

**HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD  
FULL BOARD SPECIAL MEETING**

**June 8, 2023**

**5:30 P.M.**

**CITY HALL, HEARING ROOM # 2  
ONE FRANK H. OGAWA PLAZA  
OAKLAND, CA 94612**

**AGENDA**

**PUBLIC PARTICIPATION**

The public may observe or participate in this meeting in many ways.

**OBSERVE:**

• To observe, the public may view the televised video conference by viewing KTOP channel 10 on Xfinity (Comcast) or ATT Channel 99 and locating City of Oakland KTOP – Channel 10

• To observe the meeting by video conference, please click on the link below:

When: Jun 8, 2023 05:30 PM Pacific Time (US and Canada)

Please click the link below to join the webinar:

<https://us02web.zoom.us/j/89315253317>

Or One tap mobile : +16699009128,,89315253317# US (San Jose),  
+16694449171,,89315253317# US

Or Telephone:

Dial(for higher quality, dial a number based on your current location):

+1 669 900 9128 US (San Jose), +1 669 444 9171 US, +1 719 359 4580 US

+1 253 205 0468 US, +1 253 215 8782 US (Tacoma), +1 346 248 7799 US

(Houston), +1 564 217 2000 US, +1 646 558 8656 US (New York),

+1 646 931 3860 US, +1 689 278 1000 US, +1 301 715 8592 US (Washington

DC), +1 305 224 1968 US, +1 309 205 3325 US, +1 312 626 6799 US (Chicago)

+1 360 209 5623 US, +1 386 347 5053 US, +1 507 473 4847 US

Webinar ID: 893 1525 3317

International numbers available: <https://us02web.zoom.us/j/89315253317>

**The Zoom link is to view/listen to the meeting only, not for participation.**

**PARTICIPATION/COMMENT:**

There is one way to submit public comments:

• To participate/comment during the meeting, you must attend in-person.

Comments on all agenda items will be taken during public comment at the beginning of the meeting. Comments for items not on the agenda will be taken during open forum towards the end of the meeting.

If you have any questions, please email [hearingsunit@oaklandca.gov](mailto:hearingsunit@oaklandca.gov).

## HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD MEETING

### 1. CALL TO ORDER

### 2. ROLL CALL

### 3. PUBLIC COMMENT

- a. Comments on all agenda items will be taken at this time. Comments for items not on the agenda will be taken during open forum.

### 4. CONSENT ITEMS

- a. Approval of Board Minutes, 5/11/2023 (pp. 3-9)

### 5. RESOLUTION TO RECOMMEND AMENDMENTS TO THE RENT ADJUSTMENT REGULATIONS (pp. 10-50)

### 6. AUTHORIZATION FOR CHAIR INGRAM & MEMBER DEBOER TO PRESENT TENANT FILING REQUIREMENT RESOLUTION TO CITY COUNCIL

### 7. INFORMATION AND ANNOUNCEMENTS

- a. Board Training Session—The Brown Act (pp. 51-114)

### 8. SCHEDULING AND REPORTS

- a. Board Meeting Start Times

### 9. OPEN FORUM

### 10. ADJOURNMENT

---

*\*Staff appeal summaries will be available at the Rent Program website and the Clerk's office at least 72 hours prior to the meeting pursuant to O.M.C. 2.20.080.C and 2.20.090*

As a reminder, alternates in attendance (other than those replacing an absent board member) will not be able to take any action, such as with regard to the consent calendar.

**Accessibility:** Contact us to request disability-related accommodations, American Sign Language (ASL), Spanish, Cantonese, Mandarin, or another language interpreter at least five (5) business days before the event. Rent Adjustment Program (RAP) staff can be contacted via email at [RAP@oaklandca.gov](mailto:RAP@oaklandca.gov) or via phone at (510) 238-3721. California relay service at 711 can also be used for disability-related accommodations.

Si desea solicitar adaptaciones relacionadas con discapacidades, o para pedir un intérprete de en Español, Cantonés, Mandarín o de lenguaje de señas (ASL) por favor envíe un correo electrónico a [RAP@oaklandca.gov](mailto:RAP@oaklandca.gov) o llame al (510) 238-3721 o 711 por lo menos cinco días hábiles antes de la reunión.

需要殘障輔助設施, 手語, 西班牙語, 粵語或國語翻譯服務, 請在會議前五個工作天電郵 [RAP@oaklandca.gov](mailto:RAP@oaklandca.gov) 或致電 (510) 238-3721 或711 California relay service.

**HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD  
 FULL BOARD MEETING  
 May 11, 2023  
 7:00 P.M.  
 CITY HALL  
 1 FRANK H. OGAWA PLAZA, HEARING ROOM #1  
 OAKLAND, CA 94612**

**MINUTES**

**1. CALL TO ORDER**

The Board meeting was administered in-person by B. Lawrence-McGowan from the Rent Adjustment Program (RAP), Housing and Community Development Department. B. Lawrence-McGowan explained the procedure for conducting the meeting. The HRRRB meeting was called to order by Chair Ingram at 7:05 p.m.

**2. ROLL CALL**

<b>MEMBER</b>	<b>STATUS</b>	<b>PRESENT</b>	<b>ABSENT</b>	<b>EXCUSED</b>
R. NICKENS, JR.	Tenant	X		
D. WILLIAMS	Tenant	X		
J. DEBOER	Tenant Alt.			X
M. GOOLSBY	Tenant Alt.			X
D. INGRAM	Undesignated	X		
C. OSHINUGA	Undesignated	X		
Vacant	Undesignated			
M. ESCOBAR	Undesignated Alt.	X		
Vacant	Undesignated Alt.			
D. TAYLOR	Landlord	X*		
Vacant	Landlord			
Vacant	Landlord Alt.			
K. SIMS	Landlord Alt.	X		

\*Member Taylor joined the meeting at 7:11 pm

**Staff Present**

Braz Shabrell	Deputy City Attorney
Linda Moroz	Hearing Officer (RAP)
Briana Lawrence-McGowan	Administrative Analyst II (RAP)

**3. PUBLIC COMMENT**

- a. No members of the public spoke during public comment.

**4. CONSENT ITEMS**

- a. Approval of Board Minutes, 4/13/2023 and Panel Minutes, 4/20/2023: Member R. Nickens moved to approve the Board Minutes from 4/13/2023 and the Panel Minutes from 4/20/2023. Member K. Sims seconded the motion.

The Board voted as follows:

**Aye:** D. Ingram, C. Oshinuga, M. Escobar, K. Sims, D. Williams, R. Nickens  
**Nay:** None  
**Abstain:** None

The minutes were approved.

**5. APPEALS\***

- a. T19-0186/T19-0235, Didrickson v. Dang/Commonwealth Company

Appearances: Ted Dang Owner  
Carlos & Glenda Didrickson Tenants

This case involved an owner appeal of a remand decision that partially granted the tenants’ petition for decreased housing services. The tenants filed 2 petitions in 2019 that were eventually consolidated. At the first hearing, the list of decreased housing services alleged by the tenants was condensed and limited to three issues based on the fact that other issues had been addressed and decided in prior hearings. The three issues that were addressed in the first hearing were the gas heater, smoke and carbon monoxide detectors, and the electric breaker. At the first hearing in 2019, all three claims were denied, based primarily on the owner’s testimony that the issues had all been repaired. The tenants appealed and the case came before the Board in 2020. The Board voted to remand the case to the Hearing Officer to address the issues that were listed in the 2019 Notice of Violation and to determine if they constituted decreased housing services. The parties were permitted to submit additional evidence prior to the remand hearing, which both parties did.

The remand hearing took place in October 2021. The Hearing Officer granted decreased housing service awards for the three items that are listed in the Notice of Violation. This included a leak from the heater, broken patio door handle, and

the electric breaker. The Hearing Officer's finding was based on the Notice of Violation and subsequent re-inspection notices that indicated that the issues had not been abated. The owner now appeals the remand decision regarding the door handle and the leak. The owner appeal does not contest the third item regarding the electric breaker. The following issue was presented to the Board:

- 1.) Were the Hearing Officer's findings and the remand decision regarding the leak and the door handle supported by substantial evidence?

The owner contended that there are three issues involved in this appeal and that the first one involves the patio door lock. The owner argued that the reason that the lock is broken is because Mr. Didrickson has been using the door although he's not supposed to. The owner contended that the tenant has filed 14 tenant petitions, and that seven Hearing Officers have issued decisions, but the decisions have not been followed. The owner argued that the patio door leads to the roof, and that nobody is allowed to be on the roof—as it's a new roof that replaced an older one because it was leaking into the unit. The owner contended that the deck that Mr. Didrickson was using before had to be removed because it was an illegal deck, the owner was required to remove it, and this area is now the roof. The owner argued that they wanted to seal the patio door so nobody could go onto the roof, which was previously the deck—however, Mr. Didrickson has resisted the owners' efforts to do that and continues to use the roof as the deck. The owner contended that they have pictures that show plants, furniture, and cameras—and that each month, Mr. Didrickson deducts \$298.33 because he doesn't have a deck anymore, even though he's still using the roof as the deck.

The owner contended that the second issue is the leak from the heater vent. The owner argued that they have had three contractors check the vent: a heater contractor, handyman, and a sheet metal person—and they could find no leaks. The owner contended that Mr. Didrickson claims to have a video of the leak when it rains, but the owner has not seen the video. The owner argued that part of the problem is that they do not communicate and every time the owner asks Mr. Didrickson for something, a response is never received. The owner argued that the tenants don't tell the owners what maintenance is required and that the tenants' claims are not habitability issues—they're minor maintenance issues.

The owner contended that the third issue is that they don't know what to do. The owner argued that hearing decisions have required the tenants to pay a certain amount—however, they don't pay that amount, they pay what they want, and now they owe over \$12,000 in rent. The owner argued that the tenants have claimed several times that every time they use their microwave, and the oven is on, the electric circuit blows and they have no power—however, this was checked on by an electrician and they determined that since the building is an older building and was built in 1950s, if you overload the circuit, the circuit will

pop. The owner contended that in one of the cases that the tenants previously filed, a Hearing Officer came out and turned on several appliances and kept them on for a while and they did not pop—therefore, the tenants were recommended to use a different plug to install the microwave oven. The owner argued that since then, the tenants have not complained and if the electrical problem has continued, the tenants haven't informed him; and that the tenants continue to disregard the prior issued hearing decisions, and that it's not fair.

The tenants contended that in the previous appeal hearing, the Board asked Mr. Dang if he had cured the violations and Mr. Dang was silent about it. The tenants argued that the patio door was broken before they took the deck away and that in previous hearings, Mr. Dang said that the tenants have a right to use the roof as their patio. The tenants contended that one of Mr. Dang's colleagues said if they're on the roof and using it as a patio, since they know it's no longer a patio, it will be their fault if they fall. The tenants argued that the reason the owner removed the deck is because he put up a chimney and didn't have a permit for it, so they called the City building inspector, which resulted in a red tag being placed on the building.

The tenants argued that when the City building inspector came to check the electrical, everything turned off in the apartment except the stove, and that to access the main breaker, they were required to go downstairs into the basement. The tenants contended that a licensed electrician has never come to check on the issue and that during the last hearing, they tried to show a video of the vent leaking but the Hearing Officer at the time didn't allow them to show the video. The tenants argued that the City building inspector supported the tenants' claims and that the owner has no standing in this appeal because he didn't show up to the hearing, nor did he provide a written reason as to why he didn't show. The tenants argued that an appeal requirement is that if you didn't attend the hearing, you should give a written statement in your appeal as to why you didn't, and the owner did not do that.

After parties' arguments, questions to the parties, and Board discussion, Vice Chair Oshinuga moved to affirm the Hearing Officer's decision. Member R. Nickens seconded the motion.

The Board voted as follows:

**Aye:** D. Ingram, C. Oshinuga, M. Escobar, K. Sims, D. Taylor,  
D. Williams, R. Nickens  
**Nay:** None  
**Abstain:** None

The motion was approved.

b. T22-0202, Joseph v. Jones

Appearances:	Kim Roehn	Owner Representative
	Michael Joseph	Tenant

This case involved an administrative decision that granted a tenant's petition contesting a single rent increase. Administrative decisions are decisions that are issued without a hearing, usually because the issues can be decided on the papers alone, there's no material facts and dispute, and/or there's a fundamental flaw with the filings. In this case, the tenant petition was contesting a single rent increase and the owner responded by alleging that the unit is exempt from the Rent Adjustment Program as a condo. The administrative decision was issued on the grounds that the owner was allegedly missing documentation with their response—therefore, the owner's response was disregarded. The following issues were presented to the Board:

- 1.) Was this properly decided as an administrative decision? If the unit is in fact exempt from the Rent Adjustment Program (RAP) as the owner alleges, RAP has no jurisdiction, and the rent increase would not have been unlawful, and the unit would not be subject to the rent increase moratorium.
- 2.) Was the owner's response insufficient and was the Hearing Officer justified in disregarding the owner's response?

