

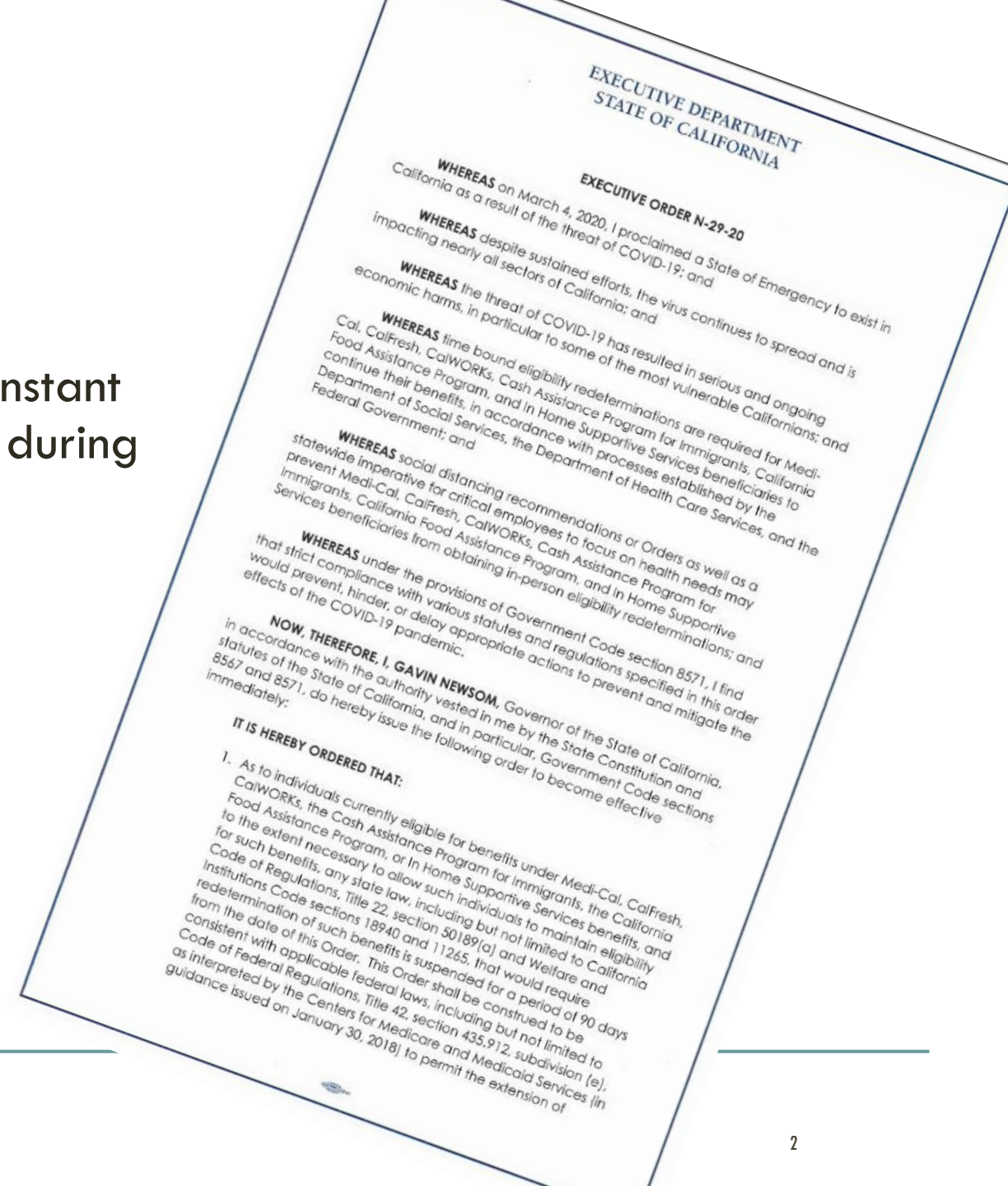


BROWN ACT MEETINGS IN A TIME OF EMERGENCY

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Shute, Mihaly & Weinberger LLP

