AGENDA

SAN MATEO COUNTY TRANSIT DISTRICT
MEASURE W CITIZENS' OVERSIGHT COMMITTEE (COC) MEETING

Due to COVID-19, this meeting will be conducted via teleconference only (no physical location) pursuant to the Governor's Executive Orders N-25-20 and N-29-20.

Committee members, staff and the public may participate remotely via Zoom at https://samtrans.zoom.us/j/93661314354?pwd=VCtYNERzb3lEdFZJb21RQ0g1czY0Zz09 or by entering Webinar ID: **936 6131 4354;** Passcode: **714083** in the Zoom app for audio/visual capability or by calling 1-669-900-9128 (enter webinar ID and press **#** when prompted for participant ID) for audio only.

The video live stream will be available after the meeting at http://www.samtrans.com/about/boardofdirectors/video.html.

Public Comments: Members of the public are encouraged to participate remotely. Public comments may be submitted to publiccomment@samtrans.com prior to the meeting's call to order so that they can be sent to the Board as soon as possible, while those received during or after an agenda item is heard will be included into the Board's weekly correspondence and posted online at: http://www.samtrans.com/about/boardofdirectors/Board_of_Directors_Calendar.html

Oral public comments will also be accepted during the meeting through *Zoom or the teleconference number listed above. Public comments on individual agenda items are limited to one per person PER AGENDA ITEM. Use the Raise Hand feature to request to speak. For participants calling in, dial *67 if you do not want your telephone number to appear on the live broadcast. Callers may dial *9 to use the Raise Hand feature for public comment and press *6 to accept being unmuted when recognized to speak. Each commenter will be automatically notified when they are unmuted to speak for three minutes or less. The Committee Chair shall have the discretion to manage the Public Comment process in a manner that achieves the purpose of public communication and assures the orderly conduct of the meeting.

THURSDAY, JULY 22, 2021 – 3:00 PM

1. Call to Order/Pledge of Allegiance

2. Roll Call

San Mateo County Transit District Measure W Citizens' Oversight Committee Members 2021: Rosanne Foust (Chair), Julie Lind Rupp (Vice Chair), Mary Adler, Lauren Bennett, Adrian Brandt, Eduardo Gonzalez, Rich Hedges, Sandra Lang, Adina Levin, Jeff Londer, Alex Madrid, Ethan Mizzi, Liza Normandy, Mario Rendon, Malcolm Robinson

Staff Liaisons: April Chan, Chief Officer, Planning, Grants/ Transportation Authority
Amy Linehan, Public Affairs Specialist

COC Secretary: MaryAnn Johnston

3. Approval of Meeting Minutes from April 19, 2021

4. Public Hearing on Annual Audit of Measure W Tax Revenues and Expenditures in Accordance with Congestion Relief Plan

   a. Independent Auditor's Presentation

   b. Committee Questions

   c. Public Comment

   d. Close Public Hearing

   e. Committee Comments

   f. Committee Discussion on Drafting of Committee Report

5. Other Business

   a. COC Handbook Review

      1) Information on Rosenberg's Rules of Order https://vimeo.com/25152753

6. Public Comment for Items Not on the Agenda

   At this time, persons in the audience may speak on any matter within the jurisdiction of the Committee. The Brown Act (the State local agency open meeting law) prohibits the Committee from acting on any matter that is not on the agenda. The Chair may limit speakers to three minutes each.

7. Committee Member Comments/Communications Regarding Transportation Matters

8. Next Meeting: Date To Be Announced

9. Adjournment

INFORMATION FOR THE PUBLIC

If you have questions on the agenda, please contact the District Secretary at 650-508-6242. Agendas are available on the SamTrans website at. Communications to the Board of Directors can be emailed to board@samtrans.com.

Free translation is available; Para traducción llama al 1.800.660.4287; 如需翻译 请电*1.800.660.4287*

Date and Time of Board and Measure W Citizens' Oversight Committee Meetings
San Mateo County Transit District Committees and Board: First Wednesday of the month, 2:00 pm; SamTrans Measure W Citizens' Oversight Committee (COC): Frequency of meetings to be determined. Date, time and location of meetings may be changed as necessary. Meeting schedules for the Board and COC are available on the website.

Location of Meeting
Due to COVID-19, the meeting will only be via teleconference as per the information provided at the top of the agenda. The Public may not attend this meeting in person.

Public Comment
Members of the public are encouraged to participate remotely. Public comments may be submitted to publiccomment@samtrans.com prior to the meeting's call to order so that they can be sent to the Board as soon as possible, while those received during or after an agenda item is heard will be included into the Board's weekly correspondence and posted online at: http://www.samtrans.com/about/boardofdirectors/Board_of_Directors_Calendar.html.
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Accessible Public Meetings/Translation
Upon request, SamTrans will provide for written agenda materials in appropriate alternative formats, or disability-related modification or accommodation, including auxiliary aids or services, to enable individuals with disabilities to participate in and provide comments at/related to public meetings. Please submit a request, including your name, phone number and/or email address, and a description of the modification, accommodation, auxiliary aid, service or alternative format requested at least at least 72 hours in advance of the meeting or hearing. Please direct requests for disability-related modification and/or interpreter services to the Title VI Administrator at San Mateo County Transit District, 1250 San Carlos Avenue, San Carlos, CA 94070-1306; or email titlevi@samtrans.com; or request by phone at 650-622-7864 or TTY 650-508-6448.

Availability of Public Records
All public records relating to an open session item on this agenda that are not exempt from disclosure pursuant to the California Public Records Act and that are distributed to a majority of the legislative body will be available for public inspection at 1250 San Carlos Avenue, San Carlos, CA 94070 at the same time that the public records are distributed or made available to the legislative body.

Draft

SAN MATEO COUNTY TRANSIT DISTRICT
1250 SAN CARLOS AVENUE, SAN CARLOS, CALIFORNIA

MINUTES OF MEASURE W CITIZENS OVERSIGHT COMMITTEE (COC) MEETING
APRIL 19, 2021

MEMBERS PRESENT (Via Teleconference): M. Adler, L. Bennett, A. Brandt, E. Gonzalez, R. Hedges, S. Lang, A. Levin, L. Normandy, J. Lind Rupp, E. Mizzi, M. Rendon, R. Foust, J. Londer, A. Madrid

MEMBERS ABSENT: M. Robinson

STAFF PRESENT: A. Linehan, C. Mao, A. Chan, D. Hansel, J. Cassman, S. van Hoften, G. Martinez, P. Gilster, M. Torres, D. Seamans, P. Skinner, P. Ledezma, J. Brook, M. Johnston

1. **CALL TO ORDER/PLEDGE OF ALLEGIANCE**

   Rosanne Foust, Committee Chair, called the meeting to order at 10:03 am and led the Pledge of Allegiance.

2. **ROLL CALL**

   Ms. Foust called the roll. A quorum was present.

3. **Election of Chair and Vice Chair for One-year Terms**

   The Committee elected R. Foust as Chair for a term of one year.
   Motion/Second: Rupp/Hedges
   Ayes: Adler, Bennett, Brandt, Foust, Gonzalez, Hedges, Lang, Levin, Lind Rupp, Londer, Mizzi, Normandy, Rendon
   Noes: None
   Absent: Madrid, Robinson

   The Committee elected J. Lind Rupp as Vice Chair for a term of one year.
   Motion/Second: Foust/Mizzi
   Ayes: Adler, Bennett, Brandt, Foust, Gonzalez, Hedges, Lang, Levin, Lind Rupp, Londer, Mizzi, Normandy, Rendon
   Noes: None
   Absent: Madrid, Robinson

4. **Review Role of the Measure W Citizens' Oversight Committee**

   Derek Hansel, CFO, shared presentation which outlined the role of the Committee.

   - Measure W defines how proceeds are to be spent by SamTrans, TA
   - SamTrans and TA CACs provide input on implementation
   - Measure W COC does not direct expenditure of funds

- Measure W tasks COC with providing information on how tax proceeds are being spent by:
    - Receiving District's annual audit report on receipt and expenditure of Measure W tax proceeds and expenditures under Congestion Relief Plan
    - Holding annual public hearing on audit report
    - Issue annual COC report on audit results

5. Discuss Committee Work Plan For Annual Audit of Measure W Tax Revenues And Expenditures In Accordance With Congestion Relief Plan

a. General cadence of meetings

- COC meetings are needed to conduct its business: reviewing the annual audits and preparing the COC Report
- When are the COC meetings required
    - Q1 (Jul-Sep) swear in new members, elect officers for year, review auditor's work plan
    - Q2 (Oct-Dec) Auditor does its work (meeting only if requested by chair/staff)
    - Q3 (Jan-Mar) Receive auditor's report, hold public hearing and provide direction on report to be drafted on behalf of the COC
    - Q4 (Apr-Jun) Receive draft COC report, make revisions and issue final COC report

Alex Madrid joined the meeting at 10:10 a.m.

b. Specifically, related to the Fiscal Year 2020 Audit Work Plan, CFO Derek Hansel discussed the following:

- Financial Statement Review
    - Confirmation of receipts
    - Audit of disbursements
    - Review of appropriate segregation of funding
        - Audit of Measure Compliance
- Compliance with laws and regulations in accordance with Government Auditing Standards
- Audit of expenditures to ensure compliance with Measure W
- Sampling
- Review purpose of expenditures
- Review of internal controls
- Reporting

c. Meetings needed for Fiscal Year 2020 Audit and Committee Report

- Review of FY 2020 Audit Work Plan (April 19)
- Conduct FY 2020 Audit, Produce Audit Report (April - June)
- COC Review FY 2020 Audit Report, Public Hearing (July)
- Develop COC Report on FY 2020 Audit – draft (July - September)
- COC consideration/approval of COC Report on FY 2020 Audit (September)

The Committee acknowledged acceptance of the FY 2020 Audit Work Plan.

Motion/Second: Hedges/Lang
Ayes: Adler, Bennett, Brandt, Gonzalez, Hedges, Lang, Levin, Lind Rupp, Londer, Madrid, Mizzi, Normandy, Rendon, Robinson
Noes: None
Absent: Foust (technical issue), Robinson

6. Finalize and Adopt Committee Bylaws

The Committee voted to adopt the bylaws with the updates discussed below.

4.3 The conduct of the Committee's meetings will be informed by Rosenberg's Rules of Order but the Commission will not be obligated to strictly comply with Rosenberg's Rules of Order.

4.5 Each member of the Committee will have one vote. Members must be present to vote. Adoption of the annual Committee report and amendment of these Bylaws requires nine votes to pass. All other action items must have at least a simple majority vote of the quorum of the Committee to pass.

4.6 The Committee Clerk will endeavor to send the proposed agenda to the Chairperson for approval 72 hours prior to the final agenda being posted. The Committee Clerk will endeavor to provide the complete agenda packet, including a complete correspondence file compiled up to the date of distribution, to each Committee member and post the same to the District's website at least one week prior to the meeting date.

4.8 Each member of the public speaking before the Committee shall be limited to three minutes, unless the Chairperson, at his or her discretion, permits additional time. Any person addressing the Committee may submit written statements, petitions, or other documents to complement his or her presentation.

Updates to the Bylaws will be distributed as part of the Member Handbook.

Motion/Second: Hedges/Mizzi
Ayes: Adler, Bennett, Brandt, Foust, Gonzalez, Hedges, Lang, Levin, Lind Rupp, Londer, Mizzi, Normandy, Rendon
Noes: None
Absent: Madrid (muted), Robinson

7. Approval of Meeting Minutes from March 15, 2021

Motion/Second: Hedges/Lang
Ayes: Adler, Bennett, Brandt, Foust, Gonzalez, Hedges, Lang, Levin, Lind Rupp, Londer, Madrid, Mizzi, Normandy, Rendon
Noes: None
Abstain: Levin
Absent: Robinson

8. Public Comment for Items Not on the Agenda

There were no comments.

9. Committee Member Comments/Communications Regarding Transportation Matters

There were no comments.

10. Next Meeting: [day], [date] at 10:00 am, via Zoom teleconference

The next meeting will be held via Zoom teleconference, and will be scheduled.

11. Adjournment

The meeting adjourned at 11:23 am.

AGENDA ITEM #4
JULY 22, 2021

SAN MATEO COUNTY TRANSIT DISTRICT
STAFF REPORT

TO: Measure W Citizens' Oversight Committee

THROUGH: Carter Mau
Acting General Manager/CEO

FROM: Derek Hansel
Chief Financial Officer

SUBJECT: **FINANCIAL AUDITS OF MEASURE W FUNDS FOR THE FISCAL YEAR ENDED JUNE 30, 2020**

ACTION

Staff proposes the Measure W Citizens' Oversight Committee (COC):

1. Receive the San Mateo County Transit District's (District) Financial Audits of Measure W Funds (Measure W Audit) for the Fiscal Year ended June 30, 2020;
2. Conduct a public hearing on the Measure W Audit and receive public comments; and
3. Provide direction on the report to be drafted on behalf of the COC to provide County residents with information on how Measure W tax proceeds are being spent.

SIGNIFICANCE

On July 11, 2018, the District adopted and sought voter approval to implement an ordinance imposing a half-cent retail transactions and use tax to implement the San Mateo County Congestion Relief Plan (Measure W Ordinance). The County's voters approved Measure W on November 6, 2018. The Measure W Ordinance requires the District to have an independent auditor annually review the receipts and expenditures of tax proceeds under the Congestion Relief Plan. The COC must then receive and hold a public hearing on the Measure W Audit, and issue a report to provide County residents with information regarding how tax proceeds are being spent.

BACKGROUND

The District contracts with an independent auditor, Eide Bailly LLP to conduct the Measure W Audit in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in Government Auditing Standards, issued by the Comptroller General of the United States of America.

The Measure W Audit is prepared in accordance with the guidelines set forth by the Government Accounting Standards Board and consists of an Independent Auditor's Report, Financial Statements, Notes to Financial Statements, and Independent Auditor's Report on Internal Control over Financial Reporting and on Compliance and Other Matters Based on an Audit of Financial Statements Performed in Accordance with

Government Auditing Standards. The Independent Auditor's Report has an unmodified "clean" audit opinion. The Financial Statements and Notes to Financial Statements provide the detail as well as the perspective with which to assess the Measure W Funds' financial condition and project expenses.

Notice of this public hearing was posted at the District's administrative offices and on the District's web page, sent out via press release, and distributed via the District's social media accounts. Public input was invited for submittal in advance and will also be accepted during the hearing.

BUDGET IMPACT

There is no impact on the Budget.

Prepared by: Jennifer Ye, Acting Director, Accounting 650-622-7890

Financial Statements
Measure W Fund
June 30, 2020

San Mateo County Transit District

San Mateo County Transit District
Measure W Fund
Table of Contents
June 30, 2020

EideBailly

CPAs & BUSINESS ADVISORS

Independent Auditor's Report

Governing Board and
Citizens Oversight Committee
San Mateo County Transit District
San Carlos, California

Report on the Financial Statements
We have audited the accompanying financial statements of the San Mateo County Transit District's (the District), Measure W Fund, as of and for the year ended June 30, 2020, and the related notes to the financial statements, as listed in the table of contents.

Management's Responsibility for the Financial Statements
Management is responsible for the preparation and fair presentation of these financial statement in accordance with accounting principles generally accepted in the United States of America; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditor's Responsibility
Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of financial statements, whether due to error or fraud. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting principles used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion
In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the Measure W Fund of San Mateo County Transit District as of June 30, 2020, and the results of its operations for the year then ended in conformity with accounting principles generally accepted in the United States of America.

Emphasis of Matter
As discussed in Note 1, the financial statements of the Measure W Fund are intended to present the financial position and the changes in financial position attributable to the transactions of that Fund. They do not purport to, and do not, present fairly the financial position of San Mateo County Transit District as of June 30, 2020, and the results of its operations for the year then ended in conformity with accounting principles generally accepted in the United States of America. Our opinion is not modified with respect to this matter.

Other Reporting Required by *Government Auditing Standards*
In accordance with *Government Auditing Standards*, we have also issued our report dated June 30, 2021, on our consideration of San Mateo County Transit District's internal control over financial reporting and on our tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements and other matters. The purpose of that report is solely to describe the scope of our testing of internal control over financial reporting and compliance and the results of that testing, and not to provide an opinion on the effectiveness of San Mateo County Transit District's internal control over financial reporting or on compliance. That report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering San Mateo County Transit District's internal control over financial reporting and compliance.

Eide Bailly LLP

Menlo Park, California
June 30, 2021

San Mateo County Transit District
Measure W Fund
Statement of Net Position
June 30, 2020 (In thousands)

Assets	
Current Assets	
Deposits and investments	$ 22,564
Accounts receivable	6,701
Total assets	29,265
Liabilities	
Current Liabilities	
Accounts payable	117
Total liabilities	117
Net Position	
Restricted for Measure W projects	29,148
Total net position	$ 29,148

San Mateo County Transit District
Measure W Fund
Statement of Revenues, Expenditures, and Changes in Net Position
Year Ended June 30, 2020 (In thousands)

Revenues		
Measure W sales tax	$	88,345
Total revenues		88,345
Expenses		
District		
Transit Operations		15,046
Transportation Authority		
Highway		19,868
Major arterial and local roadway improvements		11,038
Bicycle, pedestrian, and active transportation projects		4,415
Infrastructure and services designed to improve transit connectivity		8,830
Total expenses		59,197
Change in net position		29,148
Net position - beginning	$	-
Net position - ending	$	29,148

Year Ended June 30, 2020 (In thousands)

CASH FLOWS FROM OPERATING ACTIVITIES		
Cash received from California Department of Tax and Fee Adminstration	$	81,644 *
Payments to vendors for goods and services		393,552
Payments to employees		(452,632)
Net cash provided by operating activities		22,564
Net increase in cash and cash equivalents		22,564
Cash and cash equivalents, beginning of year		-
Cash and cash equivalents, end of year	**$**	**22,564**

RECONCILIATION OF OPERATING INCOME TO NET CASH PROVIDED IN OPERATING ACTIVITIES		
Operating income	$	29,148
Adjustments to reconcile operating income to net cash provided by operating activities		
Accounts receivable		(6,701)
Accounts payable and accrued liabilities		117
Net cash provided by operating activities	**$**	**22,564**

* Does not include tax receivables of $6,701 thousand.

Note 1 - Summary of Significant Accounting Policies

Financial Reporting Entity

Under Measure W approved by the voters of San Mateo County in November 2018, San Mateo County Transit District (District) receives a share of the one-half percent sales tax to be used for local transportation-related expenses. The duration of the sales tax is for a period of 30 years, beginning on July 1, 2019 and ending June 30, 2049.

The financial statements of the Fund do not purport to, and do not, present the financial position of the District as of June 30, 2020, and the changes in financial position and cash flows thereof for the year then ended in accordance with accounting principles generally accepted in the United States of America. The activities of the Fund are reported within the District's enterprise fund. The projects funded by Measure W represent a portion of the activities of the District and, as such, are included in the District's financial statements.

Basis of Accounting

The accompanying financial statements have been prepared on the accrual basis of accounting. Under the accrual basis of accounting, revenues are recorded when earned and expenses are recorded when a liability is incurred, regardless of the timing of the related cash flows.

Use of Estimates

The preparation of financial statements requires management to make estimates and assumptions that affect certain reported amounts and disclosures. Actual results could differ from those estimates.

Note 2 - Cash and Investments

All of the Measure W programs' cash and investments are deposited in the District's Treasury pool. The pool is unrated. Investments in the pool are made in accordance with the District's investment policy as approved by the governing board. Investments are stated at fair value. The Measure W programs' proportionate share of investments in the District's Treasury pool at June 30, 2020 is $22.6 million, which is not subject to the fair value hierarchy.

Note 3 - Accounts Receivable

Accounts receivable consist primarily of Measure W Fund from sales tax revenues collected by the State of California on all taxable sales within the County of San Mateo, California through June 30, 2020.

Note 4 - Measure W Allocations and Expenses

The following table shows the total Measure W allocations and amount reported as expended by the District and the San Mateo County Transportation Authority (Transportation Authority) from inception to June 30, 2020.

(In thousands)	Inception to date as of June 30, 2020		
	Measure W Allocations	Measure W Expenses	Unexpended Amounts
District			
Transit operation	$ 44,194	$ 15,046	$ 29,148
Transportation Authority			
Highway projects	19,868	7	19,861
Major arterial and local roadway improvements	11,038	8,830	2,208
Bicycle, pedestrian, and active transportation projects	4,415	-	4,415
Infrastructure and services for transit connectivity	8,830	7	8,823
Total	$ 88,345	$ 23,890	$ 64,455

Note 5 - Current Year Measure W Projects

The tables below show the current year Measure W project expenses for the District and the Transportation Authority, respectively.

District's Measure W Projects	Amount (In thousands)
Transit Operation	
School Bus Services	$ 9,242
South Base Pico Blvd Property	3,060
FY20 Comprehensive Operation Analysis	534
Business Intelligence Solution	517
FY2020 ADA Subsidy	416
Route 280 Expansion	276
Marketing-Transit Promotion & Reimagine Outreach	210
Route 122 Expansion	202
FY20 Shuttle Study	94
SB Gas Line Replacement	75
ZEB Program Management	70
60' Aerial Lift Apparatus	66
Energy Procurement Plan	59
Upgrade District Website	50
Zero Emission Bus Plan	28
Smart Traveler Plus /STP upgrade	26
US 101 Mobility Action Plan	26
UC Davis ITS Study	25
Bike Rack	21
SamTrans Visioning	12
MobileView (WiFi) Enhancement	12
Belle-Aire Island Erosion Study	11
Climate Adaptation Planning	7
Pacifica Microtransit Pilot	4
ADA Scheduling Software	2
Promoting Senior Mobility	1
Total Transit Operation	**$ 15,046**

Note 5 - Current Year Measure W Projects, Continued

Transportation Authority's Measure W Projects	Amount expended (In thousands)
Highway Projects	
FP&A Services-W-Highway	$ 7
Major Arterial and Local Roadway Improvements	
Local Investment Share	8,830
Bicycle, Pedestrian, and Active Transportation Projects	-
Infrastructure and Services for Transit Connectivity	
FP&A Services-W-RTC	7
Total	**$ 8,844**

Independent Auditor's Report
June 30, 2020

San Mateo County Transit District

EideBailly

CPAs & BUSINESS ADVISORS

Independent Auditor's Report on Internal Control over Financial Reporting and on Compliance and Other Matters Based on an Audit of Financial Statements Performed in Accordance with *Government Auditing Standards*

Governing Board and
Citizens Oversight Committee
San Mateo County Transit District
San Carlos, California

We have audited, in accordance with the auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States, the financial statements of the San Mateo County Transit District (the District) Measure W Fund as of and for the year ended June 30, 2020, and the related notes of the financial statements, and have issued our report thereon dated June 30, 2021.

Emphasis of Matter

As discussed in Note 1, the financial statements of the Measure W Fund are intended to present the financial position and the changes in financial position attributable to the transactions of the Fund. They do not purport to, and do not, present fairly the financial position of the San Mateo County Transit District as of June 30, 2020, and the results of its operations for the year then ended in conformity with accounting principles generally accepted in the United States of America. Our opinion is not modified with respect to this matter.

Internal Control over Financial Reporting

In planning and performing our audit of the financial statements, we considered Fund's internal control over financial reporting (internal control) as a basis for designing the audit procedures that are appropriate in the circumstances for the purpose of expressing our opinions on the financial statements, but not for the purpose of expressing an opinion on the effectiveness of Fund's internal control. Accordingly, we do not express an opinion on the effectiveness of Fund's internal control.

A deficiency in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent or detect and correct misstatements on a timely basis. A material weakness is a deficiency, or combination of deficiencies, in internal control, such that there is a reasonable possibility that a material misstatement of the District's Measure W Fund financial statements will not be prevented or detected and corrected on a timely basis. A significant deficiency is a deficiency, or a combination of deficiencies, in internal control that is less severe than a material weakness, yet important enough to merit attention by those charged with governance.

Our consideration of internal control was for the limited purpose described in the first paragraph of this section and was not designed to identify all deficiencies in internal control that might be material weaknesses or significant deficiencies. Given these limitations, during our audit we did not identify any deficiencies in internal control that we consider to be material weaknesses. However, material weaknesses may exist that have not been identified.

Compliance and Other Matters

As part of obtaining reasonable assurance about whether San Mateo County Transit District's Measure W Fund financial statements are free from material misstatement, we performed tests of its compliance with certain provisions of laws, regulations, contracts, and grant agreements including compliance with the requirements of Measure W ballot language, noncompliance with which could have a direct and material effect on the financial statements. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion. The results of our tests disclosed no instances of noncompliance or other matters that are required to be reported under *Government Auditing Standards*.

Purpose of this Report

The purpose of this report is solely to describe the scope of our testing of internal control and compliance and the results of that testing, and not to provide an opinion on the effectiveness of the Fund's internal control or on compliance. This report is an integral part of an audit performed in accordance with *Government Auditing Standards* in considering the Fund's internal control and compliance. Accordingly, this communication is not suitable for any other purpose.

Eide Bailly LLP

Menlo Park, California
June 30, 2021

SAN MATEO COUNTY TRANSIT DISTRICT

MEASURE W

CITIZENS OVERSIGHT COMMITTEE HANDBOOK

JULY 2021

MEASURE W
CITIZENS OVERSIGHT COMMITTEE
HANDBOOK

Table of Contents

MEASURE W CITIZENS OVERSIGHT COMMITTEE HANDBOOK

Section 1

Measure W

ORDINANCE NO. 105

AN ORDINANCE OF THE SAN MATEO COUNTY TRANSIT DISTRICT IMPOSING A ONE-HALF OF ONE PERCENT RETAIL TRANSACTIONS AND USE TAX TO IMPLEMENT THE SAN MATEO COUNTY CONGESTION RELIEF PLAN

WHEREAS, the San Mateo County Transit District (the "District") is a public transit district duly formed pursuant to Part 15 (commencing with Section 103000) of Division 10 of the Public Utilities Code of the State of California (hereinafter referred to as the "Transit District Act") and approved by the voters of the County of San Mateo in the general election held on November 5, 1974; and

WHEREAS, effective January 1, 2018, the Transit District Act was amended by California Assembly Bill No. 1613 to authorize a new retail transactions and use tax and to permit the District to administer the new tax in its entirety or to transfer the proceeds of such tax to the San Mateo County Transportation Authority (the "Authority"), a county transportation authority duly created pursuant to Division 12.5 (commencing with Section 131000) of the Public Utilities Code of the State of California (hereinafter referred to as the "Authority Act"), for administration by the Authority, with such administration to be consistent with the expenditure plan developed for such tax pursuant to Section 103350(c) of the Transit District Act; and

WHEREAS, the Authority Act also was amended effective January 1, 2018 by California Assembly Bill No. 1613 as set forth in Section 131507(b) of the Authority Act to authorize the Authority to administer funds transferred to it by the District pursuant to Section 103350(d) of the Transit District Act; and

WHEREAS, the District has proposed approval of this Ordinance that has as its special purpose to: 1) authorize the District to impose a one-half of one percent (0.5%) retail transactions and use tax for a period of thirty (30) years, and 2) authorize the District and the Authority to allocate the proceeds of the retail transactions and use tax to fund the transportation improvements included in the San Mateo County Congestion Relief Plan ("Congestion Relief Plan"); and

WHEREAS, implementation of the Congestion Relief Plan, which is set forth herein as Section 6, will be guided by a set of core principles established in Section 1, below; and

WHEREAS, this Ordinance contains two minor technical clean-up revisions to Ordinance No. 103, and repeals and replaces Ordinance No. 103 in its entirety.

