

CITY COUNCIL MEETING
NOVEMBER 19, 1986

6

CHANGES IN BROWN
ACT OPEN MEETING
REQUIREMENTS

CC-6
CC-28

City Attorney Stein advised the Council that on January 1, 1987, the new amendments to the Brown Act will become effective. A summary regarding the subject changes was presented to the Council by City Attorney Stein and City Clerk Reimche.

Council discussion followed with questions being directed by the Council to Mr. Stein and Mrs. Reimche. No formal action was taken by the Council on the matter.

COUNCIL COMMUNICATION

TO: THE CITY COUNCIL
FROM: THE CITY MANAGER'S OFFICE

DATE:
NOVEMBER 12, 1986

NO.

SUBJECT:
CHANGES IN BROWN ACT OPEN MEETING REQUIREMENTS

PREPARED BY: City Attorney

BACKGROUND: On January 1, 1987, the new amendments to the Brown Act will become effective. In order to adequately understand what effect these changes will have on the City Council, the City Clerk and I will be giving a short summary of the changes during the November 19, 1986 City Council meeting for your consideration.

In this regard, I am attaching hereto a copy of memo from the League of California Cities, including the report of the League's implementing committee, to which Committee I was appointed. The resultant report of the committee was reviewed by the League's City Attorneys Division.

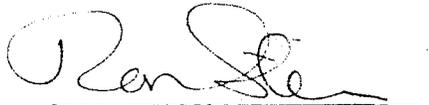
Also attached hereto is an excerpt from the City Clerks' Association of California November 1986 bulletin, detailing provisions of particular importance to City Clerks relating to the Brown Act amendments.

And finally, attached hereto is a copy of some additional comments that I have prepared, as they relate to the Brown Act, which you can review prior to our next City Council meeting.

One section of the Lodi Municipal Code will require amending because of these Brown Act amendments:

(1) Section 2.04.020 - informal informational meetings. As it relates to the Brown Act amendments, we will be required to have an agenda for said meetings and said agenda must be posted within 72 hours prior to said meeting. However, the language that I would propose would say that there will be no formal action taken at the informal informational meetings.

RECOMMENDED ACTION: That the City Council receive the report of the City Attorney and City Clerk and take the appropriate action.



Ronald M. Stein
City Attorney

attachments

ccc,txta.01v p4



League of California Cities

1400 K STREET • SACRAMENTO, CA 95814 • (916) 444-5790

Sacramento, CA.
October 6, 1986

RECEIVED

DATE: 10/30/86

ALICE M. REIMCHE
CITY CLERK
CITY OF LODI

TO: City Attorneys and City Clerks
RE: Changes in Brown Act Open Meeting Requirements

Introduction

AB 2674 (Connelly), Ch. 641 of the 1986 statutes, which dramatically changes the Brown Act open meeting requirements, takes effect January 1, 1987. This new law requires local agencies to post an agenda prior to each meeting of the legislative body, requires local agencies to provide an opportunity for the public to address the legislative body, generally prohibits the legislative body from acting on items not appearing in the agenda, and authorizes bringing suit to void certain actions taken in violation of the Brown Act.

Because the new law raises numerous questions of interpretation, Robert Flandrick, City Attorney of Baldwin Park, Bell and Whittier and President of the City Attorneys Department, appointed a committee to recommend a uniform approach to implementing AB 2674. The members of this committee are: Steve Amerikaner (Chair), City Attorney of Santa Barbara; Bill Adams, City Attorney of Palm Springs; George Buchanan, Senior Assistant City Attorney of Los Angeles; Frank Gillio, City Attorney of Los Altos Hills, Millbrae and Monte Sereno; Alice Graff, City Attorney of Hayward; Ron Johnson, Senior Chief Deputy City Attorney of San Diego; and Ron Stein, City Attorney of Lodi.

This report is intended to help city attorneys resolve some of the interpretive questions raised and ensure compliance with the spirit of the Brown Act. A summary of the bill is followed by specific, practical recommendations. The text of the bill should be carefully reviewed for detailed provisions not covered in the summary. The recommendations at times will propose alternative courses of action or merely identify issues which could arise. While the bill applies to every local "legislative body," including certain advisory bodies such as planning commissions, references will generally be made only to cities and city councils. All code section references are to the Government Code. Because the bill requires considerable attention to detail to ensure compliance, the Committee recommends that prior to January 1, 1987, each city adopt written internal procedures to provide the council and staff with guidance.

Summary of AB 2674

Posting Agendas. AB 2674 requires a city to post an agenda in a location which is freely accessible to the public at least 72 hours before each regular meeting of the city council. The agenda must include a brief description of each item of business to be transacted or discussed at the meeting together with the time and location of the meeting. The council is prohibited from taking action on any item not appearing on the posted agenda unless: (1) a council majority determines that an "emergency situation," as defined, exists; (2) the council determines by a two-thirds vote, or by a unanimous vote if less than two-thirds of the council members are present, that the "need to take action" on the item arose subsequent to the posting of the agenda; or (3) the item was included in a properly posted agenda for a prior meeting occurring not more than five days prior to the meeting at which the action is taken and was continued to the meeting at which the action is taken. (Section 54954.2).

Notice of each special meeting must be posted at least 24 hours prior to the special meeting. (Section 54956).

Public Discussion. AB 2674 requires that every agenda for a regular meeting provide an opportunity for members of the public to address the legislative body on items of interest to the public within the body's subject matter jurisdiction. If an item discussed by a member of the public did not appear in the agenda, the same restrictions on council action discussed above will apply. The council does not have to allow the public time to speak on an item which was previously considered by a council committee if an opportunity for public input was afforded at the committee meeting. (Section 54954.3).

Violations. AB 2674 authorizes any interested person to seek a judicial determination that an action taken by the council in violation of the public meeting or agenda posting requirements of the Brown Act is null and void. Prior to filing a lawsuit and within 30 days of the action, the interested person must make a demand of the council that it cure the challenged action. If the council takes no curative action within 30 days of the demand, the interested person must file suit within the earlier of: (1) 15 days after the expiration of the 30-day period; (2) 15 days after receipt of written notice from the city council of its decision to cure, or not to cure, the challenged action; or (3) 75 days from the date the challenged action was taken. Notwithstanding the foregoing, an action of the council cannot be determined to be null and void if: (1) the action was taken in substantial compliance with the Brown Act; (2) the action was taken in connection with the issuance of an evidence of indebtedness; (3) the action taken gave rise to a contractual obligation upon which a party has, in good faith, detrimentally relied; or (4) the action was taken in connection with the collection of any tax. (Section 54960.1).

Recommendations and Discussion

1. New Section 54954.2 (a) provides that an agenda shall be posted in a location that is freely accessible to the public. What is meant by "freely accessible"?

Since the statute does not specify locations where the agenda must be posted, cities should take a common sense approach to what is reasonable. If a meeting is to be held early in the week, the agenda should not be posted only in a building which is closed on weekends. Possible alternative locations might include a library, a supermarket, a newspaper building or a bulletin board located outside of city hall. The agenda should regularly be posted in the same location (or locations) rather than rotating locations. The agenda should be posted in a location where the agenda will remain undisturbed. While the statute does not require the city to maintain the agenda after it is posted, it may not be reasonable to post the agenda in a location where the agenda is regularly torn down before the meeting.

2. Should a record be kept of the time and location of posting of the agenda?

The Committee recommends that each city adopt, by resolution or otherwise, a procedure to be followed in posting agendas. The Committee recommends that the procedure include one of two alternative methods of keeping a record of posting. Under the first alternative, the clerk would routinely sign a declaration of the time and place where the agenda was posted and keep those in his or her office for public reference. Under the second alternative, each meeting's agenda would include a clerk's report on the posting of the agenda, which would be reflected in the minutes of the meeting.

3. New Section 54954.2 (a) requires that the agenda contain a brief general description of each item of business to be transacted or discussed at the meeting. How much detail must be included in this description?

For the purpose of clarifying this point, the following letter was placed in the July 3, 1986 Senate Journal at page 6703 at the time of the Senate floor vote on AB 2674: "The intent of subsection (a) of Section 54954.2 [Section 5 of AB 2674] is to require local public agencies to post agendas that contain sufficient descriptions of the items of business to be transacted at a meeting of a council, board of supervisors, commission, etc., to enable members of the general public to determine the general nature or subject matter of each agenda item, so that they may seek further information on items of interest. It is not the purpose of this bill to require agendas to contain the degree of information required to satisfy constitutional due process requirements."

The Committee recommends that the description be reasonably calculated to adequately inform the public. For example if the item involves a land use decision, the agenda should include a description of the

action proposed and the location or street address of the property in plain English, and if the item involves a contract, the agenda should describe the nature of the contract. Emphasis should be placed on informing the public of the substance of the matter rather than precisely describing the contemplated council action.