TRAINING TAKEAWAYS

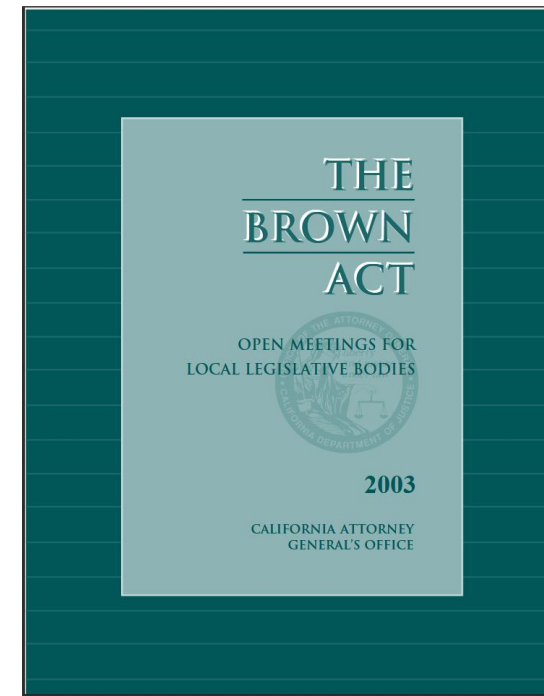
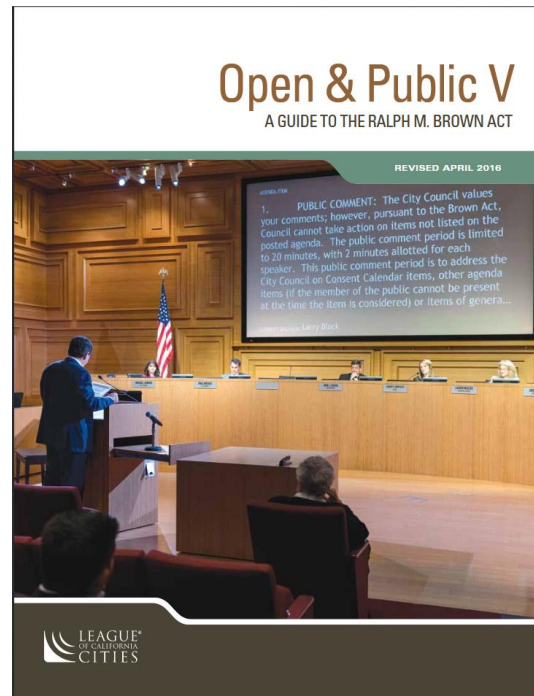
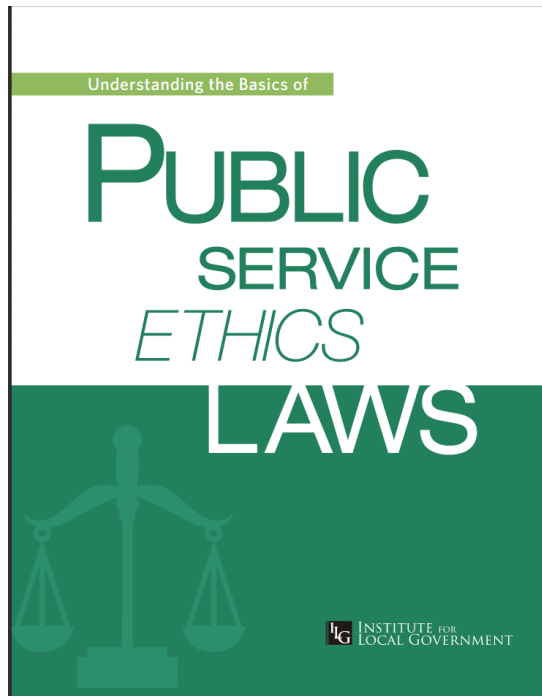
- Review of normal Brown Act rules
- What rules have changed & remained constant under Governor's Executive Orders (EOs) during Covid emergency?
- Look ahead



FORMAT

- Questions:
 - I'll leave ~10 minutes @ end
 - Use “raise hand” function
- Interactivity:
 - Instant polling:
<https://pollev.com/osawolff479>

THE BROWN ACT: ONE OF CALIFORNIA'S KEY TRANSPARENCY LAWS



THE BROWN ACT: COVID-19 & EXECUTIVE ORDERS HAVE CHANGED OUR DEMOCRACY

zoom Special City Council Meeting (4/15/20) - Shared screen with gallery view Download (613 MI)