NOW, THEREFORE, BE IT ORDAINED as follows:

Section 1. Title; Summary

a. This ordinance shall be known as the "2018 San Mateo County Transit District Retail Transactions and Use Tax Ordinance" and may also be referred to herein as the "Ordinance."

b. This Ordinance imposes a retail transactions and use tax at the rate of one-half of one percent (0.5%) within the County to be operative on the first day of the first calendar quarter commencing not less than 180 days after the adoption of this Ordinance by the voters, the authority to levy such tax to remain in effect for thirty (30) years, for the purpose of implementing the Congestion Relief Plan.

c. Investment categories identified in the Congestion Relief Plan are to be implemented primarily with guidance from the Core Principles set forth below, as applicable:
    - Relieve traffic congestion countywide;
    - Invest in a financially-sustainable public transportation system that increases ridership, embraces innovation, creates more transportation choices, improves travel experience, and provides quality, affordable transit options for youth, seniors, people with disabilities, and people with lower incomes;
    - Implement environmentally-friendly transportation solutions and projects that incorporate green stormwater infrastructure and plan for climate change;

- Promote economic vitality, economic development, and the creation of quality jobs;
- Maximize opportunities to leverage investment and services from public and private partners;
- Enhance safety and public health;
- Invest in repair and maintenance of existing and future infrastructure;
- Facilitate the reduction of vehicle miles travelled, travel times and greenhouse gas emissions;
- Incorporate the inclusion and implementation of complete street policies and other strategies that encourage safe accommodation of all people using the roads, regardless of mode of travel;
- Incentivize transit, bicycle, pedestrian, carpooling and other shared-ride options over driving alone; and
- Maximize potential traffic reduction associated with the creation of housing in high-quality transit corridors.

d. The District will administer the retail transactions and use tax imposed by this Ordinance ("2018 Sales Tax") and, as authorized by Section 103350(d) of the Transit District Act, may transfer proceeds of the 2018 Sales Tax to the San Mateo County Transportation Authority for administration by the Authority consistent with the Congestion Relief Plan.

e. The District and the Authority shall develop guidelines to administer the tax revenues received from the enactment of the retail transactions and use tax, and shall respectively allocate the tax revenues to the categories set forth in the Congestion Relief Plan. Administration of the Congestion Relief Plan will be subject to review by an independent citizens' oversight committee to ensure compliance with the Congestion Relief Plan.

f. The provisions in this Ordinance shall apply solely to the retail transactions and use tax adopted pursuant to this Ordinance. Nothing in this Ordinance is

intended to modify, repeal or alter any ordinances previously adopted by the District.

Section 2. Definitions.

a. "Authority" means the San Mateo County Transportation Authority, a county transportation authority established pursuant to Division 12.5 of the Public Utilities Code of the State of California, commencing with Section 131000 thereof, as amended and supplemented from time to time pursuant to its terms.

b. "Authority Act" means Division 12.5 (commencing with Section 131000) of the Public Utilities Code of the State of California, as amended and supplemented from time to time pursuant to its terms.

c. "Board" means the Board of Directors of the District.

d. "Board of Supervisors" means the Board of Supervisors of the County.

e. "Caltrain" means the rail line operated by the Peninsula Corridor Joint Powers Board between Gilroy and San Francisco.

f. "Category" means any one of the five transportation program categories listed in the Congestion Relief Plan.

g. "City" or "Cities" means a city or a town, or cities and towns, located within the County.

h. "Congestion Relief Plan" means the expenditure plan of projects, programs and services, developed by the Board, in concurrence with the County, authorized pursuant to Section 103350 of the Transit District Act, set forth herein in Section 6, as amended and supplemented from time to time pursuant to its terms.

i. "Core Principles" means the principles listed in Section 1.c of this Ordinance.

j. "County" means the County of San Mateo.

k. "Department of Tax and Fee Administration" means the California Department of Tax and Fee Administration or any successor thereto.

l. "District" or "SamTrans" means the San Mateo County Transit District, which is the mobility manager for the County.

m. "Government Code" means the Government Code of the State of California, as amended and supplemented from time to time pursuant to its terms.

n. "Operative Date" means the date determined as described in Section 5 herein, July 1, 2019.

o. "Pavement Condition Index" means a numerical index which is used to indicate the general condition of a specific section of road pavement.

p. "Public Utilities Code" means the Public Utilities Code of the State of California, as amended and supplemented from time to time pursuant to its terms.

q. "Revenue and Taxation Code" means the Revenue and Taxation Code of the State of California, as amended and supplemented from time to time pursuant to its terms.

r. "Sales and Use Tax Law" means Part I of Division 2 of the Revenue and Taxation Code of the State of California, commencing with Section 6000 thereof, as amended and supplemented from time to time pursuant to its terms.

s. "SamTrans" means the fixed-route bus system owned and operated by the District.

t. "Tax Proceeds" means amounts received by the District from the Department of Tax and Fee Administration from the imposition of the 2018 Sales Tax imposed pursuant to this Ordinance.

u. "Tax" or "2018 Sales Tax" means the one-half of one percent (0.5%) retail transactions and use tax imposed by this Ordinance upon approval of two-thirds (2/3) of the electors voting on the ballot measure set forth in Section 17 hereof, to be used to fund the transportation improvements included in the Congestion Relief Plan.

v. "Transactions and Use Tax Law" means Part 1.6 of Division 2 of the Revenue and Taxation Code of the State of California, commencing with Section 7251 thereof, as amended and supplemented from time to time pursuant to its terms.

w. "Transit District Act" means Part 15 of Division 10 of the Public Utilities Code of the State of California, commencing with Section 103000 thereof, as amended and supplemented from time to time pursuant to its terms.

x. "Vehicle Code" means the Vehicle Code of the State of California, as amended and supplemented from time to time pursuant to its terms.

Section 3. Findings.

The Board hereby finds and determines that the recitals set forth above and incorporated herein by reference are true and correct. In addition, the Board hereby finds:

a. The County is experiencing significant yearly growth in employment and population. This growth has rapidly outpaced investments in transportation solutions, resulting in unprecedented traffic congestion, and transit services that are not adequately resourced to support the County's evolving mobility demands.

b. To address this issue, in 2017 the Governor signed Assembly Bill No. 1613, introduced by Assembly Member Kevin Mullin, authorizing the District to

implement a new retail transactions and use tax of up to 0.5 percent if (i) the Board of Directors of the San Mateo County Transit District adopts the ordinance approving the tax before January 1, 2026, (ii) the Board, in concurrence with the County, develops a related transportation expenditure plan setting forth projects, programs and service, and (iii) the tax is adopted by a two-thirds vote of San Mateo County voters.

c. Approval of this Ordinance and the Congestion Relief Plan is expected to provide the County with resources to implement transportation solutions that address countywide traffic congestion and improve travel times; repair, maintain and replace aging infrastructure; provide mobility solutions for seniors, people with disabilities and people with lower incomes; and improve overall quality of life for County residents.

d. The Congestion Relief Plan is the product of extensive community engagement and public feedback. A public outreach process identified as "Get Us Moving San Mateo County" (the "Get Us Moving process") was launched by the District and the County Board of Supervisors in 2017 and was designed to develop a transportation investment plan based on San Mateo County residents' priorities.

e. Tens of thousands of County residents, employers, community leaders, public officials and transportation experts participated in the Get Us Moving process. The Congestion Relief Plan is the result of the feedback provided through extensive surveys, community events, public meetings, town halls, and other venues.

f. The categories, priorities, investment levels and policies included in the final Congestion Relief Plan were based on the feedback received during the Get Us Moving process and have been approved by the Board and the Board of Supervisors.

Section 4. Imposition of Retail Transactions and Use Tax; Special Purpose; Use of Proceeds.

Subject to the limits imposed by this Ordinance and the provisions of Section 103350 of the Transit District Act, including Section 103350(b) of the Transit District Act, which took effect January 1, 2018, the District hereby imposes, in the incorporated and unincorporated territory of San Mateo County, an additional retail transactions and use tax at the rate of one-half of one percent (0.5%), such tax (i) to be imposed beginning on the first day of the first calendar quarter commencing not less than 180 days after the approval of the retail transactions and use tax by the electors voting on the ballot measure set forth in Section 17 hereof, (ii) to remain in effect for a period of thirty (30) years, and (iii) to be applied to fund the transportation improvements included in the Congestion Relief Plan.

More specifically, this Ordinance, if adopted, should be interpreted so as to:

a. impose a new one-half of one percent (0.5%) retail transactions and use tax in accordance with the provisions of Part 1.6 (commencing with Section 7251) of Division 2 of the Revenue and Taxation Code and consistent with Article XIII C of the California Constitution;

b. set a maximum term of thirty (30) years during which time the retail transactions and use tax shall be imposed pursuant to the authority granted by Section 103350(a) of the Public Utilities Code;

c. incorporate provisions identical to those of the Sales and Use Tax Law insofar as those provisions are not inconsistent with the requirements and limitations contained in Part 1.6 of Division 2 of the Revenue and Taxation Code;

d. establish that the retail transactions and use tax be administered and collected by the Department of Tax and Fee Administration in a manner that adapts itself as fully as practicable to, and requires the least possible deviation from, the existing statutory and administrative procedures followed by the Department of

Tax and Fee Administration in administering and collecting state transactions and use taxes as such terms are defined in the Sales and Use Tax Law;

e. authorize the administration of the retail transactions and use tax in a manner that will, to the degree possible, be consistent with the provisions of Part 1.6 of Division 2 of the Revenue and Taxation Code, minimize the cost of collecting the retail transactions and use taxes and at the same time minimize the burden of record keeping upon persons subject to taxation under the provisions of this Ordinance;

f. adopt the Congestion Relief Plan, and require that proceeds of the tax imposed by this Ordinance be used in accordance with applicable law and solely for the projects and purposes set forth in the Congestion Relief Plan, including the improvement, construction, maintenance, and operation of certain transportation projects and facilities;

g. establish implementation guidelines for the Congestion Relief Plan and an independent oversight committee with responsibility to review and report to the public on implementation the Congestion Relief Plan; and

h. authorize the issuance, from time to time, of limited tax bonds to finance transportation improvements consistent with the Congestion Relief Plan, the Transit District Act and other applicable law.

Section 5. Applicability; Effective Date; Operative Date and Period of Tax Imposition, Termination Date.

a. This Ordinance shall be applicable in the incorporated and unincorporated territory of the County.

b. The Ordinance will become effective at the close of the polls on the day of election at which the ballot measure set forth in Section 17 of this Ordinance is

adopted by a two-thirds (2/3) vote of the electors voting on such ballot measure at such election.

c. Pursuant to Section 103351 of the Public Utilities Code, this Ordinance shall be operative on the first day of the first calendar quarter commencing not less than 180 days after the adoption of the Ordinance, July 1, 2019.

d. The maximum period during which the 2018 Sales Tax will be imposed is thirty (30) years, terminating June 30, 2049.

Section 6. San Mateo County Congestion Relief Plan

The Congestion Relief Plan contains five transportation program categories. Listed below are the five categories (each a "Category"). Also identified is the percentage distribution of funding for each Category.

a. Countywide Highway Congestion Improvements (22.5 percent)

A total of twenty two and one-half percent (22.5%) of Tax Proceeds will be invested in highway projects throughout the County designed to: provide congestion relief; reduce travel times; increase person throughput; improve highway and interchange operations, safety and access; and deploy advanced technologies and communications on the highways. Eligible candidate projects will be focused on highway and interchange facilities, including Highway 101, Highway 280, and other highways and their interchanges. Eligible candidate projects can include bicycle and pedestrian components or facilities that are incorporated into and enhance safety for a larger highway or interchange project.

Investment will be made on a discretionary basis according to criteria and award schedules established by the Authority. Sample candidate projects are set forth in Attachment A.

b. Local Safety, Pothole and Congestion Relief Improvements (12.5%)

A total of twelve and one-half percent (12.5%) of Tax Proceeds will be invested in major arterial and local roadway improvements in key congested areas throughout the County. These investments will be focused on improving safety, reducing congestion, and supporting all modes of travel on the County's roadway system. Eligible investments include, but are not limited to, the following: implement advanced technologies and communications on the roadway system; improve local streets and roads by paving streets and repairing potholes; promote alternative modes of transportation, which may include funding shuttles or sponsoring carpools, bicycling and pedestrian programs; plan and implement traffic operations and safety projects, including signal coordination, bicycle/pedestrian safety projects, and separation of roadways crossing the Caltrain rail corridor.

Each year, ten percent (10%) of the annual Tax Proceeds (out of the 12.5% total Tax Proceeds designated for this Category) will be allocated to each of the Cities and the County on a formula basis to be used for any of the purposes designated in the paragraph above. The annual distributions will be based 50 percent on population and 50 percent on road miles, and will be adjusted annually. Each of the Cities and the County will be required to demonstrate that Tax Proceeds would be used to enhance and not replace its current investments for transportation projects and programs. If a City or the County has a Pavement Condition Index score (a "PCI Score") of less than 70, it must use Tax Proceeds under this Category exclusively for projects that will increase their PCI score until such time as they reach a PCI of 70 or greater. Each of the Cities and the County will be required to transmit an annual report on projects funded, including how the funded projects reflect the Core Principles, subject to guidance established by the District and/or the Authority. Use of Tax Proceeds by Cities and the County under this Category shall be subject to audits. Estimated annual distribution percentages to each of the Cities and the County under this Category as of 2018 are set forth in Attachment B.

Two and a one-half percent (2.5%) of the Tax Proceeds (out of the 12.5% total Tax Proceeds designated for this Category) will be invested in grade separations on a discretionary basis in accordance with criteria and award schedules established by the Authority.

Sample City/County projects for the Local Safety, Pothole and Congestion Relief Improvements Category are set forth in Attachment C.

c. Bicycle and Pedestrian Improvements (5%)

A total of five percent (5%) of Tax Proceeds will be invested in bicycle, pedestrian, and active transportation projects. Programming of funds under this Category will give priority to those projects that are designed to help reduce traffic congestion by safely connecting communities and neighborhoods with schools, transit, and employment centers; fill gaps in the existing bicycle and pedestrian network; safely cross barriers such as major roads, rail corridors, and highways; improve existing facilities to make them safer and more accessible for cyclists and pedestrians; and make walking or biking a safer and more convenient means of transportation for all County residents and visitors. Bicycle, pedestrian, and other transportation programs that incentivize mode shift to active transportation options will be eligible for funding.

Investment will be made on a discretionary basis according to criteria and award schedules established by the Authority. Sample candidate projects are set forth in Attachment D.

d. Regional Transit Connections (10% percent)

A total of ten percent (10%) of Tax Proceeds will be invested in infrastructure and services that are designed to improve transit connectivity between the County and the region. Currently, the County is connected to neighboring counties and the broader region with a network of transit options including rail, water transit, heavy rail, and regional bus services. More and more County residents are traveling longer distances to get to their jobs. Today, over 60 percent of residents

commute to jobs in neighboring counties, and the vast majority of them drive alone, increasing congestion on already crowded highways.

Investments from this Category will be prioritized based on a project's ability to reduce congestion, a project's ability to enhance mobility options by connecting the County to the rest of the region, and a project's support through public-private partnerships.

Investment will be made on a discretionary basis according to criteria and award schedules established by the Authority. Sample candidate projects are set forth in Attachment E.

e. County Public Transportation Systems (50% percent)

A total of fifty percent (50%) of Tax Proceeds will be invested to support operations and capital needs of the County's primary public transit services comprised of SamTrans bus and paratransit service, Caltrain rail service, and other mobility services administered by the District.

Funding provided from this Category will provide additional funds to maintain and enhance bus, paratransit, and other mobility services to better serve vulnerable, underserved, youth, low-income, and transit-dependent populations throughout the County. Investments will be designed to increase ridership, improve efficiency, and reduce congestion within the County by facilitating the creation of new services that incentivize more riders to choose to use public transit.

Improvements to the County's bus network eligible for investment from this Category include, but are not limited to: increased frequencies on the SamTrans' core routes; expanded hours of service during mornings, evenings and weekends; changes and improvements that make service more accessible for youth, senior, disabled, and low-income populations; technology-based solutions that improve efficiency, convenience, access to information, and overall rider

experience; improved first- and last-mile connections between job centers and transit hubs; and implementation of services, programs and policies that better connect neighborhoods and communities with popular destinations to make transit the travel option of choice for more the County residents.

Investment in the Caltrain rail service will be designed to help fulfill plans to expand service levels through the operation of modern, high-performance electric trains and to fund annual operating and capital needs, including investment needed to maintain Caltrain's aging infrastructure and make capital improvements necessary to expand the system's ridership capacity.

Investment will be made on a discretionary basis by the District. Sample uses of funds are set forth in Attachment F.

Section 7. Administration of the San Mateo County Congestion Relief Plan

a. Responsibility for Administration and Implementation. As authorized pursuant to Section 103350 of the Transit District Act, the District (i) may administer the Congestion Relief Plan in its entirety or (ii) may transfer proceeds of the 2018 Sales Tax to the Authority for administration by the Authority consistent with the Congestion Relief Plan.

b. Guidelines. The District and/or the Authority shall develop guidelines to administer the Tax Proceeds. The District and Authority will work closely and cooperatively with the California State Department of Transportation, the Metropolitan Transportation Commission, and the City/County Association of Governments of San Mateo County.

c. San Mateo County Transportation Authority. Should the Authority cease to exist during the term of this Ordinance, any Tax Proceeds then under the administration of the Authority as authorized pursuant to Section 103350(d) of the Transit District Act and pursuant to Section 131057(b) of the Authority Act will

revert to the District for administration, with such Tax Proceeds to be administered in accordance with the Congestion Relief Plan.

Salaries and benefits of staff of the Authority, including staff of any agency appointed by the Authority to act as its administering agency, and other costs incurred in connection with administering the Congestion Relief Plan constitute costs of administering the Congestion Relief Plan, which may be paid from Tax Proceeds and which shall be allocated as Tax Proceeds spent on the applicable Category in the Congestion Relief Plan.

The Authority will identify funding prioritization criteria consistent with the Core Principles for inclusion in its Strategic Plan. Criteria primarily informed by these Core Principles will apply to implementation and investment of the revenues generated by this measure for the categories administered by the Authority. Development of the Strategic Plan will include broad-based community engagement and coordination with cities, the County, relevant public agencies, and key transportation stakeholders.

d. Allocation of Tax Proceeds; Reallocation. Tax proceeds shall be allocated to projects associated with the Categories identified in the Congestion Relief Plan. The Congestion Relief Plan is based on percentage distributions. Actual Tax Proceeds will be allocated in accordance with the percentages over the life of the Congestion Relief Plan (as opposed to year-by-year).

Under certain circumstances, after funds have been programmed and allocated to a project, reallocation may become necessary to effect the specific purposes of the Congestion Relief Plan. Project funds that have been programmed and allocated may become available for reallocation due to reasons which may include, but are not limited to:

1. the project is completed under budget;
2. the project is partially or fully funded from funding sources other than Tax Proceeds;
3. the project may not be completed due to infeasible design, construction limitations, or substantial failure to meet implementation milestones or guidelines.

Project funds must be reallocated within the same Category.

e. Restrictions on the Use of Tax Proceeds
   1. Tax Proceeds must be spent for the purposes of funding projects consistent with the Categories described in the Congestion Relief Plan.
   2. Tax Proceeds must be expended within the County, except that (a) expenditures for the Countywide Highway Congestion Improvements Category may be made for projects that minimally extend into adjacent counties, (b) expenditures may be made under the County Public Transportations Systems Category for regional bus or similar services serving the County but traveling into or out of an adjacent county, and (c) expenditures may be made for the District's share of Caltrain systemwide improvements under the County Public Transportation Systems Category.
   3. Receipt of Tax Proceeds may be subject to appropriate terms and conditions, as determined by the District or Authority, as applicable, as the administrator of funds being transferred. Such terms and conditions may include, but are not limited to, the right to require recipients to execute funding agreements and the right to audit recipients' use of the Tax Proceeds.
   4. Tax Proceeds may only be used to supplement existing revenue being used for improvement and maintenance of local transportation, including streets and roads improvements and public transit purposes listed in the Congestion Relief Plan. Tax proceeds may not be used to replace funds previously provided by property tax or other revenues for public transportation purposes. Tax proceeds also may be advanced to facilitate implementation of the Congestion Relief Plan.

f. Amendment of the Congestion Relief Plan. The District may supplement, revise or amend the Congestion Relief Plan to make administrative changes that are consistent with, and further the intent of, the Congestion Relief Plan. Such changes may include, but are not limited to, the adoption of policies and procedures for implementing the Congestion Relief Plan and clarifications to such policies and procedures.

g. Environmental Review of Projects Funded Under the Congestion Relief Plan. Environmental reporting, review, and approval procedures as provided under the National Environmental Policy Act, the California Environmental Quality Act, or other applicable laws will be adhered to as a prerequisite to implementation of any project funded under the Congestion Relief Plan.

h. Independent Citizens Oversight; Audits. Administration of the Congestion Relief Plan will be subject to review by a fifteen-member independent citizens' oversight committee to ensure Tax Proceeds are invested in a way that is consistent with the Congestion Relief Plan.

Members of the independent oversight committee will be appointed by the Board as follows:

- One member of the San Mateo County Transit District's Citizens Advisory Committee,
- One member of the San Mateo County Transportation Authority's Citizens Advisory Committee,
- One member of the Caltrain Citizen Advisory Committee representing San Mateo County,
- One Public Member of the City/County Association of Governments of San Mateo County's Bicycle and Pedestrian Advocacy Committee,
- One member representing private-sector employers,
- One member representing organized labor,
- One member representing an environmental or sustainability-related organization,

- One member representing people with disabilities
- One member representing youth transit riders
- One member representing the senior community
- One member from each of the County's five Supervisorial Districts.

Terms will be staggered. To provide for staggered terms, the length of the initial term of each appointee will vary, with no term exceeding three years. Subsequent terms will be three years.

Annually, the District shall have an audit conducted by an independent auditor. The auditor shall review the receipt of Tax Proceeds and expenditure of Tax Proceeds under the Congestion Relief Plan. The independent oversight committee shall receive the audit findings report, hold a public hearing and issue a report annually to provide County residents with information regarding how Tax Proceeds are being spent. The hearing will be held at a public meeting subject to the Ralph M. Brown Act.

Section 8. Contract with the State.

Prior to the Operative Date, as provided in the Transit District Act, the District will contract with the Department of Tax and Fee Administration to perform all functions incident to the administration and operation of this Ordinance and the 2018 Sales Tax; provided that, if the District shall not have contracted with the Department of Tax and Fee Administration prior to the Operative Date of this Ordinance, the District shall nevertheless so contract and in such case, the Operative Date of this Ordinance shall be the first day of the first calendar quarter following the execution of such a contract and references herein to June 30, 2049 shall be extended to permit collection of the 2018 Sales Tax for up to thirty (30) years.

Section 9. Transactions and Use Tax Rate of One-Half of One Percent; Excise Tax Rate of One-Half of One Percent

a. Transactions Tax Rate. For the privilege of selling tangible personal property at retail, a tax is hereby imposed upon all retailers in the incorporated and

unincorporated territory of San Mateo County at the rate of one-half of one percent (0.5%) of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in the County on and after July 1, 2019. This tax shall be imposed for a maximum period of thirty (30) years.

b. Use Tax Rate. An excise tax is hereby imposed on the storage, use, or other consumption in San Mateo County of tangible personal property purchased from any retailer on and after July 1, 2019 for storage, use, or other consumption in the County at the rate of one-half of one percent (0.5%) of the sales price of the property. This tax shall be imposed for a maximum period of thirty (30) years.

Section 10. Place of Sale.

For the purposes of this Ordinance, all retail sales are consummated at the place of business of the retailer unless the tangible personal property sold is delivered by the retailer to an out-of-state destination or to a common carrier for delivery to an out-of-state destination. The gross receipts from such sales shall include delivery charges, when such charges are subject to state sales and use tax, regardless of the place to which delivery is made. In the event a retailer has no permanent place of business in the state or has more than one place of business, the place or places at which the retail sales are consummated shall be determined under rules and regulations to be prescribed and adopted by the Department of Tax and Fee Administration.

Section 11. Adoption of Provisions of State Revenue and Taxation Code.

Except as otherwise provided in this Ordinance and except insofar as they are inconsistent with the provisions of Part 1.6 of Division 2 of the Revenue and Taxation Code, all of the provisions of Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code are hereby adopted and made part of this Ordinance as though fully set forth herein.

Section 12. Limitations on Adoption of State Law and Collection of Use Taxes.

