nor any derivative work prepared there from, without the express prior written permission of Tulare County Counsel through the County Counsel.