Staff Presentation_4 Carolyn Ct.pdf - Adobe Acrobat Standard 2017 172.16.1.136

Home Tools CC Full Packet.pdf x Staff Presentation_... Applicant Presentat... Exhibit 1 (Behles Pl... Exhibit 2 (Decembe... Sign In

28 / 28 76.7%

- 1.Item called by presiding officer.
- 2.Presiding officer reviews order of procedure for public hearing.
- 3.City Attorney reviews City's ex parte rules.
- 4.Council members disclose any ex parte communications and site visits occurring outside the public hearing relating to the subject of the hearing
- 5.Staff summarizes issues before the Council.
- 6.Questions from the Council to staff.
- 7.Applicant presents arguments in favor of its position (15 minutes including rebuttal time).
- 8.Questions from Council to applicant.
- 9.Appellant presents basis of appeal (15 minutes).
- 10.Questions from Council to the appellant.
- 11.Statements from persons other than the applicant and appellant (3 minutes per speaker).
- 12.Applicant offers rebuttal and concluding remarks (time remaining from the 15 minutes allotted).
- 13.Following the public testimony portion of the hearing, the presiding officer shall declare the public hearing closed and the matter is then before the Council. Each Councilmember shall be given the opportunity to speak to the subject. When the Council discussion is concluded, the Council shall make its decision.

City Attorney Wolff

Audio Transcript

Search transcript

00:24:36 The parties do process be that the parties be afforded due process. It takes this very seriously and as take gone to great lengths to ensure that that occurs.

00:24:47 One part of that is to ask council members to reveal any x party communications, which basically means communications that you may have had outside of this hearing room, you should disclose on the record all communications, including email.

00:25:03 written correspondence

00:25:05 Conversations and site visits that you might have had

00:25:09 You should identify with whom you communicated. What was communicated and for site visits were on the site. You went what you looked at and what you observed. If a communication is already reflected in the record in the sense that a copy went out to you and to members of the public.

00:25:19 / 03:30:50 2020-0 4/15/2020

TELECONFERENCING UNDER EXECUTIVE ORDER

Background Rule

- Agenda specifies teleconferencing locations
- Agenda posted at each location
- Quorum+ within jurisdictional territory
- Each teleconference location accessible to the public with full rights to participate
- All votes by roll call

What's different?

- Board and public can participate by teleconference from anywhere
- No physical location required
- Public not allowed at remote locations with Board members
- Need more explanation of process (agenda description + script)

What's the same?

- All votes by roll call
- Confirm Board can hear & see
- ADA compliance
- Items allowed on agenda (not limited to “essential” business)

POSTING NOTICE OF MEETINGS

(REGULAR, SPECIAL & EMERGENCY)

Background Rules		
Regular	Special	Emergency (rare)
72 hours notice	24 hours notice	Little (or no) notice if consequences are so immediate and significant that providing more notice would endanger public health/safety. Special notice required after.

EO Direction:

- Include with notice info re: how public can observe & comment.
- Use web posting & email notice tools to communicate rapidly.
- Physical posting (exterior bulletin board) remains in effect even though no physical meeting location required.

PUBLIC COMMENT

Background Rule

Public comment opportunity for:

- All agenda items: prior to Board action
- Public forum:
 - Required for regular meetings
 - Good practice for special meetings
- Non-action items (e.g., ceremonial & reports)

EO Changes: **None**

- But the practical details are complex
- Let's dive into these aspects
 - How
 - When
 - How Long
 - What

THE “HOW” OF PUBLIC COMMENT

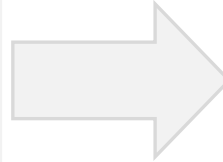
- **Speaker slips:**
 - **Normally:** Requested (not required) for in-person speakers
 - **Now:** Virtual requests to speak (e.g., Zoom “raise hand” function, emails, voicemails)
- **Written correspondence:**
 - **Normally:** Circulated before & at meeting
 - **Now:** Good practice = 3 pm cutoff for written correspondence circulated/posted on website. Later written correspondence posted to web after meeting, sometimes read by staff.
- **Staff reading public comments into record**
 - **Normally:** Sometimes done as accommodation or on request
 - **Now:** Beware “distasteful” comments (e.g., slanderous statement) sounding like they come from staff. Look into computer options for reading.

