

Recent Developments, Defenses, And Strategies In Brown Act Litigation

2017 City Attorneys' Spring Conference

Presented by:
Thomas B. Brown
Stephen A. McEwen

Presentation Overview

■ Recent Developments

- Brown Act Amendments
- Judicial Decisions & AG opinions

■ Litigation Defenses & Strategies

- Pre-Litigation Requirements And Limitation Periods
- Defenses Under Section 54960.1 (Substantial Compliance & Prejudice)
- Equitable & Other Principles
- Public Comment & Council Member Response
- Using Anti-SLAPP Motions For Brown Act Claims
- Attorney's Fees

Recent Developments – Brown Act Amendments

- **AB 1787 – Govt. Code §§ 54954.3(b)(2), (3)**
 - Under AB 1787, if legislative body limits time for public comment, it must provide at least twice the allotted time to member of public who uses a translator.
 - However, if legislative body uses simultaneous translation equipment system to hear translated public testimony, provision is inapplicable.



Recent Developments – Brown Act Amendments

- **AB 2257– Govt. Code § 54954.2(a)(2)**
 - Effective January 1, 2019
 - Must post meeting agendas on agency's primary website homepage accessible through prominent, direct link.
 - Posting must be in open format that is retrievable, downloadable, indexable, and electronically searchable by commonly used internet search applications.
 - Purpose of legislation to ensure online agendas not buried within website or posted in manner not “intuitively navigable.”

Recent Developments – Brown Act Amendments

- **SB 1436 – Govt. Code § 54953(c)(3)**
 - Legislative bodies must publicly announce any recommended pay and benefit increases for executives before taking final action on the compensation.



Recent Developments – Judicial Decisions

- ***Center For Local Government Accountability v. City Of San Diego* (2016) 247 Cal.App.4th 1146**
- **Alleged violation:** practice of having one public comment period during the course of two-day regular meetings.
- **Issues on Appeal**
 - Was a cease and desist letter prerequisite for lawsuit?
 - Did alleged Brown Act violation constitute past action or ongoing or threatened future action?
 - Did subsequent ordinance providing public comment on each day of two-day regular meeting moot action?

Recent Developments – Judicial Decisions

■ Ruling - Reversed and Remanded

- Compliance with pre-litigation conditions in Government Code section 54960.2(a) only required for lawsuits that seek to determine Brown Act's applicability to past actions, not to lawsuits related to ongoing actions.
- Lawsuit challenged an ongoing or threatened future action, rather than a past action, because original ordinance not limited to a one-time effect.
- Post-litigation ordinance providing non-agenda public comment on both days of regular meeting did not moot litigation; “did not change City’s legal position.”

Recent Developments – Judicial Decisions

- ***Cruz v. City Of Culver City* (2016) 2 Cal.App.5th 239 (“Cruz I”)**
- Issue: did city council violate Brown Act in taking action to place an issue on future agenda?
- Brief, six-minute discussion.
- Trial court granted City’s special motion to strike under Code of Civil Procedure section 425.16 (“anti-SLAPP”).
- **Ruling - Affirmed**
 - Lawsuit arose from council’s exercise of 1st Amend. rights.
 - Plaintiffs sought personal relief (preserving parking restrictions) so “public interest” exception in § 425.17 did not apply.
 - No likelihood plaintiffs would succeed on merits.

Recent Developments – Judicial Decisions

Cruz v. City Of Culver City, et al. (LA County Superior Court Case No. BC617228) (“Cruz II”)



- While appeal in Cruz I was pending, Culver City revisited parking restrictions issue.
- Issue: did council take action that was not described in the meeting agenda?
- March 14, 2016 agenda described parking issue as follows:

Recent Developments – Judicial Decisions

- (1) CONTINUED DISCUSSION OF EXISTING PERMIT PARKING RESTRICTIONS ON 10700 BLOCK OF FARRAGUT DRIVE;
- (2) CONSIDERATION OF REQUEST FROM GRACE EVANGELICAL LUTHERAN CHURCH, (4427 OVERLAND AVENUE), TO CHANGE EXISTING FARRAGUT PARKING RESTRICTIONS;
- (3) CONSIDERATION OF PARKING STUDY TO EVALUATE NEED FOR EXISTING FARRAGUT PARKING RESTRICTIONS AND, IF SUCH PARKING STUDY IS DIRECTED, (A) ADOPTION OF A RELATED RESOLUTION DIRECTING A PARKING STUDY, TEMPORARILY SUSPENDING EXISTING FARRAGUT PARKING RESTRICTIONS, AUTHORIZING TEMPORARY REMOVAL OF EXISTING PERMIT-ONLY PARKING RESTRICTION SIGNS; AND AUTHORIZING PRO-RATA REIMBURSEMENT OF COSTS OF PERMITS PREVIOUSLY ISSUED FOR THE 10700 BLOCK OF FARRAGUT DRIVE; (B) APPROVAL OF PROFESSIONAL SERVICES AGREEMENT WITH KOA CORPORATION TO CONDUCT PARKING STUDY IN AMOUNT NOT-TO-EXCEED \$35,428; AND (C) APPROVAL OF RELATED BUDGET AMENDMENT (REQUIRES FOUR-FIFTHS VOTE); AND
- (4) DIRECTION TO CITY MANAGER AS DEEMED APPROPRIATE.

Recent Developments – Judicial Decisions

- **Ruling – Demurrer Sustained Without Leave to Amend**
 - Agenda description for item relating to parking requirements satisfied Brown Act because it described exactly what city council actually did.
 - Council did not implicitly amend regulations.
 - Agenda described “whole scope” of action to be taken and, accordingly, satisfied substantial compliance.
 - Plaintiffs failed to demonstrate prejudice in light of their active involvement in city council hearing.

Recent Developments – Judicial Decisions

- ***Hernandez v. Town Of Apple Valley* (2017) 7 Cal.App.5th 194**
- Agenda item titled “Wal-Mart Initiative Measure,” described recommended action as “Provide direction to staff.”
- Agenda packet included three resolutions regarding special election for initiative to enact specific plan to allow shopping center and large retail store.
- Council approved each resolution and MOU accepting donation from Walmart to pay for special election.
- Did approval of resolutions and MOU violate agenda requirements?
- Trial Court: City violated Brown Act and initiative violated article II, section 12 of Cal. Const. because it specifically identified Walmart.

Recent Developments – Judicial Decisions

- **Ruling: Court of Appeal reversed on constitutional issue, but affirmed Brown Act ruling:**
 - Approval of the MOU violated Brown Act because the action was not described in meeting agenda.
 - There was prejudice as to MOU because it was not in agenda packet and there were no public comments on it.
 - Therefore, action of putting initiative on ballot was null and void.

Recent Developments – Judicial Decisions

- ***San Diegans For Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637**
- **Issue:** Did city substantially comply with agenda requirements when it listed agreement with developer and possible subsidy to developer, but did not describe amount of proposed subsidy?
- **Ruling: Affirmed:** City satisfied agenda description requirement because it “expressly gave the public notice that it would be considering a fairly substantial development of publicly owned property as luxury hotel; that the city would be sharing TOT’s generated by the project; and, importantly, by express reference to the subsidy report, that the project, if approved, would involve a subsidy by city.”
- Agenda “gave the public fair notice of the essential nature of what the council would be considering.”

Recent Developments – Judicial Decisions

- ***Beland v. County Of Lake*, 2016 WL 230665 (unpublished):** County Board did not violate § 54957 by engaging in closed session fact-finding or hearing upon charges at which employee had right to be present. Even when “complaints or charges” against an employee are considered at closed session, notice not required unless session is hearing under Brown Act.
- ***Fillmore Senior Center v. City Of Fillmore*, 2016 WL 3723913 (Cal.Super.) (Trial Court Order):** Lawsuit to declare action null and void was time barred by § 54960.1, and City not estopped from invoking limitations period by denial that violation had occurred.