4. New Section 54954.2 (a) provides that "no action shall be taken" on any item not appearing on the posted agenda. What is meant by the phrase "no action shall be taken"?

The Committee believes that the existing definition of "action taken" should be referred to for guidance. Government Code Section 54952.6 defines "action taken" as "a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."

5. May the council simply discuss an item which was not included in the posted agenda if no formal "action" is taken?

The language of the statute is inconsistent on this point. New Section 54954.2 (a) provides that the agenda must include a description of each item of business "to be transacted or discussed." This section then states that "[n]o action" shall be taken on any item not appearing on the agenda, but does not explicitly extend this prohibition to the discussion of such items. Clearly if the council or staff intends to bring up an item for discussion at a meeting, the item should be included in the agenda unless it falls within one of the exceptions under Section 54954.2 (b). If council members give reports, the nature of the reports should be described in the agenda. However, it is unclear whether the council may discuss an item which is brought up by a member of the public and neither was described in the agenda nor falls within one of the exceptions under Section 54954.2 (b). Under a strict interpretation of the statute, such an item should not be discussed. However, as a practical matter, it will be difficult to restrain council members from responding to the public, and such discussion is not explicitly prohibited.

6. As stated in question 5, supra, it is unclear whether the council can even discuss an item which is not included in the agenda but which is raised by a member of the public. At the same time, clearly the council cannot take "action" on such a matter. Assuming discussion is permitted, how can the council respond to the public's concern without running afoul of the prohibition against taking "action"?

Four alternatives are available to the council. First, the council can simply do nothing to resolve the concern of the public. However, council members may believe that this would make them appear to be unresponsive to their constituents. Second, the council can adopt, in advance, a rule whereby any matter raised by the public is automatically referred to staff or placed on the next meeting's agenda. Third, the prohibition on taking "action" can be construed to refer only to substantive actions taken by the council. Under such a construction, the council would be free to take procedural actions

such as referring matters to staff or placing matters on the next agenda. Any risk that such a procedural action would be deemed a prohibited "action" could be minimized by authorizing the presiding officer, in advance, to take such procedural action by edict. Fourth, the council can make a determination pursuant to Section 54954.2 (b) that the need to take action arose after the agenda was posted (see question 7) or that an emergency situation exists. Upon making such a determination, the council is free to take any appropriate action.

7. New Section 54954.2 (b) (2) provides that the council may take action on an item not appearing on the agenda upon a "determination" by a two-thirds vote (or a unanimous vote if less than two-thirds of the council are present) that "the need to take action arose" after the agenda was posted. What does the phrase "the need to take action arose" mean?

Clearly if the need for action on an item was known by the council or staff prior to posting the agenda but was not included for reasons of scheduling convenience or oversight, the need to take action did not arise after the agenda was posted. A more difficult question is presented where, for example, a developer faces a conditional use permit approval deadline but does not seek council approval until after the agenda for a meeting is posted. In this situation, it could be argued that the "need" for action did not arise until after the agenda was posted because it was not until this time that the matter was presented to the council for action. On the other hand, it could be argued that the underlying need to act before the deadline existed prior to posting the agenda regardless of whether the developer had requested council action at that time. The Committee recommends that cities adopt the latter view, as that approach is more in harmony with the Act's apparent intent of ensuring prior public notice of matters to be considered at a meeting. If this latter approach is adopted, existing ordinances which include time deadlines should be reviewed to eliminate the hardship placed on parties who seek council action within the deadline but whose requests were filed after the agenda was posted. Ordinances should be revised so that the filing of an application or request tolls any applicable deadline for a specified period of time to enable the council to act.

To protect subdividers who request subdivision map extensions after the agenda is posted, Government Code Sections 66452.6 (e) and 66463.5 (c) (the Subdivision Map Act) were amended by AB 2740 (Cortese) Ch. 787 of the 1986 statutes, to extend a tentative map for the time required to process a developer's application to extend a tentative subdivision map or tentative parcel map.

8. New Section 54954.2 (b) (1) and (2) provides that action may be taken on items not appearing on the posted agenda upon a "determination" that the item arose after the time of posting or that an emergency situation exists. To what extent must facts be presented to support these determinations?

The "determination" requirement does not mean that formal findings must be made, although a separate vote should be taken in making the determination. Nevertheless, the Committee recommends that the minutes reflect what the need for action was and why the need arose

after the posting of the agenda, or why an emergency situation exists. Cities which keep action minutes may wish to establish a policy whereby the need for any late additions are substantiated in writing and kept in the council file.

9. New Section 54954.3 (a) provides that the public shall be given an opportunity to speak on "items of interest to the public." Does this include agenda items? At what point during the meeting must this opportunity to speak be provided?

The Committee recommends that cities interpret this provision broadly to provide an opportunity to speak on all items within the subject matter jurisdiction of the council, including agenda items. The provision does not specify whether the opportunity to speak must be provided prior to council action on an item. However, the intent of the legislation is probably most fully carried out by providing the opportunity to speak prior to council action. This provision does not require the council to allow public input on each item as it comes up during the course of a meeting. Thus the Committee believes that a city may set aside a fixed period of time early in the meeting to receive public comment, both on agenda items and other matters, and decline to permit public comment at other times during the meeting (except as required for public hearings as discussed below).

The Committee believes that the determination of whether an item is within the subject matter jurisdiction of the council is a discretionary decision to be made by the council.

This provision for public input is completely independent from statutory-requirements for public hearings on particular matters (e.g. hearings on subdivision approvals and assessment proceedings) and in no way affects these requirements. Public comment which is a part of required public hearings should continue to be heard at the time the item is before the council.

10. New Section 54954.3 (b) provides that a city may adopt regulations governing public discussion "to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." If a city adopts such regulations, what may they include?

The Committee believes that these regulations may include provisions specifying the total amount of time devoted to public input, how such time should be allocated among speakers, at what point during the meeting the public will be allowed to speak, time limits on individuals, time limits on particular items and limits on the subject matter of discussion. The Committee suggests that each city adopt such regulations prior to January 1, 1987, the effective date of the statute.

11. New Section 54960.1 provides a procedure by which actions taken in violation of the Brown Act may be determined to be void. What types of Brown Act violations are susceptible to a judicial determination that the underlying action is void?

New Section 54960.1 creates a cause of action to judicially declare void only those council actions taken in violation of Sections 54953, 54954.2 or 54956. Thus actions taken in violation of the open meeting requirements, such as during seriatim meetings, can be set aside by a court. Similarly, actions improperly taken on items which should have been, but were not, described in an agenda posted at the prescribed time may also be set aside. However, violations of Brown Act provisions other than those contained in the aforementioned sections, e.g. where the council prohibits a member of the public from tape recording a meeting (Section 54953.5), do not render the underlying council actions subject to invalidation. Of course, these latter violations may still be enjoined (Section 54960) or subject council members to criminal liability (Section 54959).

12. New Section 54960.1 authorizes any interested person to bring an action "for the purpose of obtaining a judicial determination" that an action taken in violation of the Brown Act "is null and void." Does this provision make such a council action void ab initio?

This provision does not clearly specify whether an action taken by the council in violation of the Brown Act is void ab initio or whether it is voidable upon a finding by the court that a violation occurred. This distinction may be quite significant in certain situations. For example, suppose a city council approves a general plan amendment in violation of the Brown Act, but the action is not directly challenged within the period prescribed by Section 54960.1. The council then approves a development project on the property subject to the general plan amendment. An opponent of the project then challenges the development project approval on the grounds that it is inconsistent with the general plan prior to the amendment, and that the amendment is void because it was adopted in violation of the Brown Act. If the amendment is deemed to be void ab initio, the development project is inconsistent with the general plan and cannot proceed. However, if the amendment could only be set aside if a lawsuit had been filed within the prescribed period (which has now expired), the amendment is valid and the development project is consistent with the general plan.

Based on the language of the statute and the legislative history, the Committee believes that an improper council action is not void ab initio. Section 54960.1 (a) authorizes bringing an action to obtain a "judicial determination" that an improper action is void. The use of the word "determination" implies that the action is not void until the time of the determination. Further, Section 54960.1 (b) provides that an improper council action "shall not be determined to be null and void" if certain conditions exist. Significantly, this section does not say "an action shall be void unless" certain conditions exist.

The legislative history of AB 2674 also supports the position that an improper action is not void ab initio. When introduced on January 15, 1986, Section 54960.1 (a) stated, "Any action taken by a legislative body of a local agency in violation of Section 54953 or 54954.2 is null and void." On March 3, 1986, the bill was amended, at the League's request, to delete the foregoing provision.