In adopting the provisions of Part 1 of Division 2 of the Revenue and Taxation Code, wherever the State of California is named or referred to as the taxing agency,

the name of the District shall be substituted therefor. The substitution, however, shall not be made: (i) when the word "State" is used as part of the title of the State Controller, the State Treasurer, the State Board of Control, the Department of Tax and Fee Administration, State Treasury, or the Constitution of the State of California; (ii) when the result of that substitution would require action to be taken by or against the District or the Authority or any agent, officer, or employee thereof rather than by or against the Department of Tax and Fee Administration, in performing the functions incident to the administration or operation of this Ordinance; (iii) in those sections, including but not necessarily limited to, sections referring to the exterior boundaries of the State of California, where the result of the substitution would be to (a) provide an exemption from the 2018 Sales Tax with respect to certain sales, storage, use or other consumption of tangible personal property which would not otherwise be exempt from the 2018 Sales Tax while such sales, storage, use, or other consumption remains subject to tax by the State of California under the provisions of Part 1 of Division 2 of the Revenue and Taxation Code, or (b) impose the 2018 Sales Tax with respect to certain sales, storage, use or other consumption of tangible personal property which would not be subject to tax by the State of California under said provisions of the Revenue and Taxation Code; and (iv) in Sections 6701, 6702 (except in the last sentence thereof), 6711, 6715, 6737, 6797, or 6828 of the Revenue and Taxation Code. The name of the "District" shall be substituted for the word "state" in the phrase "retailer engaged in business in this state" in Section 6203 and in the definition of that phrase in Section 6203.

Section 13. Permit Not Required.

If a seller's permit has been issued to a retailer under Section 6067 of the Revenue and Taxation Code, an additional transactor's permit shall not be required by this Ordinance.

Section 14. Exemptions, Exclusions, and Credits.

a. There shall be excluded from the measure of the 2018 Sales Tax the amount of any transactions and use tax imposed by the State of California or by any city, city and county, or county pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law or the amount of any state-administered transactions and use tax.

b. There are exempted from the computation of the amount of transactions tax portion of the 2018 Sales Tax gross receipts derived from:

1. Sales of tangible personal property, other than fuel or petroleum products, to operators of aircraft to be used or consumed principally outside the County in which the sale is made and directly and exclusively in the use of such aircraft as common carriers of persons or property under the authority of the laws of the State of California, the United States, or any foreign government.
2. Sales of property to be used outside the County which is shipped to a point outside the County, pursuant to the contract of sale, by delivery to such point by a retailer or his agent, or by delivery by the retailer to a carrier for shipment to a cosignee at such point. For the purposes of this subsection, delivery to a point outside the County shall be satisfied;
    i. with respect to vehicles (other than commercial vehicles) subject to registration pursuant to Chapter 1 (commencing with Section 4000) of Division 3 of the Vehicle Code, aircraft licensed in compliance with Section 21411 of the Public Utilities Code, and undocumented vessels registered under Division 3.5 (commencing with Section 9840) of the Vehicle Code by registration to an out-of-County address and by a declaration under penalty of perjury, signed by the buyer, stating that such address is, in fact, his or her principal place of residence; and
    ii. with respect to commercial vehicles, by registration to a place of business out-of-County, and a declaration under penalty of perjury, singed by the buyer, that the vehicle will be operated from that address.
3. Sale of tangible personal property if the seller is obligated to furnish the property for a fixed price pursuant to a contract entered into prior to the Operative Date of this Ordinance; and
4. A lease of tangible personal property which is a continuing sale of such property for any period of time for which the lessor is obligated to lease

the property for an amount fixed by the lease prior to the Operative Date of this Ordinance.

5. For the purposes of numbered sections 3 and 4 of this Section 14(b), the sale or lease of tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time for which any party to the contract or lease has the unconditional right to terminate the contract upon notice, whether or not such right is exercised.

c. There are exempted from the use tax imposed by this Ordinance, the storage, use or other consumption in the County of tangible personal property:

1. The gross receipts from the sale of which have been subject to a transactions tax under any state-administered transactions and use tax ordinance;
2. Other than fuel or petroleum products purchased by operators of aircraft and used or consumed by such operators directly and exclusively in the use of such aircraft as common carriers of persons or property for hire or compensation under a certificate of public convenience and necessity issued pursuant to the laws of the State of California, the United States, or any foreign government. This exemption is in addition to the exemptions provided in Section 6366 and 6366.1 of the Revenue and Taxation Code of the State of California;
3. If the purchaser is obligated to purchase the property for a fixed price pursuant to a contract entered into prior to the Operative Date of this Ordinance; and
4. If the possession of, or the exercise of any right or power over, the tangible personal property arises under a lease which is a continuing purchase of such property for any period of time for which the lessee is obligated to lease the property for an amount fixed by a lease prior to the Operative Date of this Ordinance.
5. For the purposes of numbered sections 3 and 4 of this Section 14(c), above, storage, use, or other consumption, or possession, or exercise of

any right or power over, tangible personal property shall be deemed not to be obligated pursuant to a contract or lease for any period of time during which any party to the contract or lease has the unconditional right to terminate the contract or lease upon notice, whether or not such right is exercised.

6. Except as provided in numbered section 7 of this Section 14(c), below, a retailer engaged in business in the County shall not be required to collect use tax from the purchaser of tangible personal property, unless the retailer ships or delivers the property into the County or participates within the County in making the sale of the property, including, but not limited to, soliciting or receiving the order, either directly or indirectly, at a place of business of the retailer in the County or through any representative, agency, canvasser, solicitor, subsidiary or person in the County under the authority of the retailer.
7. "A retailer engaged in business in the County" shall also include any retailer of any of the following: vehicles subject to registration pursuant to Chapter 1 (commencing with Section 4000) of Division 3 of the Vehicle Code, aircraft licensed in compliance with Section 21411 of the Public Utilities Code, or undocumented vessels registered under Division 3.5 (commencing with Section 9840) of the Vehicle Code. That retailer shall be required to collect use tax from any purchaser who registers or licenses the vehicle, vessel, or aircraft at an address in the County.

d. Any person subject to use tax under this Ordinance may credit against that tax any transactions or reimbursement for transaction tax paid to a district imposing, or retailer liable for a transaction tax pursuant to Chapter 1.6 of Division 2 of the Revenue and Taxation Code with respect to the sale to the person of the property, the storage, use or other consumption of which is subject to the use tax.

Section 15. Revenue and Taxation Code Amendments.

All amendments to Part 1 of Division 2 of the Revenue and Taxation Code relating to sales and use taxes and which are not inconsistent with Part 1.6 of Division 2 of the Revenue and Taxation Code, and all amendments to Part 1.6 and Part 1.7 of Division 2 of the Revenue and Taxation Code, enacted subsequent to the effective date of this Ordinance as described in Section 5 hereof, shall automatically become part of this Ordinance; provided, however, that no such amendment shall operate so as to affect the rate of tax imposed by this Ordinance.

Section 16. Issuance of Bonds.

From time to time, pursuant to Section 103357, *et seq.* of the Transit District Act, the District is authorized to issue limited tax bonds payable from, and secured by a pledge of, Tax Proceeds to finance transportation improvements consistent with the Congestion Relief Plan. As authorized pursuant to Section 103358(b) of the Transit District Act, the pledge of the Tax Proceeds shall have priority over the use of any of the Tax Proceeds for "pay-as-you-go" financing.

Maximum bonded indebtedness which may be outstanding at any one time may not exceed the estimated proceeds of the 2018 Sales Tax as determined by the District.

Nothing herein shall limit or restrict in any way the power and authority of the District to issue bonds, notes or other obligations, to enter into loan agreements, leases, reimbursement agreements, standby bond purchase agreements, interest rate swap agreements or other derivative contracts or to engage in any other transaction under the Public Utilities Code, the Government Code or any other applicable law.

Section 17. Ballot Measure.

There shall be proposed to the voters of San Mateo County, the following proposition:

"To reduce highway traffic congestion (including 101, 280, interchanges); repair potholes, maintain streets, reduce local traffic, improve pedestrian safety in every San Mateo County city; maintain affordable transit services

for seniors/people with disabilities; increase Caltrain/SamTrans capacity, reduce travel times/car trips; implement the San Mateo County Congestion Relief Plan, shall San Mateo County Transit District's Ordinance levying a 30-year half-cent sales tax with independent citizen oversight, providing approximately $80 million annually that the State cannot take away, be adopted?"

Section 18. Enjoining Collection Forbidden.

No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding against the State of California, the District, or the Authority, or against any officer of the State of California, the District, or the Authority, to prevent or enjoin the collection of any tax or any amount of tax required to be collected under this Ordinance or under Part 1.6 of Division 2 of the Revenue and Taxation Code.

Section 19. Severability.

If any provision of this Ordinance including, but not limited to, any provision of the Congestion Relief Plan, any action taken to implement the Congestion Relief Plan, or the application of this Ordinance or the Congestion Relief Plan to any person or circumstance is held invalid or unenforceable by a court of competent jurisdiction, all other provisions or actions taken to implement the Ordinance and/or the Congestion Relief Plan, which are otherwise lawful, shall remain in full force and effect.

Section 20. Repeal and Replacement of Ordinance No. 103.

This Ordinance contains two minor technical clean-up revisions to Ordinance No. 103, and repeals and replaces Ordinance No. 103 in its entirety. This Ordinance No. 105 shall be attached to Resolution 2018-29 that was approved by the District Board of Directors on July 11, 2018, and this Ordinance is hereby ordained to be the "Ordinance" referenced in said Resolution.

Regularly passed and adopted this 1st day of August, 2018 by the following vote:

AYES: Gee, Guilbault, Kersteen-Tucker, Matsumoto, Pine, Powell, Ratto, Groom, Stone

NOES: None.

ABSENT: None.

Chair, San Mateo County Transit District

ATTEST:

Acting District Secretary

CERTIFICATION

Ordinance No. 105 as adopted by the Board of Directors at their duly noticed meeting on 11th day of July 2018, at which a quorum was present, is a true and accurate copy that has not been rescinded or modified as of the date of this certification.

Date: 04/02/2019

Dora Seamans
Executive Officer/District Secretary
San Mateo County Transit District

Attachment A: Countywide Highway Congestion Improvements Category Sample Candidate Projects

Geographic Location	*Title*
Countywide	Countywide Transportation Demand Management (TDM) / Commute Alternatives Program
Countywide	Intelligent Transportation System (ITS) / San Mateo County Smart Corridor
County of San Mateo (near Cities of Menlo Park, Portola Valley)	Interstate 280 and Alpine Road Reconfiguration
Cities of Foster City, San Mateo	State Route 92 / Highway 101 Interchange Improvements
Cities of Menlo Park, East Palo Alto	Dumbarton Corridor Highway Improvements (Enhanced Dumbarton Express bus service, supporting approach improvements, and Highway Bridge express lanes)
City of Brisbane	Reconstruct Highway 101/Candlestick Point Interchange
City of East Palo Alto	University Avenue/Highway 101 Interchange
City of Menlo Park	Roadway Grade Separations on Bayfront Expressway
Cities of East Palo Alto and Menlo Park	Bayfront Expressway Express Lanes
City of Millbrae	Interstate 280 Interchange Improvements Study at Hillcrest Boulevard and Larkspur Drive
City of Pacifica	Highway 1 Coastside Traffic Operation Improvement Project
City of Redwood City	Woodside Road/Highway 101 Interchange Improvements
City of San Mateo	Peninsula Avenue/Highway 101 Interchange
City of South San Francisco	Highway 101/Produce Avenue Interchange Project
Cities of South San Francisco, San Bruno	Littlefield Avenue / Interstate 380 Extension

This is a list of sample candidate projects. Other projects also may be submitted for consideration.

Attachment B: Local Safety, Pothole and Congestion Relief Improvements Category: City/County Formula Allocations

Estimated annual formula distribution percentages to each City and the County under the Local Safety, Pothole and Congestion Relief Improvement Category as of 2018 (based on 2017 population and road miles):

Jurisdiction	*Allocation Percentage*
Atherton	1.88 %
Belmont	3.55
Brisbane	1.02
Burlingame	4.32
Colma	0.28
Daly City	10.07
East Palo Alto	3.20
Foster City	3.39
Half Moon Bay	1.54
Hillsborough	3.03
Menlo Park	4.89
Millbrae	2.91
Pacifica	5.11
Portola Valley	1.49
Redwood City	9.62
San Bruno	5.02
San Carlos	4.35
San Mateo	12.15
South San Francisco	7.85
Woodside	1.79
County of San Mateo (unincorporated)	12.54
County Total	100.00 %

Attachment C: Local Safety, Pothole and Congestion Relief Improvements Category

Sample City/County Projects

Geographic Location	*Title*
Countywide	Pavement preservation and rehabilitation
Countywide	Countywide Transportation Demand Management (TDM) / Commute Alternatives Program
Countywide	Intelligent Transportation System (ITS) / San Mateo County Smart Corridor
County of San Mateo (near Cities of Menlo Park, Portola Valley)	Alpine Road Corridor Improvements Project
County of San Mateo, City of Menlo Park	Alameda de las Pulgas/Santa Cruz Avenue Corridor Improvements
Cities of Belmont, San Carlos	Alameda de las Pulgas/San Carlos Corridor Improvements
City of Belmont	Ralston Avenue Corridor Improvements
Cities of Brisbane, Daly City	Geneva Avenue Extension
City of Burlingame	El Camino Real Pedestrian Safety Improvements and Roadway Infrastructure Improvements
City of Burlingame	Old Bayshore Highway Complete Streets Improvements
City of Daly City	State Route 35/Westridge Avenue Intersection Safety Improvement Project
City of East Palo Alto	University Avenue Resurfacing and Signal Upgrade
City of East Palo Alto	The Gardens Neighborhood Traffic and Transportation Plan
City of East Palo Alto	New Loop Road
City of East Palo Alto	Traffic & Transportation Mobility Master Plan
City of East Palo Alto	Runnymede at University Avenue Signal
City of Foster City	New Traffic Signals at Various Locations
City of Foster City	Traffic Signal System Upgrades

Geographic Location	*Title*
City of Menlo Park	Various Local Intersection Improvements
City of Millbrae	Active Transportation Streetscape Improvements
City of Millbrae	El Camino Real Corridor Study
City of Millbrae	Millbrae Rideshare Program
City of Millbrae	Millbrae Parking Guidance System
City of Pacifica	Manor Drive Overcrossing Improvement Project
City of Pacifica	Citywide Local Street and Road Maintenance
City of Redwood City	El Camino Real Corridor Plan Implementation
City of Redwood City	Broadway Transit Corridor Improvements
City of San Bruno	Cherry Avenue/San Bruno Avenue Intersection Improvements
City of San Carlos	Brittan Avenue and Alameda de las Pulgas Widening Project
City of San Mateo	Hillsdale Boulevard Corridor Improvements
City of San Mateo	19th Avenue/Fashion Island Boulevard Corridor Improvements
City of South San Francisco	Grand Boulevard Initiative
City of South San Francisco	Grand Avenue Complete Street Improvements
City of South San Francisco	Oak Avenue Extension
City of South San Francisco	Railroad Avenue Extension
Cities of: South San Francisco, San Bruno, Millbrae, Burlingame, San Mateo, Belmont, Redwood City, Atherton, Menlo Park	San Mateo County Grade Crossing and Grade Separation Program (South Linden Avenue, Scott Street, Center Street, Broadway Avenue, Oak Grove Avenue, North Lane, Howard Avenue, Bayswater Avenue, Peninsula Avenue, Villa Terrace, Bellevue Avenue, 1st Avenue, 2nd Avenue, 3rd Avenue, 4th Avenue, 5th Avenue, 9th Avenue, Whipple Avenue, Brewster Avenue, Broadway, Maple Street, Main Street, Chestnut Street, Fair Oaks Lane, Watkins Avenue, Encincal Avenue,

Geographic Location	*Title*
	Glenwood Avenue, Oak Grove Avenue, Ravenswood Avenue)
Town of Atherton	Selby Lane/El Camino Real/West Selby Lane Intersection Safety Improvements
Town of Colma	Hillside Boulevard Improvement Project
Town of Hillsborough	Traffic Safety Improvements

This is a list of sample projects. Other projects also may be considered for funding.

Attachment D: Bicycle and Pedestrian Improvements Category Sample Candidate Projects

Geographic Location	*Title*
Countywide	Safe Routes to School
City of Belmont	Belmont Village Specific Plan -- Mobility Implementation Measures
City of Belmont	Belmont Bike and Pedestrian Plan Implementation
City of Burlingame	California Drive Bicycle/Pedestrian Trail
City of Daly City	Daly City Citywide ADA Infrastructure and Pedestrian Improvement Project
City of East Palo Alto	Bicycle and Pedestrian Improvements Citywide
City of East Palo Alto	Scofield Avenue Sidewalk Improvements
City of East Palo Alto	Pedestrian Accessibility Improvements Citywide
City of Foster City	O'Neill Slough and Bay Trail Levee Bicycle Improvements
City of Half Moon Bay	East of Highway 1 Class I Multi-Use Path
City of Menlo Park	Enhance Pedestrian Crossings Citywide
City of Menlo Park	El Camino Real Pedestrian Crossing and Streetscape Improvements
City of Menlo Park	Build out City of Menlo Park Bicycle Network Citywide
City of Millbrae	Millbrae Avenue & Highway 101 Interchange Improvements
City of Millbrae	Millbrae Pedestrian Over Crossing at Highway 101
City of Millbrae	Citywide Bicycle and Pedestrian Improvements

Geographic Location	*Title*
City of Millbrae	Transit Shelter Program Citywide
City of Pacifica	State Route 1 Pedestrian and Bicycle Overcrossings at Reina Del Mar and Crespi Drive
City of Pacifica	ADA Infrastructure Improvement Projects Citywide
City of Redwood City	Bicycle Backbone Network Citywide
City of San Bruno	Cherry Avenue Bikeway Corridor
City of San Bruno	El Camino Real Pedestrian Crossing Improvements
City of San Carlos	Pedestrian Safety Improvement Plan for San Carlos Avenue
City of San Carlos	Holly Street Pedestrian Safety Improvement Plan
City of San Mateo	Pedestrian Overcrossing and Bike Bridge at Hillsdale Boulevard
City of South San Francisco	Hickey Boulevard / Junipero Serra Boulevard / Longford Drive Bike & Pedestrian Improvements
County of San Mateo (near City of Half Moon Bay)	Midcoast Multimodal/Parallel Trail
County of San Mateo (near Route 35 and Crystal Springs Dam)	Complete the Gap Trail Project
County of San Mateo (Countywide)	Bicycle and Pedestrian Master Plan for Unincorporated San Mateo County
County of San Mateo (marginally extends into City of Menlo Park)	Sand Hill Road Bicycle Lane Improvements/Additions Near Interstate 280
Town of Atherton	Bicycle/Pedestrian enhancements
Town of Colma	Hillside Boulevard Improvement Project Phase II & III Bike/Ped Improvements

Geographic Location	*Title*
Town of Hillsborough	ADA Ramp Installation and Improvements Citywide
Town of Portola Valley	Lighted Pedestrian Crossing Replacement/Additions
Town of Woodside	Town-wide Bicycle/Pedestrian/Equestrian Safety and Mobility Improvements

This is a list of sample candidate projects. Other projects also may be submitted for consideration.

Attachment E: Regional Transit Connections Category Sample Candidate Projects

- BART Rail Car Expansion Project and station access improvements
- Dumbarton Corridor Improvements for enhanced express bus service, rail and bicycle/pedestrian multi-use
- Redwood and South San Francisco City Ferry Terminal and Vessels
- Caltrain Capital Improvements that provide key connections to regional projects at locations such as Millbrae and Redwood City intermodal Stations
- SamTrans Regional Express Bus Service

This is a list of sample candidate projects. Other projects also may be submitted for consideration.

Attachment F: County Public Transportation Systems Category County Bus Network Sample Candidate Projects

- Implementation of a SamTrans express bus network
- Conversion of SamTrans fleet to zero emission buses
- Increase service frequency of the core SamTrans bus network, possibly including expanded service hours
- Launch shared ride and technology driven models with the private sector to enhance service to riders
- Implementation of the SamTrans Older Adults and People with Disabilities Mobility Plan
- Implementation of the SamTrans Youth Mobility Plan
- Implementation of the Coastside Transit Study to better serve coastal residents
- Caltrain corridor capacity and service improvements in order to ease local and highway congestion in San Mateo County
- Upgrade of station amenities and improvement of multi-modal access to Caltrain stations in San Mateo County
- Projects to improve safety and reliability of Caltrain's infrastructure and equipment
- Improvements of first- and last-mile connections to the core transit services in San Mateo County
- Enhancements of the customer experience (for example: wi-fi) to promote ridership and long-term growth of the core transit services in San Mateo County

This is a list of sample projects. Other projects also may be considered for funding.

MEASURE W CITIZENS OVERSIGHT COMMITTEE HANDBOOK

Section 2

COC By-Laws

SAN MATEO COUNTY TRANSIT DISTRICT MEASURE W

CITIZENS' OVERSIGHT COMMITTEE

BYLAWS

ARTICLE I – ROLE

1.1 On November 6, 2018, the voters of San Mateo County ("County") approved a half-cent transactions and use tax for 30 years with the tax revenues to be used to fund investment for transportation and public transit in accordance with the San Mateo County Congestion Relief Plan (Measure W). As specified in Measure W, administration of the Congestion Relief Plan is subject to review by this fifteen-member independent citizens' oversight committee ("Committee") to ensure tax proceeds are invested as provided in the Congestion Relief Plan.

1.2 As prescribed in Measure W, the San Mateo County Transit District ("District") will have an annual audit conducted by an independent auditor. Annually, the Committee will receive the audit findings report, hold a public hearing and issue a report to provide County residents with information regarding how the tax proceeds are being spent ("Annual Report").

ARTICLE II – MEMBERSHIP AND TERMS

2.1 Measure W established that the Committee has 15 members, with specific membership representation requirements, and three-year staggered terms established by the District's Board of Directors ("Board").

2.2 Pursuant to the Measure W Citizens' Oversight Committee Appointment Process adopted by the Board pursuant to Resolution 2020-2, the Board's Community Relations Committee recommends candidates for ratification by the full Board.

2.3 Committee Member attendance is required at all meetings as full attendance is of prime importance to fulfilling the role of the Committee. Should a member be unable to attend a meeting, they should notify the Committee Clerk before the meeting.

ARTICLE III – OFFICERS

3.1 The officers of the Committee will be the Chairperson, Vice-Chairperson, and Committee Clerk. Their duties shall be as follows:

3.1.1 Chairperson: Presides over Committee meetings, works with the Clerk to schedule meetings and develop meeting agendas; is responsible for issuing the Annual Report, as approved by the Committee; is available to present the Annual Report to the Board; and may create and appoint members to ad hoc advisory committees of the Committee as provided in the Ralph M. Brown Act.

3.1.2 Vice-Chairperson: Conducts the Chairperson's duties in his/her absence.

3.1.3 Committee Clerk: The Clerk is a District staff member appointed by the District's General Manager/CEO. The Clerk to the Committee prepares agenda in consultation with the Chairperson, and posts meeting and public hearing notices. In addition, the Clerk

attends the meetings of the Committee, prepares meeting minutes for the Committee, assists in the preparation of the Annual Report, and accepts communications to the Committee.

3.2 The Chairperson and Vice-Chairperson serve one-year terms based on a fiscal year annual audit and report cycle. In the event of a vacancy in the office of Chairperson or Vice-Chairperson, the vacancy will be filled by an election at the first Committee meeting after the occurrence of the vacancy to select a member to serve out the remainder of the officer's term.

ARTICLE IV – MEETINGS

4.1 The Committee generally will hold regular meetings quarterly, to coincide with the annual audit and Committee report cycle.

4.2 Committee meetings are normally held at the District's headquarters and are open to the public. Meetings of the Committee will be held in compliance with the Ralph M. Brown Act (Government Code Section 54950, *et seq*.). Tele-conferencing and remote/video participation will be available when and as provided under application State or local law, regulation or order.

4.3 The conduct of the Committee's meetings will be informed by Rosenberg's Rules of Order but the Commission will not be obligated to strictly comply with Rosenberg's Rules of Order.

4.4 Nine members constitute a quorum of the Committee authorized to transact business duly presented at a meeting of the Committee. When two or three Committee positions are vacant (leaving 12 or 13 members), the quorum requirement is reduced to eight members. When four or more Committee positions are vacant (leaving 11 or fewer members), the quorum is reduced to seven members.

4.5 Each member of the Committee will have one vote. Members must be present to vote. Adoption of the annual Committee report and amendment of these Bylaws requires nine votes to pass. All other action items must have at least a simple majority vote of the quorum of the Committee to pass.

4.6 The Committee Clerk will endeavor to send the proposed agenda to the Chairperson for approval 72 hours prior to the final agenda being posted. The Committee Clerk will endeavor to provide the complete agenda packet, including a complete correspondence file compiled up to the date of distribution, to each Committee member and post the same to the District's website at least one week prior to the meeting date.

4.7 When documents are distributed to the Committee after posting of the agenda meeting, including during a Committee meeting, the Committee Clerk will endeavor to post such documents to the District's website on the same business day that the materials are provided to the Committee.

4.8 Each member of the public speaking before the Committee shall be limited to three minutes, unless the Chairperson, at his or her discretion, permits additional time. Any person addressing the Committee may submit written statements, petitions, or other documents to complement his or her presentation.