Recent Developments – Judicial Decisions

- ***Mark D. Kaye, et al. v. City Of St. Helena, et al.* (Napa County Superior Court Case No. 65665) (Trial Court Order):** Trial court denied attorney's fees under § 54960.5 because: City did not violate teleconference local quorum requirement; Brown Act imposes no requirement for "quality connectivity" in teleconferencing; and City in any event consistently agreed to cure any violation.
- ***The Alcove Unique Gifts v. Port San Luis Harbor District*, 2016 WL 6270961 (Cal.Super.) (Trial Court Order):** Trial court granted anti-SLAPP motion on Brown Act claim because plaintiff failed to satisfy Section 54960.1's pre-litigation requirement of a "cure and correct" demand.

Recent Developments – Judicial Decisions

- ***City of Bell v. Avila*, 2016 WL 8224341 (Cal.Super.) (Trial Court Order)**: Summary adjudication granted because city failed to satisfy Brown Act's "brief general description" agenda requirement for a resolution changing employee compensation.
 - City sought summary adjudication of cause of action that resolution was void and invalid because not described on council meeting agenda.
 - Resolution listed on agenda as "Approval of Resolution ... Identifying Administrative Regulations and Operating Procedures and Rescinding Resolutions."
 - City argued this was not brief, general description because action involved employee compensation.
 - Defendants did not oppose and court granted summary adjudication.

Recent Developments - Attorney General Opinions

- **99 Ops.Cal.Atty.Gen. 11 (2016)**
 - Brown Act requires agendas to be posted on city website (assuming it has one) 72 hours before Council meeting (Section 54954.2(a), (d).)
 - This requirement not necessarily violated if website experiences technical difficulties that cause agenda to be inaccessible to public for portion of 72 hours.



Litigation Defenses And Strategies

- Two types of Brown Act lawsuits:
 - § 54960(a)
 - § 54960.1
- Determining which type of lawsuit has been filed is critical to evaluating whether plaintiff satisfied applicable pre-litigation requirements and filed a timely complaint.

Government Code § 54960(a)

- **Who may commence the action?**
 - District attorney or any interested person.
- **What type of action?**
 - Mandamus, injunction, or declaratory relief.
- **Purpose of action?**
 - Stop or prevent violations or threatened violations; or
 - Determine applicability of Brown Act to ongoing actions or threatened future actions of legislative body; or
 - Determine applicability of Brown Act to past actions of legislative body, subject to § 54960.2.

Government Code § 54960(a)

- **Pre-litigation requirements.** If action seeks to determine applicability of the Brown Act to *past actions*, plaintiff must meet certain pre-litigation requirements set forth in section 54960.2:
 - Plaintiff must submit cease and desist letter to agency, describing past action and nature of alleged violation, within nine months of alleged violation.
 - Agency has 30 days to respond whether it will make unconditional commitment to cease, desist from, and not repeat past action.
- **Limitations Period.** If no unconditional commitment, plaintiff must file complaint within 60 days of receiving agency's response or 60 days after period to respond expires, whichever is earlier.
- *Center for Local Government Accountability v. City of San Diego, supra*, 247 Cal.App.4th 1146: cease and desist demand requirement applies only to claims relating to past actions, not “to ongoing actions or threatened future actions.”

Government Code Section 54960.1

- **Who may commence the action?**
 - District attorney or any interested person.
- **What type of action?**
 - Mandamus or injunction (no declaratory relief).
- **Purpose of action?**
 - Obtain judicial determination that action taken by legislative body in violation of Sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void.

Government Code Section 54960.1

- **Pre-litigation requirements:**
 - Written demand to cure or correct alleged violation.
 - Demand must clearly describe challenged action and nature of alleged violation.
 - Demand must be made within 90 days from action.
 - If action taken in open session in violation of agenda posting and brief description requirements of Section 54954.2, written demand must be made within 30 days.
 - Within 30 days of receipt of demand, legislative body shall cure or correct and inform demanding party in writing of actions to cure or correct or inform demanding party in writing of decision not to cure or correct.