Note that Section 54960.1 (a) authorizes an action by mandamus or injunction. The Committee believes that the most appropriate means to

declare a legislative decision void is declaratory relief. When introduced, AB 2674 also authorized an action for declaratory relief. This authority was inexplicably dropped when the bill was amended on March 10, 1986. The Legislative Counsel's Digest of AB 2674 at the time the bill was adopted continued to state that the bill authorizes actions by mandamus, injunction or declaratory relief.

13. New section 54950.1 provides that, prior to seeking a judicial determination that an improper council action is void, the complainant must make a demand of the council to cure or correct the allegedly improper action. The council may then cure or correct the challenged action or decide not to do so. Procedurally, how should the council respond to such a demand?

The Committee recommends that upon receipt of a demand, an item with two sub-items should be added to the next meeting's agenda. The first sub-item should be consideration of the demand, i.e. whether the challenged action can reasonably be said to have violated the Brown Act. The second sub-item should be consideration of the underlying subject matter of the challenged action if the council decided, in considering the demand, that the challenged action may have violated the Brown Act. (Alternatively, the council may want to consider the demand at one meeting and, if it finds the demand to be valid, consider the subject matter of the challenged action at a subsequent meeting. However, since an action to cure or correct must be taken within 30 days of receipt of the demand, the council may need to take prompt action.)

- 1) The first sub-item to be considered is the demand that the council cure or correct the allegedly improper action. The rationale for considering the demand as a separate sub-item, as opposed to discussing the subject matter of the challenged action at the same time, is two-fold. First, it ensures that the council, rather than staff, makes the determination of whether a violation may have occurred. Second, it avoids any implication that the council, by considering the underlying matter, is admitting that a violation took place or is waiving a possible defense of substantial compliance. Since filing a demand is a preliminary step to bringing a suit, the Committee believes that the council generally will be able to consider the demand in closed session pursuant to Section 54956.9 on the basis that a significant exposure to litigation exists.

In considering the demand, the council may want to take one of two approaches. It could ask: Was there an actual violation of the Brown Act? Alternatively: Is there a colorable claim that the Brown Act was violated?

- 2) If the council decides to act upon the demand, it should then consider the second sub-item, i.e. whether action should be taken on the matter considered in the allegedly improper action. The Committee recommends that this sub-item on the agenda should not be termed on the agenda a ratification or confirmation of the allegedly improper action, because such terminology implies that the action was invalid when taken and presupposes that the council will not be influenced by public input to take a

different action. The Committee therefore suggests it be termed a "consideration."

In considering the underlying matter, should the council set aside the original action prior to taking corrective action? As discussed in question 9 supra, the Committee believes that an action taken in violation of the Brown Act is not void ab initio, so such an action remains in effect at the time curative action is being considered. However, the Committee recommends that the council should not declare the original action to be void, because then any action taken, e.g. the imposition of a fee, would not be effective until the corrective action was taken. At the same time, the council should not just ignore the fact that the original action was taken, because this could create confusion if the corrective action differed in substance from the original action. Thus the Committee recommends that the corrective ordinance or resolution state that the original action is superseded or rescinded as of the effective date of the corrective action. To establish a record the corrective ordinance or resolution should also describe the original action and why the corrective action is being taken.

The foregoing procedure may also help cities in demonstrating compliance with the Permit Streamlining Act (PSA) which, among other things, requires a city to approve or disapprove a development project within one year of accepting the application. Has a city complied with the PSA if an allegedly improper approval or disapproval occurs before the one year deadline and the corrective action occurs after the deadline? The Committee believes that the city has complied with the PSA in this situation, because it took an action, albeit defective, which was not void ab initio and which was taken prior to the deadline.

In considering the underlying matter, should the council build a new record from scratch, or can it rely on the record developed when taking the allegedly improper action? Certainly the council must permit new public testimony on the underlying matter. At the same time, the Committee believes that the council can incorporate the record of the prior meeting in support of any findings, provided that no member of the public shows that he or she has suffered prejudice (e.g. by not being present at the earlier meeting and not being able to review the testimony offered at the earlier meeting.) In allowing additional testimony at the subsequent meeting, the council probably can limit members of the public from repeating testimony given at the previous meeting. However, it would be more prudent simply to state that all previous testimony will be considered part of the record and that such testimony need not be repeated.

14. New Section 54960.1 (c) provides that an action taken "in connection with the collection of any tax" shall not be determined to be null and void. How broad is the phrase "in connection with the collection of any tax?"

Although the statute is not clear, the author of AB 2674 has indicated that he did not intend for this phrase to include the collection of any fee or assessment or to include the imposition of any tax.

15. Amended Section 54960.5 provides that a court may award court costs and attorneys fees to the plaintiff in an action brought pursuant to the Brown Act where the court finds a violation. If the council purportedly takes corrective action after the statutory deadline and after the suit has been filed, is a court nevertheless authorized to award attorneys fees?

If the council takes corrective action, any previously filed suit must be dismissed with prejudice pursuant to Section 54960.1 (d). Accordingly, the Committee believes that a court has no authority to award attorneys fees under this provision because no Brown Act violation has been found. At the same time, a council's decision to take corrective action has no effect on the authority of a court to award attorneys fees in an action brought pursuant to Section 54960.

AB2674.legal

EXCERPT FROM CITY CLERKS' ASSOCIATION OF CALIFORNIA BULLETIN

VOLUME 13, NUMBER 7

NOVEMBER 1986

BROWN ACT AMENDMENTS

AB 2674 was approved by the Governor on August 29 and will become effective January 1, 1987. Provisions of particular importance to City Clerks are:

1. Regular meeting agendas must be posted 72 hours before the meeting in a location freely accessible to public. (Sec. 54954.2)
2. Agenda must contain a brief description of each item to be acted on. (Sec. 54954.2)
3. Items not on the posted agenda may be acted on if:
 - A. Majority of the legislative body determines that an emergency exists (as defined in Sec. 54956.5)
 - B. 2/3 of the legislative body, or if less than 2/3 are present a unanimous vote of those present, determine that the need to take action arose after the agenda was posted.
 - C. The item was on a posted agenda for a meeting less than six calendar days prior and was continued to the meeting when action is being taken.
4. Every regular meeting agenda must give the public an opportunity to speak on items within the jurisdiction of the legislative body. Except.
 - A. Time need not be given if the item was considered by a Council committee at a public hearing, unless the item has been substantially changed. (Sec. 54954.3)
 - B. Regulations may be adopted limiting the total amount of time on a particular issue and for each speaker. (Sec. 54954.3)

No action can be taken on non-docketed items unless they meet the criteria above.
5. Notice of special meetings must be posted 24 hours prior to the meeting in a location freely accessible to the public. (Sec. 54956)

Full text of the bill is available from the Legislative Bill Room in Sacramento.

END.

BROWN ACT OPEN MEETINGS

ADDITIONAL COMMENTS FOR REVIEW

1. Agenda must be posted 72 hours before each regular meeting of the City Council. It is important that a record be kept of the date and time and place that the agenda was posted, so that in the event of a controversy, it can be shown by way of this record exactly when and where it was posted.
2. Agenda must be posted at a location which is freely accessible to the public. If you post an agenda at City Hall 72 hours prior to the Council session, and you find that City Hall is closed, it is better to post it someplace where the public would access, such as the Library, supermarket or a bulletin board located outside of City Hall.
3. Agenda must include a brief description of each item of business to be transacted and discussed at the meeting, together with the date, time and location of the meeting.
4. The City Council is prohibited from taking action on any item not appearing on the posted agenda unless the City Council determines that:

- a) an emergency situation has arisen, that must be addressed,
 - b) that the City Council has determine by a 2/3 vote, or by unanimous vote if less than 2/3 of the City Council members are present, that they need to take action on the item arose subsequent to the posting of the agenda, or
 - c) the item was included in a properly posted agenda for a prior meeting occuring not more than 5 days prior to the meeting at which the action was taken and was continued to the meeting at which the action was taken.
5. Notices of special meetings must be posted 24 hours prior to the meeting.
6. There must be an opportunity for members of the public to address the legislative body on items of interest to the public within the body's subject matter jurisdiction. Note: It does not mean that the public must be given an opportunity to speak on every agenda item at the time that the item occurs, but it does require that some time and space be set aside for comments by the public.

It should be noted, however, that the City Council can limit the time in which the public is allowed an opportunity to speak, and it is not required that they get to to speak at the time that a

particular item is before the Council, except when you are dealing with a public hearing.

7. As to items that are brought up by the public at Council meetings, if it is an item that could have been put on the agenda, then it should be suggested to the Council that they refer the item to staff for a staff report. It is therefore suggested that we do a very good education program for the public, that although they may bring up items that were not on the agenda, that they must be made aware and realize that no action can be taken on their item except under the exceptions.