4.9 The order of business for Committee meetings generally will be as follows:

a) CALL TO ORDER/PLEDGE OF ALLEGIANCE

b) ROLL CALL

c) ELECTION OF OFFICERS – *When appropriate and at least once each year*

d) APPROVAL OF MEETING MINUTES

e) DISCUSS WORK PLAN FOR ANNUAL AUDIT OF MEASURE W TAX REVENUES AND EXPENDITURES IN ACCORDANCE WITH CONGESTION RELIEF PLAN – *When appropriate and at least once each year*

OR

PUBLIC HEARING ON ANNUAL AUDIT OF MEASURE W TAX REVENUES AND EXPENDITURES IN ACCORDANCE WITH CONGESTION RELIEF PLAN – *When appropriate and at least once each year*

1. Independent Auditor's Presentation
2. Committee Questions
3. Public Comment
4. Close Public Hearing
5. Committee Comments
6. Committee Discussion on Drafting of Committee Report

OR

CONSIDERATION AND APPROVAL OF ANNUAL COMMITTEE REPORT ON USE OF MEASURE W TAX REVENUES AND EXPENDITURES – *When appropriate and at least once each year*

g) OTHER BUSINESS

h) PUBLIC COMMENTS – At this time, persons in the audience may speak on any matter within the jurisdiction of the Committee. The Brown Act (the State local agency open meeting law) prohibits the Committee from acting on any matter that is not on the agenda. The Chair may limit speakers to three minutes each.

i) COMMITTEE MEMBER COMMENTS / COMMUNICATIONS REGARDING TRANSPORTATION MATTERS

j) ADJOURNMENT

MEASURE W CITIZENS OVERSIGHT COMMITTEE HANDBOOK

Section 3

COC Roster

District Staff Org Chart

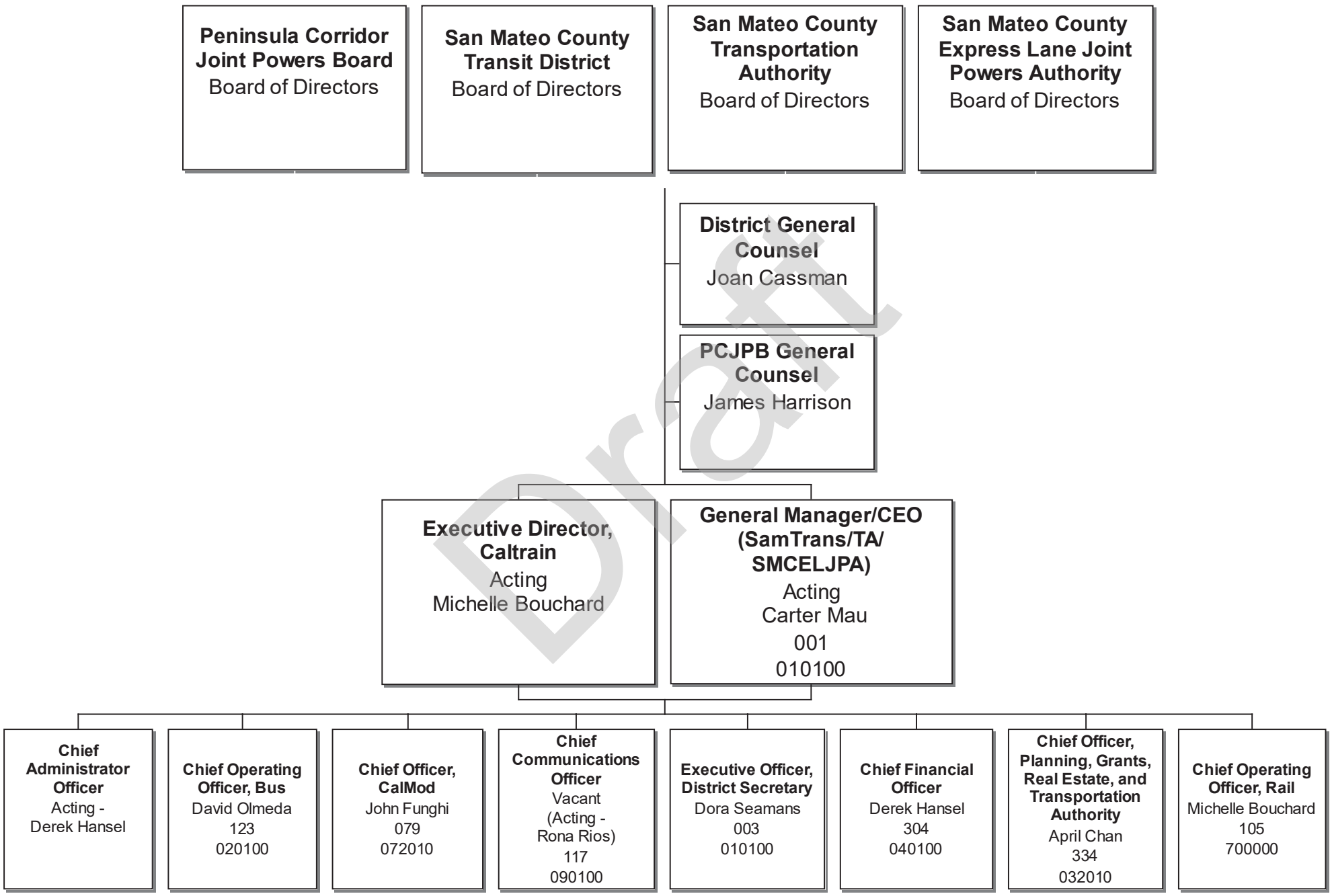
SAMTRANS MEASURE W CITIZENS' OVERSIGHT COMMITTEE ROSTER – 2021

NAME	REPRESENTATION	EMAIL	INITIAL TERM (EXPIRES)
Adina Levin	San Mateo County Supervisor District 3 (Don Horsley)	alevin@alevin.com	3 yrs. (2021-2024)
Adrian Brandt	Caltrain CAC (representing San Mateo County)	adrian.brandt@gmail.com	2 yrs. (2021- 2023)
Alex Madrid	People with Disabilities	alexm@cidsanmateo.org	3 yrs. (2021-2024)
Eduardo (Lalo) Gonzalez	County Supervisor District 5 (David Canepa)	egonzalez@yli.org	2 yrs. (2021-2023)
Ethan Mizzi	Youth/Youth Transit Riders	ethanjmizzi@gmail.com	1 yr. (2021-2022)
Jeff Londer	Environmental or Sustainability Organization	jwlonder@aol.com	3 yrs. (2021-2024)
Julie Lind Rupp	Organized Labor	Smclcjulie@sbcglobal.net	1 yr. (2021-2022)
Lauren Bennett	Private Sector Employer	bennett.lauren@gene.com	1 yr. (2021-2022)
Liza Normandy	County Supervisor District 1 (Dave Pine)	liza427@comcast.net	1 yr. (2021-2022)
Malcolm Robinson	C/CAG BPAC	matisse200@outlook.com	3 yrs. (2021-2024)
Mario Rendon	TA Citizen's Advisory Committee	demingbuddy@gmail.com	3 yrs. (2021-2024)
Mary Adler	SamTrans Citizens Advisory Committee	madler@opentext.com; mary.adler.11@gmail.com	2 yrs. (2021-2023)
Rich Hedges	County Supervisor District 2 (Carole Groom)	hedghogg@ix.netcom.com	1 yr. (2021-2022)
Rosanne Foust	County Supervisor District 4 (Warren Slocum)	rosannefoust@comcast.net	3 yrs. (2021-2023)

SAMTRANS MEASURE W CITIZENS' OVERSIGHT COMMITTEE ROSTER – 2021

Sandra Lang	Senior Community	langinsureyou@gmail.com	2 yrs. (2021-2023)

SAN MATEO COUNTY TRANSIT DISTRICT



MEASURE W CITIZENS OVERSIGHT COMMITTEE HANDBOOK

Section 4

Rosenberg's Rules

Summary provided by National League of Cities and link to video provided by David Rosenberg (creator of Rosenberg's Rules)

Rosenberg's Rules of Order

REVISED 2011

Simple Rules of Parliamentary Procedure for the 21st Century

By Judge Dave Rosenberg

LEAGUE® OF CALIFORNIA CITIES

MISSION AND CORE BELIEFS

To expand and protect local control for cities through education and advocacy to enhance the quality of life for all Californians.

VISION

To be recognized and respected as the leading advocate for the common interests of California's cities.

About the League of California Cities

Established in 1898, the League of California Cities is a member organization that represents California's incorporated cities. The League strives to protect the local authority and automony of city government and help California's cities effectively serve their residents. In addition to advocating on cities' behalf at the state capitol, the League provides its members with professional development programs and information resources, conducts education conferences and research, and publishes Western City magazine.

About the Author

Dave Rosenberg is a Superior Court Judge in Yolo County. He has served as presiding judge of his court, and as presiding judge of the Superior Court Appellate Division. He also has served as chair of the Trial Court Presiding Judges Advisory Committee (the committee composed of all 58 California presiding judges) and as an advisory member of the California Judicial Council. Prior to his appointment to the bench, Rosenberg was member of the Yolo County Board of Supervisors, where he served two terms as chair. Rosenberg also served on the Davis City Council, including two terms as mayor. He has served on the senior staff of two governors, and worked for 19 years in private law practice. Rosenberg has served as a member and chair of numerous state, regional and local boards. Rosenberg chaired the California State Lottery Commission, the California Victim Compensation and Government Claims Board, the Yolo-Solano Air Quality Management District, the Yolo County Economic Development Commission, and the Yolo County Criminal Justice Cabinet. For many years, he has taught classes on parliamentary procedure and has served as parliamentarian for large and small bodies.

Table of Contents

Introduction

The rules of procedure at meetings should be simple enough for most people to understand. Unfortunately, that has not always been the case. Virtually all clubs, associations, boards, councils and bodies follow a set of rules — *Robert's Rules of Order* — which are embodied in a small, but complex, book. Virtually no one I know has actually read this book cover to cover. Worse yet, the book was written for another time and for another purpose. If one is chairing or running a parliament, then *Robert's Rules of Order* is a dandy and quite useful handbook for procedure in that complex setting. On the other hand, if one is running a meeting of say, a five-member body with a few members of the public in attendance, a simplified version of the rules of parliamentary procedure is in order.

Hence, the birth of *Rosenberg's Rules of Order*.

What follows is my version of the rules of parliamentary procedure, based on my decades of experience chairing meetings in state and local government. These rules have been simplified for the smaller bodies we chair or in which we participate, slimmed down for the 21st Century, yet retaining the basic tenets of order to which we have grown accustomed. Interestingly enough, *Rosenberg's Rules* has found a welcoming audience. Hundreds of cities, counties, special districts, committees, boards, commissions, neighborhood associations and private corporations and companies have adopted *Rosenberg's Rules* in lieu of *Robert's Rules* because they have found them practical, logical, simple, easy to learn and user friendly.

This treatise on modern parliamentary procedure is built on a foundation supported by the following four pillars:

1. **Rules should establish order.** The first purpose of rules of parliamentary procedure is to establish a framework for the orderly conduct of meetings.
2. **Rules should be clear.** Simple rules lead to wider understanding and participation. Complex rules create two classes: those who understand and participate; and those who do not fully understand and do not fully participate.
3. **Rules should be user friendly.** That is, the rules must be simple enough that the public is invited into the body and feels that it has participated in the process.
4. **Rules should enforce the will of the majority while protecting the rights of the minority.** The ultimate purpose of rules of procedure is to encourage discussion and to facilitate decision making by the body. In a democracy, majority rules. The rules must enable the majority to express itself and fashion a result, while permitting the minority to also express itself, but not dominate, while fully participating in the process.

Establishing a Quorum

The starting point for a meeting is the establishment of a quorum. A quorum is defined as the minimum number of members of the body who must be present at a meeting for business to be legally transacted. The default rule is that a quorum is one more than half the body. For example, in a five-member body a quorum is three. When the body has three members present, it can legally transact business. If the body has less than a quorum of members present, it cannot legally transact business. And even if the body has a quorum to begin the meeting, the body can lose the quorum during the meeting when a member departs (or even when a member leaves the dais). When that occurs the body loses its ability to transact business until and unless a quorum is reestablished.

The default rule, identified above, however, gives way to a specific rule of the body that establishes a quorum. For example, the rules of a particular five-member body may indicate that a quorum is four members for that particular body. The body must follow the rules it has established for its quorum. In the absence of such a specific rule, the quorum is one more than half the members of the body.

The Role of the Chair

While all members of the body should know and understand the rules of parliamentary procedure, it is the chair of the body who is charged with applying the rules of conduct of the meeting. The chair should be well versed in those rules. For all intents and purposes, the chair makes the final ruling on the rules every time the chair states an action. In fact, all decisions by the chair are final unless overruled by the body itself.

Since the chair runs the conduct of the meeting, it is usual courtesy for the chair to play a less active role in the debate and discussion than other members of the body. This does not mean that the chair should not participate in the debate or discussion. To the contrary, as a member of the body, the chair has the full right to participate in the debate, discussion and decision-making of the body. What the chair should do, however, is strive to be the last to speak at the discussion and debate stage. The chair should not make or second a motion unless the chair is convinced that no other member of the body will do so at that point in time.

The Basic Format for an Agenda Item Discussion

Formal meetings normally have a written, often published agenda. Informal meetings may have only an oral or understood agenda. In either case, the meeting is governed by the agenda and the agenda constitutes the body's agreed-upon roadmap for the meeting. Each agenda item can be handled by the chair in the following basic format:

First, the chair should clearly announce the agenda item number and should clearly state what the agenda item subject is. The chair should then announce the format (which follows) that will be followed in considering the agenda item.

Second, following that agenda format, the chair should invite the appropriate person or persons to report on the item, including any recommendation that they might have. The appropriate person or persons may be the chair, a member of the body, a staff person, or a committee chair charged with providing input on the agenda item.

Third, the chair should ask members of the body if they have any technical questions of clarification. At this point, members of the body may ask clarifying questions to the person or persons who reported on the item, and that person or persons should be given time to respond.

Fourth, the chair should invite public comments, or if appropriate at a formal meeting, should open the public meeting for public input. If numerous members of the public indicate a desire to speak to the subject, the chair may limit the time of public speakers. At the conclusion of the public comments, the chair should announce that public input has concluded (or the public hearing, as the case may be, is closed).

Fifth, the chair should invite a motion. The chair should announce the name of the member of the body who makes the motion.

Sixth, the chair should determine if any member of the body wishes to second the motion. The chair should announce the name of the member of the body who seconds the motion. It is normally good practice for a motion to require a second before proceeding to ensure that it is not just one member of the body who is interested in a particular approach. However, a second is not an absolute requirement, and the chair can proceed with consideration and vote on a motion even when there is no second. This is a matter left to the discretion of the chair.

Seventh, if the motion is made and seconded, the chair should make sure everyone understands the motion.

This is done in one of three ways:

1. The chair can ask the maker of the motion to repeat it;
2. The chair can repeat the motion; or
3. The chair can ask the secretary or the clerk of the body to repeat the motion.

Eighth, the chair should now invite discussion of the motion by the body. If there is no desired discussion, or after the discussion has ended, the chair should announce that the body will vote on the motion. If there has been no discussion or very brief discussion, then the vote on the motion should proceed immediately and there is no need to repeat the motion. If there has been substantial discussion, then it is normally best to make sure everyone understands the motion by repeating it.

Ninth, the chair takes a vote. Simply asking for the "ayes" and then asking for the "nays" normally does this. If members of the body do not vote, then they "abstain." Unless the rules of the body provide otherwise (or unless a super majority is required as delineated later in these rules), then a simple majority (as defined in law or the rules of the body as delineated later in these rules) determines whether the motion passes or is defeated.

Tenth, the chair should announce the result of the vote and what action (if any) the body has taken. In announcing the result, the chair should indicate the names of the members of the body, if any, who voted in the minority on the motion. This announcement might take the following form: "The motion passes by a vote of 3-2, with Smith and Jones dissenting. We have passed the motion requiring a 10-day notice for all future meetings of this body."

Motions in General

Motions are the vehicles for decision making by a body. It is usually best to have a motion before the body prior to commencing discussion of an agenda item. This helps the body focus.

Motions are made in a simple two-step process. First, the chair should recognize the member of the body. Second, the member of the body makes a motion by preceding the member's desired approach with the words "I move … "

A typical motion might be: "I move that we give a 10-day notice in the future for all our meetings."

The chair usually initiates the motion in one of three ways:

1. **Inviting the members of the body to make a motion,** for example, "A motion at this time would be in order."
2. **Suggesting a motion to the members of the body,** "A motion would be in order that we give a 10-day notice in the future for all our meetings."
3. **Making the motion.** As noted, the chair has every right as a member of the body to make a motion, but should normally do so only if the chair wishes to make a motion on an item but is convinced that no other member of the body is willing to step forward to do so at a particular time.

The Three Basic Motions

There are three motions that are the most common and recur often at meetings:

The basic motion. The basic motion is the one that puts forward a decision for the body's consideration. A basic motion might be: "I move that we create a five-member committee to plan and put on our annual fundraiser."

The motion to amend. If a member wants to change a basic motion that is before the body, they would move to amend it. A motion to amend might be: "I move that we amend the motion to have a 10-member committee." A motion to amend takes the basic motion that is before the body and seeks to change it in some way.

The substitute motion. If a member wants to completely do away with the basic motion that is before the body, and put a new motion before the body, they would move a substitute motion. A substitute motion might be: "I move a substitute motion that we cancel the annual fundraiser this year."

"Motions to amend" and "substitute motions" are often confused, but they are quite different, and their effect (if passed) is quite different. A motion to amend seeks to retain the basic motion on the floor, but modify it in some way. A substitute motion seeks to throw out the basic motion on the floor, and substitute a new and different motion for it. The decision as to whether a motion is really a "motion to amend" or a "substitute motion" is left to the chair. So if a member makes what that member calls a "motion to amend," but the chair determines that it is really a "substitute motion," then the chair's designation governs.

A "friendly amendment" is a practical parliamentary tool that is simple, informal, saves time and avoids bogging a meeting down with numerous formal motions. It works in the following way: In the discussion on a pending motion, it may appear that a change to the motion is desirable or may win support for the motion from some members. When that happens, a member who has the floor may simply say, "I want to suggest a friendly amendment to the motion." The member suggests the friendly amendment, and if the maker and the person who seconded the motion pending on the floor accepts the friendly amendment, that now becomes the pending motion on the floor. If either the maker or the person who seconded rejects the proposed friendly amendment, then the proposer can formally move to amend.

Multiple Motions Before the Body

There can be up to three motions on the floor at the same time. The chair can reject a fourth motion until the chair has dealt with the three that are on the floor and has resolved them. This rule has practical value. More than three motions on the floor at any given time is confusing and unwieldy for almost everyone, including the chair.

When there are two or three motions on the floor (after motions and seconds) at the same time, the vote should proceed *first* on the *last* motion that is made. For example, assume the first motion is a basic "motion to have a five-member committee to plan and put on our annual fundraiser." During the discussion of this motion, a member might make a second motion to "amend the main motion to have a 10-member committee, not a five-member committee to plan and put on our annual fundraiser." And perhaps, during that discussion, a member makes yet a third motion as a "substitute motion that we not have an annual fundraiser this year." The proper procedure would be as follows:

First, the chair would deal with the *third* (the last) motion on the floor, the substitute motion. After discussion and debate, a vote would be taken first on the third motion. If the substitute motion *passed*, it would be a substitute for the basic motion and would eliminate it. The first motion would be moot, as would the second motion (which sought to amend the first motion), and the action on the agenda item would be completed on the passage by the body of the third motion (the substitute motion). No vote would be taken on the first or second motions.

Second, if the substitute motion *failed*, the chair would then deal with the second (now the last) motion on the floor, the motion to amend. The discussion and debate would focus strictly on the amendment (should the committee be five or 10 members). If the motion to amend *passed*, the chair would then move to consider the main motion (the first motion) as *amended*. If the motion to amend *failed,* the chair would then move to consider the main motion (the first motion) in its original format, not amended.

Third, the chair would now deal with the first motion that was placed on the floor. The original motion would either be in its original format (five-member committee), or if *amended*, would be in its amended format (10-member committee). The question on the floor for discussion and decision would be whether a committee should plan and put on the annual fundraiser.

To Debate or Not to Debate

The basic rule of motions is that they are subject to discussion and debate. Accordingly, basic motions, motions to amend, and substitute motions are all eligible, each in their turn, for full discussion before and by the body. The debate can continue as long as members of the body wish to discuss an item, subject to the decision of the chair that it is time to move on and take action.

There are exceptions to the general rule of free and open debate on motions. The exceptions all apply when there is a desire of the body to move on. The following motions are not debatable (that is, when the following motions are made and seconded, the chair must immediately call for a vote of the body without debate on the motion):

Motion to adjourn. This motion, if passed, requires the body to immediately adjourn to its next regularly scheduled meeting. It requires a simple majority vote.

Motion to recess. This motion, if passed, requires the body to immediately take a recess. Normally, the chair determines the length of the recess which may be a few minutes or an hour. It requires a simple majority vote.

Motion to fix the time to adjourn. This motion, if passed, requires the body to adjourn the meeting at the specific time set in the motion. For example, the motion might be: "I move we adjourn this meeting at midnight." It requires a simple majority vote.

Motion to table. This motion, if passed, requires discussion of the agenda item to be halted and the agenda item to be placed on "hold." The motion can contain a specific time in which the item can come back to the body. "I move we table this item until our regular meeting in October." Or the motion can contain no specific time for the return of the item, in which case a motion to take the item off the table and bring it back to the body will have to be taken at a future meeting. A motion to table an item (or to bring it back to the body) requires a simple majority vote.

Motion to limit debate. The most common form of this motion is to say, "I move the previous question" or "I move the question" or "I call the question" or sometimes someone simply shouts out "question." As a practical matter, when a member calls out one of these phrases, the chair can expedite matters by treating it as a "request" rather than as a formal motion. The chair can simply inquire of the body, "any further discussion?" If no one wishes to have further discussion, then the chair can go right to the pending motion that is on the floor. However, if even one person wishes to discuss the pending motion further, then at that point, the chair should treat the call for the "question" as a formal motion, and proceed to it.

When a member of the body makes such a motion ("I move the previous question"), the member is really saying: "I've had enough debate. Let's get on with the vote." When such a motion is made, the chair should ask for a second, stop debate, and vote on the motion to limit debate. The motion to limit debate requires a two-thirds vote of the body.

NOTE: A motion to limit debate could include a time limit. For example: "I move we limit debate on this agenda item to 15 minutes." Even in this format, the motion to limit debate requires a two-thirds vote of the body. A similar motion is a *motion to object to consideration of an item.* This motion is not debatable, and if passed, precludes the body from even considering an item on the agenda. It also requires a two-thirds vote.

Majority and Super Majority Votes

In a democracy, a simple majority vote determines a question. A tie vote means the motion fails. So in a seven-member body, a vote of 4-3 passes the motion. A vote of 3-3 with one abstention means the motion fails. If one member is absent and the vote is 3-3, the motion still fails.

All motions require a simple majority, but there are a few exceptions. The exceptions come up when the body is taking an action which effectively cuts off the ability of a minority of the body to take an action or discuss an item. These extraordinary motions require a two-thirds majority (a super majority) to pass:

Motion to limit debate. Whether a member says, "I move the previous question," or "I move the question," or "I call the question," or "I move to limit debate," it all amounts to an attempt to cut off the ability of the minority to discuss an item, and it requires a two-thirds vote to pass.

Motion to close nominations. When choosing officers of the body (such as the chair), nominations are in order either from a nominating committee or from the floor of the body. A motion to close nominations effectively cuts off the right of the minority to nominate officers and it requires a two-thirds vote to pass.

Motion to object to the consideration of a question. Normally, such a motion is unnecessary since the objectionable item can be tabled or defeated straight up. However, when members of a body do not even want an item on the agenda to be considered, then such a motion is in order. It is not debatable, and it requires a two-thirds vote to pass.

Motion to suspend the rules. This motion is debatable, but requires a two-thirds vote to pass. If the body has its own rules of order, conduct or procedure, this motion allows the body to suspend the rules for a particular purpose. For example, the body (a private club) might have a rule prohibiting the attendance at meetings by non-club members. A motion to suspend the rules would be in order to allow a non-club member to attend a meeting of the club on a particular date or on a particular agenda item.

Counting Votes

The matter of counting votes starts simple, but can become complicated.

Usually, it's pretty easy to determine whether a particular motion passed or whether it was defeated. If a simple majority vote is needed to pass a motion, then one vote more than 50 percent of the body is required. For example, in a five-member body, if the vote is three in favor and two opposed, the motion passes. If it is two in favor and three opposed, the motion is defeated.

If a two-thirds majority vote is needed to pass a motion, then how many affirmative votes are required? The simple rule of thumb is to count the "no" votes and double that count to determine how many "yes" votes are needed to pass a particular motion. For example, in a seven-member body, if two members vote "no" then the "yes" vote of at least four members is required to achieve a two-thirds majority vote to pass the motion.

What about tie votes? In the event of a tie, the motion always fails since an affirmative vote is required to pass any motion. For example, in a five-member body, if the vote is two in favor and two opposed, with one member absent, the motion is defeated.

Vote counting starts to become complicated when members vote "abstain" or in the case of a written ballot, cast a blank (or unreadable) ballot. Do these votes count, and if so, how does one count them? The starting point is always to check the statutes.

In California, for example, for an action of a board of supervisors to be valid and binding, the action must be approved by a majority of the board. (California Government Code Section 25005.) Typically, this means three of the five members of the board must vote affirmatively in favor of the action. A vote of 2-1 would not be sufficient. A vote of 3-0 with two abstentions would be sufficient. In general law cities in

California, as another example, resolutions or orders for the payment of money and all ordinances require a recorded vote of the total members of the city council. (California Government Code Section 36936.) Cities with charters may prescribe their own vote requirements. Local elected officials are always well-advised to consult with their local agency counsel on how state law may affect the vote count.

After consulting state statutes, step number two is to check the rules of the body. If the rules of the body say that you count votes of "those present" then you treat abstentions one way. However, if the rules of the body say that you count the votes of those "present and voting," then you treat abstentions a different way. And if the rules of the body are silent on the subject, then the general rule of thumb (and default rule) is that you count all votes that are "present and voting."

Accordingly, under the "present and voting" system, you would **NOT** count abstention votes on the motion. Members who abstain are counted for purposes of determining quorum (they are "present"), but you treat the abstention votes on the motion as if they did not exist (they are not "voting"). On the other hand, if the rules of the body specifically say that you count votes of those "present" then you **DO** count abstention votes both in establishing the quorum and on the motion. In this event, the abstention votes act just like "no" votes.

How does this work in practice?
Here are a few examples.

Assume that a five-member city council is voting on a motion that requires a simple majority vote to pass, and assume further that the body has no specific rule on counting votes. Accordingly, the default rule kicks in and we count all votes of members that are "present and voting." If the vote on the motion is 3-2, the motion passes. If the motion is 2-2 with one abstention, the motion fails.

Assume a five-member city council voting on a motion that requires a two-thirds majority vote to pass, and further assume that the body has no specific rule on counting votes. Again, the default rule applies. If the vote is 3-2, the motion fails for lack of a two-thirds majority. If the vote is 4-1, the motion passes with a clear two-thirds majority. A vote of three "yes," one "no" and one "abstain" also results in passage of the motion. Once again, the abstention is counted only for the purpose of determining quorum, but on the actual vote on the motion, it is as if the abstention vote never existed — so an effective 3-1 vote is clearly a two-thirds majority vote.

Now, change the scenario slightly. Assume the same five-member city council voting on a motion that requires a two-thirds majority vote to pass, but now assume that the body **DOES** have a specific rule requiring a two-thirds vote of members "present." Under this specific rule, we must count the members present not only for quorum but also for the motion. In this scenario, any abstention has the same force and effect as if it were a "no" vote. Accordingly, if the votes were three "yes," one "no" and one "abstain," then the motion fails. The abstention in this case is treated like a "no" vote and effective vote of 3-2 is not enough to pass two-thirds majority muster.