The owner representative contended that the administrative decision is invalid under state and local law, and it is inconsistent with prior RAP decisions. The owner representative argued that the owner is requesting that the administrative decision be reversed in full, and that the tenant's petition be dismissed. The owner representative contended that RAP personnel have a duty to exercise basic due diligence to confirm they are acting within the bounds of their authority under the code and that this consideration is fundamental to party's due process rights. The owner representative argued that under Oakland Municipal Code, rent control rules only apply to covered units, they do not apply to exempt units. The owner representative contended that condominiums are a common and well-known exemption under the code and under California's law, known as Costa Hawkins and that the property at issue here is a condominium. The owner representative argued that the condo has its own assessor's parcel number, was purchased as a single unit by the owner in 1979, and it is alienable and separate from the title to any other dwelling unit under Costa Hawkins—therefore, it's exempt from Oakland's RAP ordinance.

The owner representative argued that the administrative decision is void by law because RAP has no jurisdiction over the unit—and that the owner did in fact submit a properly filed and timely response both by mail and via the online RAP

portal. The owner representative contended that the filing was confirmed as being received by RAP, and that it stated that this is an exempt property both on the response form and in the supporting documentation—which included the business tax certificate, tax documentation, and history showing the unit as a condo—including the grant deed, property tax bills, and proof of service on the tenant. The owner representative argued that despite this, a deficiency notice was issued to the owner stating that none of the above documentation had been filed—which was incorrect.

The owner representative argued that when a unit is exempt, Hearing Officers are required to dismiss the petition—regardless of the submission of those supposedly missing documents, and that RAP does not have authority to take any other action. The owner representative contended that the owner re-filed the executed proof of service for the second time—however, the Hearing Officer then issued an administrative decision, which is a decision without a hearing. The owner representative argued that the decision was in favor of the tenant, striking down the rent increase and citing the City’s rent increase moratorium—however, the owner is respectfully requesting for the decision be reversed and for the rent increase be reinstated effective of the date of the original notice. The owner representative contended that the 3% CPI rent increase limit does not apply to exempt units, that the unit was exempt, and that the owner is also requesting that if the Board remands this case for any further action, that a new Hearing Officer be assigned—which is a party's automatic right under California law.

The tenant contended that although the property is a condo, they do not have the expertise and the information required to make a determination about whether the condo is exempt from RAP. The tenant argued that their understanding is that it is currently covered by RAP, that it's not exempt, and that they have no material evidence which proves otherwise. The tenant contended that they were an excellent tenant, paid rent on time, and treated the apartment like it was their home up until they received the rent increase notice. The tenant argued that the rental was set up to maximize the income of the owner—who lives halfway across the country in Texas and has the ability to hire a lawyer.

The tenant contended that the Rent Adjustment Program limits rent increases to the annual CPI, which was 3% in 2022—however, the property manager raised the rent by about 9%, which is three times the CPI. The tenant argued that the rent increase was illegal for that reason, assuming that the condo falls under the Rent Adjustment Program. The tenant contended that this situation forced them to move out and that the prices of rentals in the surrounding area are much lower than what the rent was raised to. The tenant argued that they could get a two-bedroom for the price that the rent was raised to, and that due to the high cost, they were forced to find another place to live.



After parties' arguments, questions to the parties, and Board discussion, Vice Chair Oshinuga moved to vacate the Hearing Officer's Administrative Decision and to remand the case back to the Hearing Officer for a full hearing and to consider the property owner's full response. Member R. Nickens seconded the motion.

The Board voted as follows:

**Aye:** D. Ingram, C. Oshinuga, M. Escobar, K. Sims, D. Taylor,  
D. Williams, R. Nickens  
**Nay:** None  
**Abstain:** None

The motion was approved.

## 6. INFORMATION AND ANNOUNCEMENTS

- a. Briana Lawrence-McGowan announced to the Board that beginning on 5/25/2023, the Board will be having special meetings on the 2<sup>nd</sup> and 4<sup>th</sup> Thursdays of the month, which will begin at 5:30pm.
- b. Chair Ingram announced to the Board that he's still working with the Office of the City Attorneys on the proposed regulations and that they will be brought back to the Board very soon.

## 7. OPEN FORUM

- a. No members of the public spoke during open forum.

## 8. ADJOURMENT

- a. The meeting was adjourned at 8:18 p.m.

**CITY OF OAKLAND  
HOUSING, RESIDENTIAL RENT AND  
RELOCATION BOARD (HRRRB)**

**RESOLUTION NO. \_\_\_\_\_**

**INTRODUCED BY BOARD CHAIR DENARD INGRAM**

---

**RESOLUTION TO RECOMMEND AMENDMENT OF THE RENT ADJUSTMENT PROGRAM REGULATIONS TO (1) EXTEND AMORTIZATION PERIOD FOR MANDATORY SEISMIC RETROFITS TO 25 YEARS; (2) REDUCE ARGUMENT TIME TO FIVE MINUTES PER PARTY; (3) REMOVE APPEARANCE REQUIREMENT FOR APPELLANT AT APPEAL HEARINGS; (4) ALLOW NON-VOTING ALTERNATES TO PARTICIPATE IN BOARD MEETINGS IN NON-VOTING CAPACITY; (5) ADD GOOD CAUSE HEARINGS FOR FAILURE TO APPEAR AT HEARINGS; (6) CODIFY EXISTING PROCEDURAL PRACTICES IN REGULATIONS; AND (7) MAKE OTHER CLARIFYING AND REORGANIZATION CHANGES**

**WHEREAS**, the Housing, Residential Rent and Relocation Board may make recommendations to the City Council or appropriate City Council committee pertaining to Chapter 8.22 of the Oakland Municipal Code (O.M.C.) or City housing policy when requested to do so by the City Council or when the Board otherwise acts to do so, pursuant to O.M.C. 8.22.040 D.4; and

**WHEREAS**, on January 22, 2019, the City Council adopted Ordinance No. 13516, to require mandatory seismic evaluation and retrofit of certain multifamily residential buildings; and

**WHEREAS**, in Ordinance No. 13516, the City Council directed the Rent Board to revise the capital improvements amortization schedule in the Rent Program Regulations to provide an amortization period for Mandatory Seismic Capital Improvements that conforms with the Rent Board's final motion passed during Item 5 of their July 9, 2015 meeting; and

**WHEREAS**, on June 21, 2022, the City Council adopted Ordinance No. 13695, which established a rent registry and requires evidence of registration before submitting an owner petition or an owner response to a tenant petition; and now, therefore, be it

**WHEREAS**, Rent Adjustment Program Regulation Section 8.22.120.I. provides that if an appellant fails to appear at an appeal hearing, the Board will consider the appeal dropped and will issue a decision dismissing the appeal, subject to the appellant showing good cause for the failure to appear; and

**WHEREAS**, Rent Adjustment Program Regulation section 8.22.120.D.2. provides that unless the Board or Appeal Panel votes otherwise, each party will have fifteen (15) minutes to present argument on or in opposition to the appeal; and

**WHEREAS**, on October 20, 2020, the City Council adopted Ordinance No. 13618 (Efficiency Ordinance), to among other things, streamline Rent Board meetings by allowing the Housing, Residential Rent and Relocation Board (Rent Board) to limit argument time for each party to six (6) minutes; and

**WHEREAS**, to make the appeal process more efficient and to minimize time commitment for parties to appeals, the Rent Board wishes to make appearances at appeals voluntary and reduce argument time to six (6) minutes per side; and

**WHEREAS**, Rent Adjustment Program Regulation section 8.22.100.B provides that of a petitioner fails to appear at a properly noticed mediation, the Hearing Officer may dismiss the case; and

**WHEREAS**, because mediations are voluntary, the Rent Board wishes to amend the regulations to allow parties who miss a mediation the opportunity to receive a hearing on the petition; and

**WHEREAS**, Rent Adjustment Program Regulation section 8.22.110.B provides that if a petitioner fails to appear at a properly noticed hearing, the Hearing Officer may dismiss the case;

**WHEREAS**, Rent Adjustment Program Regulation section 8.22.110 does not currently outline any good-cause relief for a party that fails to appear at a properly noticed hearing except through the appeal process; and

**WHEREAS**, either party can potentially wait an extended period of time for a scheduled appeal hearing just to address their good cause evidence, depending on the number of pending petitions; and

**WHEREAS**, significant wait times for either party to be able to present their good-cause evidence can, in some occasions, significantly impact the relief that can be granted by the Appeal Body or by the Hearing Officer; and

**WHEREAS**, Rent Adjustment Program Regulation section 8.22.040 does not currently address Alternate Board Members and their participation in scheduled Board meetings unless they are filling in for regular members; and

**WHEREAS**, allow non-voting alternates to participate in board meetings would allow alternates to learn about the Rent Board in a non-voting capacity; and

**WHEREAS**, Rent Adjustment Program Regulation section 8.22.090.B.1 provides that A Tenant petition or response to an Owner petition is not considered filed unless the tenant submits evidence that the tenant is current on rent or lawfully withholding rent; and

**WHEREAS**, consistent with the Rent Board’s recommendation to City Council to remove the current on rent requirement from the Rent Adjustment Ordinance, the Rent Board wishes to remove the requirement for the tenant be current on rent before filing a petition from the Rent Adjustment Regulations; and

**WHEREAS**, the Rent Board wishes to revise the Rent Adjustment Regulations to clarify rent board procedures from case precedents and codify them in regulations;

**WHEREAS**, the Housing, Residential Rent and Relocation Board seeks to ensure that all covered Oakland tenants and property owners have equitable access to the protections and relief provided by the Rent Adjustment Ordinance; now, therefore, be it

**RESOLVED**, That the Housing, Residential Rent and Relocation Board recommends the City Council amend the Rent Adjustment Program Regulations by adopting the attached amendments to the Rent Adjustment Regulations;

**RESOLVED:** That the Rent Board wishes to amend the Rent Adjustment Regulations consistent with these ordinance changes; and be it

**FURTHER RESOLVED:** That the Rent Board approves the attached Rent Adjustment Regulation amendments and forwards the attached regulation amendments to City Council for approval; and be it

**Proposed Amendments to the Rent Adjustment Regulations Sections 8.22.020-040, 8.22.070, 8.22.090-120, and Appendix A.** (additions are shown as double underline and deletions are shown as ~~strikethrough~~):

**8.22.020 DEFINITIONS.**

“Base occupancy level” means the number of tenants occupying the covered unit as principal residence as of June 16, 2020, with the owner’s knowledge, or allowed by the lease or rental agreement effective as of June 16, 2020, whichever is greater, except that, for units that had an initial rent established on or after June 17, 2020, “base occupancy level” means the number of tenants allowed by the lease or rental agreement entered into at the beginning of the current tenancy. When there is a new lease or rental agreement solely as a result of adding one or more additional occupants to the lease or rental agreement, the “beginning of the current tenancy” refers to the tenancy existing prior to the new lease or rental agreement regarding the additional occupant(s).

“Base Rent” means the monthly rental rate before the latest proposed increase. If the rental agreement provides for a period of “free” or discounted rent within its initial term, the base rent shall be reduced to account for the “free” or discounted period.

“Imputed interest” means the average of the 10 year United States treasury bill rate and the 10 year LIBOR swap rate for the quarter prior to the date the permits for the improvements were obtained plus an additional one and one-half percent, to be taken as simple interest. The Rent Program will post the quarterly interest rates allowable.

“Primary tenant” means a tenant who resides in a covered unit, is not an owner of record of the property, and charges rent to or receives rent from one or more subtenants in the covered unit.

“Principal Residence” means the one dwelling place where an individual primarily resides. Such occupancy does not require that the individual be physically present in the dwelling place at all times or continuously, but the dwelling place must be the individual’s usual or intended place of return. A Principal Residence is distinguishable from one kept primarily for secondary residential occupancy, such as a pied-a-terre or vacation home, or non-residential use, such as storage or commercial use. A determination of Principal Residence shall be based on the totality of circumstances, which may include, but are not limited to, the following factors: (1) whether the individual carries on basic living activities at the subject premises; (2) whether the individual maintains another dwelling and, if so, the amount of time that the individual spends at each dwelling place and indications, if any, that residence in one dwelling is temporary; (3) the subject premises are listed as the individual’s place of residence on any motor vehicle registration, driver’s license, voter registration, or with any other public agency, including Federal, State and local taxing authorities; (4) utilities are billed to and paid by the individual at the subject premises; (5) all or most of the individual’s personal possessions have been moved into the subject premises; (6) a homeowner’s tax exemption for the individual has not been filed for a different property; (7) the subject premises are the place the individual normally returns to as his/her home, exclusive of military service, hospitalization, vacation, family emergency, travel necessitated by employment or education, incarceration, or other reasonable temporary periods of absence.