8. As to the question of action on an item not appearing on the agenda, there must be a 2/3 vote that the need to take the action arose after the agenda was posted. So this will require two votes: (1) That the need to take the action arose after the agenda was prepared, and (2) the action which could be taken. (Note: If the mayor just refers the item to staff, this would not be "action taken", therefore, no vote would be required.)

9. As to the item on the agenda "Comments by City Council Members", I would recommend that if there is an item that arises subsequent to the agenda's preparation, and which action need not be immediately taken, that the Council member bring up the item and request that it be referred to staff. The mayor would then refer the item to staff and this would not constitute action taken, and there would be no requirement of a 2/3 vote.

As to items that are brought up by the Council under the comments by council members portion of the agenda, that do require that action be taken, then the Council would be required to have two separate votes:

(1) A vote on the fact that the action arose subsequent to the agenda's preparation, and action is needed to be taken on the matter; and

(2) A vote that would be the actual action on the item.

The record would then reflect the reason why it was necessary that the action be taken immediately.

The other area under the council members comments portion - reports or commendations - my recommendation would be if the Council is required to take action, then I would suggest that you advise the City Clerk prior to the agenda's being prepared, that you will be discussing that subject and it is then placed on the agenda. If, however, there is no action taken, then I see no reason why the Council person cannot bring that item up under Council members comments.

10. As to the time that people can speak, it has been recommended that we adopt regulations governing public discussion. This could be important, especially when dealing with the issues of subject matter jurisdiction. Discussions of nuclear war, etc. may or may

not be items that in the subject matter jurisdiction of the Council, and this would be a good time to discuss that.

Secondly, we should determine if we want to set aside a particular amount of time for the public to speak on agenda or other items of interest, and if so, do we want to have a certain amount of time per speaker, or a certain amount of time totally.

11. Regarding the Government Code Section requiring that no action shall be taken on any item not appearing on the agenda, the statute is inconsistent on whether an item can be discussed that was not on the agenda. It will be important to remind the Council of this provision, and if they are going to discuss an item which could have been on the agenda, then it should be put on the agenda. It might be important to give notice to Council members on a bi-weekly basis that if there are any items that they want to have on the agenda, that they should give notice to the City Clerk of same prior to the preparation of the agenda so that it can be included in the agenda which must be posted 72 hours before the session.

brownact,txta.01v,p4

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LODI
AMENDING TITLE 2, CHAPTER 2.04, SECTION 2.04.020 OF THE
LODI MUNICIPAL CODE RELATING TO INFORMAL INFORMATIONAL MEETINGS.

BE IT ORDAINED BY THE LODI CITY COUNCIL.

SECTION 1. Lodi Municipal Code Title 2, Chapter 2.04, Section 2.04.020 is hereby amended to read as follows:

"Informal informational meetings of the city council shall be held on each Tuesday morning of each month at the hour of seven a.m. in the council chambers of the city. An agenda shall be prepared for such meeting, which shall be posted within 72 hours prior to the meeting in a location freely accessible to the public. No formal action shall be taken by the City Council at such meeting. The city manager and such department heads as the council may request shall be present and present such information as may be deemed desirable."

SECTION 2. All ordinances and parts of ordinances in conflict herewith are repealed insofar as such conflict may exist.

SECTION 3. This ordinance shall be published one time in the "Lodi News Sentinel", a daily newspaper of general circulation printed and published in the City of Lodi and shall be in force and take effect thirty days from and after its passage and approval.

Approved this day of

FRED M. REID
MAYOR

Attest:

ALICE M. REIMCHE
City Clerk

State of California
County of San Joaquin, ss.

I, Alice M. Reimche, City Clerk of the City of Lodi, do hereby certify that Ordinance No. _____ was introduced at a regular meeting of the City Council of the City of Lodi held _____ and was thereafter passed, adopted and ordered to print at a regular meeting of said Council held _____ by the following vote:

Ayes:	Council Members -
Noes:	Council Members -
Absent:	Council Members -
Abstain:	Council Members -

I further certify that Ordinance No. _____ was approved and signed by the Mayor on the date of its passage and the same has been published pursuant to law.

ALICE M. REIMCHE
City Clerk

Approved as to Form

RONALD M. STEIN
City Attorney

Alice

RECEIVED

1986 OCT -8 PM 3:43

ALICE M. REIMCHE
CITY CLERK
CITY OF LODI

MEMORANDUM

To: Honorable Mayor and City Council Members
City Manager
City Clerk

From: City Attorney

Date: October 6, 1986

Re: AB 2674 (Connelly) - Brown Act Open Meetings

Attached hereto please find a copies of AB 2674 and the AB 2674 draft report of the Implementation Committee, to which I am appointed. This subject matter is set for discussion at a shirtsleeves session on Tuesday morning, November 25, 1986.

I thought perhaps you would want to read this over. If you have any questions or comments, please contact me.



RONALD M. STEIN
CITY ATTORNEY

RMS:vc

attachments



League of California Cities

1400 K STREET • SACRAMENTO, CA 95814 • (916) 444-5790

Sacramento, CA.
September 25, 1986

TO: Frank Gillio Ron Johnson
Alice Graff Bill Adams
George Buchanan Ron Stein

FROM: Paul Valle-Riestra

RE: AB 2674 Implementation Committee

Please find enclosed the final draft of the AB 2674 Report. You will recall you gave Steve Amerikaner final editorial control over the report to make any last minute changes. I hope to mail the final report to all city attorneys and city clerks prior to the Annual Conference.

Many thanks to each of you for the time and energy you put into this Committee. I believe that the report is a good one and will save city officials across the state considerable time and frustration sorting through this "inexplicable" bill.

PV925M1.legal

DRAFT REPORT OF THE AB 2674 IMPLEMENTATION COMMITTEE

Introduction

AB 2674 (Connelly), Ch. 641 of the 1986 statutes, which dramatically changes the Brown Act open meeting requirements, takes effect January 1, 1987. This new law requires local agencies to post an agenda prior to each meeting of the legislative body, requires local agencies to provide an opportunity for the public to address the legislative body, generally prohibits the legislative body from acting on items not appearing in the agenda, and authorizes bringing actions to void certain council actions taken in violation of the Brown Act.

Because the new law raises numerous questions of interpretation, Robert Flandrick, City Attorney of Baldwin Park, Bell and Whittier and President of the City Attorneys Department, appointed a committee to recommend a uniform approach to implementing AB 2674. The members of this committee are: Steve Amerikaner (Chair), City Attorney of Santa Barbara; Bill Adams, City Attorney of Palm Springs; George Buchanan, Senior Assistant City Attorney of Los Angeles; Frank Gillio, City Attorney of Los Altos Hills, Millbrae and Monte Sereno; Alice Graff, City Attorney of Hayward; Ron Johnson, Senior Chief Deputy City Attorney of San Diego; and Ron Stein, City Attorney of Lodi.

This report is intended to help city attorneys resolve some of the interpretive questions raised and ensure compliance with the spirit of the Brown Act. A summary of the bill is followed by specific, practical recommendations. The text of the bill should be carefully reviewed for detailed provisions not covered in the summary. The recommendations at times will propose alternative courses of action or merely identify issues which could arise. While the bill applies to every local "legislative body," including certain advisory bodies such as planning commissions, references will generally be made only to cities and city councils. All code section references are to the Government Code. Because the bill requires considerable attention to detail to ensure compliance, the Committee recommends that prior to January 1, 1987, each city adopt written internal procedures to provide the council and staff with guidance.

Summary of AB 2674

Posting Agendas. AB 2674 requires a city to post an agenda in a location which is freely accessible to the public at least 72 hours before each regular meeting of the city council. The agenda must include a brief description of each item of business to be transacted or discussed at the meeting together with the time and location of the meeting. The council is prohibited from taking action on any item not appearing on the posted agenda unless: (1) a council majority determines that an "emergency situation," as defined, exists;

(2) the council determines by a two-thirds vote, or by a unanimous vote if less than two-thirds of the council members are present, that the "need to take action" on the item arose subsequent to the posting of the agenda; or (3) the item was included in a properly posted agenda for a prior meeting occurring not more than five days prior to the meeting at which the action is taken and was continued to the meeting at which the action is taken. (Section 54954.2).

Notice of each special meeting must be posted at least 24 hours prior to the special meeting. (Section 54956).

Public Discussion. AB 2674 requires that every agenda for a regular meeting provide an opportunity for members of the public to address the legislative body on items of interest to the public within the body's subject matter jurisdiction. If an item discussed by a member of the public did not appear in the agenda, the same restrictions on council action discussed above will apply. The council does not have to allow the public time to speak an item which was previously considered by a council committee if an opportunity for public input was afforded at the committee meeting. (Section 54954.3).