Now, exactly how does a member cast an "abstention" vote? Any time a member votes "abstain" or says, "I abstain," that is an abstention. However, if a member votes "present" that is also treated as an abstention (the member is essentially saying, "Count me for purposes of a quorum, but my vote on the issue is abstain.") In fact, any manifestation of intention not to vote either "yes" or "no" on the pending motion may be treated by the chair as an abstention. If written ballots are cast, a blank or unreadable ballot is counted as an abstention as well.

Can a member vote "absent" or "count me as absent?" Interesting question. The ruling on this is up to the chair. The better approach is for the chair to count this as if the member had left his/her chair and is actually "absent." That, of course, affects the quorum. However, the chair may also treat this as a vote to abstain, particularly if the person does not actually leave the dais.

The Motion to Reconsider

There is a special and unique motion that requires a bit of explanation all by itself; the motion to reconsider. A tenet of parliamentary procedure is finality. After vigorous discussion, debate and a vote, there must be some closure to the issue. And so, after a vote is taken, the matter is deemed closed, subject only to reopening if a proper motion to consider is made and passed.

A motion to reconsider requires a majority vote to pass like other garden-variety motions, but there are two special rules that apply only to the motion to reconsider.

First, is the matter of timing. A motion to reconsider must be made at the meeting where the item was first voted upon. A motion to reconsider made at a later time is untimely. (The body, however, can always vote to suspend the rules and, by a two-thirds majority, allow a motion to reconsider to be made at another time.)

Second, a motion to reconsider may be made only by certain members of the body. Accordingly, a motion to reconsider may be made only by a member who voted in the majority on the original motion. If such a member has a change of heart, he or she may make the motion to reconsider (any other member of the body — including a member who voted in the minority on the original motion — may second the motion). If a member who voted in the minority seeks to make the motion to reconsider, it must be ruled out of order. The purpose of this rule is finality. If a member of minority could make a motion to reconsider, then the item could be brought back to the body again and again, which would defeat the purpose of finality.

If the motion to reconsider passes, then the original matter is back before the body, and a new original motion is in order. The matter may be discussed and debated as if it were on the floor for the first time.

Courtesy and Decorum

The rules of order are meant to create an atmosphere where the members of the body and the members of the public can attend to business efficiently, fairly and with full participation. At the same time, it is up to the chair and the members of the body to maintain common courtesy and decorum. Unless the setting is very informal, it is always best for only one person at a time to have the floor, and it is always best for every speaker to be first recognized by the chair before proceeding to speak.

The chair should always ensure that debate and discussion of an agenda item focuses on the item and the policy in question, not the personalities of the members of the body. Debate on policy is healthy, debate on personalities is not. The chair has the right to cut off discussion that is too personal, is too loud, or is too crude.

Debate and discussion should be focused, but free and open. In the interest of time, the chair may, however, limit the time allotted to speakers, including members of the body.

Can a member of the body interrupt the speaker? The general rule is "no." There are, however, exceptions. A speaker may be interrupted for the following reasons:

Privilege. The proper interruption would be, "point of privilege." The chair would then ask the interrupter to "state your point." Appropriate points of privilege relate to anything that would interfere with the normal comfort of the meeting. For example, the room may be too hot or too cold, or a blowing fan might interfere with a person's ability to hear.

Order. The proper interruption would be, "point of order." Again, the chair would ask the interrupter to "state your point." Appropriate points of order relate to anything that would not be considered appropriate conduct of the meeting. For example, if the chair moved on to a vote on a motion that permits debate without allowing that discussion or debate.

Appeal. If the chair makes a ruling that a member of the body disagrees with, that member may appeal the ruling of the chair. If the motion is seconded, and after debate, if it passes by a simple majority vote, then the ruling of the chair is deemed reversed.

Call for orders of the day. This is simply another way of saying, "return to the agenda." If a member believes that the body has drifted from the agreed-upon agenda, such a call may be made. It does not require a vote, and when the chair discovers that the agenda has not been followed, the chair simply reminds the body to return to the agenda item properly before them. If the chair fails to do so, the chair's determination may be appealed.

Withdraw a motion. During debate and discussion of a motion, the maker of the motion on the floor, at any time, may interrupt a speaker to withdraw his or her motion from the floor. The motion is immediately deemed withdrawn, although the chair may ask the person who seconded the motion if he or she wishes to make the motion, and any other member may make the motion if properly recognized.

Special Notes About Public Input

The rules outlined above will help make meetings very public-friendly. But in addition, and particularly for the chair, it is wise to remember three special rules that apply to each agenda item:

Rule One: Tell the public what the body will be doing.

Rule Two: Keep the public informed while the body is doing it.

Rule Three: When the body has acted, tell the public what the body did.

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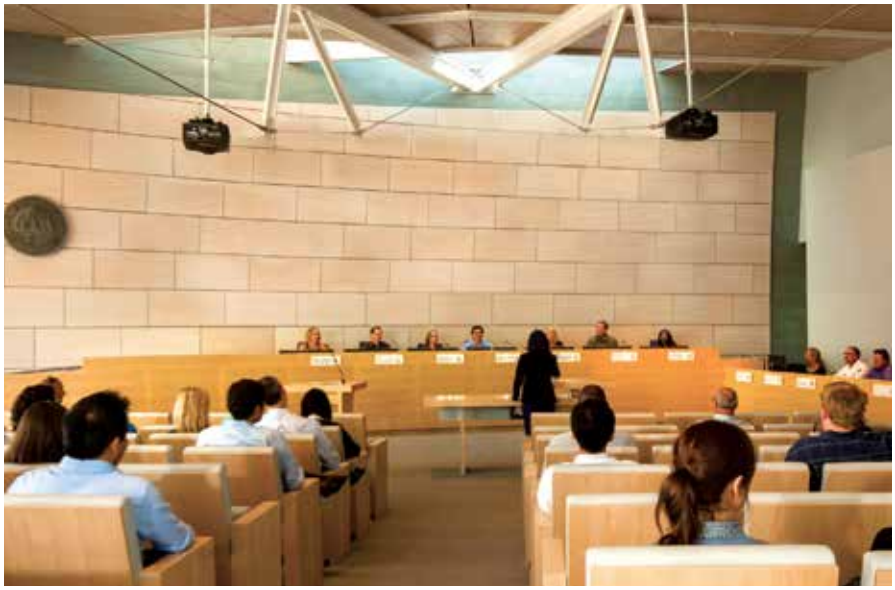

Open & Public V

A GUIDE TO THE RALPH M. BROWN ACT

REVISED APRIL 2016

TABLE OF CONTENTS

Chapter 1

IT IS THE PEOPLE'S BUSINESS

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The right of access

Two key parts of the Brown Act have not changed since its adoption in 1953. One is the Brown Act's initial section, declaring the Legislature's intent:

"In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly."

"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."[1]

The people reconfirmed that intent 50 years later in the November 2004 election by adopting Proposition 59, amending the California Constitution to include a public right of access to government information:

> *"The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."*[2]

PRACTICE TIP: The key to the Brown Act is a single sentence. In summary, all meetings shall be **open and public** except when the Brown Act authorizes otherwise.

The Brown Act's other unchanged provision is a single sentence:

> *"All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."*[3]

That one sentence is by far the most important of the entire Brown Act. If the opening is the soul, that sentence is the heart of the Brown Act.

Broad coverage

The Brown Act covers members of virtually every type of local government body, elected or appointed, decision-making or advisory. Some types of private organizations are covered, as are newly-elected members of a legislative body, even before they take office.

Similarly, meetings subject to the Brown Act are not limited to face-to-face gatherings. They also include any communication medium or device through which a majority of a legislative body

discusses, deliberates or takes action on an item of business outside of a noticed meeting. They include meetings held from remote locations by teleconference.

New communication technologies present new Brown Act challenges. For example, common email practices of forwarding or replying to messages can easily lead to a serial meeting prohibited by the Brown Act, as can participation by members of a legislative body in an internet chatroom or blog dialogue. Communicating during meetings using electronic technology (such as laptop computers, tablets, or smart phones) may create the perception that private communications are influencing the outcome of decisions; some state legislatures have banned the practice. On the other hand, widespread cablecasting and web streaming of meetings has greatly expanded public access to the decision-making process.

Narrow exemptions

The express purpose of the Brown Act is to assure that local government agencies conduct the public's business openly and publicly. Courts and the California Attorney General usually broadly construe the Brown Act in favor of greater public access and narrowly construe exemptions to its general rules.[4]

Generally, public officials should think of themselves as living in glass houses, and that they may only draw the curtains when it is in the public interest to preserve confidentiality. Closed sessions may be held only as specifically authorized by the provisions of the Brown Act itself.

The Brown Act, however, is limited to meetings among a majority of the members of multi-member government bodies when the subject relates to local agency business. It does not apply to independent conduct of individual decision-makers. It does not apply to social, ceremonial, educational, and other gatherings as long as a majority of the members of a body do not discuss issues related to their local agency's business. Meetings of temporary advisory committees — as distinguished from standing committees — made up solely of less than a quorum of a legislative body are not subject to the Brown Act.

The law does not apply to local agency staff or employees, but they may facilitate a violation by acting as a conduit for discussion, deliberation, or action by the legislative body.[5]

The law, on the one hand, recognizes the need of individual local officials to meet and discuss matters with their constituents. On the other hand, it requires — with certain specific exceptions to protect the community and preserve individual rights — that the decision-making process be public. Sometimes the boundary between the two is not easy to draw.

PRACTICE TIP: Think of the government's house as being made of glass. The curtains may be drawn only to further the public's interest. A local policy on the use of laptop computers, tablets, and smart phones during Brown Act meetings may help avoid problems.

Public participation in meetings

In addition to requiring the public's business to be conducted in open, noticed meetings, the Brown Act also extends to the public the right to participate in meetings. Individuals, lobbyists, and members of the news media possess the right to attend, record, broadcast, and participate in public meetings. The public's participation is further enhanced by the Brown Act's requirement that a meaningful agenda be posted in advance of meetings, by limiting discussion and action to matters listed on the agenda, and by requiring that meeting materials be made available.

Legislative bodies may, however, adopt reasonable regulations on public testimony and the conduct of public meetings, including measures to address disruptive conduct and irrelevant speech.

Controversy

Not surprisingly, the Brown Act has been a source of confusion and controversy since its inception. News media and government watchdogs often argue the law is toothless, pointing out that there has never been a single criminal conviction for a violation. They often suspect that closed sessions are being misused.

Public officials complain that the Brown Act makes it difficult to respond to constituents and requires public discussions of items better discussed privately — such as why a particular person should not be appointed to a board or commission. Many elected officials find the Brown Act inconsistent with their private business experiences. Closed meetings can be more efficient; they eliminate grandstanding and promote candor. The techniques that serve well in business — the working lunch, the sharing of information through a series of phone calls or emails, the backroom conversations and compromises — are often not possible under the Brown Act.

As a matter of public policy, California (along with many other states) has concluded that there is more to be gained than lost by conducting public business in the open. Government behind closed doors may well be efficient and business-like, but it may be perceived as unresponsive and untrustworthy.

PRACTICE TIP: Transparency is a foundational value for ethical government practices. The Brown Act is a floor, not a ceiling, for conduct.

Beyond the law — good business practices

Violations of the Brown Act can lead to invalidation of an agency's action, payment of a challenger's attorney fees, public embarrassment, even criminal prosecution. But the Brown Act is a floor, not a ceiling for conduct of public officials. This guide is focused not only on the Brown Act as a minimum standard, but also on meeting practices or activities that, legal or not, are likely to create controversy. Problems may crop up, for example, when agenda descriptions are too brief or vague, when an informal get-together takes on the appearance of a meeting, when an agency conducts too much of its business in closed session or discusses matters in closed session that are beyond the authorized scope, or when controversial issues arise that are not on the agenda.

The Brown Act allows a legislative body to adopt practices and requirements for greater access to meetings for itself and its subordinate committees and bodies that are more stringent than the law itself requires.[6] Rather than simply restate the basic requirements of the Brown Act, local open meeting policies should strive to anticipate and prevent problems in areas where the Brown Act does not provide full guidance. As with the adoption of any other significant policy, public comment should be solicited.

A local policy could build on these basic Brown Act goals:

- A legislative body's need to get its business done smoothly;
- The public's right to participate meaningfully in meetings, and to review documents used in decision-making at a relevant point in time;
- A local agency's right to confidentially address certain negotiations, personnel matters, claims and litigation; and
- The right of the press to fully understand and communicate public agency decision-making.

An explicit and comprehensive public meeting and information policy, especially if reviewed periodically, can be an important element in maintaining or improving public relations. Such a policy exceeds the absolute requirements of the law — but if the law were enough, this guide would be unnecessary. A narrow legalistic approach will not avoid or resolve potential controversies. An agency should consider going beyond the law, and look at its unique circumstances and determine if there is a better way to prevent potential problems and promote public trust. At the very least, local agencies need to think about how their agendas are structured in order to make Brown Act compliance easier. They need to plan carefully to make sure public participation fits smoothly into the process.

Achieving balance

The Brown Act should be neither an excuse for hiding the ball nor a mechanism for hindering efficient and orderly meetings. The Brown Act represents a balance among the interests of constituencies whose interests do not always coincide. It calls for openness in local government, yet should allow government to function responsively and productively.

There must be both adequate notice of what discussion and action is to occur during a meeting as well as a normal degree of spontaneity in the dialogue between elected officials and their constituents.

The ability of an elected official to confer with constituents or colleagues must be balanced against the important public policy prohibiting decision-making outside of public meetings.

In the end, implementation of the Brown Act must ensure full participation of the public and preserve the integrity of the decision-making process, yet not stifle government officials and impede the effective and natural operation of government.

PRACTICE TIP: The Brown Act should be viewed as a tool to facilitate the business of local government agencies. Local policies that go beyond the minimum requirements of law may help instill public confidence and avoid problems.

Historical note

In late 1951, *San Francisco Chronicle* reporter Mike Harris spent six weeks looking into the way local agencies conducted meetings. State law had long required that business be done in public, but Harris discovered secret meetings or caucuses were common. He wrote a 10-part series on "Your Secret Government" that ran in May and June 1952.

Out of the series came a decision to push for a new state open meeting law. Harris and Richard (Bud) Carpenter, legal counsel for the League of California Cities, drafted such a bill and Assembly Member Ralph M. Brown agreed to carry it. The Legislature passed the bill and Governor Earl Warren signed it into law in 1953.

The Ralph M. Brown Act, known as the Brown Act, has evolved under a series of amendments and court decisions, and has been the model for other open meeting laws — such as the Bagley-Keene Act, enacted in 1967 to cover state agencies.

Assembly Member Brown is best known for the open meeting law that carries his name. He was elected to the Assembly in 1942 and served 19 years, including the last three years as Speaker. He then became an appellate court justice.

ENDNOTES:

1 California Government Code section 54950

2 California Constitution, Art. 1, section 3(b)(1)

3 California Government Code section 54953(a)

4 This principle of broad construction when it furthers public access and narrow construction if a provision limits public access is also stated in the amendment to the State's Constitution adopted by Proposition 59 in 2004. California Constitution, Art. 1, section 3(b)(2).

5 California Government Code section 54952.2(b)(2) and (c)(1); *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533

6 California Government Code section 54953.7

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Chapter 2

LEGISLATIVE BODIES

Chapter 2

LEGISLATIVE BODIES

The Brown Act applies to the legislative bodies of local agencies. It defines "legislative body" broadly to include just about every type of decision-making body of a local agency.[1]

What is a "legislative body" of a local agency?

A "legislative body" includes:

- **The "governing body** of a local agency" and certain of its subsidiary bodies; "or any other local body created by state or federal statute."[2] This includes city councils, boards of supervisors, school boards and boards of trustees of special districts. A "local agency" is any city, county, city and county, school district, municipal corporation, successor agency to a redevelopment agency, district, political subdivision or other local public agency.[3] A housing authority is a local agency under the Brown Act even though it is created by and is an agent of the state.[4] The California Attorney General has opined that air pollution control districts and regional open space districts are also covered.[5] Entities created pursuant to joint powers agreements are also local agencies within the meaning of the Brown Act.[6]

PRACTICE TIP: The prudent presumption is that an advisory committee or task force is subject to the Brown Act. Even if one clearly is not, it may want to comply with the Brown Act. Public meetings may reduce the possibility of misunderstandings and controversy.

- **Newly-elected members** of a legislative body who have not yet assumed office must conform to the requirements of the Brown Act as if already in office.[7] Thus, meetings between incumbents and newly-elected members of a legislative body, such as a meeting between two outgoing members and a member-elect of a five-member body, could violate the Brown Act.

Q. On the morning following the election to a five-member legislative body of a local agency, two successful candidates, neither an incumbent, meet with an incumbent member of the legislative body for a celebratory breakfast. Does this violate the Brown Act?

A. *It might, and absolutely would if the conversation turns to agency business. Even though the candidates-elect have not officially been sworn in, the Brown Act applies. If purely a social event, there is no violation but it would be preferable if others were invited to attend to avoid the appearance of impropriety.*

- **Appointed bodies** — whether permanent or temporary, decision-making or advisory — including planning commissions, civil service commissions and other subsidiary committees, boards, and bodies. Volunteer groups, executive search committees, task forces, and blue ribbon committees created by formal action of the governing body are legislative bodies. When the members of two or more legislative bodies are appointed to serve on an entirely separate advisory group, the resulting body may be subject to the

Brown Act. In one reported case, a city council created a committee of two members of the city council and two members of the city planning commission to review qualifications of prospective planning commissioners and make recommendations to the council. The court held that their joint mission made them a legislative body subject to the Brown Act. Had the two committees remained separate; and met only to exchange information and report back to their respective boards, they would have been exempt from the Brown Act.[8]

- **Standing committees** of a legislative body, irrespective of their composition, which have either: (1) a continuing subject matter jurisdiction; or (2) a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body.[9] Even if it comprises less than a quorum of the governing body, a standing committee is subject to the Brown Act. For example, if a governing body creates long-term committees on budget and finance or on public safety, those are standing committees subject to the Brown Act. Further, according to the California Attorney General, function over form controls. For example, a statement by the legislative body that the advisory committee "shall not exercise continuing subject matter jurisdiction" or the fact that the committee does not have a fixed meeting schedule is not determinative.[10] "Formal action" by a legislative body includes authorization given to the agency's executive officer to appoint an advisory committee pursuant to agency-adopted policy.[11]
- The governing body of any **private organization** either: (1) created by the legislative body in order to exercise authority that may lawfully be delegated by such body to a private corporation, limited liability company or other entity; or (2) that receives agency funding and whose governing board includes a member of the legislative body of the local agency appointed by the legislative body as a full voting member of the private entity's governing board.[12] These include some nonprofit corporations created by local agencies.[13] If a local agency contracts with a private firm for a service (for example, payroll, janitorial, or food services), the private firm is not covered by the Brown Act.[14] When a member of a legislative body sits on a board of a private organization as a private person and is not appointed by the legislative body, the board will not be subject to the Brown Act. Similarly, when the legislative body appoints someone other than one of its own members to such boards, the Brown Act does not apply. Nor does it apply when a private organization merely receives agency funding.[15]

Q: The local chamber of commerce is funded in part by the city. The mayor sits on the chamber's board of directors. Is the chamber board a legislative body subject to the Brown Act?

A: *Maybe. If the chamber's governing documents require the mayor to be on the board and the city council appoints the mayor to that position, the board is a legislative body. If, however, the chamber board independently appoints the mayor to its board, or the mayor attends chamber board meetings in a purely advisory capacity, it is not.*

Q: If a community college district board creates an auxiliary organization to operate a campus bookstore or cafeteria, is the board of the organization a legislative body?

A: *Yes. But, if the district instead contracts with a private firm to operate the bookstore or cafeteria, the Brown Act would not apply to the private firm.*

- **Certain types of hospital operators.** A lessee of a hospital (or portion of a hospital)

PRACTICE TIP: It can be difficult to determine whether a subcommittee of a body falls into the category of a standing committee or an exempt temporary committee. Suppose a committee is created to explore the renewal of a franchise or a topic of similarly limited scope and duration. Is it an exempt temporary committee or a non-exempt standing committee? The answer may depend on factors such as how meeting schedules are determined, the scope of the committee's charge, or whether the committee exists long enough to have "continuing jurisdiction."

first leased under Health and Safety Code subsection 32121(p) after January 1, 1994, which exercises "material authority" delegated to it by a local agency, whether or not such lessee is organized and operated by the agency or by a delegated authority.[16]

What is not a "legislative body" for purposes of the Brown Act?

- A temporary advisory committee composed **solely of less than a quorum** of the legislative body that serves a limited or single purpose, that is not perpetual, and that will be dissolved once its specific task is completed is not subject to the Brown Act.[17] Temporary committees are sometimes called *ad hoc* committees, a term not used in the Brown Act. Examples include an advisory committee composed of less than a quorum created to interview candidates for a vacant position or to meet with representatives of other entities to exchange information on a matter of concern to the agency, such as traffic congestion.[18]
- Groups advisory to a single decision-maker or appointed by staff are not covered. The Brown Act applies only to committees created by formal action of the legislative body and not to committees created by others. A committee advising a superintendent of schools would not be covered by the Brown Act. However, the same committee, if created by formal action of the school board, would be covered.[19]

  Q. A member of the legislative body of a local agency informally establishes an advisory committee of five residents to advise her on issues as they arise. Does the Brown Act apply to this committee?

  A. *No, because the committee has not been established by formal action of the legislative body.*

  Q. During a meeting of the city council, the council directs the city manager to form an advisory committee of residents to develop recommendations for a new ordinance. The city manager forms the committee and appoints its members; the committee is instructed to direct its recommendations to the city manager. Does the Brown Act apply to this committee?

  A. *Possibly, because the direction from the city council might be regarded as a formal action of the body notwithstanding that the city manager controls the committee.*

- Individual decision makers who are not elected or appointed members of a legislative body are not covered by the Brown Act. For example, a disciplinary hearing presided over by a department head or a meeting of agency department heads are not subject to the Brown Act since such assemblies are not those of a legislative body.[20]
- Public employees, each acting individually and not engaging in collective deliberation on a specific issue, such as the drafting and review of an agreement, do not constitute a legislative body under the Brown Act, even if the drafting and review process was established by a legislative body.[21]
- County central committees of political parties are also not Brown Act bodies.[22]

ENDNOTES:

1 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, 1127

2 California Government Code section 54952(a) and (b)

3 California Government Code section 54951; Health and Safety Code section 34173(g) (successor agencies to former redevelopment agencies subject to the Brown Act). But see Education Code section 35147, which exempts certain school councils and school site advisory committees from the Brown Act and imposes upon them a separate set of rules.

4 *Torres v. Board of Commissioners of Housing Authority of Tulare County* (1979) 89 Cal.App.3d 545, 549-550

5 71 Ops.Cal.Atty.Gen. 96 (1988); 73 Ops.Cal.Atty.Gen. 1 (1990)

6 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App.4th 354, 362

7 California Government Code section 54952.1

8 *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 804-805

9 California Government Code section 54952(b)

10 79 Ops.Cal.Atty.Gen. 69 (1996)

11 *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 793

12 California Government Code section 54952(c)(1). Regarding private organizations that receive local agency funding, the same rule applies to a full voting member appointed prior to February 9, 1996 who, after that date, is made a non-voting board member by the legislative body. California Government Code section 54952(c)(2)

13 California Government Code section 54952(c)(1)(A); International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal.App.4th 287, 300; Epstein v. Hollywood Entertainment Dist. II Business Improvement District (2001) 87 Cal.App.4th 862, 876; see also 85 Ops.Cal.Atty.Gen. 55 (2002)

14 *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal* (1999) 69 Cal. App.4th 287, 300 fn. 5

15 "*The Brown Act, Open Meetings for Local Legislative Bodies,*" California Attorney General's Office (2003), p. 7

16 California Government Code section 54952(d)

17 California Government Code section 54952(b); see also *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors* (1993) 6 Cal.4th 821, 832.

18 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, 1129

19 56 Ops.Cal.Atty.Gen. 14, 16-17 (1973)

20 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870, 878-879

21 *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1513

22 59 Ops.Cal.Atty.Gen. 162, 164 (1976)

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Chapter 3

MEETINGS

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MEETINGS

The Brown Act only applies to meetings of local legislative bodies. The Brown Act defines a meeting as: "… and any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take any action on any item that is within the subject matter jurisdiction of the legislative body."[1] The term "meeting" is not limited to gatherings at which action is taken but includes deliberative gatherings as well. A hearing before an individual hearing officer is not a meeting under the Brown Act because it is not a hearing before a legislative body.[2]

Brown Act meetings

Brown Act meetings include a legislative body's regular meetings, special meetings, emergency meetings, and adjourned meetings.

- **"Regular meetings"** are meetings occurring at the dates, times, and location set by resolution, ordinance, or other formal action by the legislative body and are subject to 72-hour posting requirements.[3]
- **"Special meetings"** are meetings called by the presiding officer or majority of the legislative body to discuss only discrete items on the agenda under the Brown Act's notice requirements for special meetings and are subject to 24-hour posting requirements.[4]
- **"Emergency meetings"** are a limited class of meetings held when prompt action is needed due to actual or threatened disruption of public facilities and are held on little notice.[5]
- **"Adjourned meetings"** are regular or special meetings that have been adjourned or re-adjourned to a time and place specified in the order of adjournment, with no agenda required for regular meetings adjourned for less than five calendar days as long as no additional business is transacted.[6]

Six exceptions to the meeting definition

The Brown Act creates six exceptions to the meeting definition:[7]

Individual Contacts

The first exception involves individual contacts between a member of the legislative body and any other person. The Brown Act does not limit a legislative body member acting on his or her own. This exception recognizes the right to confer with constituents, advocates, consultants, news reporters, local agency staff, or a colleague.

Individual contacts, however, cannot be used to do in stages what would be prohibited in one step. For example, a series of individual contacts that leads to discussion, deliberation, or action among a majority of the members of a legislative body is prohibited. Such serial meetings are discussed below.

Conferences

The second exception allows a legislative body majority to attend a conference or similar gathering open to the public that addresses issues of general interest to the public or to public agencies of the type represented by the legislative body.

Among other things, this exception permits legislative body members to attend annual association conferences of city, county, school, community college, and other local agency officials, so long as those meetings are open to the public. However, a majority of members cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their local agency's subject matter jurisdiction.