“Staff” means the staff appointed by City Administrator to administer the Rent Adjustment Program.

“Subtenant,” for purposes of Regulation 8.22.025, means a tenant who resides with and pays rent to one or more primary tenants, rather than directly to the owner to whom the primary tenant(s) pay rent, for the housing services provided to the subtenant.

## **8.22.030 EXEMPTIONS.**

### **A. Dwelling Units That Are Not Covered Units**

1. In order to be a Covered Unit, the Owner must be receiving Rent in return for the occupancy of the dwelling unit.
  - a. Rent need not be cash, but can be in the form of “in-kind” services or materials that would ordinarily be the Owner’s responsibility.
    - i. For example, a person who lives in a dwelling unit and paints the premises, repairs damage, or upgrades the unit is considered to be paying Rent unless the person caused the damage.
  - b. Payment of some of expenses of the dwelling unit even though not all costs are paid is Rent.
    - i. Payment of all or a portion of the property taxes or insurance.
    - ii. Payment of utility costs that are not directly associated with the use of the unit occupied.
2. If California law determines that an “employee of the Owner”, including a manager who resides in the Owner’s property, is not a Tenant, then the dwelling unit occupied by such person is not subject to OMC Chapter 8.22 so long as the person is an employee and continues to reside in the unit.

### **B. Types of Dwelling Units Exempt**

1. Subsidized units. Dwelling units whose rents are subsidized by a governmental unit, including the federal Section 8 voucher program.
2. Newly constructed dwelling units (receiving a certificate of occupancy after January 1, 1983).
  - a. Newly constructed units include legal conversions of uninhabited spaces not used by Tenants, such as:
    - i. Garages;
    - ii. Attics;
    - iii. Basements;
    - iv. Spaces that were formerly entirely commercial.
  - b. Any dwelling unit that is exempt as newly constructed under applicable interpretations of the new construction exemption pursuant to Costa-Hawkins (California Civil Code Section 1954.52).
  - c. Dwelling units not eligible for the new construction exemption include:
    - i. Live/work space where the work portion of the space was converted into a separate dwelling unit;
    - ii. Common area converted to a separate dwelling unit.
3. ~~Substantially rehabilitated buildings.~~
  - a. ~~In order to qualify for the substantial rehabilitation exemption, the rehabilitation work must be completed within a two (2) year period after the issuance of the building permit for the work unless the Owner demonstrates good cause for the work exceeding two (2) years.~~
  - b. ~~For the substantial rehabilitation exemption, the entire building must qualify for the exemption and not just individual units Reserved.~~
4. Dwelling Units Exempt Under Costa-Hawkins. Costa-Hawkins addresses dwelling units that are exempt under state law. The Costa Hawkins exemptions are contained at California Civil Code Section 1954.52. ~~The text of Costa-Hawkins is attached as an appendix to OMC Chapter 8.22.~~

### **C. Certificates of Exemption**

1. Whenever an Owner seeks a Certificate of Exemption the following procedures apply:
  - a. The petition cannot be decided on a summary basis and may only be decided after a hearing on the merits;

b. Staff may intervene in the matter for the purpose of better ensuring that all facts relating to the exemption are presented to the Hearing Officer;

c. In addition to a party's right to appeal, Staff or the Hearing Officer may appeal the decision to the Rent Board; and,

d. A Certificate of Exemption shall be issued in the format specified by Government Code Section 27361.6 for purposes of recording with the County Recorder.

2. In the event that a previously issued Certificate of Exemption is found to have been issued based on fraud, or mistake, or no longer valid due to an intervening material change in law or circumstances, and thereby rescinded, the Staff shall record a rescission of the Certificate of Exemption against the affected real property with the County Recorder.

## **8.22.040 THE BOARD.**

### **A. Meetings**

1. Notice. Meetings shall be noticed and the agenda posted in accordance with the Ralph M. Brown Act (California Government Code Sections 54950, et. seq. (“Brown Act”) and Sunshine Ordinance (OMC Chapter 2.20).)
2. Regular Meetings. The Board or an Appeal Panel shall meet regularly on the second and fourth Thursdays of each month, unless cancelled. Rent Program staff is authorized to schedule these regular meetings either for the full Board or for an Appeal Panel.
3. Special Meetings. Meetings called by the Mayor or City Administrator, or meetings scheduled by the Board for a time and place other than regular meetings are to be designated Special Meetings. The agenda of Special Meetings shall be restricted to those matters for which the meeting was originally called and no additional matters may be added to the agenda.
4. Adjourned or Rescheduled Meetings. A meeting may be adjourned to a time and place to complete the agenda if voted by the Board members present. A rescheduled meeting may be held when a quorum cannot be convened for a regular meeting or when a quorum votes to substitute another time and/or place for a scheduled meeting. Notice of change of meeting time and/or place shall be sent to the City Clerk and absent Board members and provided in accordance with the Brown Act and Sunshine Ordinance.
5. Time of Meetings. Board meetings shall start at **7:00** p.m. and end by 10:00 p.m. unless some other time is set in advance or the meeting is extended by a vote of the Board.
6. Location of Meetings. The Board meetings shall be held at City Hall, One Frank H. Ogawa Plaza, Oakland, CA 94612, unless otherwise designated.
7. Agenda. The agenda for each meeting shall be posted at such time and places as required by the Brown Act and Sunshine Ordinance.
8. Board meetings shall be conducted in accordance with “Robert’s Rules of Order (**Newly Revised**),” unless modified by these Regulations, requirements of the Brown Act or Sunshine Ordinance, or the Board.
9. Open to Public. The meetings shall be open to the public in accordance with the Brown Act and the Sunshine Ordinance, except for circumstances where the Brown Act or Sunshine Ordinance permits the Board to address a matter in closed session, such as litigation or personnel matters.
10. Board Vacations. The Board may schedule dates during the year when no regular Board meetings may be held so that the entire Board may take vacations. The Board must schedule vacation times at least two (2) months prior to the date of the vacation time.
11. Alternate Board Members. Alternate board members may participate in discussion and deliberations, but will only be allowed to vote when filling in for a regular member who is not



present or who has been excused from consideration of or voting on a matter by the Board.

## **B. Quorum and Voting**

1. Four Board members constitutes a quorum of the Board.
2. Decisions of the Board. For the Board to make a decision on the first time a matter comes before the Board, the quorum must include at least one of each of the three categories of Board members (Tenant, residential rental property Owner, and one who is neither of the foregoing). If a matter cannot be decided because at least one of each of the three categories of Board members is not present, the matter will be considered a second time at a future meeting where the matter can be decided even if at least one member from each category is not present. A majority of the Board members present are required to make decisions, provided a quorum is present and sufficient members of each category are present.
3. A Board member who does not participate in a matter because of a conflict of interest or incompatible employment neither counts towards a quorum nor in calculating the number of Board members required to make a majority.
4. Special voting requirements for Just Cause for Eviction regulations enacted as part of partial settlement of *Kim v. City of Oakland*, Alameda County Superior Court Case No. RG03081362 (the "Settlement Regulations").

a. The special voting requirements set out in this subsection apply only to the Just Cause for Eviction regulations set out in Exhibit A.

b. The Settlement Regulations may be amended only by affirmative vote of at least five (5) members of the Rent Board, provided that at least one member from each class of Rent Board members (homeowner, landlord, and tenant) affirmatively votes to modify the Settlement Regulations.

c. Before the Board adopts any amendments to the Settlement Regulations, the Board must introduce the proposed amendments at a meeting, hold a public hearing at which members of the public and interested organizations, including the Rental Housing Association of Northern Alameda County, Inc. and Just Cause Oakland, are noticed, and the amendments can only be considered for adoption at a subsequent meeting.

d. After the introduction of proposed amendments to the Settlement Regulations, if the Board decides to further consider the adoption of the regulations and sets a public hearing to do so, the Board must also transmit the proposed amendments to the appropriate committee of the City Council so the City Council may have the option of commenting on or holding its own hearing before the Rent Board votes to adopt or reject the proposed amendments. If the Council elects not to comment on the proposed amendments or does not comment on them within 90 days after transmittal of the proposed amendments by the Rent Board, the Rent Board may proceed to vote on the proposed amendments.

## **C. Officers**

1. The Board shall select a Chair from among the Board members who are neither tenants nor residential rental property owners. Each Appeal Panel shall be chaired by the member of that panel who is neither a tenant nor a residential rental property owner.
2. The Board may also select a Vice-Chair (who is neither a Tenant nor an Owner) to act as Chair in the Chair's absence.
3. The Officers shall serve one-year terms.
4. The Board shall elect Officers each year at the second meeting in February.
5. The Chair votes on matters as any other Board member.
- ~~6. The Chair or the Chair's designee is authorized to speak on behalf of the Board, in support of any resolution the Board passes, at City Council or City Council Committee meetings.~~

**D. Standing Committees**

The Board may establish standing committees subject to prior approval of the City Council. A request to create a standing committee must include:

1. The staffing costs for the committee; and
2. The costs of complying with meeting noticing requirements.

**8.22.060 NOTICE OF THE EXISTENCE OF CHAPTER 8.22 REQUIRED AT COMMENCEMENT OF TENANCY.**

A. Providing Notice in Multiple Languages

1. The requirement to provide the Notice of the Existence of Chapter 8.22 Required at Commencement of Tenancy in multiple languages took effect on September 24, 2016 and only applies to new tenancies that commenced on or after that date.

2. No Owner will be penalized for failing to comply with this requirement until the later of sixty (60) days after the Rent Program makes a general announcement of the requirement or all the translations are available on the Rent Program website.

3. Until September 21, 2017, no Owner will be denied a Rent increase for failing to provide the notice in the required languages, unless:

a. the Tenant is proficient in one of the non-English languages specified in OMC 8.22.060 (Spanish or Chinese), and is not proficient in English;

or

b. the Owner negotiated the terms of the rental agreement in either Spanish or Chinese and failed to give the notice in that language.

## **8.22.070 RENT ADJUSTMENTS FOR OCCUPIED COVERED UNITS.**

### **A. Purpose**

This section sets forth the Regulations for a Rent adjustment exceeding the CPI Rent Adjustment and that is not authorized as an allowable increase following certain vacancies.

### **B. CPI and Banking Rent Adjustments**

#### **5. Rent History/"Banking"**

(a) If a landlord chooses to increase rents less than the annual CPI Adjustment [formerly Annual Permissible Increase] permitted by the Ordinance, any remaining CPI Rent Adjustment may be carried over to succeeding twelve (12) month periods ("Banked"). However, the total of CPI Adjustments imposed in any one Rent increase, including the current CPI Rent Adjustment, may not exceed three times the allowable CPI Rent Adjustment on the effective date of the Rent Increase notice.

(b) Banked CPI Rent Adjustments may be used together with other Rent justifications, except Increased Housing Service Costs and Fair Return, because these justifications replace the current year's CPI increase.

(c) In no event may any banked CPI Rent Adjustment be implemented more than ten years after it accrues.

### **C. Justifications for a Rent Increase in Excess of the CPI Rent Adjustment or Banking**

1. Regulations regarding ~~†~~The justifications for a Rent increase in excess of the CPI Rent Adjustment or Banking are attached as Appendix A to these Regulations. The justifications are: banking; capital improvement costs; uninsured repair costs; increased housing service costs; additional occupant as defined by OMC 8.22.020; Tenant does not reside in the unit as their principal residence; and the rent increase is necessary to meet constitutional or fair return requirements.

**a. Capital Improvement Costs:** Capital Improvement Costs are those improvements which materially add to the value of the property and appreciably prolong its useful life or adapt it to new building codes. Those improvements primarily must benefit the tenant rather than the landlord.

(1) Credit for capital improvements will only be given for those improvements which have been completed and paid for within the twenty-four (24) month period prior to the date the petition for a rent increase based on the improvements is filed.

(2) Eligible capital improvements include, but are not limited to, the following items:

1. Those improvements which primarily benefit the tenant rather than the landlord. (For example, the remodeling of a lobby would be eligible as a capital improvement, while the construction of a sign advertising the rental complex would not be eligible). However, the complete painting of the exterior of a building, and the complete interior painting of internal dwelling units are eligible capital improvement costs.

2. In order for equipment to be eligible as a capital improvement cost, such equipment must be permanently fixed in place or relatively immobile (for example, draperies, blinds,

carpet, sinks, bathtubs, stoves, refrigerators, and kitchen cabinets are eligible capital improvements. Hot plates, toasters, throw rugs, and hibachis would not be eligible as capital improvements).

3. Except as set forth in subsection 4, repairs completed in order to comply with the Oakland Housing Code may be considered capital improvements.