Violations. AB 2674 authorizes any interested person to seek a judicial determination that an action taken by the council in violation of the public meeting or agenda posting requirements of the Brown Act is null and void. Prior to filing a lawsuit and within 30 days of the action, the interested person must make a demand of the council that it cure the challenged action. If the council takes no curative action within 30 days of the demand, the interested person must file suit within the earlier of: (1) 15 days after the expiration of the 30-day period; (2) 15 days after receipt of written notice from the city council of its decision to cure, or not to cure, the challenged action; or (3) 75 days from the date the challenged action was taken. Notwithstanding the foregoing, an action of the council cannot be determined to be null and void if: (1) the action was taken in substantial compliance with the Brown Act; (2) the action was taken in connection with the issuance of an evidence of indebtedness; (3) the action taken gave rise to a contractual obligation upon which a party has, in good faith, detrimentally relied; or (4) the action was taken in connection with the collection of any tax. (Section 54960.1).

Recommendations and Discussion

1. New Section 54954.2 (a) provides that an agenda shall be posted in a location that is freely accessible to the public. What is meant by "freely accessible"?

Because the statute does not specify locations where the agenda must be posted, cities should take a common sense approach to what is reasonable. If a meeting is to be held early in the week, the agenda should not be posted only in a building which is closed on weekends. Possible alternative locations might include a library, a supermarket, a newspaper building or a bulletin board located outside of city hall. The agenda should regularly be posted in the same location (or

locations) rather than rotating locations. The agenda should be posted in a location where the agenda will remain undisturbed. While the statute does not require the city to maintain the agenda after it is posted, it may not be reasonable to post the agenda in a location where the agenda is regularly torn down before the meeting.

2. Should a record be kept of the time and location of posting of the agenda?

The Committee recommends that each city adopt, by resolution or otherwise, a procedure to be followed in posting agendas. The Committee recommends that the procedure include one of two alternative methods of keeping a record of posting. Under the first alternative, the clerk would routinely sign a declaration of the time and place where the agenda was posted and keep those in his or her office for public reference. Under the second alternative, each meeting's agenda would include a clerk's report on the posting of the agenda, which would be reflected in the minutes of the meeting.

3. New Section 54954.2 (a) requires that the agenda contain a brief general description of each item of business to be transacted or discussed at the meeting. How much detail must be included in this description?

For the purpose of clarifying this point, the following letter was placed in the July 3, 1986 Senate Journal at page 6703 at the time of the Senate floor vote on AB 2674: "The intent of subsection (a) of Section 54954.2 [Section 5 of AB 2674] is to require local public agencies to post agendas that contain sufficient descriptions of the items of business to be transacted at a meeting of a council, board of supervisors, commission, etc., to enable members of the general public to determine the general nature or subject matter of each agenda item, so that they may seek further information on items of interest. It is not the purpose of this bill to require agendas to contain the degree of information required to satisfy constitutional due process requirements."

The Committee recommends that the description be reasonably calculated to adequately inform the public. For example if the item involves a land use decision, the agenda should include a description of the action proposed and the location or street address of the property in plain English, and if the item involves a contract, the agenda should describe the nature of the contract. Emphasis should be placed on informing the public of the substance of the matter rather than precisely describing the contemplated council action.

4. New Section 54954.2 (a) provides that "no action shall be taken" on any item not appearing on the posted agenda. What is meant by the phrase "no action shall be taken"?

The Committee believes that the existing definition of "action taken" should be referred to for guidance. Government Code Section 54952.6 defines "action taken" as "a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members

of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."

5. May the council simply discuss an item which was not included in the posted agenda if no formal "action" is taken?

The language of the statute is inconsistent on this point. New Section 54954.2 (a) provides that the agenda must include a description of each item of business "to be transacted or discussed." This section then states that "[n]o action" shall be taken on any item not appearing on the agenda, but does not explicitly extend this prohibition to the discussion of such items. Clearly if the council or staff intends to bring up an item for discussion at a meeting, the item should be included in the agenda unless it falls within one of the exceptions under Section 54954.2 (b). If council members give reports, the nature of the reports should be described in the agenda. However, it is unclear whether the council may discuss an item which is brought up by a member of the public and neither was described in the agenda nor falls within one of the exceptions under Section 54954.2 (b). Under a strict interpretation of the statute, such an item should not be discussed. However, as a practical matter, it will be difficult to restrain council members from responding to the public, and such discussion is not explicitly prohibited.

6. As stated in question 5, supra, it is unclear whether the council can even discuss an item which is not included in the agenda but which is raised by a member of the public. At the same time, clearly the council cannot take "action" on such a matter. Assuming discussion is permitted, how can the council respond to the public's concern without running afoul of the prohibition against taking "action"?

Four alternatives are available to the council. First, the council can simply do nothing to resolve the concern of the public. However, council members may believe that this would make them appear to be unresponsive to their constituents. Second, the council can adopt, in advance, a rule whereby any matter raised by the public is automatically referred to staff or placed on the next meeting's agenda. Third, the prohibition on taking "action" can be construed to refer only to substantive actions taken by the council. Under such a construction, the council would be free to take procedural actions such as referring matters to staff or placing matters on the next agenda. Any risk that such a procedural action would be deemed a prohibited "action" could be minimized by authorizing the presiding officer, in advance, to take such procedural action by edict. Fourth, the council can make a determination pursuant to Section 54954.2 (b) that the need to take action arose after the agenda was posted (see question 7) or that an emergency situation exists. Upon making such a determination, the council is free to take any appropriate action.

7. New Section 54954.2 (b) (2) provides that the council may take action on an item not appearing on the agenda upon a "determination" by a two-thirds vote (or a unanimous vote if less than two-thirds of the council are present) that "the need to take action arose" after the agenda was posted. What does the phrase "the need to take action arose" mean?

Clearly if the need for action on an item was known by the council or staff prior to posting the agenda but was not included for reasons of scheduling convenience or oversight, the need to take action did not arise after the agenda was posted. A more difficult question is presented where, for example, a developer faces a conditional use permit approval deadline but does not seek council approval until after the agenda for a meeting is posted. In this situation, it could be argued that the "need" for action did not arise until after the agenda was posted because it was not until this time that the matter was presented to the council for action. On the other hand, it could be argued that the underlying need to act before the deadline existed prior to posting the agenda regardless of whether the developer had requested council action at that time. The Committee recommends that cities adopt the latter view, as that approach is more in harmony with the Act's apparent intent of ensuring prior public notice of matters to be considered at a meeting. If this latter approach is adopted, existing ordinances which include time deadlines should be reviewed to eliminate the hardship placed on parties who seek council action within the deadline but whose requests were filed after the agenda was posted. Ordinances should be revised so that the filing of an application or request tolls any applicable deadline for a specified period of time to enable the council to act.

To protect subdividers who request subdivision map extensions after the agenda is posted, Government Code Sections 66452.6 (e) and 66463.5 (c) (the Subdivision Map Act) were amended by AB 2740 (Cortese) Ch. 787 of the 1986 statutes, to extend a tentative map for the time required to process a developer's application to extend a tentative subdivision map or tentative parcel map.

8. New Section 54954.2 (b) (1) and (2) provides that action may be taken on items not appearing on the posted agenda upon a "determination" that the item arose after the time of posting or that an emergency situation exists. To what extent must facts be presented to support these determinations?

The "determination" requirement does not mean that formal findings must be made, although a separate vote should be taken in making the determination. Nevertheless, the Committee recommends that the minutes reflect what the need for action was and why the need arose after the posting of the agenda, or why an emergency situation exists. Cities which keep action minutes may wish to establish a policy whereby the need for any late additions are substantiated in writing and kept in the council file.

9. New Section 54954.3 (a) provides that the public shall be given an opportunity to speak on "items of interest to the public." Does this include agenda items? At what point during the meeting must this opportunity to speak be provided?

The Committee recommends that cities interpret this provision broadly to provide an opportunity to speak on all items within the subject matter jurisdiction of the council, including agenda items. The provision does not specify whether the opportunity to speak must be provided prior to council action on an item. However, the intent of the legislation is probably most fully carried out by providing the

opportunity to speak prior to council action. This provision does not require the council to allow public input on each item as it comes up during the course of a meeting. Thus the Committee believes that a city may set aside a fixed period of time early in the meeting to receive public comment, both on agenda items and other matters, and decline to permit public comment at other times during the meeting (except as required for public hearings as discussed below).

The Committee believes that the determination of whether an item is within the subject matter jurisdiction of the council is a discretionary decision to be made by the council.

This provision for public input is completely independent from statutory-requirements for public hearings on particular matters (e.g. hearings on subdivision approvals and assessment proceedings) and in no way affects these requirements. Public comment which is a part of required public hearings should continue to be heard at the time the item is before the council.

10. New Section 54954.3 (b) provides that a city may adopt regulations governing public discussion "to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." If a city adopts such regulations, what may they include?