Community Meetings

The third exception allows a legislative body majority to attend an open and publicized meeting held by another organization to address a topic of local community concern. A majority cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the legislative body's subject matter jurisdiction. Under this exception, a legislative body majority may attend a local service club meeting or a local candidates' night if the meetings are open to the public.

> **"I see we have four distinguished members of the city council at our meeting tonight," said the chair of the Environmental Action Coalition. "I wonder if they have anything to say about the controversy over enacting a slow growth ordinance?"**
>
> *The Brown Act permits a majority of a legislative body to attend and speak at an open and publicized meeting conducted by another organization. The Brown Act may nevertheless be violated if a majority discusses, deliberates, or takes action on an item during the meeting of the other organization. There is a fine line between what is permitted and what is not; hence, members should exercise caution when participating in these types of events.*

Q. The local chamber of commerce sponsors an open and public candidate debate during an election campaign. Three of the five agency members are up for re-election and all three participate. All of the candidates are asked their views of a controversial project scheduled for a meeting to occur just after the election. May the three incumbents answer the question?

A. *Yes, because the Brown Act does not constrain the incumbents from expressing their views regarding important matters facing the local agency as part of the political process the same as any other candidates.*

Other Legislative Bodies

The fourth exception allows a majority of a legislative body to attend an open and publicized meeting of: (1) another body of the local agency; and (2) a legislative body of another local agency.[8] Again, the majority cannot discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within their subject matter jurisdiction. This exception allows, for example, a city council or a majority of a board of supervisors to attend a controversial meeting of the planning commission.

Nothing in the Brown Act prevents the majority of a legislative body from sitting together at such a meeting. They may choose not to, however, to preclude any possibility of improperly discussing local agency business and to avoid the appearance of a Brown Act violation. Further, aside from the Brown Act, there may be other reasons, such as due process considerations, why the members should avoid giving public testimony or trying to influence the outcome of proceedings before a subordinate body.

Q. The entire legislative body intends to testify against a bill before the Senate Local Government Committee in Sacramento. Must this activity be noticed as a meeting of the body?

A. *No, because the members are attending and participating in an open meeting of another governmental body which the public may attend.*

Q. The members then proceed upstairs to the office of their local Assembly member to discuss issues of local interest. Must this session be noticed as a meeting and be open to the public?

A. *Yes, because the entire body may not meet behind closed doors except for proper closed sessions. The same answer applies to a private lunch or dinner with the Assembly member.*

Standing Committees

The fifth exception authorizes the attendance of a majority at an open and noticed meeting of a standing committee of the legislative body, provided that the legislative body members who are not members of the standing committee attend only as observers (meaning that they cannot speak or otherwise participate in the meeting).[9]

Q. The legislative body establishes a standing committee of two of its five members, which meets monthly. A third member of the legislative body wants to attend these meetings and participate. May she?

A. *She may attend, but only as an observer; she may not participate.*

Social or Ceremonial Events

The final exception permits a majority of a legislative body to attend a purely social or ceremonial occasion. Once again, a majority cannot discuss business among themselves of a specific nature that is within the subject matter jurisdiction of the legislative body.

Nothing in the Brown Act prevents a majority of members from attending the same football game, party, wedding, funeral, reception, or farewell. The test is not whether a majority of a legislative body attends the function, but whether business of a specific nature within the subject matter jurisdiction of the body is discussed. So long as no such business is discussed, there is no violation of the Brown Act.

Grand Jury Testimony

In addition, members of a legislative body, either individually or collectively, may give testimony in private before a grand jury.[10] This is the equivalent of a seventh exception to the Brown Act's definition of a "meeting."

Collective briefings

None of these exceptions permits a majority of a legislative body to meet together with staff in advance of a meeting for a collective briefing. Any such briefings that involve a majority of the body in the same place and time must be open to the public and satisfy Brown Act meeting notice and agenda requirements.

Retreats or workshops of legislative bodies

Gatherings by a majority of legislative body members at the legislative body's retreats, study sessions, or workshops are covered under the Brown Act. This is the case whether the retreat, study session, or workshop focuses on long-range agency planning, discussion of critical local issues, or team building and group dynamics.[11]

Q. The legislative body wants to hold a team-building session to improve relations among its members. May such a session be conducted behind closed doors?

A. *No, this is not a proper subject for a closed session, and there is no other basis to exclude the public. Council relations are a matter of public business.*

Serial meetings

One of the most frequently asked questions about the Brown Act involves serial meetings. At any one time, such meetings involve only a portion of a legislative body, but eventually involve a majority. The Brown Act provides that "[a] majority of the members of a legislative body shall not, outside a meeting … 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."[12] The problem with serial meetings is the process, which deprives the public of an opportunity for meaningful observation of and participation in legislative body decision-making.

The serial meeting may occur by either a "daisy chain" or a "hub and spoke" sequence. In the daisy chain scenario, Member A contacts Member B, Member B contacts Member C, Member C contacts Member D and so on, until a quorum has discussed, deliberated, or taken action on an item within the legislative body's subject matter jurisdiction. The hub and spoke process involves at least two scenarios. In the first scenario, Member A (the hub) sequentially contacts Members B, C, and D and so on (the spokes), until a quorum has been contacted. In the second scenario, a staff member (the hub), functioning as an intermediary for the legislative body or one of its members, communicates with a majority of members (the spokes) one-by-one for for discussion, deliberation, or a decision on a proposed action.[13] Another example of a serial meeting is when a chief executive officer (the hub) briefs a majority of members (the spokes) prior to a formal meeting and, in the process, information about the members' respective views is revealed. Each of these scenarios violates the Brown Act.

A legislative body member has the right, if not the duty, to meet with constituents to address their concerns. That member also has the right to confer with a colleague (but not with a majority of the body, counting the member) or appropriate staff about local agency business. An employee or official of a local agency may engage in separate conversations or communications outside of an open and noticed meeting "with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body."[14]

The Brown Act has been violated, however, if several one-on-one meetings or conferences leads to a discussion, deliberation, or action by a majority. In one case, a violation occurred when a quorum of a city council, by a letter that had been circulated among members outside of a formal meeting, directed staff to take action in an eminent domain proceeding.[15]

A unilateral written communication to the legislative body, such as an informational or advisory memorandum, does not violate the Brown Act.[16] Such a memo, however, may be a public record.[17]

> **The phone call was from a lobbyist. "Say, I need your vote for that project in the south area. How about it?"**
>
> **"Well, I don't know," replied Board Member Aletto. "That's kind of a sticky proposition. You sure you need my vote?"**
>
> **"Well, I've got Bradley and Cohen lined up and another vote leaning. With you I'd be over the top."**
>
> **Moments later, the phone rings again. "Hey, I've been hearing some rumbles on that south area project," said the newspaper reporter. "I'm counting noses. How are you voting on it?"**

Neither the lobbyist nor the reporter has violated the Brown Act, but they are facilitating

a violation. The board member may have violated the Brown Act by hearing about the positions of other board members and indeed coaxing the lobbyist to reveal the other board members' positions by asking "You sure you need my vote?" The prudent course is to avoid such leading conversations and to caution lobbyists, staff, and news media against revealing such positions of others.

> **The mayor sat down across from the city manager. "From now on," he declared, "I want you to provide individual briefings on upcoming agenda items. Some of this material is very technical, and the council members don't want to sound like idiots asking about it in public. Besides that, briefings will speed up the meeting."**

Agency employees or officials may have separate conversations or communications outside of an open and noticed meeting "with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body."[18] Members should always be vigilant when discussing local agency business with anyone to avoid conversations that could lead to a discussion, deliberation or action taken among the majority of the legislative body.

> **"Thanks for the information," said Council Member Kim. "These zoning changes can be tricky, and now I think I'm better equipped to make the right decision."**
>
> **"Glad to be of assistance," replied the planning director. "I'm sure Council Member Jones is OK with these changes. How are you leaning?"**
>
> **"Well," said Council Member Kim, "I'm leaning toward approval. I know that two of my colleagues definitely favor approval."**

The planning director should not disclose Jones' prospective vote, and Kim should not disclose the prospective votes of two of her colleagues. Under these facts, there likely has been a serial meeting in violation of the Brown Act.

PRACTICE TIP: When briefing legislative body members, staff must exercise care not to disclose other members' views and positions.

Q. The agency's website includes a chat room where agency employees and officials participate anonymously and often discuss issues of local agency business. Members of the legislative body participate regularly. Does this scenario present a potential for violation of the Brown Act?

A. *Yes, because it is a technological device that may serve to allow for a majority of members to discuss, deliberate, or take action on matters of agency business.*

Q. A member of a legislative body contacts two other members on a five-member body relative to scheduling a special meeting. Is this an illegal serial meeting?

A. *No, the Brown Act expressly allows a majority of a body to call a special meeting, though the members should avoid discussing the merits of what is to be taken up at the meeting.*

Particular care should be exercised when staff briefings of legislative body members occur by email because of the ease of using the "reply to all" button that may inadvertently result in a Brown Act violation.

Informal gatherings

Often members are tempted to mix business with pleasure — for example, by holding a post-meeting gathering. Informal gatherings at which local agency business is discussed or transacted violate the law if they are not conducted in conformance with the Brown Act.[19] A luncheon gathering in a crowded dining room violates the Brown Act if the public does not have an opportunity to attend, hear, or participate in the deliberations of members.

> **Thursday at 11:30 a.m., as they did every week, the board of directors of the Dry Gulch Irrigation District trooped into Pop's Donut Shoppe for an hour of talk and fellowship. They sat at the corner window, fronting on Main and Broadway, to show they had nothing to hide. Whenever he could, the managing editor of the weekly newspaper down the street hurried over to join the board.**

A gathering like this would not violate the Brown Act if board members scrupulously avoided talking about irrigation district issues — which might be difficult. This kind of situation should be avoided. The public is unlikely to believe the board members could meet regularly without discussing public business. A newspaper executive's presence in no way lessens the potential for a violation of the Brown Act.

Q. The agency has won a major victory in the Supreme Court on an issue of importance. The presiding officer decides to hold an impromptu press conference in order to make a statement to the print and broadcast media. All the other members show up in order to make statements of their own and be seen by the media. Is this gathering illegal?

A. *Technically there is no exception for this sort of gathering, but as long as members do not state their intentions as to future action to be taken and the press conference is open to the public, it seems harmless.*

Technological conferencing

Except for certain nonsubstantive purposes, such as scheduling a special meeting, a conference call including a majority of the members of a legislative body is an unlawful meeting. But, in an effort to keep up with information age technologies, the Brown Act specifically allows a legislative body to use any type of teleconferencing to meet, receive public comment and testimony, deliberate, or conduct a closed session.[20] While the Brown Act contains specific requirements for conducting a teleconference, the decision to use teleconferencing is entirely discretionary with the body. No person has a right under the Brown Act to have a meeting by teleconference.

"Teleconference" is defined as "a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either

audio or video, or both."[21] In addition to the specific requirements relating to teleconferencing, the meeting must comply with all provisions of the Brown Act otherwise applicable. The Brown Act contains the following teleconferencing requirements:[22]

- Teleconferencing may be used for all purposes during any meeting;
- At least a quorum of the legislative body must participate from locations within the local agency's jurisdiction;
- Additional teleconference locations may be made available for the public;
- Each teleconference location must be specifically identified in the notice and agenda of the meeting, including a full address and room number, as may be applicable;
- Agendas must be posted at each teleconference location, even if a hotel room or a residence;
- Each teleconference location, including a hotel room or residence, must be accessible to the public and have technology, such as a speakerphone, to enable the public to participate;
- The agenda must provide the opportunity for the public to address the legislative body directly at each teleconference location; and
- All votes must be by roll call.

Q. A member on vacation wants to participate in a meeting of the legislative body and vote by cellular phone from her car while driving from Washington, D.C. to New York. May she?

A. *She may not participate or vote because she is not in a noticed and posted teleconference location.*

The use of teleconferencing to conduct a legislative body meeting presents a variety of issues beyond the scope of this guide to discuss in detail. Therefore, before teleconferencing a meeting, legal counsel for the local agency should be consulted.

Location of meetings

The Brown Act generally requires all regular and special meetings of a legislative body, including retreats and workshops, to be held within the boundaries of the territory over which the local agency exercises jurisdiction.[23]

An open and publicized meeting of a legislative body may be held outside of agency boundaries if the purpose of the meeting is one of the following:[24]

- Comply with state or federal law or a court order, or attend a judicial conference or administrative proceeding in which the local agency is a party;
- Inspect real or personal property that cannot be conveniently brought into the local agency's territory, provided the meeting is limited to items relating to that real or personal property;

Q. The agency is considering approving a major retail mall. The developer has built other similar malls, and invites the entire legislative body to visit a mall outside the jurisdiction. May the entire body go?

A. *Yes, the Brown Act permits meetings outside the boundaries of the agency for specified reasons and inspection of property is one such reason. The field trip must be treated as a meeting and the public must be allowed to attend.*

- Participate in multiagency meetings or discussions; however, such meetings must be held within the boundaries of one of the participating agencies, and all of those agencies must give proper notice;
- Meet in the closest meeting facility if the local agency has no meeting facility within its boundaries, or meet at its principal office if that office is located outside the territory over which the agency has jurisdiction;
- Meet with elected or appointed federal or California officials when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction;
- Meet in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility; or
- Visit the office of its legal counsel for a closed session on pending litigation, when to do so would reduce legal fees or costs.[25]

In addition, the governing board of a school or community college district may hold meetings outside of its boundaries to attend a conference on nonadversarial collective bargaining techniques, interview candidates for school district superintendent, or interview a potential employee from another district.[26] A school board may also interview members of the public residing in another district if the board is considering employing that district's superintendent.

Similarly, meetings of a joint powers authority can occur within the territory of at least one of its member agencies, and a joint powers authority with members throughout the state may meet anywhere in the state.[27]

Finally, if a fire, flood, earthquake, or other emergency makes the usual meeting place unsafe, the presiding officer can designate another meeting place for the duration of the emergency. News media that have requested notice of meetings must be notified of the designation by the most rapid means of communication available.[28]

Endnotes:

1 California Government Code section 54952.2(a)

2 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870

3 California Government Code section 54954(a)

4 California Government Code section 54956

5 California Government Code section 54956.5

6 California Government Code section 54955

7 California Government Code section 54952.2(c)

8 California Government Code section 54952.2(c)(4)

9 California Government Code section 54952.2(c)(6)

10 California Government Code section 54953.1

11 "*The Brown Act,*" California Attorney General (2003), p. 10

12 California Government Code section 54952.2(b)(1)

13 *Stockton Newspaper Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95

14 California Government Code section 54952.2(b)(2)

15 *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518

16 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363

17 California Government Code section 54957.5(a)

18 California Government Code section 54952.2(b)(2)

19 California Government Code section 54952.2; 43 Ops.Cal.Atty.Gen. 36 (1964)

20 California Government Code section 54953(b)(1)

21 California Government Code section 54953(b)(4)

22 California Government Code section 54953

23 California Government Code section 54954(b)

24 California Government Code section 54954(b)(1)-(7)

25 94 Ops.Cal.Atty.Gen. 15 (2011)

26 California Government Code section 54954(c)

27 California Government Code section 54954(d)

28 California Government Code section 54954(e)

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Chapter 4

AGENDAS, NOTICES, AND PUBLIC PARTICIPATION

Chapter 4

AGENDAS, NOTICES, AND PUBLIC PARTICIPATION

Effective notice is essential for an open and public meeting. Whether a meeting is open or how the public may participate in that meeting is academic if nobody knows about the meeting.

Agendas for regular meetings

Every regular meeting of a legislative body of a local agency — including advisory committees, commissions, or boards, as well as standing committees of legislative bodies — must be preceded by a posted agenda that advises the public of the meeting and the matters to be transacted or discussed.

The agenda must be posted at least 72 hours before the regular meeting in a location "freely accessible to members of the public."[1] The courts have not definitively interpreted the "freely accessible" requirement. The California Attorney General has interpreted this provision to require posting in a location accessible to the public 24 hours a day during the 72-hour period, but any of the 72 hours may fall on a weekend.[2] This provision may be satisfied by posting on a touch screen electronic kiosk accessible without charge to the public 24 hours a day during the 72-hour period.[3] While posting an agenda on an agency's Internet website will not, by itself, satisfy the "freely accessible" requirement since there is no universal access to the internet, an agency has a supplemental obligation to post the agenda on its website if: (1) the local agency has a website; and (2) the legislative body whose meeting is the subject of the agenda is either (a) a governing body, or (b) has members that are compensated, with one or more members that are also members of a governing body.[4]

Q. May the meeting of a governing body go forward if its agenda was either inadvertently not posted on the city's website or if the website was not operational during part or all of the 72-hour period preceding the meeting?

A. *At a minimum, the Brown Act calls for "substantial compliance" with all agenda posting requirements, including posting to the agency website.[5] Should website technical difficulties arise, seek a legal opinion from your agency attorney. The California Attorney General has opined that technical difficulties which cause the website agenda to become inaccessible for a portion of the 72 hours preceding a meeting do not automatically or inevitably lead to a Brown Act violation, provided the agency can demonstrate substantial compliance.[6] This inquiry requires a fact-specific examination of whether the agency or its legislative body made "reasonably effective efforts to notify interested persons of a public meeting" through online posting and other available means.[7] The Attorney General's opinion suggests that this examination would include an evaluation of how long a technical problem persisted, the efforts made to correct the problem or otherwise ensure that the public was informed, and the actual effect the problem had on public*

awareness, among other factors.[8] The City Attorneys' Department has taken the position that obvious website technical difficulties do not require cancellation of a meeting, provided that the agency meets all other Brown Act posting requirements and the agenda is available on the website once the technical difficulties are resolved.

The agenda must state the meeting time and place and must contain "a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session."[9] Special care should be taken to describe on the agenda each distinct action to be taken by the legislative body, and avoid overbroad descriptions of a "project" if the "project" is actually a set of distinct actions that must each be separately listed on the agenda.[10]

PRACTICE TIP: Putting together a meeting agenda requires careful thought.

Q. The agenda for a regular meeting contains the following items of business:

- Consideration of a report regarding traffic on Eighth Street; and
- Consideration of contract with ABC Consulting.

Are these descriptions adequate?

A. *If the first is, it is barely adequate. A better description would provide the reader with some idea of what the report is about and what is being recommended. The second is not adequate. A better description might read "consideration of a contract with ABC Consulting in the amount of $50,000 for traffic engineering services regarding traffic on Eighth Street."*

Q. The agenda includes an item entitled City Manager's Report, during which time the city manager provides a brief report on notable topics of interest, none of which are listed on the agenda.

Is this permissible?

A. *Yes, so long as it does not result in extended discussion or action by the body.*

A brief general description may not be sufficient for closed session agenda items. The Brown Act provides safe harbor language for the various types of permissible closed sessions. Substantial compliance with the safe harbor language is recommended to protect legislative bodies and elected officials from legal challenges.

Mailed agenda upon written request

The legislative body, or its designee, must mail a copy of the agenda or, if requested, the entire agenda packet, to any person who has filed a written request for such materials. These copies shall be mailed at the time the agenda is posted. If requested, these materials must be made available in appropriate alternative formats to persons with disabilities.

A request for notice is valid for one calendar year and renewal requests must be filed following January 1 of each year. The legislative body may establish a fee to recover the cost of providing the service. Failure of the requesting person to receive the agenda does not constitute grounds for invalidation of actions taken at the meeting.[11]

Notice requirements for special meetings

There is no express agenda requirement for special meetings, but the notice of the special meeting effectively serves as the agenda and limits the business that may be transacted or discussed. Written notice must be sent to each member of the legislative body (unless waived in writing by that member) and to each local newspaper of general circulation, and radio or television station that has requested such notice in writing. This notice must be delivered by personal delivery or any other means that ensures receipt, at least 24 hours before the time of the meeting.

The notice must state the time and place of the meeting, as well as all business to be transacted or discussed. It is recommended that the business to be transacted or discussed be described in the same manner that an item for a regular meeting would be described on the agenda — with a brief general description. As noted above, closed session items should be described in accordance with the Brown Act's safe harbor provisions to protect legislative bodies and elected officials from challenges of noncompliance with notice requirements.

The special meeting notice must also be posted at least 24 hours prior to the special meeting using the same methods as posting an agenda for a regular meeting: (1) at a site that is freely accessible to the public, and (2) on the agency's website if: (1) the local agency has a website; and (2) the legislative body whose meeting is the subject of the agenda is either (a) a governing body, or (b) has members that are compensated, with one or more members that are also members of a governing body.[12]

Notices and agendas for adjourned and continued meetings and hearings

A regular or special meeting can be adjourned and re-adjourned to a time and place specified in the order of adjournment.[13] If no time is stated, the meeting is continued to the hour for regular meetings. Whoever is present (even if they are less than a quorum) may so adjourn a meeting; if no member of the legislative body is present, the clerk or secretary may adjourn the meeting. If a meeting is adjourned for less than five calendar days, no new agenda need be posted so long as a new item of business is not introduced.[14] A copy of the order of adjournment must be posted within 24 hours after the adjournment, at or near the door of the place where the meeting was held.

A hearing can be continued to a subsequent meeting. The process is the same as for continuing adjourned meetings, except that if the hearing is continued to a time less than 24 hours away, a copy of the order or notice of continuance must be posted immediately following the meeting.[15]

Notice requirements for emergency meetings

The special meeting notice provisions apply to emergency meetings, except for the 24-hour notice.[16] News media that have requested written notice of special meetings must be notified by telephone at least one hour in advance of an emergency meeting, and all telephone numbers provided in that written request must be tried. If telephones are not working, the notice requirements are deemed waived. However, the news media must be notified as soon as possible of the meeting and any action taken.

News media may make a practice of having written requests on file for notification of special or emergency meetings. Absent such a request, a local agency has no legal obligation to notify news media of special or emergency meetings — although notification may be advisable in any event to avoid controversy.

Notice of compensation for simultaneous or serial meetings

A legislative body that has convened a meeting and whose membership constitutes a quorum of another legislative body, may convene a simultaneous or serial meeting of the other legislative body only after a clerk or member of the convened legislative body orally announces: (1) the amount of compensation or stipend, if any, that each member will be entitled to receive as a result of convening the meeting of the other legislative body; and (2) that the compensation or stipend is provided as a result of convening the meeting of that body.[17]

No oral disclosure of the amount of the compensation is required if the entire amount of such compensation is prescribed by statute and no additional compensation has been authorized by the local agency. Further, no disclosure is required with respect to reimbursements for actual and necessary expenses incurred in the performance of the member's official duties, such as for travel, meals, and lodging.

Educational agency meetings

The Education Code contains some special agenda and special meeting provisions.[18] However, they are generally consistent with the Brown Act. An item is probably void if not posted.[19] A school district board must also adopt regulations to make sure the public can place matters affecting the district's business on meeting agendas and to address the board on those items.[20]

Notice requirements for tax or assessment meetings and hearings

The Brown Act prescribes specific procedures for adoption by a city, county, special district, or joint powers authority of any new or increased tax or assessment imposed on businesses.[21] Though written broadly, these Brown Act provisions do not apply to new or increased real property taxes or assessments as those are governed by the California Constitution, Article XIIIC or XIIID, enacted by Proposition 218. At least one public meeting must be held to allow public testimony on the tax or assessment. In addition, there must also be at least 45 days notice of a public hearing at which the legislative body proposes to enact or increase the tax or assessment. Notice of the public meeting and public hearing must be provided at the same time and in the same document. The public notice relating to general taxes must be provided by newspaper publication. The public notice relating to new or increased business assessments must be provided through a mailing to all business owners proposed to be subject to the new or increased assessment. The agency may recover the reasonable costs of the public meetings, hearings, and notice.

The Brown Act exempts certain fees, standby or availability charges, recurring assessments, and new or increased assessments that are subject to the notice and hearing requirements of the Constitution.[22] As a practical matter, the Constitution's notice requirements have preempted this section of the Brown Act.

Non-agenda items

The Brown Act generally prohibits any action or discussion of items not on the posted agenda. However, there are three specific situations in which a legislative body can act on an item not on the agenda:[23]

- When a majority decides there is an "emergency situation" (as defined for emergency meetings);
- When two-thirds of the members present (or all members if less than two-thirds are present) determine there is a need for immediate action and the need to take action "came to the attention of the local agency subsequent to the agenda being posted." This exception requires a degree of urgency. Further, an item cannot be considered under this provision if the legislative body or the staff knew about the need to take immediate action before the agenda was posted. A new need does not arise because staff forgot to put an item on the agenda or because an applicant missed a deadline; or
- When an item appeared on the agenda of, and was continued from, a meeting held not more than five days earlier.

PRACTICE TIP: Subject to very limited exceptions, the Brown Act prohibits any action or discussion of an item not on the posted agenda.

The exceptions are narrow, as indicated by this list. The first two require a specific determination by the legislative body. That determination can be challenged in court and, if unsubstantiated, can lead to invalidation of an action.

> **"I'd like a two-thirds vote of the board, so we can go ahead and authorize commencement of phase two of the East Area Project," said Chair Lopez.**
>
> **"It's not on the agenda. But we learned two days ago that we finished phase one ahead of schedule — believe it or not — and I'd like to keep it that way. Do I hear a motion?"**

The desire to stay ahead of schedule generally would not satisfy "a need for immediate action." Too casual an action could invite a court challenge by a disgruntled resident. The prudent course is to place an item on the agenda for the next meeting and not risk invalidation.

> **"We learned this morning of an opportunity for a state grant," said the chief engineer at the regular board meeting, "but our application has to be submitted in two days. We'd like the board to give us the go ahead tonight, even though it's not on the agenda."**

A legitimate immediate need can be acted upon even though not on the posted agenda by following a two-step process:

- First, make two determinations: 1) that there is an immediate need to take action, and 2) that the need arose after the posting of the agenda. The matter is then placed on the agenda.
- Second, discuss and act on the added agenda item.

Responding to the public

The public can talk about anything within the jurisdiction of the legislative body, but the legislative body generally cannot act on or discuss an item not on the agenda. What happens when a member of the public raises a subject not on the agenda?

While the Brown Act does not allow discussion or action on items not on the agenda, it does allow members of the legislative body, or its staff, to "briefly respond" to comments or questions from members of the public, provide a reference to staff or other resources for factual information, or direct staff to place the issue on a future agenda. In addition, even without a comment from the public, a legislative body member or a staff member may ask for information, request a report back, request to place a matter on the agenda for a subsequent meeting (subject to the body's rules or procedures), ask a question for clarification, make a brief announcement, or briefly report on his or her own activities.[24] However, caution should be used to avoid any discussion or action on such items.