4. The following may not be considered as capital improvements:

a. Repairs for code violations may not be considered capital improvements if the Tenant proves the following:

i. That a repair was performed to correct a Priority 1 or 2 Condition that was not created by the Tenant, which may be demonstrated by any of the following:

(a) the condition was cited by a City Building Services Inspector as a Priority 1 or 2 Condition;

(b) the Tenant produces factual evidence to show that had the property or unit been inspected by a City Building Services Inspector, the Inspector would have determined the condition to be a Priority 1 or 2 Condition, but the Hearing Officer may determine that in order to decide if a condition is a Priority 1 or 2 Condition expert testimony is required, in which case the Hearing Officer may require such testimony.

ii. That the tenant

(a) informed the Owner of the condition in writing;

(b) otherwise proves that the landlord knew of the conditions, or

(c) proves that there were exceptional circumstances that prohibited the tenant from submitting needed repairs in writing; and

iii. That the Owner failed to repair the condition within a reasonable time after the Tenant informed Owner of the condition or the Owner otherwise knew of the condition.

iv. A reasonable time is determined as follows:

(a) If the condition was cited by a City Building Services Inspector and the Inspector required the repairs to be performed within a particular time frame, or any extension thereof, the time frame set out by the Inspector is deemed a reasonable time; or

(b) Ninety (90) days after the Owner received notice of the condition or otherwise learned of the condition is presumed a reasonable time unless either of the following apply:

(1) the violation remained unabated for ninety (90) days after the date of notice to the Owner and the Owner demonstrates timely, good faith efforts to correct the violation within the ninety the (90) days but such efforts were unsuccessful due to the nature of the work or circumstances beyond the Owner's control, or the delay was attributable to other good cause; or

(2) the Tenant demonstrated that the violation was an immediate threat to the health and safety of occupants of the property, [in which case] fifteen (15) business days is presumed a reasonable time unless:

(i) the Tenant proves a shorter time is reasonable based on the hazardous nature of the condition, and the ease of correction, or

(ii) the Owner demonstrates timely, good faith efforts to correct the violation within the fifteen (15) business days after notice but such efforts were unsuccessful due to the nature of the work or circumstances beyond the Owner's control, or the delay was attributable to other good cause.

(c) If an Owner is required to get a building or other City permit to perform the work, or is required to get approval from a government agency before commencing work on the premises, the Owner's attempt to get the required permit or approval within the timelines set out in (i) and (ii) above shall be deemed evidence of good faith and the Owner shall not be penalized for delays attributable to the action of the approving government agency.

b. **Deferred Maintenance.** Costs for work or portion of work that could have been avoided by the landlord's exercise of reasonable diligence in making timely repairs after the landlord knew or should reasonably have known of the problem that caused the damage leading to the repair claimed as a capital improvement.

i. Among the factors that may be considered in determining if the landlord knew or should reasonably have known of the problem that caused the damage:

(a) Was the condition leading to the repairs outside the tenant's unit or inside the tenant's unit?

(b) Did the tenant notify the landlord in writing or use the landlord's procedures for notifying the landlord of conditions that might need repairs?

(c) Did the landlord conduct routine inspections of the property?

(d) Did the tenant permit the landlord to inspect the interior of the unit?

ii. Examples:

(a) A roof leaks and, after the landlord knew of the leak, did not timely repair the problem and leak causes ceiling or wall damage to units that could have been avoided had the landlord acted timely to make the repair. In this case, replacement of the roof would be a capital improvement, but the repairs to the ceiling or wall would not be.

(b) A problem has existed for an extended period of time visible outside tenants' units and could be seen from a reasonable inspection of the property, but the landlord or landlord's agents either had not inspected the property for an unreasonable period of time, or did not exercise due diligence in making such inspections. In such a case, the landlord should have reasonably known of the problem. Annual inspections may be considered a reasonable time period for inspections depending on the facts and circumstances of the property such as age, condition, and tenant complaints.

iii. Burden of Proof

(a) The tenant has the initial burden to prove that the landlord knew or should have reasonably known of the problem that caused the repair.

(b) Once a tenant meets the burden to prove the landlord knew or should have reasonably known, the burden shifts to the landlord

to prove that the landlord exercised reasonable diligence in making timely repairs after the landlord knew or should have known of the problem.

c. “Gold-plating” or “Over-improvements”

i. Examples:

(a) A landlord replaces a Kenmore stove with a Wolf range. In such a case, the landlord may only pass on the cost of the substantially equivalent replacement.

(b) A landlord replaces a standard bathtub with a jacuzzi bathtub. In such a case, the landlord may only pass on the cost of the substantially equivalent replacement.

ii. Burden of Proof

(a) The tenant has the initial burden to prove that the improvement is greater in character or quality than existing improvements.

(b) Once a tenant meets the burden to prove that the improvement is greater in character or quality than existing improvements, the burden shifts to the landlord to prove that the tenant approved the improvement in writing, the improvement brought the unit up to current building or housing codes, or the improvement did not cost more than a substantially equivalent replacement.

d. Use of a landlord's personal appliances, furniture, etc., or those items inherited or borrowed are not eligible for consideration as capital improvements.

e. Normal routine maintenance and repair of the rental until and the building is not a capital improvement cost, but a housing service cost. (For example: while the replacement of old screens with new screens would be a capital improvement).

f. Costs for which an Owner is reimbursed (e.g., insurance, court awarded damages, subsidies, tax credits, and grants) are not capital improvement costs.

(3) Rent Increases for Capital Improvement costs are calculated according to the following rules:

1. For mixed-use structures, only the percent of residential square footage will be applied in the calculations. The same principle shall apply to landlord-occupied dwellings (i.e., exclusion of landlord's unit).

2. Items determined to be capital improvements pursuant to Section 10.2.2. shall be amortized over the useful life of the improvement as set out in the Amortization Schedule attached as Exhibit 1 to these regulations and the total costs shall be amortized over that time period, unless the Rent increase using this amortization would exceed the Rent increase limits provided by O.M.C. 8.22.070 A2 or 3. Whenever a Capital Improvement Rent increase alone or with any other Rent increases noticed at the same time for a particular Unit exceeds the limits set by O.M.C. 8.22.070 A2 or 3, if the Owner elects to recover the portion of the Capital Improvement that causes the Rent Increase to exceed the limits set by O.M.C. 8.22.070 A2 or 3, the excess can only be recovered by extending the Capital Improvement's amortization period in yearly increments sufficient to cover the excess, and complying with any requirements to notice the Tenant of the extended amortization period with the initial Capital Improvement increase. The dollar amount of the rent increase justified by Capital Improvements shall be removed from the allowable rent at the end of the amortization period.

3. A monthly Rent increase for a Capital Improvement is determined as follows:

a. A maximum of seventy percent (70%) of the total cost for the Capital Improvement (plus imputed interest calculated pursuant to the formula set forth

- in Regulation 8.22.020) may be passed through to the Tenant;
- b. The amount of the Capital Improvement calculated in a. above is then divided equally among the Units that benefit from the Capital Improvement;
- c. The monthly Rent increase is the amount of the Capital Improvement that may be passed through as determined above, divided by the number of months the Capital Improvement is amortized over for the particular Unit.

4. If a unit is occupied by an agent of the landlord, this unit must be included when determining the average cost per unit. (For example, if a building has ten (10) units, and one is occupied by a nonpaying manager, any capital improvement would have to be divided by ten (10), not nine (9), in determining the average rent increase). This policy applies to all calculations in the financial statement which involve average per unit figures.

5. Undocumented labor costs provided by the landlord cannot exceed 25% of the cost of materials.

6. Equipment otherwise eligible as a Capital Improvement will not be considered if a "use fee" is charged (i.e., coin-operated washers and dryers).

7. Where a landlord is reimbursed for Capital Improvements (i.e., insurance, court-awarded damages, subsidies, etc.), this reimbursement must be deducted from such Capital Improvements before costs are amortized and allocated among the units. For each improvement listed on a petition, the landlord must state whether a reimbursement or tax credit is or will be received for that improvement.

(4) In some cases, it is difficult to separate costs between rental units; common vs. rental areas; commercial vs. residential areas; or housing service costs vs. Capital Improvements. In these cases, the Hearing Officer will make a determination on a case-by-case basis.

(5) Interest on Failure to Reduce Capital Improvement Increase After End of Amortization Period.

1. If an Owner fails to reduce a Capital Improvement Rent increase in the month following the end of the amortization period for such improvement and the Tenant pays any portion of such Rent increase after the end of the amortization period, the Tenant may recover interest on the amount overpaid.

2. The applicable rate of interest for overpaid Capital Improvements shall be the rate specified by law for judgments pursuant to California Constitution, Article XV and any legislation adopted thereto and shall be calculated at simple interest.

(6) Documentation of improvement costs with proof of payment (i.e., invoices, receipts, and/or canceled checks) must be presented for all costs which are being used for justification of the proposed rent increase.

(7) Amortization of Capital Improvements. The following schedule shall be used to determine the amortization period of the capital improvement:

<u>IMPROVEMENT</u>	<u>YEARS</u>
<u>Air Conditioners</u>	10
<u>Appliances</u>	



Refrigerator	5
Stove	5
Garbage Disposal	5
Water Heater	5
Dishwasher	5
Microwave Oven	5
Washer/Dryer	5
Fans	5
<b><u>Cabinets</u></b>	10
<b><u>Carpentry</u></b>	10
<b><u>Counters</u></b>	10
<b><u>Doors</u></b>	10
Knobs	5
Screen Doors	5
<b><u>Earthquake Expenses</u></b>	
Architectural and Engineering Fees	5
Emergency Services	
Clean Up	5
Fencing and Security	5
Management	5
Tenant Assistance	5
<b><u>Structural Repair and Retrofitting</u></b>	
Foundation Repair	10

Foundation Replacement	20
Foundation Bolting	20
Iron or Steel Work	20
Masonry-Chimney Repair	20
Shear Wall Installation	10
<u>Seismic Retrofit</u>	<u>25</u>
<b><u>Electrical Wiring</u></b>	10
<b><u>Elevator</u></b>	20
<b><u>Fencing and Security</u></b>	
Chain	10
Block	10
Wood	10
<b><u>Fire Alarm System</u></b>	10
<b><u>Fire Sprinkler System</u></b>	20
<b><u>Fire Escape</u></b>	10
<b><u>Flooring/Floor Covering</u></b>	
Hardwood	10
Tile and Linoleum	5
Carpet	5
Carpet Pad	5
Subfloor	10
<b><u>Fumigation</u></b>	
Tenting	5
<b><u>Furniture</u></b>	5

<b><u>Automatic Garage Door Openers</u></b>	10
<b><u>Gates</u></b>	
Chain Link	10
Wrought Iron	10
Wood	10
<b><u>Glass</u></b>	
Windows	5
Doors	5
Mirrors	5
<b><u>Heating</u></b>	
Central	10
Gas	10
Electric	10
Solar	10
<b><u>Insulation</u></b>	10
<b><u>Landscaping</u></b>	
Planting	10
Sprinklers	10
Tree Replacement	10
<b><u>Lighting</u></b>	
Interior	10
Exterior	10

<b><u>Locks</u></b>	5
<b><u>Mailboxes</u></b>	10
<b><u>Meters</u></b>	10
<b><u>Plumbing</u></b>	
Fixtures	10
Pipe Replacement	10
Re-Pipe Entire Building	20
Shower Doors	5
<b><u>Painting</u></b>	
Interior	5
Exterior	5
<b><u>Paving</u></b>	
Asphalt	10
Cement	10
Decking	10
<b><u>Plastering</u></b>	10
<b><u>Pumps</u></b>	
Sump	10
<b><u>Railing</u></b>	10
<b><u>Roofing</u></b>	
Shingle/Asphalt	10
Built-Up, Tar, and Gravel	10
Tile and Linoleum	10
Gutters/Downspouts	10

<b><u>Security</u></b>	
Entry Telephone Intercom	10
Gates/Doors	10
Fencing	10
Alarms	10
<b><u>Sidewalks/Walkways</u></b>	10
<b><u>Stairs</u></b>	10
<b><u>Stucco</u></b>	10
<b><u>Tilework</u></b>	10
<b><u>Wallpaper</u></b>	5
<b><u>Window Coverings</u></b>	
Drapes	5
Shades	5
Screens	5
Awnings	5
Blinds/Miniblinds	5
Shutters	5

(8) The following describe five major hazard conditions classified as Priorities 1 & 2:

I. **MECHANICAL**

**Priority 1**

- A. Unvented heaters
- B. No combustion chamber, fire or vent hazard
- C. Water heaters in sleeping rooms, bathrooms
- D. Open gas lines, open flame heaters

**Priority 2**

- A. Damaged gas appliance
- B. Flame impingement, soot
- C. Crimped gas line, rubber gas connections
- D. Dampers in gas heater vent pipes, no separation or clearance, through or near combustibile surfaces
- E. Water heater on garage floor

II. PLUMBING

Priority 1

- A. Sewage overflow on surface

Priority 2

- A. Open sewers or waste lines
- B. Unsanitary, inoperative fixtures; leaking toilets
- C. T & P systems, newly or improperly installed

III. ELECTRICAL

Priority 1

- A. Bare wiring, open splices, unprotected knife switches, exposed energized electrical parts
- B. Evidence of overheated conductors including extension cords
- C. Extension cords under rugs

Priority 2

- A. Stapled cord wiring; extension cords
- B. Open junction boxes, switches, outlets
- C. Over-fused circuits
- D. Improperly added wiring

IV. STRUCTURAL

Priority 1

- A. Absence of handrail, loose, weakly-supported handrail
- B. Broken glass, posing potential immediate injury
- C. Hazardous stairs
- D. Collapsing structural members

Priority 2

- A. Garage wall separation
- B. Uneven walks, floors, tripping hazards
- C. Loose or insufficient supporting structural members
- D. Cracked glass, leaky roofs, missing doors (exterior) and windows
- E. Exit, egress requirements; fire safety

Note: Floor separation and stairway enclosures in multi-story handled on a case basis.