Government Code Section 54960.1

- **Limitations period:**

- If legislative body takes no action within 30-day period, inaction deemed decision not to cure or correct, and 15-day period commences the day after 30-days lapses.
- Within 15 days of receipt of written notice of decision to cure or correct, or not to cure or correct, or within 15 days of the expiration of the 30-day period to cure or correct, whichever is earlier, demanding party required to sue or thereafter be barred.

Section 54960(a) or 54960.1?

- **The party bringing the lawsuit typically should clearly identify the applicable section in both the demand letter (if applicable) and the complaint.**
- **Potential Trap for Plaintiffs - Cruz I**
 - Pre-litigation demand letter and complaint did not indicate whether the plaintiffs were proceeding under section 54960 or section 54960.1.
 - The demand letter, however, clearly sought to invalidate city council's initial decision to place parking restrictions on future agenda and to stop further actions from occurring (fruit of the poisonous tree).
 - Plaintiffs did not submit this demand letter within 30-day time period required under Government Code section 54960.1 for actions taken in open session.
 - Trial court concluded that only section 54960.1 applied and, therefore, found complaint to be both time-barred and subject to prejudice defense

Defenses – Substantial Compliance

- “[A]n agency fulfills its agenda obligations under the Brown Act so long as it substantially complies with statutory requirements.”
- Substantial compliance standard applies when:
 - Proceeding under section 54960.1 to deem action null and void.
 - Action was taken in substantial compliance with:
 - § 54953 (requirement that meetings be open and public; teleconferencing rules; prohibition against secret ballots; teleconferencing rules for health authorities)
 - § 54954.2 (agenda posting and description requirements)
 - § 54954.5 (closed session description requirements)
 - § 54954.6 (notice and hearing requirements for new or increased taxes or assessments)
 - § 54956 (requirements for special meetings)
 - § 54956.5 (requirements for emergency meetings)

Defenses – Substantial Compliance

- **Castaic Lake Water Agency v. Newhall County Water District (2015) 238 Cal.App.4th 1196**
 - “Substantial compliance” means actual compliance in respect to the substance essential to every reasonable objective of the statute.
 - “Strict compliance is not required, and reviewing courts are to reject “hypertechnical” arguments that “elevate form over substance.”
 - There is no Brown Act violation where the agency has made “reasonably effective efforts” to comply
- **San Diegans for Open Government - substantial compliance with agenda requirements**
 - City may substantially comply with the “brief general description” requirement by giving “the public fair notice of the essential nature of what the council would be considering.”
 - Agenda should describe each action to be taken, but does not have to include details that are more appropriate for a staff report.

Defenses - Prejudice

- **Prejudice requirement applies to actions under § 54960.1**
- *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547 - Alleged violation of agenda requirements; plaintiff cannot establish prejudice simply by alleging inability to participate in meeting. Rather, plaintiff must demonstrate attendance would have affected result of meeting in some fashion.
- *Hernandez v. Town of Apple Valley* - Court concluded that because of inadequate agenda description as to one decision (MOU) City made, there had been no meaningful opposition mounted. Court concluded this was sufficient to establish prejudice.

Additional Section 54960.1 Defenses

- Actions that violate sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 are not null and void if any of the following conditions exist:
 - Action taken in connection with sale/issuance of notes, bonds, or other evidences of indebtedness or contract, instrument, or agreement thereto.
 - Action taken gave rise to contractual obligation, including contract let by competitive bid other than compensation for services in form of salary or fees for professional services, upon which party has, in good faith and without notice of challenge to validity of action, detrimentally relied.
 - Action taken was in connection with collection of any tax.
 - Person alleging noncompliance with section 54954.2(a), section 54956, or section 54956.5, because of defect, error, irregularity, or omission in notice, had actual notice of item at least 72 hours prior to regular meeting or 24 hours prior to special meeting.
 - When action taken in violation of sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 has been cured or corrected, action filed pursuant to subdivision (a) shall be dismissed with prejudice.