Council Member Jefferson: I would like staff to respond to Resident Joe's complaints during public comment about the repaving project on Elm Street — are there problems with this project?

City Manager Frank: The public works director has prepared a 45-minute power point presentation for you on the status of this project and will give it right now.

Council Member Brown: Take all the time you need; we need to get to the bottom of this. Our residents are unhappy.

It is clear from this dialogue that the Elm Street project was not on the council's agenda, but was raised during the public comment period for items not on the agenda. Council Member A properly asked staff to respond; the city manager should have given at most a brief response. If a lengthy report from the public works director was warranted, the city manager should have stated that it would be placed on the agenda for the next meeting. Otherwise, both the long report and the likely discussion afterward will improperly embroil the council in a matter that is not listed on the agenda.

The right to attend and observe meetings

A number of Brown Act provisions protect the public's right to attend, observe, and participate in meetings.

Members of the public cannot be required to register their names, provide other information, complete a questionnaire, or otherwise "fulfill any condition precedent" to attending a meeting. Any attendance list, questionnaire, or similar document posted at or near the entrance to the meeting room or circulated at a meeting must clearly state that its completion is voluntary and that all persons may attend whether or not they fill it out.[25]

No meeting can be held in a facility that prohibits attendance based on race, religion, color, national origin, ethnic group identification, age, sex, sexual orientation, or disability, or that is inaccessible to the disabled. Nor can a meeting be held where the public must make a payment or purchase in order to be present.[26] This does not mean, however, that the public is entitled to free entry to a conference attended by a majority of the legislative body.[27]

While a legislative body may use teleconferencing in connection with a meeting, the public must be given notice of and access to the teleconference location. Members of the public must be able to address the legislative body from the teleconference location.[28]

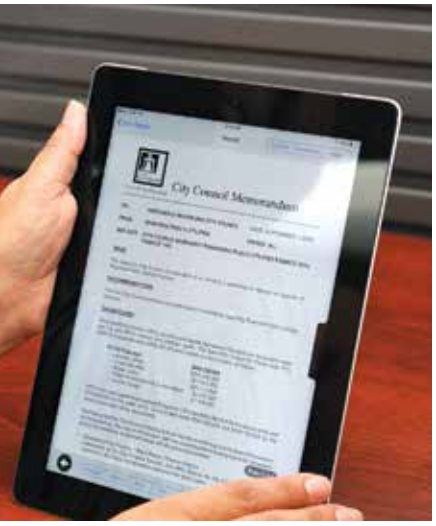
Action by secret ballot, whether preliminary or final, is flatly prohibited.[29]

All actions taken by the legislative body in open session, and the vote of each member thereon, must be disclosed to the public at the time the action is taken.[30]

Q: The agenda calls for election of the legislative body's officers. Members of the legislative body want to cast unsigned written ballots that would be tallied by the clerk, who would announce the results. Is this voting process permissible?

A: *No. The possibility that a public vote might cause hurt feelings among members of the legislative body or might be awkward — or even counterproductive — does not justify a secret ballot.*

The legislative body may remove persons from a meeting who willfully interrupt proceedings.[31] Ejection is justified only when audience members actually disrupt the proceedings.[32] If order cannot be restored after ejecting disruptive persons, the meeting room may be cleared. Members of the news media who have not participated in the disturbance must be allowed to continue to attend the meeting. The legislative body may establish a procedure to re-admit an individual or individuals not responsible for the disturbance.[33]



Records and recordings

The public has the right to review agendas and other writings distributed by any person to a majority of the legislative body in connection with a matter subject to discussion or consideration at a meeting. Except for privileged documents, those materials are public records and must be made available upon request without delay.[34] A fee or deposit as permitted by the California Public Records Act may be charged for a copy of a public record.[35]

Q: In connection with an upcoming hearing on a discretionary use permit, counsel for the legislative body transmits a memorandum to all members of the body outlining the litigation risks in granting or denying the permit. Must this memorandum be included in the packet of agenda materials available to the public?

A: *No. The memorandum is a privileged attorney-client communication.*

Q: In connection with an agenda item calling for the legislative body to approve a contract, staff submits to all members of the body a financial analysis explaining why the terms of the contract favor the local agency. Must this memorandum be included in the packet of agenda materials available to the public?

A. *Yes. The memorandum has been distributed to the majority of the legislative body, relates to the subject matter of a meeting, and is not a privileged communication.*

A legislative body may discuss or act on some matters without considering written materials. But if writings are distributed to a majority of a legislative body in connection with an agenda item, they must also be available to the public. A non-exempt or otherwise privileged writing distributed to a majority of the legislative body less than 72 hours before the meeting must be made available for inspection at the time of distribution at a public office or location designated for that purpose; and the agendas for all meetings of the legislative body must include the address of this office or location.[36] A writing distributed during a meeting must be made public:

- At the meeting if prepared by the local agency or a member of its legislative body; or
- After the meeting if prepared by some other person.[37]

Any tape or film record of an open and public meeting made for whatever purpose by or at the direction of the local agency is subject to the California Public Records Act; however, it may be erased or destroyed 30 days after the taping or recording. Any inspection of a video or tape recording is to be provided without charge on a video or tape player made available by the local agency.[38] The agency may impose its ordinary charge for copies that is consistent with the California Public Records Act.[39]

In addition, the public is specifically allowed to use audio or video tape recorders or still or motion picture cameras at a meeting to record the proceedings, absent a reasonable finding by the legislative body that noise, illumination, or obstruction of view caused by recorders or cameras would persistently disrupt the proceedings.[40]

Similarly, a legislative body cannot prohibit or restrict the public broadcast of its open and public meetings without making a reasonable finding that the noise, illumination, or obstruction of view would persistently disrupt the proceedings.[41]

The public's place on the agenda

Every agenda for a regular meeting must allow members of the public to speak on any item of interest, so long as the item is within the subject matter jurisdiction of the legislative body. Further, the public must be allowed to speak on a specific item of business before or during the legislative body's consideration of it.[42]

Q. Must the legislative body allow members of the public to show videos or make a power point presentation during the public comment part of the agenda, as long as the subject matter is relevant to the agency and is within the established time limit?

A. *Probably, although the agency is under no obligation to provide equipment.*

Moreover, the legislative body cannot prohibit public criticism of policies, procedures, programs, or services of the agency or the acts or omissions of the legislative body itself. But the Brown Act provides no immunity for defamatory statements.[43]

PRACTICE TIP: Public speakers cannot be compelled to give their name or address as a condition of speaking. The clerk or presiding officer may request speakers to complete a speaker card or identify themselves for the record, but must respect a speaker's desire for anonymity.

Q. May the presiding officer prohibit a member of the audience from publicly criticizing an agency employee by name during public comments?

A. *No, as long as the criticism pertains to job performance.*

Q. During the public comment period of a regular meeting of the legislative body, a resident urges the public to support and vote for a candidate vying for election to the body. May the presiding officer gavel the speaker out of order for engaging in political campaign speech?

A. *There is no case law on this subject. Some would argue that campaign issues are outside the subject matter jurisdiction of the body within the meaning of Section 54954.3(a). Others take the view that the speech must be allowed under paragraph (c) of that section because it is relevant to the governing of the agency and an implicit criticism of the incumbents.*

The legislative body may adopt reasonable regulations, including time limits, on public comments. Such regulations should be enforced fairly and without regard to speakers' viewpoints. The legislative body has discretion to modify its regulations regarding time limits on public comment if necessary. For example, the time limit could be shortened to accommodate a lengthy agenda or lengthened to allow additional time for discussion on a complicated matter.[44]

The public does not need to be given an opportunity to speak on an item that has already been considered by a committee made up exclusively of members of the legislative body at a public meeting, if all interested members of the public had the opportunity to speak on the item before or during its consideration, and if the item has not been substantially changed.[45]

Notices and agendas for special meetings must also give members of the public the opportunity to speak before or during consideration of an item on the agenda but need not allow members of the public an opportunity to speak on other matters within the jurisdiction of the legislative body.[46]

Endnotes:

1 California Government Code section 54954.2(a)(1)

2 78 Ops.Cal.Atty.Gen. 327 (1995)

3 88 Ops.Cal.Atty.Gen. 218 (2005)

4 California Government Code sections 54954.2(a)(1) and 54954.2(d)

5 California Government Code section 54960.1(d)(1)

6 ___ Ops.Cal.Atty.Gen.___, No. 14-1204 (January 19, 2016) 16 Cal. Daily Op. Serv. 937 (Cal.A.G.), 2016 WL 375262

7 *North Pacifica LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416, 1432

8 ___ Ops.Cal.Atty.Gen.___, No. 14-1204 (January 19, 2016) 16 Cal. Daily Op. Serv. 937 (Cal.A.G.), 2016 WL 375262, Slip Op. at p. 8

9 California Government Code section 54954.2(a)(1)

10 *San Joaquin Raptor Rescue v. County of Merced* (2013) 216 Cal.App.4th 1167 (legislative body's approval of CEQA action (mitigated negative declaration) without specifically listing it on the agenda violates Brown Act, even if the agenda generally describes the development project that is the subject of the CEQA analysis.)

11 California Government Code section 54954.1

12 California Government Code sections 54956(a) and (c)

13 California Government Code section 54955

14 California Government Code section 54954.2(b)(3)

15 California Government Code section 54955.1

16 California Government Code section 54956.5

17 California Government Code section 54952.3

18 Education Code sections 35144, 35145 and 72129

19 *Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196

20 California Education Code section 35145.5

21 California Government Code section 54954.6

22 See Cal.Const.Art.XIIIC, XIIID and California Government Code section 54954.6(h)

23 California Government Code section 54954.2(b)

24 California Government Code section 54954.2(a)(2)

25 California Government Code section 54953.3

26 California Government Code section 54961(a); California Government Code section 11135(a)

27 California Government Code section 54952.2(c)(2)

28 California Government Code section 54953(b)

29 California Government Code section 54953(c)

30 California Government Code section 54953(c)(2)

31 California Government Code section 54957.9.

32 *Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966 (silent and momentary Nazi salute directed towards mayor is not a disruption); *Acosta v. City of Costa Mesa* (9th Cir. 2013) 718 F.3d 800 (city council may not prohibit "insolent" remarks by members of the public absent actual disruption).

33 California Government Code section 54957.9

34 California Government Code section 54957.5

35 California Government Code section 54957.5(d)

36 California Government Code section 54957.5(b)

37 California Government Code section 54957.5(c)

38 California Government Code section 54953.5(b)

39 California Government Code section 54957.5(d)

40 California Government Code section 54953.5(a)

41 California Government Code section 54953.6

42 California Government Code section 54954.3(a)

43 California Government Code section 54954.3(c)

44 California Government Code section 54954.3(b); Chaffee v. San Francisco Public Library Com. (2005) 134 Cal.App.4th 109; 75 Ops.Cal.Atty.Gen. 89 (1992)

45 California Government Code section 54954.3(a)

46 California Government Code section 54954.3(a)

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Chapter 5

CLOSED SESSIONS

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CLOSED SESSIONS

A closed session is a meeting of a legislative body conducted in private without the attendance of the public or press. A legislative body is authorized to meet in closed session only to the extent expressly authorized by the Brown Act.[1]

As summarized in Chapter 1 of this Guide, it is clear that the Brown Act must be interpreted liberally in favor of open meetings, and exceptions that limit public access (including the exceptions for closed session meetings) must be narrowly construed.[2] The most common purposes of the closed session provisions in the Brown Act are to avoid revealing confidential information (e.g., prejudicing the city's position in litigation or compromising the privacy interests of employees). Closed sessions should be conducted keeping those narrow purposes in mind. It is not enough that a subject is sensitive, embarrassing, or controversial. Without specific authority in the Brown Act for a closed session, a matter to be considered by a legislative body must be discussed in public. As an example, a board of police commissioners cannot meet in closed session to provide general policy guidance to a police chief, even though some matters are sensitive and the commission considers their disclosure contrary to the public interest.[3]

In this chapter, the grounds for convening a closed session are called "exceptions" because they are exceptions to the general rule that meetings must be conducted openly. In some circumstances, none of the closed session exceptions apply to an issue or information the legislative body wishes to discuss privately. In these cases, it is not proper to convene a closed session, even to protect confidential information. For example, although the Brown Act does authorize closed sessions related to specified types of contracts (e.g., specified provisions of real property agreements, employee labor agreements, and litigation settlement agreements),[4] the Brown Act does not authorize closed sessions for other contract negotiations.

PRACTICE TIP: Some problems over closed sessions arise because secrecy itself breeds distrust. The Brown Act does not require closed sessions and legislative bodies may do well to resist the tendency to call a closed session simply because it may be permitted. A better practice is to go into closed session only when necessary.

Agendas and reports

Closed session items must be briefly described on the posted agenda and the description must state the specific statutory exemption.[5] An item that appears on the open meeting portion of the agenda may not be taken into closed session until it has been properly agendized as a closed session item or unless it is properly added as a closed session item by a two-thirds vote of the body after making the appropriate urgency findings.[6]

The Brown Act supplies a series of fill in the blank sample agenda descriptions for various types of authorized closed sessions, which provide a "safe harbor" from legal attacks. These sample

agenda descriptions cover license and permit determinations, real property negotiations, existing or anticipated litigation, liability claims, threats to security, public employee appointments, evaluations and discipline, labor negotiations, multi-jurisdictional law enforcement cases, hospital boards of directors, medical quality assurance committees, joint powers agencies, and audits by the California State Auditor's Office.[7]

If the legislative body intends to convene in closed session, it must include the section of the Brown Act authorizing the closed session in advance on the agenda and it must make a public announcement prior to the closed session discussion. In most cases, the announcement may simply be a reference to the agenda item.[8]

Following a closed session, the legislative body must provide an oral or written report on certain actions taken and the vote of every elected member present. The timing and content of the report varies according to the reason for the closed session and the action taken.[9] The announcements may be made at the site of the closed session, so long as the public is allowed to be present to hear them.

If there is a standing or written request for documentation, any copies of contracts, settlement agreements, or other documents finally approved or adopted in closed session must be provided to the requestor(s) after the closed session, if final approval of such documents does not rest with any other party to the contract or settlement. If substantive amendments to a contract or settlement agreement approved by all parties requires retyping, such documents may be held until retyping is completed during normal business hours, but the substance of the changes must be summarized for any person inquiring about them.[10]

The Brown Act does not require minutes, including minutes of closed sessions. However, a legislative body may adopt an ordinance or resolution to authorize a confidential "minute book" be kept to record actions taken at closed sessions.[11] If one is kept, it must be made available to members of the legislative body, provided that the member asking to review minutes of a particular meeting was not disqualified from attending the meeting due to a conflict of interest.[12] A court may order the disclosure of minute books for the court's review if a lawsuit makes sufficient claims of an open meeting violation.

PRACTICE TIP: Pay close attention to closed session agenda descriptions. Using the wrong label can lead to invalidation of an action taken in closed session if not substantially compliant.

Litigation

There is an attorney/client relationship, and legal counsel may use it to protect the confidentiality of privileged written and oral communications to members of the legislative body — outside of meetings. But protection of the attorney/client privilege cannot by itself be the reason for a closed session.[13]

The Brown Act expressly authorizes closed sessions to discuss what is considered pending litigation. The rules that apply to holding a litigation closed session involve complex, technical definitions and procedures. The essential thing to know is that a closed session can be held by the body to confer with, or receive advice from, its legal counsel when open discussion would prejudice the position of the local agency in litigation in which the agency is, or could become, a party.[14] The litigation exception under the Brown Act is narrowly construed and does not permit activities beyond a legislative body's conferring with its own legal counsel and required support staff.[15] For example, it is not permissible to hold a closed session in which settlement negotiations take place between a legislative body, a representative of an adverse party, and a mediator.[16]

The California Attorney General has opined that if the agency's attorney is not a participant, a litigation closed session cannot be held.[17] In any event, local agency officials should always consult the agency's attorney before placing this type of closed session on the agenda in order to be certain that it is being done properly.

Before holding a closed session under the pending litigation exception, the legislative body must publicly state the basis for the closed session by identifying one of the following three types of matters: existing litigation, anticipated exposure to litigation, or anticipated initiation of litigation.[18]

Existing litigation

Q. May the legislative body agree to settle a lawsuit in a properly-noticed closed session, without placing the settlement agreement on an open session agenda for public approval?

A. *Yes, but the settlement agreement is a public document and must be disclosed on request. Furthermore, a settlement agreement cannot commit the agency to matters that are required to have public hearings.*

Existing litigation includes any adjudicatory proceedings before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. The clearest situation in which a closed session is authorized is when the local agency meets with its legal counsel to discuss a pending matter that has been filed in a court or with an administrative agency and names the local agency as a party. The legislative body may meet under these circumstances to receive updates on the case from attorneys, participate in developing strategy as the case develops, or consider alternatives for resolution of the case. Generally, an agreement to settle litigation may be approved in closed session. However, an agreement to settle litigation cannot be approved in closed session if it commits the city to take an action that is required to have a public hearing.[19]

Anticipated exposure to litigation against the local agency

Closed sessions are authorized for legal counsel to inform the legislative body of a significant exposure to litigation against the local agency, but only if based on "existing facts and circumstances" as defined by the Brown Act.[20] The legislative body may also meet under this exception to determine whether a closed session is authorized based on information provided by legal counsel or staff. In general, the "existing facts and circumstances" must be publicly disclosed unless they are privileged written communications or not yet known to a potential plaintiff.

Anticipated initiation of litigation by the local agency

A closed session may be held under the exception for the anticipated initiation of litigation when the legislative body seeks legal advice on whether to protect the agency's rights and interests by initiating litigation.

Certain actions must be reported in open session at the same meeting following the closed

session. Other actions, as where final approval rests with another party or the court, may be announced when they become final and upon inquiry of any person.[21] Each agency attorney should be aware of and make the disclosures that are required by the particular circumstances.

Real estate negotiations

A legislative body may meet in closed session with its negotiator to discuss the purchase, sale, exchange, or lease of real property by or for the local agency. A "lease" includes a lease renewal or renegotiation. The purpose is to grant authority to the legislative body's negotiator on price and terms of payment.[22] Caution should be exercised to limit discussion to price and terms of payment without straying to other related issues such as site design, architecture, or other aspects of the project for which the transaction is contemplated.[23]

Q. May other terms of a real estate transaction, aside from price and terms of payment, be addressed in closed session?

A. *No. However, there are differing opinions over the scope of the phrase "price and terms of payment" in connection with real estate closed sessions. Many agency attorneys argue that any term that directly affects the economic value of the transaction falls within the ambit of "price and terms of payment." Others take a narrower, more literal view of the phrase.*

The agency's negotiator may be a member of the legislative body itself. Prior to the closed session, or on the agenda, the legislative body must identify its negotiators, the real property that the negotiations may concern[24] and the names of the parties with whom its negotiator may negotiate.[25]

After real estate negotiations are concluded, the approval and substance of the agreement must be publicly reported. If its own approval makes the agreement final, the body must report in open session at the public meeting during which the closed session is held. If final approval rests with another party, the local agency must report the approval and the substance of the agreement upon inquiry by any person, as soon as the agency is informed of it.[26]

"Our population is exploding, and we have to think about new school sites," said Board Member Jefferson.

"Not only that," interjected Board Member Tanaka, "we need to get rid of a couple of our older facilities."

"Well, obviously the place to do that is in a closed session," said Board Member O'Reilly. "Otherwise we're going to set off land speculation. And if we even mention closing a school, parents are going to be in an uproar."

A closed session to discuss potential sites is not authorized by the Brown Act. The exception is limited to meeting with its negotiator over specific sites — which must be identified at an open and public meeting.

Public employment

The Brown Act authorizes a closed session "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee."[27] The purpose of this exception — commonly referred to as the "personnel exception" — is to avoid undue publicity or embarrassment for an employee or applicant for employment and to allow full and candid discussion by the legislative body; thus, it is restricted to discussing individuals, not general personnel policies.[28] The body must possess the power to appoint, evaluate, or dismiss the employee to hold a closed session under this exception.[29] That authority may be delegated to a subsidiary appointed body.[30]

PRACTICE TIP: Discussions of who to appoint to an advisory body and whether or not to censure a fellow member of the legislative body must be held in the open.

An employee must be given at least 24 hours notice of any closed session convened to hear specific complaints or charges against him or her. This occurs when the legislative body is reviewing evidence, which could include live testimony, and adjudicating conflicting testimony offered as evidence. A legislative body may examine (or exclude) witnesses,[31] and the California Attorney General has opined that, when an affected employee and advocate have an official or essential role to play, they may be permitted to participate in the closed session.[32] The employee has the right to have the specific complaints and charges discussed in a public session rather than closed session.[33] If the employee is not given the 24-hour prior notice, any disciplinary action is null and void.[34]

However, an employee is not entitled to notice and a hearing where the purpose of the closed session is to consider a performance evaluation. The Attorney General and the courts have determined that personnel performance evaluations do not constitute complaints and charges, which are more akin to accusations made against a person.[35]

Q. Must 24 hours notice be given to an employee whose negative performance evaluation is to be considered by the legislative body in closed session?

A. *No, the notice is reserved for situations where the body is to hear complaints and charges from witnesses.*

Correct labeling of the closed session on the agenda is critical. A closed session agenda that identified discussion of an employment contract was not sufficient to allow dismissal of an employee.[36] An incorrect agenda description can result in invalidation of an action and much embarrassment.

For purposes of the personnel exception, "employee" specifically includes an officer or an independent contractor who functions as an officer or an employee. Examples of the former include a city manager, district general manager or superintendent. Examples of the latter Include a legal counsel or engineer hired on contract to act as local agency attorney or chief engineer.

Elected officials, appointees to the governing body or subsidiary bodies, and independent contractors other than those discussed above are not employees for purposes of the personnel exception.[37] Action on individuals who are not "employees" must also be public — including discussing and voting on appointees to committees, or debating the merits of independent contractors, or considering a complaint against a member of the legislative body itself.

The personnel exception specifically prohibits discussion or action on proposed compensation in closed session, except for a disciplinary reduction in pay. Among other things, that means there can be no personnel closed sessions on a salary change (other than a disciplinary reduction) between any unrepresented individual and the legislative body. However, a legislative body may address the compensation of an unrepresented individual, such as a city manager, in a closed session as part of a labor negotiation (discussed later in this chapter), yet another example of the importance of using correct agenda descriptions.

PRACTICE TIP: The personnel exception specifically prohibits discussion or action on proposed compensation in closed session except for a disciplinary reduction in pay.

Reclassification of a job must be public, but an employee's ability to fill that job may be considered in closed session.

Any closed session action to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee must be reported at the public meeting during which the closed session is held. That report must identify the title of the position, but not the names of all persons considered for an employment position.[38] However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.[39]

> **"I have some important news to announce," said Mayor Garcia. "We've decided to terminate the contract of the city manager, effective immediately. The council has met in closed session and we've negotiated six months severance pay."**
>
> **"Unfortunately, that has some serious budget consequences, so we've had to delay phase two of the East Area Project."**
>
> *This may be an improper use of the personnel closed session if the council agenda described the item as the city manager's evaluation. In addition, other than labor negotiations, any action on individual compensation must be taken in open session. Caution should be exercised to not discuss in closed session issues, such as budget impacts in this hypothetical, beyond the scope of the posted closed session notice.*

Labor negotiations

The Brown Act allows closed sessions for some aspects of labor negotiations. Different provisions (discussed below) apply to school and community college districts.

A legislative body may meet in closed session to instruct its bargaining representatives, which may be one or more of its members,[40] on employee salaries and fringe benefits for both represented ("union") and non-represented employees. For represented employees, it may also consider working conditions that by law require negotiation. For the purpose of labor negotiation closed sessions, an "employee" includes an officer or an independent contractor who functions as an officer or an employee, but independent contractors who do not serve in the capacity of an officer or employee are not covered by this closed session exception.[41]

These closed sessions may take place before or during negotiations with employee representatives. Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

PRACTICE TIP: Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

During its discussions with representatives on salaries and fringe benefits, the legislative body may also discuss available funds and funding priorities, but only to instruct its representative. The body may also meet in closed session with a conciliator who has intervened in negotiations.[42]

The approval of an agreement concluding labor negotiations with represented employees must be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other party or parties to the negotiation.[43] The labor closed sessions specifically cannot include final action on proposed compensation of one or more unrepresented employees.

Labor negotiations — school and community college districts

Employee relations for school districts and community college districts are governed by the Rodda Act, where different meeting and special notice provisions apply. The entire board, for example, may negotiate in closed sessions.

Four types of meetings are exempted from compliance with the Rodda Act:

1. A negotiating session with a recognized or certified employee organization;
2. A meeting of a mediator with either side;
3. A hearing or meeting held by a fact finder or arbitrator; and
4. A session between the board and its bargaining agent, or the board alone, to discuss its position regarding employee working conditions and instruct its agent.[44]

Public participation under the Rodda Act also takes another form.[45] All initial proposals of both sides must be presented at public meetings and are public records. The public must be given reasonable time to inform itself and to express its views before the district may adopt its initial proposal. In addition, new topics of negotiations must be made public within 24 hours. Any votes on such a topic must be followed within 24 hours by public disclosure of the vote of each member.[46] The final vote must be in public.

Other Education Code exceptions

The Education Code governs student disciplinary meetings by boards of school districts and community college districts. District boards may hold a closed session to consider the suspension or discipline of a student, if a public hearing would reveal personal, disciplinary, or academic information about the student contrary to state and federal pupil privacy law. The student's parent or guardian may request an open meeting.[47]

Community college districts may also hold closed sessions to discuss some student disciplinary matters, awarding of honorary degrees, or gifts from donors who prefer to remain anonymous.[48] Kindergarten through 12th grade districts may also meet in closed session to review the contents of the statewide assessment instrument.[49]

PRACTICE TIP: Attendance by the entire legislative body before a grand jury would not constitute a closed session meeting under the Brown Act.