V. OTHER

Priority 1

- A. Wet garbage
- B. Open wells or unattended swimming pools
- C. Abandoned refrigerators
- D. Items considered by field person to be immediate hazards

- C. Significant quantity of debris
- D. Abandoned vehicles

Priority 2

- A. Broken-down fences or retaining walls
- B. High, dry weeds, next to combustible surfaces

Questions concerning permits, repairs and compliance schedules should be referred to code enforcement office of the City of Oakland -- (510) 238-3381.

**b. Uninsured Repair Costs:** Uninsured Repair Costs are costs for work done by a landlord or tenant to a rental unit or to the common area of the property or structure containing a rental unit which is performed to secure compliance with any state or local law as to repair damage resulting from, fire, earthquake, or other casualty or natural disaster, to the extent such repair is not reimbursed by insurance proceeds

(1) Uninsured Repair Costs are those costs incurred as a result of natural causes and casualty claims; it does not include improvement work or code correction work. Improvements work or code correction work will be considered either capital improvements or housing services, depending on the nature of the improvement.

(2) Increases justified by Uninsured Repair Costs will be calculated as Capital Improvement costs.

**c. Increased Housing Service Costs:** Increased Housing Service Costs are services provided by the landlord related to the use or occupancy of a rental unit, including, but not limited to, insurance, repairs, replacement maintenance, painting, lighting, heat, water, elevator service, laundry facilities, janitorial service, refuse removal, furnishings, parking, security service and employee services. Any repair cost that is the result of deferred maintenance, as defined in Appendix A, Section 10.2.28.22.070.C.1.a(2)(4)(b), cannot be considered a repair for calculation of Increased Housing Service Costs. Property tax is not considered a housing service cost.

(1) In determining whether there has been an increase in housing service costs, consider the annual operating expenses for the previous two years. (For example: if the rent increase is proposed in 1993, the difference in housing service costs between 1991 and 1992 will be considered.) The average housing service cost percentage (%) increase per month per unit shall be derived by dividing this difference by twelve (12) months, then by the number of units in the building and finally by the average gross operating income per month per unit (which is determined by dividing the gross monthly operating income by the number of units). Once the percentage increase is determined the percentage amount must exceed the allowable rental increase deemed by City Council. The total determined percentage amount is the actual percentage amount allowed for a rental increase.

(2) Any major or unusual housing service costs (i.e., a major repair which does not occur every year) shall be considered a capital improvement. However, any repair cost that is not eligible as a capital improvement because it is deferred maintenance pursuant to Appendix A, Section 10.2.28.22.070.C.1.a(2)(4)(b), may not be considered a repair for purposes of calculating Increased Housing Service Costs.

(3) Any item which has a useful life of one year or less, or which is not considered to be a capital improvement, will be considered a housing service cost (i.e., maintenance and repair).

(4) Individual housing service cost items will not be considered for special consideration. For example, PG&E increased costs will not be considered separately from other housing service costs.

(5) Documentation (i.e., bills, receipts, and/or canceled checks) must be presented for all costs

which are being used for justification of the proposed rent increase.

(6) Landlords are allowed up to 8% of the gross operating income of unspecified expenses (i.e., maintenance, repairs, legal and management fees, etc.) under housing service costs unless verified documentation in the form of receipts and/or canceled checks justify a greater percentage.

(7) If a landlord chooses to use 8% of his/her income for unspecified expenses, it must be applied to both years being considered under housing service cost (for example, 8% cannot be applied to 1980 and not 1981).

**(8) An Increased Housing Service Costs increase may not be taken in the same year as a CPI increase because it replaces the current year's CPI increase.**

~~1.8 A decrease in housing service costs (i.e., any items originally included as housing service costs such as water, garbage, etc.) is considered to be an increase in rent and will be calculated as such (i.e., the average cost of the service eliminated will be considered as a percentage of the rent). If a landlord adds service (i.e., cable TV, etc.) without increasing rent or covers costs previously paid by a tenant, this is considered to be a rent decrease and will be calculated as such.~~

~~1.9 The transfer of utility costs to the tenant by the landlord is not considered as part of the rent increase unless the landlord is designated in the original rental agreement to be the party responsible for such costs.~~

~~1.10 When more than one rental unit shares any type of utility bill with another rental unit, it is illegal to divide up the bill between units. Splitting the costs of utilities among tenants who live in separate units is prohibited by the Public Utilities Commission Code and Rule 18 of PG&E. The best way to remedy the bill is to install individual meters. If this is too expensive, then the property owner should pay the utility bill himself/herself and build the cost into the rent.~~

**d. "Fair Return"**

(1) Owners are entitled to the opportunity to receive a fair return. Ordinarily, a fair return will be measured by maintaining the net operating income (NOI) produced by the property in a base year, subject to CPI related adjustments. Permissible rent increases will be adjusted upon a showing that the NOI in the comparison year is not equal to the base year NOI.

(2) Maintenance of Net Operating Income (MNOI) Calculations

1. The base year shall be the calendar year 2014.
  - a. New owners are expected to obtain relevant records from prior owners.
  - b. Hearing officers are authorized to use a different base date, however, if an owner can demonstrate that relevant records were unavailable (e.g., in a foreclosure sale) or that use of base year 2014 will otherwise result in injustice.
2. The NOI for a property shall be the gross income less the following: property taxes, housing service costs, and the amortized cost of capital improvements. Gross income shall be the total of gross rents lawfully collectible from a property at 100%



occupancy, plus any other consideration received or receivable for, or in connection with, the use or occupancy of rental units and housing services. Gross rents collectible shall include the imputed rental value of owner-occupied units.

3. When an expense amount for a particular year is not a reasonable projection of ongoing or future expenditures for that item, said expense shall be averaged with the expense level for that item for other years or amortized or adjusted by the CPI or may otherwise be adjusted, in order to establish an expense amount for that item which most reasonably serves the objectives of obtaining a reasonable comparison of base year and current year expenses.

(3) Owners may present methodologies alternative to MNOI for assessing their fair return if they believe that an MNOI analysis will not adequately address the fair return considerations in their case. To pursue an alternative methodology, owners must first show that they cannot get a fair return under an MNOI analysis. They must specifically state in the petition the factual and legal bases for the claim, including any calculations.

## **6 Additional Occupants**

As provided by O.M.C. 8.22.020, "Additional occupant," the addition of occupants above the base occupancy level, as defined by the Rent Adjustment Ordinance, allows an owner to petition to increase the rent by an amount up to 5% for each occupant above the base occupancy level. Such petitions must be filed within ninety (90) days of approval, or deemed approval as provided by O.M.C. 8.22.360.A.2.b, of the tenant's written request to add the occupant. No rent increase shall be granted for an additional occupant who is the spouse, registered domestic partner, parent, grandparent, child, adopted child, foster child, or grandchild of an existing tenant, or the legal guardian of an existing tenant's child or grandchild who resides in the unit, or a caretaker/attendant as required for a reasonable accommodation for an occupant with a disability.

Such rent increases must be reversed by the Owner if the additional occupancy level decreases, beginning with the most recently granted increase. Once a tenant provides written notice to the Owner of a decrease in the additional occupancy level and lists all current occupants, the Owner must provide written notice within fifteen (15) days to the tenant of the applicable reduced rent, effective as of the next regular rent due date occurring no sooner than thirty (30) days after the tenant's written notice.

If there are changes in occupancy following a tenant's request to add an occupant and, prior to the Owner's 15-day rent reduction notice deadline and the Owner issuing the notice, the additional occupancy level remains the same (e.g., a departing occupant is replaced), the Owner need not issue the rent reduction notice and the rent increase granted due to the prior additional occupant shall remain in effect, until and unless the additional occupancy level decreases. When the additional occupancy level remains the same following a change in occupancy, the Owner may not be granted a new additional occupant rent increase for any additional occupant that is added. The number of rent increases for additional occupants that currently apply to the rent may not exceed the additional occupancy level.

**7 Tenant Not Residing in Unit as Principal Residence** [Added May 5, 2021, but does not take effect until 3 months after the Local Emergency regarding the COVID-19 pandemic declared on March 9, 2020, is terminated by the City Council]

An Owner who seeks to impose a rent increase without limitation because the Tenant is not residing in the unit as their principal residence must petition for approval of the unrestricted rent increase based on a determination made pursuant to a hearing that the Tenant does not reside in the unit as their principal residence as of the date the petition is filed. The Hearing Officer shall not consider evidence in support of a petition that is obtained in violation of California Civil Code Section 1954 or the Oakland Tenant Protection Ordinance.

#### F. Decreased Housing Services

1. A decrease in housing service costs (i.e., any items originally included as housing service costs such as water, garbage, etc.) is considered to be an increase in rent and will be calculated as such (i.e., the average cost of the service eliminated will be considered as a percentage of the rent). If a landlord adds service (i.e., cable TV, etc.) without increasing rent or covers costs previously paid by a tenant, this is considered to be a rent decrease and will be calculated as such.

2. The transfer of utility costs to the tenant by the landlord is not considered as part of the rent increase unless the landlord is designated in the original rental agreement to be the party responsible for such costs.

3. When more than one rental unit shares any type of utility bill with another rental unit, it is illegal to divide up the bill between units. Splitting the costs of utilities among tenants who live in separate units is prohibited by the Public Utilities Commission Code and Rule 18 of PG&E. The best way to remedy the bill is to install individual meters. If this is too expensive, then the property owner should pay the utility bill himself/herself and build the cost into the rent.

**8.22.090 PETITION AND RESPONSE FILING PROCEDURES.**

**A. Filing Deadlines**

1. In order for a document to meet the filing deadlines prescribed by OMC Chapter 8.22.090, documents must be received by the Rent Adjustment Program offices no later than 5 PM on the date the document is due. A postmark is not sufficient to meet the requirements of OMC Chapter 8.22.090. ~~Additional Regulations regarding electronic and facsimile filing will be developed when these filing methods become available at the Rent Adjustment Program.~~

2. Electronically filed documents must be received by the Rent Adjustment Program no later than 11:59 PM on the date the document is due.

**B. Tenant Petition and Response Requirements**

1. A Tenant petition or response to an Owner petition is not considered filed until the following has been submitted:

a. ~~Evidence that the Tenant is current on his or her Rent or is lawfully withholding Rent. For purposes of filing a petition or response, a statement under oath that a Tenant is current in his or her Rent or is lawfully withholding Rent is sufficient, but is subject to challenge at the hearing~~Reserved;

b. A substantially completed petition or response on the form prescribed by the Rent Adjustment Program, signed under oath; and

c. For Decreased Housing Services claims, organized documentation clearly showing the Housing Service decreases claimed and the claimed value of the services, and detailing the calculations to which the documentation pertains. Copies of documents should be submitted rather than originals. All documents submitted to the Rent Adjustment Program become permanent additions to the file.

d. Proof of service by first-class mail or in person of the tenant petition or response and any supporting documents on the owner.

2. Subtenant petitions described by Regulation 8.22.025 and Primary Tenant responses to them are subject to the tenant petition and response requirements in this section.

**C. Owner Petition and Response Requirements**

1. An Owner's petition or response to a petition is not considered filed until the following has been submitted:

a. Evidence that the Owner has paid his or her City of Oakland Business License Tax;

b. Evidence that the Owner has paid his or her Rent Program Service Fee or evidence that the unit is exempt from the fee;

c.

i. Evidence that the Owner has provided written notice, to all Tenants **in each covered unit** affected by the petition or response, of the existence and scope of the Rent Adjustment Program as required by OMC 8.22.060. For purposes of filing a petition or response, a statement that the Owner has provided the required notices is sufficient, but is subject to challenge at the hearing;

ii. After July 1, 2023, evidence of registration with the Rent Adjustment Program as required by O.M.C. 8.22.510 for each affected covered unit in the building prior to the petition or response being filed;

d. A substantially completed petition or response on the form prescribed by the Rent Adjustment Program, signed under oath;

e. Organized documentation clearly showing the Rent increase justification and detailing the calculations to which the documentation pertains. Copies of documents should be submitted rather than originals. All documents submitted to the Rent Adjustment Program become permanent additions to the file; and

f. Proof of service by first-class mail or in person of the owner petition or response and any supporting documents on the tenants of all units affected by the petition. Supporting documents that exceed twenty-five (25) pages are exempt from the service requirement, provided that: (1) the owner petition form must be served by first-class mail or in person; (2) the petition or attachment to the petition must indicate that additional documents are or will be available at the Rent Adjustment Program; and (3) the owner must provide a paper copy of supporting documents to the tenant or the tenant's representative within ten (10) days if a tenant requests a paper copy in the tenant's response.