The Committee believes that these regulations may include provisions specifying the total amount of time devoted to public input, how such time should be allocated among speakers, at what point during the meeting the public will be allowed to speak, time limits on individuals, time limits on particular items and limits on the subject matter of discussion. The Committee suggests that each city adopt such regulations prior to January 1, 1987, the effective date of the statute.

11. New Section 54960.1 provides a procedure by which actions taken in violation of the Brown Act may be determined to be void. What types of Brown Act violations are susceptible to a judicial determination that the underlying action is void?

New Section 54960.1 creates a cause of action to judicially declare void only those council actions taken in violation of Sections 54953, 54954.2 or 54956. Thus actions taken in violation of the open meeting requirements, such as during seriatim meetings, can be set aside by a court. Similarly, actions improperly taken on items which should have been, but were not, described in an agenda posted at the prescribed time may also be set aside. However, violations of Brown Act provisions other than those contained in the aforementioned sections, e.g. where the council prohibits a member of the public from tape recording a meeting (Section 54953.5), do not render the underlying council actions subject to invalidation. Of course, these latter violations may still be enjoined (Section 54960) or subject council members to criminal liability (Section 54959).

12. New Section 54960.1 authorizes any interested person to bring an action "for the purpose of obtaining a judicial determination" that an

action taken in violation of the Brown Act "is null and void." Does this provision make such a council action void ab initio?

This provision does not clearly specify whether an action taken by the council in violation of the Brown Act is void ab initio or whether it is voidable upon a finding by the court that a violation occurred. This distinction may be quite significant in certain situations. For example, suppose a city council approves a general plan amendment in violation of the Brown Act, but the action is not directly challenged within the period prescribed by Section 54960.1. The council then approves a development project on the property subject to the general plan amendment. An opponent of the project then challenges the development project approval on the grounds that it is inconsistent with the general plan prior to the amendment, and that the amendment is void because it was adopted in violation of the Brown Act. If the amendment is deemed to be void ab initio, the development project is inconsistent with the general plan and cannot proceed. However, if the amendment could only be set aside if a lawsuit had been filed within the prescribed period (which has now expired), the amendment is valid and the development project is consistent with the general plan.

Based on the language of the statute and the legislative history, the Committee believes that an improper council action is not void ab initio. Section 54960.1 (a) authorizes bringing an action to obtain a "judicial determination" that an improper action is void. The use of the word "determination" implies that the action is not void until the time of the determination. Further, Section 54960.1 (b) provides that an improper council action "shall not be determined to be null and void" if certain conditions exist. Significantly, this section does not say "an action shall be void unless" certain conditions exist.

The legislative history of AB 2674 also supports the position that an improper action is not void ab initio. When introduced on January 15, 1986, Section 54960.1 (a) stated, "Any action taken by a legislative body of a local agency in violation of Section 54953 or 54954.2 is null and void." On March 3, 1986, the bill was amended, at the League's request, to delete the foregoing provision.

Note that Section 54960.1 (a) authorizes an action by mandamus or injunction. The Committee believes that the most appropriate means to declare a legislative decision void is declaratory relief. When introduced, AB 2674 also authorized an action for declaratory relief. This authority was inexplicably dropped when the bill was amended on March 10, 1986. The Legislative Counsel's Digest of AB 2674 at the time the bill was adopted continued to state that the bill authorizes actions by mandamus, injunction or declaratory relief.

13. New section 54960.1 provides that, prior to seeking a judicial determination that an improper council action is void, the complainant must make a demand of the council to cure or correct the allegedly improper action. The council may then cure or correct the challenged action or decide not to do so. Procedurally, how should the council respond to such a demand?

The Committee recommends that upon receipt of a demand, an item with two sub-items should be added to the next meeting's agenda. The first sub-item should be consideration of the demand, i.e. whether the challenged action can reasonably be said to have violated the Brown Act. The second sub-item should be consideration of the underlying subject matter of the challenged action if the council decided, in considering the demand, that the challenged action may have violated the Brown Act. (Alternatively, the council may want to consider the demand at one meeting and, if it finds the demand to be valid, consider the subject matter of the challenged action at a subsequent meeting. However, an action to cure or correct must be taken within 30 days of receipt of the demand, so the council should emphasize prompt action.)

The first sub-item to be considered is the demand that the council cure or correct the allegedly improper action. The rationale for considering the demand as a separate sub-item, as opposed to discussing the subject matter of the challenged action at the same time, is two-fold. First, it ensures that the council, rather than staff, makes the determination of whether a violation occurred. Second, it avoids any implication that the council, by considering the underlying matter, is admitting that a violation took place or is waiving a possible defense of substantial compliance. Because filing a demand is a preliminary step to bringing a suit, generally the council will be able to consider the demand in closed session pursuant to Section 54956.9 on the basis that a significant exposure to litigation exists.

In considering the demand, the council may want to take one of two approaches. The council may review the allegedly improper action to determine whether, in its view, a violation of the Brown Act occurred. Alternatively the council may review the allegedly improper action to determine whether the demand presents a colorable claim that a violation occurred. In following the latter approach, the council may decide to take curative action without admitting that a violation took place.

If the council decides to act upon the demand, it should then consider the second sub-item, i.e. whether action should be taken on the matter considered in the allegedly improper action. The Committee recommends that this sub-item on the agenda should not be termed on the agenda a ratification or confirmation of the allegedly improper action, because such terminology implies that the action was invalid when taken and presupposes that the council will not be influenced by public input to take a different action. The Committee therefore suggests it be termed a "consideration."

In considering the underlying matter, should the council set aside the original action prior to taking corrective action? As discussed in question 9 supra, the Committee believes that an action taken in violation of the Brown Act is not void ab initio, so such an action remains in effect at the time curative action is being considered. However, the Committee recommends that the council should not declare the original action to be void, because then any action taken, e.g. the imposition of a fee, would not be effective until the corrective action was taken. At the same time, the council should not just

ignore the fact that the original action was taken, because this could create confusion if the corrective action differed in substance from the original action. Thus the Committee recommends that the corrective ordinance or resolution state that the original action is superseded or rescinded as of the effective date of the corrective action. The corrective ordinance or resolution should also describe the original action and why the corrective action is being taken to establish a record.

The foregoing procedure may also help cities in demonstrating compliance with the Permit Streamlining Act (PSA) which, among other things, requires a city to approve or disapprove a development project within one year of accepting the application. Has a city complied with the PSA if an allegedly improper approval or disapproval occurs before the one year deadline and the corrective action occurs after the deadline? The Committee believes that the city has complied with the PSA in this situation, because it took an action, albeit defective, which was not void ab initio and which was taken prior to the deadline.

In considering the underlying matter, should the council build a new record from scratch, or can it rely on the record developed when taking the allegedly improper action? Certainly the council must permit new public testimony on the underlying matter. At the same time, the Committee believes that the council can incorporate the record of the prior meeting in support of any findings, provided that no member of the public shows that he or she has suffered prejudice. In allowing additional testimony at the subsequent meeting, the council probably can limit members of the public from repeating testimony given at the previous meeting. However, it would be more prudent simply to state that all previous testimony will be considered part of the record and that such testimony need not be repeated.

14. New Section 54960.1 (c) provides that an action taken "in connection with the collection of any tax" shall not be determined to be null and void. How broad is the phrase "in connection with the collection of any tax?"

Although the statute is not clear, the author of AB 2674 has indicated that he did not intend for this phrase to include the collection of any fee or assessment or to include the imposition of any tax.

15. Amended Section 54960.5 provides that a court may award court costs and attorneys fees to the plaintiff in an action brought pursuant to the Brown Act where the court finds a violation. If the council purportedly takes corrective action after the statutory deadline and after the suit has been filed, is a court nevertheless authorized to award attorneys fees?

If the council takes corrective action, any previously filed suit must be dismissed with prejudice pursuant to Section 54960.1 (d). Accordingly, the Committee believes that a court has no authority to award attorneys fees under this provision because no Brown Act violation has been found. At the same time, a council's decision to take corrective action has no effect on the authority of a court to award attorneys fees in an action brought pursuant to Section 54960.

AMENDED IN SENATE JUNE 4, 1986
AMENDED IN SENATE MAY 22, 1986
AMENDED IN ASSEMBLY MARCH 18, 1986
AMENDED IN ASSEMBLY MARCH 10, 1986
AMENDED IN ASSEMBLY MARCH 3, 1986

CALIFORNIA LEGISLATURE—1985-86 REGULAR SESSION

ASSEMBLY BILL

No. 2674

Introduced by Assembly Member Connelly
(Principal coauthor: Assembly Member Johnson)
(Coauthor: Senator Marks) (Coauthors: Senators Ayala,
Bergeson, Craven, and Marks)

January 15, 1986

An act to amend Sections 35144, 35145, 72121, and 72129 of the Education Code, to amend Sections 54956, 54956.5, and 54960.5 of, and to add Sections 54954.2, 54954.3, and 54960.1 to, the Government Code, relating to local agencies.