Joint Powers Authorities

The legislative body of a joint powers authority may adopt a policy regarding limitations on disclosure of confidential information obtained in closed session, and may meet in closed session to discuss information that is subject to the policy.[50]

License applicants with criminal records

A closed session is permitted when an applicant, who has a criminal record, applies for a license or license renewal and the legislative body wishes to discuss whether the applicant is sufficiently rehabilitated to receive the license. The applicant and the applicant's attorney are authorized to attend the closed session meeting. If the body decides to deny the license, the applicant may withdraw the application. If the applicant does not withdraw, the body must deny the license in public, immediately or at its next meeting. No information from the closed session can be revealed without consent of the applicant, unless the applicant takes action to challenge the denial.[51]

Public security

Legislative bodies may meet in closed session to discuss matters posing a threat to the security of public buildings, essential public services, including water, sewer, gas, or electric service, or to the public's right of access to public services or facilities over which the legislative body has jurisdiction. Closed session meetings for these purposes must be held with designated security or law enforcement officials including the Governor, Attorney General, district attorney, agency attorney, sheriff or chief of police, or their deputies or agency security consultant or security operations manager.[52] Action taken in closed session with respect to such public security issues is not reportable action.

Multijurisdictional law enforcement agency

A joint powers agency formed to provide law enforcement services (involving drugs; gangs; sex crimes; firearms trafficking; felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft) to multiple jurisdictions may hold closed sessions to discuss case records of an on-going criminal investigation, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases.[53]

The exception applies to the legislative body of the joint powers agency and to any body advisory to it. The purpose is to prevent impairment of investigations, to protect witnesses and informants, and to permit discussion of effective courses of action.[54]

Hospital peer review and trade secrets

Two specific kinds of closed sessions are allowed for district hospitals and municipal hospitals, under other provisions of law.[55]

1. A meeting to hear reports of hospital medical audit or quality assurance committees, or for related deliberations. However, an applicant or medical staff member whose staff privileges are the direct subject of a hearing may request a public hearing.
2. A meeting to discuss "reports involving trade secrets" — provided no action is taken.

A "trade secret" is defined as information which is not generally known to the public or competitors and which: 1) "derives independent economic value, actual or potential" by virtue of its restricted knowledge; 2) is necessary to initiate a new hospital service or program or facility; and 3) would, if prematurely disclosed, create a substantial probability of depriving the hospital of a substantial economic benefit.

The provision prohibits use of closed sessions to discuss transitions in ownership or management, or the district's dissolution.[56]

Other legislative bases for closed session

Since any closed session meeting of a legislative body must be authorized by the Legislature, it is important to carefully review the Brown Act to determine if there is a provision that authorizes a closed session for a particular subject matter. There are some less frequently encountered topics that are authorized to be discussed by a legislative body in closed session under the Brown Act, including: a response to a confidential final draft audit report from the Bureau of State Audits,[57] consideration of the purchase or sale of particular pension fund investments by a legislative body of a local agency that invests pension funds,[58] hearing a charge or complaint from a member enrolled in a health plan by a legislative body of a local agency that provides Medi-Cal services,[59] discussions by a county board of supervisors that governs a health plan licensed pursuant to the Knox-Keene Health Care Services Plan Act related to trade secrets or contract negotiations concerning rates of payment,[60] and discussions by an insurance pooling joint powers agency related to a claim filed against, or liability of, the agency or a member of the agency.[61]

PRACTICE TIP: Meetings are either open or closed. There is nothing "in between."[62]

Who may attend closed sessions

Meetings of a legislative body are either fully open or fully closed; there is nothing in between. Therefore, local agency officials and employees must pay particular attention to the authorized attendees for the particular type of closed session. As summarized above, the authorized attendees may differ based on the topic of the closed session. Closed sessions may involve only the members of the legislative body and only agency counsel, management and support staff, and consultants necessary for consideration of the matter that is the subject of closed session, with very limited exceptions for adversaries or witnesses with official roles in particular types of hearings (e.g., personnel disciplinary hearings and license hearings). In any case, individuals who do not have an official role in the closed session subject matters must be excluded from closed sessions.[63]

Q. May the lawyer for someone suing the agency attend a closed session in order to explain to the legislative body why it should accept a settlement offer?

A. *No, attendance in closed sessions is reserved exclusively for the agency's advisors.*

The confidentiality of closed session discussions

The Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired in a closed session by any person present, and offers various remedies to address breaches of confidentiality.[64] It is incumbent upon all those attending lawful closed sessions to protect the confidentiality of those discussions. One court has held that members of a legislative body cannot be compelled to divulge the content of closed session discussions through the discovery process.[65] Only the legislative body acting as a body may agree to divulge confidential closed session information; regarding attorney/client privileged communications, the entire body is the holder of the privilege and only the entire body can decide to waive the privilege.[66]

Before adoption of the Brown Act provision specifically prohibiting disclosure of closed session communications, agency attorneys and the Attorney General long opined that officials have a fiduciary duty to protect the confidentiality of closed session discussions. The Attorney General issued an opinion that it is "improper" for officials to disclose information received during a closed session regarding pending litigation,[67] though the Attorney General has also concluded that a local agency is preempted from adopting an ordinance criminalizing public disclosure of closed session discussions.[68] In any event, in 2002, the Brown Act was amended to prescribe particular remedies for breaches of confidentiality. These remedies include injunctive relief; and, if the breach is a willful disclosure of confidential information, the remedies include disciplinary action against an employee, and referral of a member of the legislative body to the grand jury.[69]

PRACTICE TIP: There is a strong interest in protecting the confidentiality of proper and lawful closed sessions.

The duty of maintaining confidentiality, of course, must give way to the responsibility to disclose improper matters or discussions that may come up in closed sessions. In recognition of this public policy, under the Brown Act, a local agency may not penalize a disclosure of information learned during a closed session if the disclosure: 1) is made in confidence to the district attorney or the grand jury due to a perceived violation of law; 2) is an expression of opinion concerning the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal action; or 3) is information that is not confidential.[70]

The interplay between these possible sanctions and an official's first amendment rights is complex and beyond the scope of this guide. Suffice it to say that this is a matter of great sensitivity and controversy.

> **"I want the press to know that I voted in closed session against filing the eminent domain action," said Council Member Chang.**
>
> **"Don't settle too soon," reveals Council Member Watson to the property owner, over coffee. "The city's offer coming your way is not our bottom line."**
>
> *The first comment to the press may be appropriate if it is a part of an action taken by the City Council in closed session that must be reported publicly.[71] The second comment to the property owner is not — disclosure of confidential information acquired in closed session is expressly prohibited and harmful to the agency.*

ENDNOTES:

1 California Government Code section 54962

2 California Constitution, Art. 1, section 3

3 61 Ops.Cal.Atty.Gen. 220 (1978); but see California Government Code section 54957.8 (multijurisdictional law enforcement agencies are authorized to meet in closed session to discuss the case records of ongoing criminal investigations, and other related matters).

4 California Government Code section 54957.1

5 California Government Code section 54954.5

6 California Government Code section 54954.2

7 California Government Code section 54954.5

8 California Government Code sections 54956.9 and 54957.7

9 California Government Code section 54957.1(a)

10 California Government Code section 54957.1(b)

11 California Government Code section 54957.2

12 *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050; 2 Cal.Code Regs. section 18707

13 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363

14 California Government Code section 54956.9; *Shapiro v. Board of Directors of Center City Development Corp.* (2005) 134 Cal.App.4th 170 (agency must be a party to the litigation).

15 82 Ops.Cal.Atty.Gen. 29 (1999)

16 *Page v. Miracosta Community College District* (2009) 180 Cal.App.4th 471

17 "*The Brown Act,*" California Attorney General (2003), p. 40

18 California Government Code section 54956.9(g)

19 *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172

20 Government Code section 54956.9(e)

21 California Government Code section 54957.1

22 California Government Code section 54956.8

23 *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904; see also 93 Ops.Cal.Atty.Gen. 51 (2010) (redevelopment agency may not convene a closed session to discuss rehabilitation loan for a property already subleased to a loan recipient, even if the loan Incorporates some of the sublease terms and includes an operating covenant governing the property); 94 Ops.Cal.Atty.Gen. 82 (2011) (real estate closed session may address form, manner and timing of consideration and other items that cannot be disclosed without revealing price and terms).

24 73 Ops.Cal.Atty.Gen. 1 (1990)

25 California Government Code sections 54956.8 and 54954.5(b)

26 California Government Code section 54957.1(a)(1)

27 California Government Code section 54957(b)

28 63 Ops.Cal.Atty.Gen. 153 (1980); but see *Duvall v. Board of Trustees* (2000) 93 Cal.App.4th 902 (board may discuss personnel evaluation criteria, process and other preliminary matters in closed session but only if related to the evaluation of a particular employee).

29 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 85 Ops.Cal.Atty.Gen. 77 (2002)

30 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 80 Ops.Cal.Atty. Gen. 308 (1997). Interviews of candidates to fill a vacant staff position conducted by a temporary committee appointed by the governing body may be done in closed session.

31 California Government Code section 54957(b)(3)

32 88 Ops.Cal.Atty.Gen. 16 (2005)

33 *Morrison v. Housing Authority of the City of Los Angeles* (2003) 107 Cal.App.4th 860

34 California Government Code section 54957(b); but see *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal.App.4th 568 (notice not required for closed session deliberations regarding complaints or charges, when there was a public evidentiary hearing prior to closed session).

35 78 Ops.Cal.Atty.Gen. 218 (1995); *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876; *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87

36 *Moreno v. City of King* (2005) 127 Cal.App.4th 17

37 California Government Code section 54957

38 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165

39 California Government Code section 54957.1(a)(5)

40 California Government Code section 54957.6

41 California Government Code section 54957.6(b); see also 98 Ops.Cal.Atty.Gen. 41 (2015) (a project labor agreement between a community college district and workers hired by contractors or subcontractors is not a proper subject of closed session for labor negotiations because the workers are not "employees" of the district).

42 California Government Code section 54957.6; and 51 Ops.Cal.Atty.Gen. 201 (1968)

43 California Government Code section 54957.1(a)(6)

44 California Government Code section 3549.1

45 California Government Code section 3540

46 California Government Code section 3547

47 California Education Code section 48918; but see *Rim of the World Unified School District v. Superior Court* (2003) 104 Cal.App.4th 1393 (Section 48918 preempted by the Federal Family Educational Right and Privacy Act in regard to expulsion proceedings).

48 California Education Code section 72122

49 California Education Code section 60617

50 California Government Code section 54956.96

51 California Government Code section 54956.7

52 California Government Code section 54957

53 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App.4th 354

54 California Government Code section 54957.8

55 California Government Code section 54962

56 California Health and Safety Code section 32106

57 California Government Code section 54956.75

58 California Government Code section 54956.81

59 California Government Code section 54956.86

60 California Government Code section 54956.87

61 California Government Code section 54956.95

62 46 Ops.Cal.Atty.Gen. 34 (1965)

63 82 Ops.Cal.Atty.Gen. 29 (1999)

64 Government Code section 54963

65 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 327; see also California Government Code section 54963.

66 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363

67 80 Ops.Cal.Atty.Gen. 231 (1997)

68 76 Ops.Cal.Atty.Gen. 289 (1993)

69 California Government Code section 54963

70 California Government Code section 54963

71 California Government Code section 54957.1

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at **www.cacities.org/opengovernment**. A current version of the Brown Act may be found at **www.leginfo.ca.gov**.

Chapter 6

REMEDIES

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REMEDIES

Certain violations of the Brown Act are designated as misdemeanors, although by far the most commonly used enforcement provisions are those that authorize civil actions to invalidate specified actions taken in violation of the Brown Act and to stop or prevent future violations. Still, despite all the safeguards and remedies to enforce them, it is ultimately impossible for the public to monitor every aspect of public officials' interactions. Compliance ultimately results from regular training and a good measure of self-regulation on the part of public officials. This chapter discusses the remedies available to the public when that self-regulation is ineffective.

Invalidation

Any interested person, including the district attorney, may seek to invalidate certain actions of a legislative body on the ground that they violate the Brown Act.[1] Violations of the Brown Act, however, cannot be invalidated if they involve the following types of actions:

- Those taken in substantial compliance with the law. No Brown Act violation is found when the given notice substantially complies with the Brown Act, even when the notice erroneously cites to the wrong Brown Act section, but adequately advises the public that the Board will meet with legal counsel to discuss potential litigation in closed session;[2]
- Those involving the sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements;
- Those creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment;
- Those connected with the collection of any tax; or
- Those in which the complaining party had actual notice at least 72 hours prior to the regular meeting or 24 hours prior to the special meeting, as the case may be, at which the action is taken.

Before filing a court action seeking invalidation, a person who believes that a violation has occurred must send a written "cure or correct" demand to the legislative body. This demand must clearly describe the challenged action and the nature of the claimed violation. This demand must be sent within 90 days of the alleged violation or 30 days if the action was taken in open session but in violation of Section 54954.2, which requires (subject to specific exceptions) that only properly agendized items are acted on by the governing body during a meeting.[3] The legislative body then has up to 30 days to cure and correct its action. If it does not act, any lawsuit must be filed within the next 15 days. The purpose of this requirement is to offer the body an opportunity to consider whether a violation has occurred and to weigh its options before litigation is filed.

Although just about anyone has standing to bring an action for invalidation,[4] the challenger must show prejudice as a result of the alleged violation.[5] An action to invalidate fails to state a cause of action against the agency if the body deliberated but did not take an action.[6]

Applicability to Past Actions

Any interested person, including the district attorney, may file a civil action to determine whether past actions of a legislative body occurring on or after January 1, 2013 constitute violations of the Brown Act and are subject to a mandamus, injunction, or declaratory relief action.[7] Before filing an action, the interested person must, within nine months of the alleged violation of the Brown Act, submit a "cease and desist" letter to the legislative body, clearly describing the past action and the nature of the alleged violation.[8] The legislative body has 30 days after receipt of the letter to provide an unconditional commitment to cease and desist from the past action.[9] If the body fails to take any action within the 30-day period or takes an action other than an unconditional commitment, a lawsuit may be filed within 60 days.[10]

The legislative body's unconditional commitment must be approved at a regular or special meeting as a separate item of business and not on the consent calendar.[11] The unconditional commitment must be substantially in the form set forth in the Brown Act.[12] No legal action may thereafter be commenced regarding the past action.[13] However, an action of the legislative body in violation of its unconditional commitment constitutes an independent violation of the Brown Act and a legal action consequently may be commenced without following the procedural requirements for challenging past actions.[14]

The legislative body may rescind its prior unconditional commitment by a majority vote of its membership at a regular meeting as a separate item of business not on the consent calendar. At least 30 days written notice of the intended rescission must be given to each person to whom the unconditional commitment was made and to the district attorney. Upon rescission, any interested person may commence a legal action regarding the past actions without following the procedural requirements for challenging past actions.[15]

PRACTICE TIP: A lawsuit to invalidate must be preceded by a demand to cure and correct the challenged action in order to give the legislative body an opportunity to consider its options. The Brown Act does not specify how to cure or correct a violation; the best method is to rescind the action being complained of and start over, or reaffirm the action if the local agency relied on the action and rescinding the action would prejudice the local agency.

Civil action to prevent future violations

The district attorney or any interested person can file a civil action asking the court to:

- Stop or prevent violations or threatened violations of the Brown Act by members of the legislative body of a local agency;
- Determine the applicability of the Brown Act to actions or threatened future action of the legislative body;
- Determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid under state or federal law; or
- Compel the legislative body to tape record its closed sessions.

It is not necessary for a challenger to prove a past pattern or practice of violations by the local agency in order to obtain injunctive relief. A court may presume when issuing an injunction that a single violation will continue in the future where the public agency refuses to admit to the alleged violation or to renounce or curtail the practice.[16] Note, however, that a court may not compel elected officials to disclose their recollections of what transpired in a closed session.[17]

Upon finding a violation of the Brown Act pertaining to closed sessions, a court may compel the legislative body to tape record its future closed sessions. In a subsequent lawsuit to enforce the Brown Act alleging a violation occurring in closed session, a court may upon motion of the plaintiff review the tapes if there is good cause to think the Brown Act has been violated, and make public the relevant portion of the closed session recording.

Costs and attorney's fees

Someone who successfully invalidates an action taken in violation of the Brown Act or who successfully enforces one of the Brown Act's civil remedies may seek court costs and reasonable attorney's fees. Courts have held that attorney's fees must be awarded to a successful plaintiff unless special circumstances exist that would make a fee award against the public agency unjust.[18] When evaluating how to respond to assertions that the Brown Act has been violated, elected officials and their lawyers should assume that attorney's fees will be awarded against the agency if a violation of the Act is proven.

An attorney's fee award may only be directed against the local agency and not the individual members of the legislative body. If the local agency prevails, it may be awarded court costs and attorney's fees if the court finds the lawsuit was clearly frivolous and lacking in merit.[19]

PRACTICE TIP: Attorney's fees will likely be awarded if a violation of the Brown Act is proven.

Criminal complaints

A violation of the Brown Act by a member of the legislative body who acts with the improper intent described below is punishable as a misdemeanor.[20]

A criminal violation has two components. The first is that there must be an overt act — a member of a legislative body must attend a meeting at which action is taken in violation of the Brown Act.[21]

"Action taken" is not only an actual vote, but also a collective decision, commitment or promise by a majority of the legislative body to make a positive or negative decision.[22] If the meeting involves mere deliberation without the taking of action, there can be no misdemeanor penalty.

A violation occurs for a tentative as well as final decision.[23] In fact, criminal liability is triggered by a member's participation in a meeting in violation of the Brown Act — not whether that member has voted with the majority or minority, or has voted at all.

The second component of a criminal violation is that action is taken with the intent of a member "to deprive the public of information to which the member knows or has reason to know the public is entitled" by the Brown Act.[24]

As with other misdemeanors, the filing of a complaint is up to the district attorney. Although criminal prosecutions of the Brown Act are uncommon, district attorneys in some counties aggressively monitor public agencies' adherence to the requirements of the law.

Some attorneys and district attorneys take the position that a Brown Act violation may be pursued criminally under Government Code section 1222.[25] There is no case law to support this view; if anything, the existence of an express criminal remedy within the Brown Act would suggest otherwise.[26]

Voluntary resolution

Arguments over Brown Act issues often become emotional on all sides. Newspapers trumpet relatively minor violations, unhappy residents fume over an action, and legislative bodies clam up about information better discussed in public. Hard lines are drawn and rational discussion breaks down. The district attorney or even the grand jury occasionally becomes involved. Publicity surrounding alleged violations of the Brown Act can result in a loss of confidence by constituents in the legislative body. There are times when it may be preferable to consider re-noticing and rehearing, rather than litigating, an item of significant public interest, particularly when there is any doubt about whether the open meeting requirements were satisfied.

At bottom, agencies that regularly train their officials and pay close attention to the requirements of the Brown Act will have little reason to worry about enforcement.

ENDNOTES:

1 California Government Code section 54960.1. Invalidation is limited to actions that violate the following sections of the Brown Act: section 54953 (the basic open meeting provision); sections 54954.2 and 54954.5 (notice and agenda requirements for regular meetings and closed sessions); 54954.6 (tax hearings); 54956 (special meetings); and 54596.5 (emergency situations). Violations of sections not listed above cannot give rise to invalidation actions, but are subject to the other remedies listed in section 54960.1.

2 *Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1198

3 California Government Code section 54960.1 (b) and (c)(1)

4 *McKee v. Orange Unified School District* (2003) 110 Cal. App.4th 1310, 1318-1319

5 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556, 561

6 *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116-17, 1118

7 Government Code Section 54960.2(a); Senate Bill No. 1003, Section 4 (2011-2012 Session)

8 Government Code Sections 54960.2(a)(1), (2)

9 Government Code Section 54960.2(b)

10 Government Code Section 54960.2(a)(4)

11 Government Code Section 54960.2(c)(2)

12 Government Code Section 54960.2(c)(1)

13 Government Code Section 54960.2(c)(3)

14 Government Code Section 54960.2(d)

15 Government Code Section 54960.2(e)

16 *California Alliance for Utility Safety and Education (CAUSE) v. City of San Diego* (1997) 56 Cal.App.4th 1024; *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 524; *Accord Shapiro v. San Diego City Council* (2002) 96 Cal. App. 4th 904, 916 & fn.6

17 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334-36

18 *Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors* (2003) 112 Cal. App.4th 1313, 1327-29 and cases cited therein

19 California Government Code section 54960.5

20 California Government Code section 54959. A misdemeanor is punishable by a fine of up to $1,000 or up to six months in county jail, or both. California Penal Code section 19. Employees of the agency who participate in violations of the Brown Act cannot be punished criminally under section 54959. However, at least one district attorney instituted criminal action against employees based on the theory that they criminally conspired with the members of the legislative body to commit a crime under section 54949.

21 California Government Code section 54959

22 California Government Code section 54952.6

23 61 Ops.Cal.Atty.Gen.283 (1978)

24 California Government Code section 54959

25 California Government Code section 1222 provides that "[e]very wilful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor."

26 The principle of statutory construction known as *expressio unius est exclusio alterius* supports the view that section 54959 is the exclusive basis for criminal liability under the Brown Act.

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at **www.cacities.org/opengovernment**. A current version of the Brown Act may be found at **www.leginfo.ca.gov**.

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MEASURE W CITIZENS OVERSIGHT COMMITTEE HANDBOOK

Section 6

Glossary of Terms

GLOSSARY OF ACRONYMS/TERMS

AASHTO	American Association of State Highways and Transportation Officials
AB	Assembly Bill
ABAG	Association of Bay Area Governments
ACE	Altamont Commuter Express
ACS	Advanced Communications System
ADA	Americans with Disabilities Act
AFC	Automatic Fare Collection System
AL-COM	Advocacy and Legislative Committee of the PCC
Alliance	Peninsula Traffic Congestion Relief Alliance
Amtrak	National Rail Passenger Corporation
APTA	American Public Transportation Association
ARRA	American Recovery & Reinvestment Act
ATC	Automatic Train Control
ATMS	Advanced Transportation Management System
ATSP	Adaptive Transit Signal Priority
ATU	Amalgamated Transit Union
AWR	Average Weekday Ridership
BAAQMD	Bay Area Air Quality Management District
BAC	Bicycle Advisory Committee
BART	Bay Area Rapid Transit District
BCDC	San Francisco Bay Conservation and Development Commission
BPAC	Bicycle & Pedestrian Advisory Committee (C/CAG Committee)
C/CAG	City/County Association of Governments of San Mateo County

CAA	Clean Air Act
CAC	Citizens Advisory Committee
CHSRA	California High Speed Rail Authority
Caltrain	Commuter rail system between San Francisco & San Jose/Gilroy (Peninsula Corridor Joint Powers Board)
Caltrans	California State Department of Transportation
CARB	California Air Resources Board
CBOSS	Communications-based Overlay Signal System
CCF	Central Control Facility
CCTV	Closed Circuit Television
CEMOF	Centralized Equipment Maintenance and Operations Facility
CEQA	California Environmental Quality Act
CFP	Call for Projects
CID	Card Interface Device (Clipper)
CIP	Capital Improvement Program
CMA	Congestion Management Agency
CMAQ	Congestion Mitigation and Air Quality Improvement Program
CMEQ	Congestion Management and Environmental Quality (C/CAG Committee)
CMIA	Corridor Mobility Improvement Account (of Prop 1B)
CMP	Congestion Management Program
CMS	Changeable Message Sign
CNG	Compressed Natural Gas
COA	Comprehensive Operational Analysis
CPUC	California Public Utilities Commission
CTA	California Transit Association

CTC	California Transportation Commission
CTP	Countywide Transportation Plan
DBE	Disadvantaged Business Enterprise
DOT	Department of Transportation
DRC	Dumbarton Rail Corridor
DTX	Downtown Extension
EIR	Environmental Impact Report (State)
EIS	Environmental Impact Statement (Federal)
EMU	Electric Multiple Unit (rail car)
EPA	U.S. Environmental Protection Agency
FCC	Federal Communications Commission
FEMA	Federal Emergency Management Agency
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
HOT	High Occupancy Toll Lane
HOV	High Occupancy Vehicle Lane
HSR	High-speed Rail
HUD	Housing & Urban Development
ISTEA	Intermodal Surface Transportation Efficiency Act of 1991
ITS	Intelligent Transportation Systems
JPA	Joint Powers Agreement
JPB	Joint Powers Board (Caltrain)
KCA	Key Congested Areas

LAIF	Local Agency Investment Funds
LRTP	Long-range Transit Plan
LRV	Light Rail Vehicle
LRT	Light Rail Transit
MA	Master Agreement
MAP-21	Moving Ahead for Progress in the 21st Century
MBE	Minority Business Enterprise
MIS	Management Information System
MOU	Memorandum of Understanding
MTC	Metropolitan Transportation Commission
NEPA	National Environmental Policy Act
NIMS	National Incident Management System
O & D	Origin & Destination
PAC	Policy Advisory Committee
PADS	Predictive Arrival & Departure System
PCC	Paratransit Coordinating Council
PERS	Public Employee Retirement System
POP	Proof of Payment
PTA	Public Transportation Account
PTC	Positive Train Control
PTMISEA	Public Transportation Modernization, Improvement, and Service Enhancement Account
PUC	Public Utilities Commission
RFP	Request for Proposals
RM2	Regional Measure 2

ROW	Right of Way
SAAC	SamTrans Accessibility Advisory Committee
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SAMCEDA	San Mateo County Economic Development Association
SB	Senate Bill
SFBC	San Francisco Bicycle Coalition
SFCTA	San Francisco County Transportation Authority
SFMTA	San Francisco Municipal Transportation Authority
SHOPP	State Highway Operations & Protection Program
SLPP	State-local Partnership Program
SMCTA	San Mateo County Transportation Authority
SOV	Single Occupant Vehicle
SR	Supplemental Roadways
SRTP	Short-range Transit Plan
STA	State Transit Assistance Fund
STIP	State Transportation Improvement Plan
STP	Surface Transportation Program
SVBC	Silicon Valley Bicycle Coalition
TA	Transportation Authority (San Mateo County)
TAC	Technical Advisory Committee
TARP	Troubled Assets Relief Program
TASI	TransitAmerica Services, Inc.
TCRP	Traffic Congestion Relief Program

TDA	Transportation Development Act
TDM	Transportation Demand Management
TEP	Transportation Enhancement Program
TFCA	Transportation Fund for Clean Air
TIP	Transportation Improvement Program
TLSP	Traffic Light Synchronization Program
TOD	Transit-oriented Development
TRB	Transportation Research Board
TSM	Transportation Systems Management
TJPA	Transbay Joint Powers Authority
TVM	Ticket Vending Machine
UPRR	Union Pacific Railroad
VMS	Visual Message Sign
VTA	Santa Clara Valley Transportation Authority
WBE	Women's Business Enterprise
WETA	Water Emergency Transportation Authority

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