2. Primary tenant responses to subtenant petitions described by Regulation 8.22.025 are not subject to the Owner response requirements in this section.

#### **D. Time of Hearing and Decision**

1. The time frames for hearings and decisions set out below are repeated from OMC 8.22.110 D.

2. The Hearing Officer shall have the goal of hearing the matter within sixty (60) days of the original petition's filing date.

3. The Hearing Officer shall have a goal of rendering a decision within sixty (60) days after the conclusion of the hearing or the close of the record, whichever is later.

#### **E. Designation of Representative**

Parties have the right to be represented by the person of their choice. A Representative does not have to be a licensed attorney. Representatives must be designated in writing by the party. Notices and correspondence from the Rent Adjustment Program will be sent to representatives as well as parties so long as a written Designation of Representative has been received by the

Rent Adjustment Program at least ten (10) days prior to the mailing of the notice or correspondence. Parties are encouraged to designate their representatives at the time of filing their petition or response whenever possible.

## **8.22.100 MEDIATION OF RENT DISPUTES.**

### **A. Availability of Mediation**

Voluntary mediation of Rent disputes will be available to all parties participating in Rent adjustment proceedings after the filing of a petition and response. Mediation will only be conducted in those cases in which all parties agree in advance to an effort to mediate the dispute.

### **B. Procedures**

1. Parties who desire mediation shall have the choice between the use of Rent Adjustment Program Staff Hearing Officers acting as mediators or the selection of an outside mediator. Staff Hearing Officers shall be made available to conduct mediations free of charge. The Rent Adjustment Program will develop a list of available outside mediators for those who do not wish to have Staff Hearing Officers mediate rent disputes. Any fees charged by an outside mediator for mediation of rent disputes will be the responsibility of the parties requesting the use of their services.

2. The following rules apply to mediations conducted by Staff Hearing Officers and notices regarding the scheduling of a mediation session shall explain the following:

a. Participation in a mediation session is voluntary;

b. A request by any party for a hearing on the petition instead of the mediation session received prior to or during the scheduled mediation will be granted. Such a request will be immediately referred to the Rent Adjustment Program and a hearing on the petition will be scheduled;

c. Written notice of the mediation session shall be served on the parties by the Rent Adjustment Program in accordance with OMC 8.22.110.

d. It is the goal to have the mediation scheduled within the first 30 days after the response to the petition is filed.

e. Absence Of Parties. If either party fails to appear for a properly noticed mediation, the Hearing Officer will refer the matter to the Rent Adjustment Program for administrative review or hearing on the petition, whichever is appropriate.

~~i. If a petitioner fails to appear at a properly noticed mediation, the Hearing Officer may, in the Hearing Officer's discretion, dismiss the case.~~

~~ii. If a respondent fails to appear, the Hearing Officer will refer the matter to the Rent Adjustment Program for administrative review or hearing on the petition, whichever is appropriate.~~

3. The following rules apply to mediations conducted by outside mediators and notices regarding the scheduling of a mediation session shall explain the following:

a. Participation in a mediation session is voluntary;

b. The Rent Adjustment Program will not schedule the mediation; the parties will be responsible for scheduling the mediation between themselves and the mediator and for notifying the Rent Adjustment Program of the time and date for the mediation;

c. A request by any party for a hearing on the petition instead of the mediation session received prior to or during the scheduled mediation will be granted. Such a request will be immediately referred to the Rent Adjustment Program and an administrative hearing will be scheduled.

~~d. In the event that the responding either party fails to appear for the mediation session, the case will be referred back to the Rent Adjustment Program for administrative review and or hearing on the petition, whichever is appropriate.~~

~~d. In the event that the petitioning party fails to appear for the mediation session, the case will be referred back to the Rent Adjustment Program for administrative dismissal of the petition.~~

4. The Regulations regarding representation by an agent and translation apply to mediations.

5. If the parties fail to settle the rent dispute through the mediation process after a good faith effort, a hearing on the petition will be scheduled on a priority basis with a Staff Hearing Officer. If the mediation was conducted by a Staff Hearing Officer, the hearing on the petition will be conducted by a different Hearing Officer.

6. If the parties reach an agreement during the mediation, a written mediation agreement will be prepared immediately by the mediator and signed by the parties at the conclusion of the mediation. To the extent possible, mediation agreements shall be self-enforcing. The Hearing Officer will issue an order corresponding to the mediated agreement and signed by the parties that either dismisses the petition or grants the petition according to terms set out in the mediation agreement.

7. A settlement agreement reached by the parties will become a part of the record of the proceedings on the petition unless the parties otherwise agree.

8. The parties cannot agree to grant an Owner a permanent exemption of for dwelling unit. Permanent exemption claims must be decided by a Hearing Officer after a hearing on the evidence.

### **C. Postponements of Mediations Before Hearing Officers**

1. A Hearing Officer or designated Staff member may grant a postponement of the mediation only for good cause shown and in the interests of justice. A party may be granted only one postponement for good cause, unless the party shows extraordinary circumstances.

2. "Good cause" includes but is not limited to:

a. Verified illness of a party an attorney or other authorized representative of a party or

material witness of the party;

b. Verified travel plans scheduled before the receipt of notice of hearing;

c. Any other reason that makes it impractical to appear at the scheduled mediation date due to unforeseen circumstances or verified prearranged plans that cannot be changed. Mere inconvenience or difficulty in appearing shall not constitute "good cause".

3. A request for a postponement of a mediation must be made in writing at the earliest date possible after receipt of the notice of mediation with supporting documentation attached.

4. Parties may mutually agree to a postponement at any time. When the parties have agreed to a postponement, the Rent Adjustment Program office must be notified in writing at the earliest date possible prior to the date set for the mediation.



## **8.22.110 HEARING PROCEDURE.**

### **A. Postponements**

1. A Hearing Officer or designated Staff member may grant a postponement of the hearing only for good cause shown and in the interests of justice. A party may be granted only one postponement for good cause, unless the party shows extraordinary circumstances.
2. "Good cause" includes but is not limited to: a. Verified illness of a party an attorney or other authorized representative of a party or material witness of the party; b. Verified travel plans scheduled before the receipt of notice of hearing; c. Any other reason that makes it impractical to appear at the scheduled date due to unforeseen circumstances or verified prearranged plans that cannot be changed. Mere inconvenience or difficulty in appearing shall not constitute "good cause".
3. A request for a postponement of a hearing must be made in writing at the earliest date possible after receipt of the notice of hearing with supporting documentation attached.
4. Parties may mutually agree to a postponement at any time. When the parties have agreed to a postponement, the Rent Adjustment Program office must be notified in writing at the earliest date possible prior to the date set for the hearing.

### **B. Absence Of Parties**

1. If a petitioner fails to appear at a properly noticed hearing, the Hearing Officer may, in the Hearing Officer's discretion, dismiss the case, subject to the petitioner showing good cause for the failure to appear.
  - a. Any excuse for failing to appear, along with supporting documentation, must be submitted to the Hearing Officer within ten (10) days of service of the hearing decision.
  - b. The Hearing Officer will determine if the excuse represents a prima facie case of good cause based on the standards for failing to appear at a hearing and any Board decisions interpreting good cause for failure to appear.
  - c. If the Hearing Officer determines that the application represents a prima facie case of good cause, the Hearing Officer may schedule a new hearing on good cause and on the petition.
  - d. If the petitioner submits a timely application under subsection (a), the time to appeal the Hearing Decision is extended until fifteen (15) days after service of the Hearing Officer's decision denying good cause for failure to appear.

2. If a respondent fails to appear, the Hearing Officer may rule against the respondent, or proceed to a hearing on the evidence.

### **C. Record Of Proceedings**

1. All proceedings before a Hearing Officer or the Rent Board, except mediation sessions, shall

be recorded by tape or other mechanical means. A party may order a duplicate or transcript of the tape recording of any hearing provided that the party ordering the duplicate or transcript pays for the expense of duplicating or transcribing the tape.

2. Any party desiring to employ a court reporter to create a record of a proceeding, except a mediation session, is free to do so at their own expense, provided that the opportunity to obtain copies of any transcript are offered to the Rent Adjustment Program and to the opposing party.

#### **D. Translation**

Translation services for documents, procedures, hearings and mediations in languages other than English pursuant to the Equal Access to Services ordinance (O.M.C. Chapter 2.3) shall be made available to persons requesting such services subject to the City's ability to provide such services. In the event that the City is unable to provide such services, petitioners and respondents who do not speak or are not comfortable with English must provide their own translators. The translators will be required to take an oath that they are fluent in both English and the relevant foreign language and that they will fully and to the best of their ability translate the proceedings.

#### **E. Conduct Of Hearings Before Hearing Officers**

1. Each party, attorney, other representative of a party or witness appearing at the hearing shall complete a written Notice of Appearance and oath, as appropriate, that will be submitted to the Hearing Officer at the commencement of the hearing. All Notices of Appearance shall become part of the record.

2. All oral testimony must be given under oath or affirmation to be admissible.

3. Each party shall have these rights:

a. To call and examine witnesses;

b. To introduce exhibits, provided that the party provides the exhibits to the Rent Adjustment Program and serves copies to the other party not less than seven (7) days before the hearing;

c. To cross-examine opposing witnesses on any matter relevant to the issues even if that issue was not raised on direct examination;

d. To impeach any witness regardless of which party called first called him or her to testify;

e. To rebut the evidence against him or her;

f. To cross-examine an opposing party or their agent even if that party did not testify on his or her own behalf or on behalf of their principal

g. A party who fails to file a response to a petition is prohibited from calling or examining witnesses or introducing oral or written evidence and is limited to cross-examination, unless the

party has good cause for failing to file a response.

4. Unless otherwise specified in these Regulations or OMC Chapter 8.22, the rules of evidence applicable to administrative hearings contained in the California Administrative Procedures Act (California Government Code Section 11513) shall apply.

#### **F. Decisions Of The Hearing Officer**

1. The Hearing Officer shall make written findings of fact and issue a written decision on petitions filed.

2. If an increase in Rent is granted, the Hearing Officer shall state the amount of increase that is justified, and the effective date of the increase.

3. If a decrease in Rent is granted, the Hearing Officer shall state when the decrease commenced, the nature of the service decrease, the value of the decrease in services, and the amount to which the rent may be increased when the service is restored. When the service is restored, any Rent increase based on the restoration of service may only be taken following a valid change of terms of tenancy notice pursuant to California Civil Code Section 827. A Rent increase for restoration of decreased Housing Services is not considered a Rent increase for purposes of the limitation on one Rent increase in twelve (12) months pursuant to OMC 8.22.070 A. (One Rent Increase Each Twelve Months).

4. The Hearing Officer may order Rent adjustment for overpayments or underpayments over a period of months, however, such adjustments shall not span more than a twelve (12) month period, unless longer period is warranted for extraordinary circumstances. The following is a schedule of adjustments for underpayment and overpayments that Hearing Officers must follow unless the parties otherwise agree or good cause is shown:

a. If the underpayment or overpayment is 25% of the Rent or less, the Rent will be adjusted over 3 months;

b. If the underpayment or overpayment is 50% of the Rent or less, the Rent will be adjusted over 6 months;

c. If the underpayment or overpayment is 75% of the Rent or less, the Rent will be adjusted over 9 months;

d. If the underpayment or overpayment is 100% of the Rent or more, the Rent will be adjusted over 12 months.

5. For Rent overpayments based on an Owner's failure to reduce Rent after the expiration of the amortization period for a Capital Improvement, the decision shall also include a calculation of any interest that may be due pursuant to Reg. 8.22.070.C.1.a(5) 10.2.5 (see Appendix A).

6. If the Landlord has petitioned for multiple capital improvements covering the same unit or building, the Hearing Officer may consolidate the capital improvements into a single amortization period and, in the Hearing Officer's discretion, determine the length for that

amortization period in the Decision.

**G. Administrative Decisions**

For rent increase petitions based on one or more additional occupants, if there is no genuine dispute regarding any material fact, the petition may be decided as a matter of law, and the tenant waives their right to a hearing in writing on a form provided by the Rent Adjustment Program, the Hearing Officer shall issue a decision without a hearing.