THE “WHEN” OF PUBLIC COMMENT

Normally

Familiar/normal structure:

- Chair introduces item
- Staff report
- Questions from Board
- Public comment
- Board deliberates & acts



Now

Same process, but some things to note:

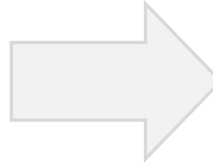
- Best practice = Real time public comment for each agenda item (oral, email or both)
- Some agencies have limited public to comments received pre-meeting, but then public does not have benefit of hearing staff report & questions from Board
- Emerging middle ground option/innovation: post PPT & recorded staff report with agenda before meeting

THE “HOW LONG” OF PUBLIC COMMENT

Normally

Reasonable time limits set by each jurisdiction

- Common: 3 minutes/person/item
- Less common: 30 minutes/item (shortening each person's time to fit within limit)
- Carefully order agenda keeping public comment in mind



Now

- Best practice = Follow your normal time limits
- Challenge: Some jurisdictions find meetings are running long because members of public now comment on every item and/or more members of public comment
- Option: move public forum to end of meeting

THE “WHAT” OF PUBLIC COMMENT

(ZOOM BOMBING AND DISRUPTIVE SPEECH)

Normally

- Disruptive speech is rare, but challenging
- Must allow speech critical of Board & District
- Some distasteful speech must be allowed per First Amendment
- Recording meetings (audio/video) = allowed if not disruptive
- *Best practice:* allow irrelevant (off topic) speech subject to time limit
- *Best practice:* allow clapping/booing if it doesn't disrupt meeting



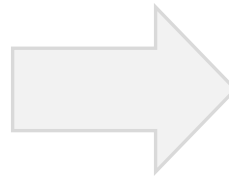
Now

- Disruptive speech (Zoom bombing) is now easier to do anonymously & even more challenging than normally
- Same First Amendment issues
- *Option:* “Muting” available for extreme cases, but be judicious
- *Option:* Limit screen sharing & video participation
- *Option:* Tiny URL and other tech solutions

BOARD MEMBER PARTICIPATION & SPEECH

Normally

- Recusal/conflict of interest: leave the room
- Hot mic issue rare, but embarrassing
- Video/audio recording & posting to web was common, but not universal



Now

- Recusal/conflict of interest: leave virtually
- Hot mic/live camera issue still, and embarrassing situations go viral
- Video/audio recording & posting to web are increasingly expected



San Francisco Chronicle

LOCAL // BAY AREA & STATE

Vallejo planning commissioner throws cat,
chugs from a bottle during live-streamed-
video meeting

CLOSED SESSION

Background Rule

- Allowed only for limited purposes (GC 54957) (e.g., labor, litigation, real estate)
- Agenda notice is critical and tricky (consult with agency counsel)
- Public comment allowed before closed session
- Public report sometimes required after closed session

EO Changes: **None**

- **Practice tip:** Use innovative online meeting tools (e.g., breakout rooms)
- **Practice tip:** Ensure security/confidentiality, check who participates & avoid recording
- **Practice tip:** Reliance on GC 54957 (threat to public services or facilities) not advisable – for public trust, better to discuss virus response in open session (different from terrorist threat)

BRIEFINGS BY STAFF

Background Rule

Limited staff authority to separately brief Board members outside of Brown Act meeting (e.g., email, phone, meeting):

- OK to answer questions
- OK to provide information
- Not OK to communicate one Board member's comments or position to other Board member

What's different under EO?

Staff may simultaneously update Board members on matters relevant to the emergency (e.g., impacts of COVID-19, government response) in order for Board to stay apprised of emergency operations and the impact of the emergency on their constituents.

- Not OK to take action
- Not OK to discuss (be careful: questions can seem like discussion)

WHAT'S NEXT?

LESSONS LEARNED FOR WHEN THINGS RETURN TO NORMAL

Public agencies have adapted quickly & well to “new normal” for public meeting

- **When will in-person meetings will return again?**
 - EO remains in place as long as state or local health officials have imposed or recommended social distancing measures.
- **Increased reliance on teleconferencing will likely remain**
 - Public health & safety
 - Busy people can participate more easily
 - Popular with some
 - Reduces travel time & expense
 - Video often better record of meeting than just audio
- **Access issues to watch**
 - ADA/accessibility
 - Internet speed/access

QUESTIONS?



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