LEGISLATIVE COUNSEL'S DIGEST

AB 2674, as amended, Connelly. Open meetings: local agencies.

(1) Under existing provisions of the Ralph M. Brown Act and the Education Code, the actions of legislative bodies of local agencies and governing boards of school and community college districts are required to be taken openly and their deliberations are required to be conducted openly. Under these existing laws, the legislative body of a local agency and the governing boards of school and community college districts are not required to post an agenda containing a brief general description of each item of business to be transacted or discussed at a regular meeting. Additionally, existing law

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

does not prohibit any action to be taken, as defined, on any item not appearing on the posted agenda.

This bill would make this requirement and prohibition, with certain exceptions, as specified. The requirement would impose a state-mandated local program.

(2) The Ralph M. Brown Act does not require that every agenda for regular meetings provide an opportunity for members of the public to directly address the legislative body on items of interest to the public that are within the subject matter jurisdiction of the legislative body.

This bill would, *except as specified*, make this requirement and would require the legislative body to adopt reasonable regulations, as specified. These new requirements would impose a state-mandated local program.

(3) The Ralph M. Brown Act requires the legislative body of a local agency to give a specified notice of special meetings.

This bill would, in addition, require a specified posting and make a conforming change.

Existing law requires that an agenda of special meetings of the governing boards of school and community college districts be posted at least 24 hours prior to special meetings.

This bill would additionally require that the posted notice specify the time and location of the meeting. This requirement would impose a state-mandated local program.

(4) Existing law defines the term "action taken" and prescribes misdemeanor sanctions for each member of a legislative body who knowingly attends a meeting of the legislative body where action is taken in violation of the Ralph M. Brown Act. Existing law also authorizes any interested person to commence an action by mandamus, injunction, or declaratory relief to stop or prevent violations or threatened violations of statutory provisions relating to open meetings of local agencies or to determine the application of those provisions.

Under existing law, as construed by the courts, any action taken at a meeting in violation of the Ralph M. Brown Act is nonetheless valid.

This bill would authorize any interested person to commence an action by mandamus, injunction, or declaratory relief to determine if certain actions taken by the legislative

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

body of a local agency and the governing boards of school or community college districts are null and void, as specified. It would require the interested person to make a demand of the legislative or governing body to cure or correct the action, as specified, before commencing the action. It would provide that the fact that a legislative or governing body takes a subsequent action to cure or correct an action pursuant to this section shall not be construed, or be admissible, as evidence of a violation of the Ralph M. Brown Act.

(5) Existing law authorizes a court to award reasonable attorneys' fee to a plaintiff where it is found the local agency has violated provisions of law relating to open meetings, or to a prevailing defendant in cases in which the court finds the action was clearly frivolous and totally lacking in merit.

This bill would authorize the award of reasonable attorneys' fees in actions to determine null and void the actions of a local agency as described in (4) above.

(6) The bill would also declare the Legislature's intent with regard to the application of the Ralph M. Brown Act to the governing boards of school and community districts.

(7) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed \$500,000 statewide and other procedures for claims whose statewide costs exceed \$500,000.

This bill would provide that reimbursement for costs mandated by the bill shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed \$500,000, shall be payable from the State Mandates Claims Fund.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 35144 of the Education Code is
- 2 amended to read:
- 3 35144. A special meeting of the governing board of a

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

1 school district may be called at any time by the presiding
2 officer of the board, or by a majority of the members
3 thereof, by delivering personally or by mail written
4 notice to each member of the board, and to each local
5 newspaper of general circulation, radio, or television
6 station requesting notice in writing. The notice shall be
7 delivered personally or by mail at least 24 hours before
8 the time of the meeting as specified in the notice. The call
9 and notice shall specify the time and place of the special
10 meeting and the business to be transacted. No other
11 business shall be considered at those meetings by the
12 governing board. The written notice may be dispensed
13 with as to any member who at or prior to the time the
14 meeting convenes files with the clerk or secretary of the
15 board a written waiver of notice. The waiver may be
16 given by telegram. The written notice may also be
17 dispensed with as to any member who is actually present
18 at the meeting at the time it convenes.

19 The call and notice shall be posted at least 24 hours
20 prior to the special meeting and shall specify the time and
21 location of the meeting and be posted in a location that
22 is freely accessible to members of the public and district
23 employees.

24 SEC. 2. Section 35145 of the Education Code is
25 amended to read:

26 35145. Except as provided in Sections 54957 and
27 54957.6 of the Government Code and in Section 35146 of,
28 and subdivision (c) of Section 48918 of, this code, all
29 meetings of the governing board of any school district
30 shall be open to the public, and all actions authorized or
31 required by law of the governing board shall be taken at
32 the meetings and shall be subject to the following
33 requirements:

34 (a) Minutes shall be taken at all of those meetings,
35 recording all actions taken by the governing board. The
36 minutes are public records and shall be available to the
37 public.

38 (b) An agenda shall be posted by the governing board,
39 or its designee, in accordance with the requirements of
40 Section 54954.2 of the Government Code. Any interested

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

1 person may commence an action by mandamus or
2 injunction pursuant to Section 54960.1 of the
3 Government Code for the purpose of obtaining a judicial
4 determination that any action taken by the governing
5 board in violation of this subdivision or Section 35144 is
6 null and void.

7 ~~SEC. 3. Section 72121 of the Education Code is~~
8 amended to read:

9 72121. Except as provided in Sections 54957 and
10 54957.6 of the Government Code and in Section 72122 of,
11 and subdivision (c) of Section 48914 of, this code, all
12 meetings of the governing board of any community
13 college district shall be open to the public, and all actions
14 authorized or required by law of the governing board
15 shall be taken at the meetings and shall be subject to the
16 following requirements:

17 (a) Minutes shall be taken at all of those meetings,
18 recording all actions taken by the governing board. The
19 minutes are public records and shall be available to the
20 public.

21 (b) An agenda shall be posted by the governing board,
22 or its designee, in accordance with the requirements of
23 Section 54954.2 of the Government Code. Any interested
24 person may commence an action by mandamus or
25 injunction pursuant to Section 54960.1 of the
26 Government Code for the purpose of obtaining a judicial
27 determination that any action taken by the governing
28 board in violation of this subdivision or subdivision (b) of
29 Section 72129 is null and void.

30 SEC. 4. Section 72129 of the Education Code is
31 amended to read:

32 72129. (a) Special meetings may be held at the call of
33 the president of the board or upon a call issued in writing
34 and signed by a majority of the members of the board.

35 (b) A notice of the meeting shall be posted at least 24
36 hours prior to the special meeting and shall specify the
37 time and location of the meeting and *the business to be*
38 *transacted and shall* be posted in a location that is freely
39 accessible to members of the public and district
40 employees.

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

1 SEC. 5. Section 54954.2 is added to the Government
2 Code, to read:

3 54954.2. (a) At least 72 hours before a regular
4 meeting, the legislative body of the local agency, or its
5 designee, shall post an agenda containing a brief general
6 description of each item of business to be transacted or
7 discussed at the meeting. The agenda shall specify the
8 time and location of the regular meeting and shall be
9 posted in a location that is freely accessible to members
10 of the public. No action shall be taken on any item not
11 appearing on the posted agenda.

12 (b) Notwithstanding subdivision (a), the legislative
13 body may take action on items of business not appearing
14 on the posted agenda under any of the following
15 conditions:

16 (1) Upon a determination by a majority vote of the
17 legislative body that an emergency situation exists, as
18 defined in Section 54956.5.

19 (2) Upon a determination by a two-thirds vote of the
20 legislative body, or, if less than two-thirds of the members
21 are present, a unanimous vote of those members present,
22 that the need to take action arose subsequent to the
23 agenda being posted as specified in subdivision (a).

24 (3) The item was posted pursuant to subdivision (a)
25 for a prior meeting of the legislative body occurring not
26 more than five calendar days prior to the date action is
27 taken on the item, and at the prior meeting the item was
28 continued to the meeting at which action is being taken.

29 SEC. 6. Section 54954.3 is added to the Government
30 Code, to read:

31 54954.3. (a) Every agenda for regular meetings shall
32 provide an opportunity for members of the public to
33 directly address the legislative body on items of interest
34 to the public that are within the subject matter
35 jurisdiction of the legislative body, provided that no
36 action shall be taken on any item not appearing on the
37 agenda unless the action is otherwise authorized by
38 subdivision (b) of Section 54954.2. However, in the case
39 of a meeting of a city council in a city or a board of
40 supervisors in a city and county, the agenda need not

X

*How
This defined?*

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

1 provide an opportunity for members of the public to
 2 address the council or board on any item that has already
 3 been considered by a committee, composed exclusively
 4 of members of the council or board, at a public meeting
 5 wherein all interested members of the public were
 6 afforded the opportunity to address the committee on the
 7 item, unless the item has been substantially changed
 8 since the committee heard the item, as determined by
 9 the council or board.