**8.22.120 APPEALS.**

**A. Statement of Grounds for Appeal and Supporting Documentation**

1. A party who appeals a decision of a Hearing Officer or administrative decision must clearly state the grounds for the appeal on the appeal form or an attachment. The grounds for appeal must be stated sufficiently clearly for the responding party, and the Board to reasonably determine the basis for the appeal so that the responding party can adequately respond and the Board can adequately adjudicate the appeal.
2. A party who files an appeal must file any supporting argument and documentation and serve it on the opposing party within fifteen (15) days of filing the appeal along with a proof of service on the opposition party.
3. A party responding to an appeal must file any response to the appeal and any supporting documentation and serve it on the opposing party within fifteen (15) days of the service of the supporting documentation along with a proof of service on the opposing party.
4. Any argument and supporting documentation may not be any more than twenty-five (25) pages. Arguments must be legible and double-spaced if typed. Any submissions not conforming to these requirements may be rejected by Staff. Staff may limit the pages for argument and supporting documentation submitted in consolidated cases.
5. Staff, in its discretion, may modify or waive the above requirements for good cause. The good cause must be provided in writing by the party seeking a waiver or modification.

**B. Grounds for Appeal**

The grounds on which a party may appeal a decision of a Hearing Officer include, but are not limited to, the following:

1. The decision is inconsistent with OMC Chapter 8.22, the Regulations, or prior decisions of the Board;
2. The decision is inconsistent with decisions issued by other Hearing Officers;
3. The decision raises a new policy issue that has not previously been decided by the Board;
4. The decision violates federal, state, or local law;
5. The decision is not supported by substantial evidence. Where a party claims the decision is not supported by substantial evidence, the party making this claim has the burden to ensure that sufficient record is before the Board to enable the Board to evaluate the party's claim;
6. The Hearing Officer made a procedural error that denied the party sufficient opportunity to adequately present his or her claim or to respond to the opposing party; or
7. The decision denies the Owner a fair return.

a. This appeal ground may only be used by an Owner when his or her underlying petition for approval of a rent increase was based on a fair return claim.

b. Where an Owner claims the decision denies a fair return, the Owner must specifically state on the appeal form the basis for the claim, including any calculations, and the legal basis for the claim.

### **C. Postponements**

1. The Board or Staff may grant a postponement of the appeal hearing only for good cause shown and in the interests of justice. A party may be granted only one postponement for good cause, unless the party shows extraordinary circumstances.

2. "Good cause" shall include but is not limited to:

a. Verified illness of a party an attorney or other authorized representative of a party or material witness of the party;

b. Verified travel plans scheduled before the receipt of notice of hearing;

c. Any other reason that makes it impractical to appear at the scheduled date due to unforeseen circumstances or verified prearranged plans that cannot be changed. Mere inconvenience or difficulty in appearing shall not constitute "good cause".

3. A request for a postponement of an appeal hearing must be made in writing at the earliest date possible after receipt of the notice of appeal hearing with supporting documentation attached.

~~4. Parties may mutually agree to a postponement at any time. When the parties have agreed to a postponement, the Rent Adjustment Program office must be notified in writing at the earliest date possible prior to the date for the appeal hearing.~~

### **D. Procedures at Appeal Hearings**

1. It is the Board's or Appeal Panel's goal to hear three (3) appeals per meeting.

2. Unless the Board or Appeal Panel votes otherwise, or the Appeal Body Chair establishes an alternate time limit prior to the first appeal being heard by the Appeal Body, each party will have ~~fifteen (15)~~ six (6) minutes to present argument on or in opposition to the appeal. This time includes opening argument and any response.

3. Whenever the Board or Appeal Panel considers an appeal at more than one meeting, any Board member not present at a prior hearing must listen to a tape of the prior hearing in order to participate at a subsequent hearing.

4. Only those grounds presented in the written appeal may be argued before the Board or the Appeal Panel.

### **E. Record Of Proceedings**

1. All proceedings before the Rent Board shall be recorded by tape or other mechanical means. A party may order a duplicate or transcript of the tape recording of any appeal hearing provided that the party ordering the duplicate or transcript pays for the expense of duplicating or transcribing the tape.
2. Any party desiring to employ a court reporter to create a record of a proceeding, except a mediation session, is free to do so at their own expense, provided that the opportunity to obtain copies of any transcript are offered to the Rent Adjustment Program and to the opposing party.

#### **F. Evidentiary Hearings**

1. As a general rule, the Board and Appeal Panels should not conduct evidentiary hearings. When the Board or Appeal Panel determines that additional evidence or reconsideration of evidence is necessary, the Board or Appeal Panel should remand the matter back to a Hearing Officer for consideration of evidence.
2. The Board or Appeal Panel should only consider evidence when the evidence is limited in scope and resolution of the matter is more efficient than having it remanded to a Hearing Officer for consideration of the evidence.
3. In order for new evidence to be considered, the party offering the new evidence must show that the new evidence could not have been available at the Hearing Officer proceedings.
4. If the Board or Appeal Panel deems an evidentiary hearing necessary, the appeal will be continued and the Board will issue a written order setting forth the issues on which the parties may present evidence.
5. The parties must file any new documentary evidence with the Board or Appeal Panel and also serve it the opposing party not more than ten (10) days after notice is given that a date has been set for the evidentiary appeal hearing.
  - a. Parties must also file with the Rent Program proofs of service of the evidence on the opposing party.
  - b. Failure to file the evidence and the proofs of service may result in the evidence not being considered by the Board or Appeal Panel.
6. When the Board or Appeal Panel conducts an evidentiary hearing, the same rules will apply as to hearings before Hearing Officers.

#### **G. Appeal Decisions**

1. **Vote Required.** Provided a quorum of the Board is present, or all three Appeal Panel members if a matter is being heard by an Appeal Panel, a majority vote of the Board members present is required to overturn or modify a Hearing Officer's decision. A tie vote upholds the Hearing Officer's decision. If no Board member makes a motion to uphold, reverse, or modify the Hearing Officer's decision on appeal or no motion receives a second, the appeal is deemed denied without comment.

2. Vote at Close of Appeal Hearing. Unless the Board or Appeal Panel votes otherwise, it shall vote on each appeal at the close of the appeal. The motion should include the reasons for the decisions so that the reasons can be set forth in a written decision.

a. Form of Decision. An appeal decision must be in writing and include findings and conclusions.

b. Time for Written Decision. The Board has the goal of issuing a written decision within thirty (30) days of the close of the appeal hearing.

c. Final decision.

i. Written appeal decisions are drafted by Staff, reviewed by the City Attorney, signed by staff as the Board's designee, and served on the parties.

ii. In any individual matter, however, the Board or Appeal Panel may vote to require that a decision first come to the full Board or full Appeal Panel or to the Board or Appeal Panel Chair for final approval and signature of that Chair. A decision is not final until signed by Staff or the Board or Appeal Panel Chair and served on the parties.

d. In its decision, the Board is authorized to designate a schedule for refunds or repayments consistent with Reg. 8.22.110 F.4 in cases where its decision results in under- or over-payments by a party; alternatively, the Board may remand to the Hearing Officer for purposes of devising a refund or repayment plan.

e. Staff shall serve decisions on the parties.

## **H. Dismissal of Appeal**

1. Untimely appeal filing.

a. Staff may dismiss an appeal that is not timely filed.

b. Within ten (10) days following Staff's notice of the dismissal, the party filing the late appeal may submit a written statement explaining any good cause for the late filing.

c. If the good cause appears within the guidelines for acceptable good cause set out in Rent Board decisions, Staff may reinstate the appeal or set a hearing before the Board on whether there is good cause for the late appeal.

d. If the good cause does not appear within the acceptable good cause parameters, Staff may reject the good cause and affirm the appeal dismissal.

2. Failing to adequately state grounds for appeal.

a. If Staff determines that an appeal fails to adequately state the grounds for appeal, Staff will send a deficiency notice to the appellant notifying the appellant of the deficiency and giving the appellant ten (10) days to correct the deficiency.



b. If the appellant fails to respond to the deficiency notice or fails to correct the deficiency in the response, Staff may dismiss the appeal, or ask the Rent Board to determine the adequacy of the appeal.

### **I. Failure to Appear**

1. Appellant. If an appellant fails to appear at an appeal hearing, the Board or Appeal Panel will decide the appeal on the record as submitted~~consider the appeal dropped and will issue a decision dismissing the appeal, subject to the appellant showing good cause for the failure to appear.~~

a. ~~Any excuse for failing to appear, along with supporting documentation, must be submitted to Staff with ten (10) days of the date of the service of the appeal decision.~~

b. ~~Staff will, in the first instance determine if the excuse represents a prima facie case of good cause based on the standards for failing to appear at a hearing and any Board decisions interpreting good cause for failure to appear.~~

e. ~~If a prima facie case of good cause is shown, Staff will schedule an appeal hearing on whether the Board or Appeal Panel accepts the good cause.~~

2. Responding party. If the responding party fails to appear, the Board or Appeal Panel must still hear and decide the appeal.

**Appendix A**

Deleted [Contents moved to Section 8.22.070.]

**FURTHER RESOLVED:** That the Rent Board authorizes the Chair or the Chair’s designee to speak in support of the resolution on behalf of the Board at City Council or Committee meetings.

APPROVED BY THE FOLLOWING VOTE

AYES: WILLIAMS, NICKENS, OSHINUGA, ESCOBAR, TAYLOR, AND  
CHAIRPERSON INGRAM

NOES:

ABSENT:

ABSTENTION:

\_\_\_\_\_  
Date:

ATTEST \_\_\_\_\_  
BRIANA LAWRENCE-MCGOWAN  
Rent Adjustment Program, Housing  
& Community Development  
Department

# Open & Public V

A GUIDE TO THE RALPH M. BROWN ACT

REVISED APRIL 2016



AGENDA ITEM

1. PUBLIC COMMENT: The City Council values your comments; however, pursuant to the Brown Act, Council cannot take action on items not listed on the posted agenda. The public comment period is limited to 20 minutes, with 2 minutes allotted for each speaker. This public comment period is to address the City Council on Consent Calendar items, other agenda items (if the member of the public cannot be present at the time the item is considered) or items of genera...

CURRENT SPEAKER: Larry Block

**ACKNOWLEDGEMENTS**

The League thanks the following individuals for their work on this publication:

**Brown Act Committee**

Michael Jenkins, Committee Chair  
City Attorney, Hermosa Beach, Rolling Hills and West Hollywood

Michael W. Barrett  
*City Attorney, Napa*

Damien Brower  
*City Attorney, Brentwood*

Ariel Pierre Calonne  
*City Attorney, Santa Barbara*

Veronica Ramirez  
*Assistant City Attorney, Redwood City*

Malathy Subramanian  
*City Attorney, Clayton and Lafayette*

Paul Zarefsky  
*Deputy City Attorney, San Francisco*

Gregory W. Stepanicich  
*1st Vice President, City Attorneys' Department  
City Attorney Fairfield, Mill Valley, Town of Ross*

**League Staff**

Patrick Whitnell, *General Counsel*

Koreen Kelleher, *Assistant General Counsel*

Corrie Manning, *Senior Deputy General Counsel*

Alison Leary, *Deputy General Counsel*

Janet Leonard, *Legal Assistant*



# Open & Public V

A GUIDE TO THE RALPH M. BROWN ACT

REVISED APRIL 2016

<b>CHAPTER 1: IT IS THE PEOPLE'S BUSINESS</b> .....	5
<b>CHAPTER 2: LEGISLATIVE BODIES</b> .....	11
<b>CHAPTER 3: MEETINGS</b> .....	17
<b>CHAPTER 4: AGENDAS, NOTICES, AND PUBLIC PARTICIPATION</b> .....	29
<b>CHAPTER 5: CLOSED SESSIONS</b> .....	41
<b>CHAPTER 6: REMEDIES</b> .....	55

## TABLE OF CONTENTS

<b>CHAPTER 1: IT IS THE PEOPLE’S BUSINESS .....</b>	<b>5</b>
The right of access .....	6
Broad coverage .....	6
Narrow exemptions .....	7
Public participation in meetings .....	7
Controversy .....	8
Beyond the law — good business practices.....	8
Achieving balance .....	9
Historical note .....	9
<b>CHAPTER 2: LEGISLATIVE BODIES.....</b>	<b>11</b>
What is a “legislative body” of a local agency? .....	12
What is <u>not</u> a “legislative body” for purposes of the Brown Act? .....	14
<b>CHAPTER 3: MEETINGS.....</b>	<b>17</b>
Brown Act meetings.....	18
Six exceptions to the meeting definition .....	18
Collective briefings.....	21
Retreats or workshops of legislative bodies.....	21
Serial meetings.....	21
Informal gatherings .....	24
Technological conferencing .....	24
Location of meetings.....	25
<b>CHAPTER 4: AGENDAS, NOTICES, AND PUBLIC PARTICIPATION .....</b>	<b>29</b>
Agendas for regular meetings.....	30
Mailed agenda upon written request.....	31
Notice requirements for special meetings .....	32
Notices and agendas for adjourned and continued meetings and hearings .....	32
Notice requirements for emergency meetings .....	32
Notice of compensation for simultaneous or serial meetings .....	33
Educational agency meetings .....	33
Notice requirements for tax or assessment meetings and hearings .....	33