10 (b) The legislative body of a local agency may adopt
 11 reasonable regulations to ensure that the intent of
 12 subdivision (a) is carried out, including, but not limited
 13 to, regulations limiting the total amount of time allocated
 14 for public testimony on particular issues and for each
 15 individual speaker.

16 SEC. 7. Section 54956 of the Government Code is
 17 amended to read:

18 54956. A special meeting may be called at any time by
 19 the presiding officer of the legislative body of a local
 20 agency, or by a majority of the members of the legislative
 21 body, by delivering personally or by mail written notice
 22 to each member of the legislative body and to each local
 23 newspaper of general circulation, radio or television
 24 station requesting notice in writing. The notice shall be
 25 delivered personally or by mail and shall be received at
 26 least 24 hours before the time of the meeting as specified
 27 in the notice. The call and notice shall specify the time
 28 and place of the special meeting and the business to be
 29 transacted. No other business shall be considered at these
 30 meetings by the legislative body. The written notice may
 31 be dispensed with as to any member who at or prior to
 32 the time the meeting convenes files with the clerk or
 33 secretary of the legislative body a written waiver of
 34 notice. The waiver may be given by telegram. The
 35 written notice may also be dispensed with as to any
 36 member who is actually present at the meeting at the
 37 time it convenes. Notice shall be required pursuant to this
 38 section regardless of whether any action is taken at the
 39 special meeting.

40 The call and notice shall be posted at least 24 hours

Amended

THE REPRODUCTION
 OF THIS DOCUMENT
 CANNOT BE IMPROVED
 DUE TO THE CONDITION
 OF THIS ORIGINAL

1 prior to the special meeting and shall specify the time and
2 location of the meeting and be posted in a location that
3 is freely accessible to members of the public.

4 SEC. 8. Section 54956.5 of the Government Code is
5 amended to read:

6 54956.5. In the case of an emergency situation
7 involving matters upon which prompt action is necessary
8 due to the disruption or threatened disruption of public
9 facilities, a legislative body may hold an emergency
10 meeting without complying with either the 24-hour
11 notice requirement or the 24-hour posting requirement
12 of Section 54956 or both of the notice and posting
13 requirements.

14 For purposes of this section, "emergency situation"
15 means any of the following:

16 (a) Work stoppage or other activity which severely
17 impairs public health, safety, or both, as determined by
18 a majority of the members of the legislative body.

19 (b) Crippling disaster which severely impairs public
20 health, safety, or both, as determined by a majority of the
21 members of the legislative body.

22 However, each local newspaper of general circulation
23 and radio or television station which has requested notice
24 of special meetings pursuant to Section 54956 shall be
25 notified by the presiding officer of the legislative body, or
26 designee thereof, one hour prior to the emergency
27 meeting by telephone and all telephone numbers
28 provided in the most recent request of such newspaper
29 or station for notification of special meetings shall be
30 exhausted. In the event that telephone services are not
31 functioning, the notice requirements of this section shall
32 be deemed waived, and the legislative body, or designee
33 of the legislative body, shall notify those newspapers,
34 radio stations, or television stations of the fact of the
35 holding of the emergency meeting, the purpose of the
36 meeting, and any action taken at the meeting as soon
37 after the meeting as possible.

38 Notwithstanding Section 54957, the legislative body
39 shall not meet in closed session during a meeting called
40 pursuant to this section.

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

1 All special meeting requirements, as prescribed in
2 Section 54956 shall be applicable to a meeting called
3 pursuant to this section, with the exception of the 24-hour
4 notice requirement.

5 The minutes of a meeting called pursuant to this
6 section, a list of persons who the presiding officer of the
7 legislative body, or designee of the legislative body,
8 notified or attempted to notify, a copy of the rollcall vote,
9 and any actions taken at the meeting shall be posted for
10 a minimum of 10 days in a public place as soon after the
11 meeting as possible.

12 SEC. 9. Section 54960.1 is added to the Government
13 Code, to read:

14 54960.1. (a) Any interested person may commence
15 an action by mandamus or injunction for the purpose of
16 obtaining a judicial determination that an action taken by
17 a legislative body of a local agency in violation of Section
18 54953, 54954.2, or 54956 is null and void under this section.
19 Nothing in this chapter shall be construed to prevent a
20 legislative body from curing or correcting an action
21 challenged pursuant to this section.

22 (b) Prior to any action being commenced pursuant to
23 subdivision (a), the interested person shall make a
24 demand of the legislative body to cure or correct the
25 action alleged to have been taken in violation of Section
26 54953, 54954.2, or 54956. The demand shall be in writing
27 and clearly describe the challenged action of the
28 legislative body and nature of the alleged violation. The
29 written demand shall be made within 30 days from the
30 date the action was taken. Within 30 days of receipt of the
31 demand, the legislative body shall cure or correct the
32 challenged action and inform the demanding party in
33 writing of its actions to cure or correct or inform the
34 demanding party in writing of its decision not to cure or
35 correct the challenged action. If the legislative body takes
36 no action within the 30-day period, the inaction shall be
37 deemed a decision not to cure or correct the challenged
38 action, and the 15-day period to commence the action
39 described in subdivision (a) shall commence to run the
40 day after the 30-day period to cure or correct expires.

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

1 Within 15 days of receipt of the written information
2 notice of the legislative body's decision to cure or correct,
3 the expiration of the 30-day period to cure or correct, or
4 75 days from the date the challenged action was taken,
5 whichever is earlier, the demanding party shall be
6 required to commence the action pursuant to subdivision
7 (a) or thereafter be barred from commencing the action. (b)

8 (c) An action taken shall not be determined to be null
9 and void if any of the following conditions exist:

10 (1) The action taken was in substantial compliance
11 with Sections 54953, 54954.2, and 54956.

12 (2) The action taken was in connection with the sale
13 or issuance of notes, bonds, or other evidences of
14 indebtedness or any contract, instrument, or agreement
15 thereto.

16 (3) The action taken gave rise to a contractual
17 obligation, including a contract let by competitive bid,
18 upon which a party has, in good faith, detrimentally
19 relied.

20 (4) The action taken was in connection with the
21 collection of any tax. (c)

22 (d) During any action seeking a judicial
23 determination pursuant to subdivision (a) if the court
24 determines, pursuant to a showing by the legislative body
25 that an action alleged to have been taken in violation of
26 Section 54953, 54954.2, or 54956 has been cured or
27 corrected by a subsequent action of the legislative body,
28 the action filed pursuant to subdivision (a) shall be
29 dismissed with prejudice.

30 (e) The fact that a legislative body takes a subsequent
31 action to cure or correct an action taken pursuant to this
32 section shall not be construed or admissible as evidence
33 of a violation of this chapter.

34 SEC. 10. Section 54960.5 of the Government Code is
35 amended to read:

36 54960.5. A court may award court costs and
37 reasonable attorney fees to the plaintiff in an action
38 brought pursuant to Section 54960 or 54960.1 where it is
39 found that a legislative body of the local agency has
40 violated this chapter. The costs and fees shall be paid by (d)

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL

1 the local agency and shall not become a personal liability
2 of any public officer or employee of the local agency.
3 A court may award court costs and reasonable attorney
4 fees to a defendant in any action brought pursuant to
5 Section 54960 or 54960.1 where the defendant has
6 prevailed in a final determination of such action and the
7 court finds that the action was clearly frivolous and totally
8 lacking in merit.
9 SEC. 11. The Legislature does not intend, by
10 including an express reference to Sections 54954.2 and
11 54960.1 of the Government Code in Sections 35145 and
12 72121 of the Education Code, as amended by this act, to
13 imply that other sections of the Ralph M. Brown Act
14 which have been construed as applying to meetings of
15 the governing boards of school and community college
16 districts shall not continue to apply to those meetings.
17 SEC. 12. Reimbursement to local agencies and school
18 districts for costs mandated by the state pursuant to this
19 act shall be made pursuant to Part 7 (commencing with
20 Section 17500) of Division 4 of Title 2 of the Government
21 Code and, if the statewide cost of the claim for
22 reimbursement does not exceed five hundred thousand
23 dollars (\$500,000), shall be made from the State Mandates
24 Claims Fund.

THE REPRODUCTION
OF THIS DOCUMENT
CANNOT BE IMPROVED
DUE TO THE CONDITION
OF THIS ORIGINAL