Non-agenda items.....	34
Responding to the public.....	34
The right to attend and observe meetings.....	35
Records and recordings.....	36
The public’s place on the agenda.....	37
<b>CHAPTER 5: CLOSED SESSIONS.....</b>	<b>41</b>
Agendas and reports.....	42
Litigation.....	43
Real estate negotiations.....	45
Public employment.....	46
Labor negotiations.....	47
Labor negotiations — school and community college districts.....	48
Other Education Code exceptions.....	48
Joint Powers Authorities.....	48
License applicants with criminal records.....	49
Public security.....	49
Multijurisdictional law enforcement agency.....	49
Hospital peer review and trade secrets.....	49
Other legislative bases for closed session.....	50
Who may attend closed sessions.....	50
The confidentiality of closed session discussions.....	50
<b>CHAPTER 6: REMEDIES.....</b>	<b>55</b>
Invalidation.....	56
Applicability to Past Actions.....	57
Civil action to prevent future violations.....	57
Costs and attorney’s fees.....	58
Criminal complaints.....	58
Voluntary resolution.....	59







# Chapter 1

## IT IS THE PEOPLE’S BUSINESS

The right of access.....	6
Broad coverage .....	6
Narrow exemptions .....	7
Public participation in meetings .....	7
Controversy.....	8
Beyond the law — good business practices .....	8
Achieving balance .....	9
Historical note.....	9

# Chapter 1

## IT IS THE PEOPLE'S BUSINESS



### 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."*<sup>1</sup>

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."*<sup>2</sup>

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."*<sup>3</sup>

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

**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.

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.<sup>4</sup>

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.<sup>5</sup>

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.

### **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.

---

**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.

---

### 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.<sup>6</sup> 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.

## 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.

---

**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.

---

**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

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



# Chapter 2

## LEGISLATIVE BODIES

What is a “legislative body” of a local agency? ..... 12

What is not a “legislative body” for purposes of the Brown Act? ..... 14

# 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.<sup>1</sup>*



### What is a “legislative body” of a local agency?

A “legislative body” includes:

- **The “governing body”** of a local agency<sup>2</sup> and certain of its subsidiary bodies; “or any other local body created by state or federal statute.”<sup>2</sup> 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.<sup>3</sup> A housing authority is a local agency under the Brown Act even though it is created by and is an agent of the state.<sup>4</sup> The California Attorney General has opined that air pollution control districts and regional open space districts are also covered.<sup>5</sup> Entities created pursuant to joint powers agreements are also local agencies within the meaning of the Brown Act.<sup>6</sup>

- **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.<sup>7</sup> 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

**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.



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.<sup>8</sup>

- **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.<sup>9</sup> 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.<sup>10</sup> “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.<sup>11</sup>
- 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.<sup>12</sup> These include some nonprofit corporations created by local agencies.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

**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.<sup>16</sup>

### 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.<sup>17</sup> 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.<sup>18</sup>
- 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.<sup>19</sup>

**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.<sup>20</sup>
- 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.<sup>21</sup>
- County central committees of political parties are also not Brown Act bodies.<sup>22</sup>

#### 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)

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





# Chapter 3

## MEETINGS

Brown Act meetings .....	18
Six exceptions to the meeting definition.....	18
Collective briefings.....	21
Retreats or workshops of legislative bodies.....	21
Serial meetings .....	21
Informal gatherings .....	24
Technological conferencing .....	24
Location of meetings .....	25

# Chapter 3

## 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."<sup>1</sup> 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.<sup>2</sup>

### 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.<sup>3</sup>
- **"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.<sup>4</sup>
- **"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.<sup>5</sup>
- **"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.<sup>6</sup>

### Six exceptions to the meeting definition

The Brown Act creates six exceptions to the meeting definition:<sup>7</sup>

#### *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.<sup>8</sup> 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).<sup>9</sup>

- 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.<sup>10</sup> 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.<sup>11</sup>



**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."<sup>12</sup> 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 discussion, deliberation, or a decision on a proposed action.<sup>13</sup> 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.”<sup>14</sup>

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.<sup>15</sup>

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

**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."<sup>18</sup> 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.*

- 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.

---

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

---

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.<sup>19</sup> 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.<sup>20</sup> 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.”<sup>21</sup> 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:<sup>22</sup>

- 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.<sup>23</sup>

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:<sup>24</sup>

- 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.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup>



## 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)

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







# Chapter 4

## AGENDAS, NOTICES, AND PUBLIC PARTICIPATION

Agendas for regular meetings .....	30
Mailed agenda upon written request .....	31
Notice requirements for special meetings .....	32
Notices and agendas for adjourned and continued meetings and hearings .....	32
Notice requirements for emergency meetings .....	32
Notice of compensation for simultaneous or serial meetings .....	33
Educational agency meetings .....	33
Notice requirements for tax or assessment meetings and hearings .....	33
Non-agenda items .....	34
Responding to the public .....	34
The right to attend and observe meetings .....	35
Records and recordings .....	36
The public's place on the agenda .....	37

# 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.”<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

**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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.”<sup>9</sup> 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.<sup>10</sup>

**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?

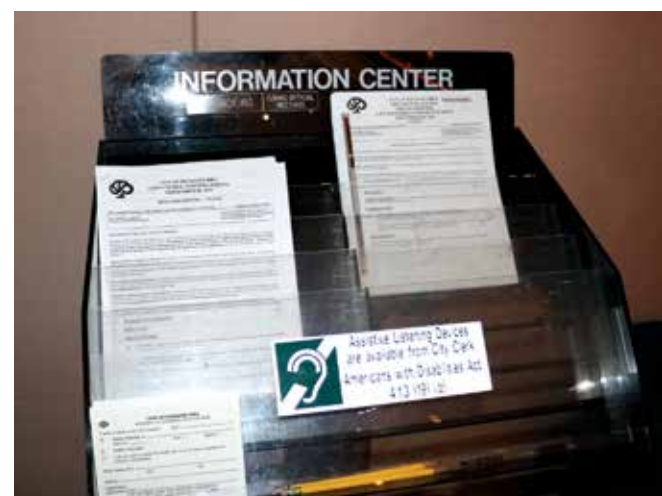
**A.** *Yes, so long as it does not result in extended discussion or action by the body.*

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.<sup>11</sup>



### 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.<sup>12</sup>

### 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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

### Notice requirements for emergency meetings

The special meeting notice provisions apply to emergency meetings, except for the 24-hour notice.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup> However, they are generally consistent with the Brown Act. An item is probably void if not posted.<sup>19</sup> 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.<sup>20</sup>

### **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.<sup>21</sup> 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 XIII C or XIII D, 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.<sup>22</sup> 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:<sup>23</sup>

- 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.

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?

**PRACTICE TIP:** Subject to very limited exceptions, the Brown Act prohibits any action or discussion of an item not on the posted 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> This does not mean, however, that the public is entitled to free entry to a conference attended by a majority of the legislative body.<sup>27</sup>

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.<sup>28</sup>

Action by secret ballot, whether preliminary or final, is flatly prohibited.<sup>29</sup>

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.<sup>30</sup>

**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.<sup>31</sup> Ejection is justified only when audience members actually disrupt the proceedings.<sup>32</sup> 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.<sup>33</sup>

### 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.<sup>34</sup> A fee or deposit as permitted by the California Public Records Act may be charged for a copy of a public record.<sup>35</sup>

**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.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup> The agency may impose its ordinary charge for copies that is consistent with the California Public Records Act.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup>

### 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.<sup>42</sup>

**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.<sup>43</sup>



**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.<sup>44</sup>

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.<sup>45</sup>

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.<sup>46</sup>

**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 Pacific 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)

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





# Chapter 5

## CLOSED SESSIONS

Agendas and reports.....	42
Litigation.....	43
Real estate negotiations .....	45
Public employment .....	46
Labor negotiations .....	47
Labor negotiations — school and community college districts.....	48
Other Education Code exceptions.....	48
Joint Powers Authorities.....	48
License applicants with criminal records .....	49
Public security.....	49
Multijurisdictional law enforcement agency .....	49
Hospital peer review and trade secrets .....	49
Other legislative bases for closed session .....	50
Who may attend closed sessions .....	50
The confidentiality of closed session discussions.....	50

# Chapter 5

## 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.<sup>1</sup>



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.<sup>2</sup> 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.<sup>3</sup>

**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.

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),<sup>4</sup> the Brown Act does not authorize closed sessions for other contract negotiations.

### Agendas and reports

Closed session items must be briefly described on the posted agenda and the description must state the specific statutory exemption.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup> 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.

## 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

---

**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.

---

The California Attorney General has opined that if the agency’s attorney is not a participant, a litigation closed session cannot be held.<sup>17</sup> 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.<sup>18</sup>

**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.<sup>19</sup>

**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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>



**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<sup>24</sup> and the names of the parties with whom its negotiator may negotiate.<sup>25</sup>

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.<sup>26</sup>

**“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.*

**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.

## 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.”<sup>27</sup> 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.<sup>28</sup> The body must possess the power to appoint, evaluate, or dismiss the employee to hold a closed session under this exception.<sup>29</sup> That authority may be delegated to a subsidiary appointed body.<sup>30</sup>

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,<sup>31</sup> 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.<sup>32</sup> The employee has the right to have the specific complaints and charges discussed in a public session rather than closed session.<sup>33</sup> If the employee is not given the 24-hour prior notice, any disciplinary action is null and void.<sup>34</sup>

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.<sup>35</sup>

**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.<sup>36</sup> 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.<sup>37</sup> 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.

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.<sup>38</sup> However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.<sup>39</sup>

**"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,<sup>40</sup> 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.<sup>41</sup>

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

---

**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.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup>

Public participation under the Rodda Act also takes another form.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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.<sup>48</sup> Kindergarten through 12th grade districts may also meet in closed session to review the contents of the statewide assessment instrument.<sup>49</sup>

### 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.<sup>50</sup>

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

## 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.<sup>51</sup>

## 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.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup>

## 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.<sup>55</sup>

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.<sup>56</sup>



**PRACTICE TIP:** Meetings are either open or closed. There is nothing “in between.”<sup>62</sup>

### 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,<sup>57</sup> consideration of the purchase or sale of particular pension fund investments by a legislative body of a local agency that invests pension funds,<sup>58</sup> 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,<sup>59</sup> 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,<sup>60</sup> 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.<sup>61</sup>

### 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.<sup>63</sup>

**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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

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,<sup>67</sup> though the Attorney General has also concluded that a local agency is preempted from adopting an ordinance criminalizing public disclosure of closed session discussions.<sup>68</sup> 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.<sup>69</sup>

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.<sup>70</sup>

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.<sup>71</sup> 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.*

---

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

---

## 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](http://www.cacities.org/opengovernment). A current version of the Brown Act may be found at [www.leginfo.ca.gov](http://www.leginfo.ca.gov).



# Chapter 6

## REMEDIES

Invalidation.....	56
Applicability to Past Actions .....	57
Civil action to prevent future violations .....	57
Costs and attorney’s fees .....	58
Criminal complaints.....	58
Voluntary resolution.....	59

# Chapter 6

## 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.<sup>1</sup> 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;<sup>2</sup>
- 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 agendaized items are acted on by the governing body during a meeting.<sup>3</sup> 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,<sup>4</sup> the challenger must show prejudice as a result of the alleged violation.<sup>5</sup> An action to invalidate fails to state a cause of action against the agency if the body deliberated but did not take an action.<sup>6</sup>

### 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.<sup>7</sup> 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.<sup>8</sup> The legislative body has 30 days after receipt of the letter to provide an unconditional commitment to cease and desist from the past action.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> The unconditional commitment must be substantially in the form set forth in the Brown Act.<sup>12</sup> No legal action may thereafter be commenced regarding the past action.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

### 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.

---

**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.

---



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.<sup>16</sup> Note, however, that a court may not compel elected officials to disclose their recollections of what transpired in a closed session.<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup>

### 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.<sup>20</sup>

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.<sup>21</sup>

"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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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

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.<sup>25</sup> 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.<sup>26</sup>

## 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 54956.5 (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](http://www.cacities.org/opengovernment). A current version of the Brown Act may be found at [www.leginfo.ca.gov](http://www.leginfo.ca.gov).







1400 K Street, Suite 400, Sacramento, CA 95814  
Phone: (916) 658-8200 | Fax: (916) 658-8240  
[www.cacities.org](http://www.cacities.org) | [www.cacities.org/events](http://www.cacities.org/events) | [www.westerncity.com](http://www.westerncity.com)