Equitable Principles in Brown Act Litigation

- Courts adopt flexible reading of Brown Act where doing so is generally consistent with the purposes of Brown Act. (*Travis v. Board of Trustees* (2008) 161 Cal.App.4th 335, 346.)
- Courts decline to speculate about what might happen in other meetings were City to push some imaginary Brown Act envelope. (See, e.g., *Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal.App.4th 109, 115 fn. 5.)
- Where Brown Act creates general rule without limitation, courts not at liberty to manufacture and insert one. (*Coalition of Labor, Agriculture and Business v. County of Santa Barbara Bd. of Supervisors*, 129 Cal.App.4th 205, 209-210.)

Public/Council Member Comment Period

- Government Code § 54954.2(a)(2) sets forth three exceptions to Brown Act agenda requirement:
 - Members of legislative body or staff may briefly respond to statements made or questions posed by persons exercising public testimony rights under Section 54954.3;
 - On their own or in response to questions posed by public, member of legislative body or staff may ask question for clarification, make a brief announcement, or make brief report on his or her own activities;
 - Member of legislative body, or body itself, subject to rules and procedures of legislative body, may provide reference to staff or other resources for factual information, request staff to report back at subsequent meeting, or direct staff to place matter on future agenda.
- Cruz I

Using The Anti-SLAPP Statute To Address Brown Act Claims

- Section 425.16 (b)(1) provides that cause of action against person arising from that person's act in furtherance of right of petition or free speech under United States or California Constitution in connection with public issue shall be subject to special motion to strike, unless court determines that plaintiff has established probability that plaintiff will prevail.
- Anti-SLAPP statute protects cities and city officials. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19.)
- Applies to lawsuits seeking declaratory relief for alleged Brown Act violations.
 - *Cruz v. City of Culver City* (2016) 2 Cal.App.5th 239
 - *Holbrook v. Santa Monica* (2004) 144 Cal.App.4th 1242

Using The Anti-SLAPP Statute To Address Brown Act Claims

- An anti-SLAPP motion requires a two-step analysis:
 - (1) Moving defendant must show the challenged cause of action arises from protected activity.
 - (2) If moving defendant makes threshold showing, court then decides whether plaintiff has demonstrated “probability of prevailing” on claim.
- Protected activities include (Code Civ. Proc. § 425.16(e)(1)-(4):
 - written or oral statement or writing before legislative proceeding or other official proceeding authorized by law
 - written or oral statement or writing made in connection with issue under review or consideration by legislative body or in other official proceeding
 - any written or oral statement or writing made in public forum in connection with issue of public interest; or
 - any other conduct taken to further the exercise of the constitutional right of petition or right of free speech in connection with a public issue.

Anti-SLAPP – Cruz I

- Council member's request to agendize parking restrictions for future discussion was oral statement during duly-authorized Council meeting, as were follow-up questions by mayor and vice mayor. (Code Civ. Proc. § 425.16(e)(1).)
- In requesting future agenda item on parking restrictions, council member made oral statement in connection with issue (parking restrictions) under consideration/review by council. (§ 425.16(e)(2).)
- Brief oral statements regarding nature and scope of future agenda item made in regular, open council meeting. (§ 425.16(e)(3).)
- Council member's disclosure he received inquiry from constituent about parking restrictions and his request to place issue on future agenda was "conduct in furtherance of exercise of constitutional right of petition or constitutional right of free speech in connection with public issue or issue of public interest." (§ 425.16(e)(4).)

Anti-SLAPP – Public Interest Exception

- Section 425.17(b)
 - Section 425.16 does not apply to action brought solely in public interest or on behalf of general public if all of the following exist:
 - (1) Plaintiff does not seek relief greater than or different from relief sought for general public
 - (2) Action, if successful, would enforce important right affecting public interest, and would confer significant benefit, whether pecuniary or nonpecuniary, on general public or large class of persons
 - (3) Private enforcement is necessary and places disproportionate financial burden on plaintiff in relation to plaintiff's stake in matter

Anti-SLAPP – Public Interest Exception

- *Cruz I* plaintiffs argued that public interest exception applied
 - No direct prayer for personal relief.
 - Plaintiffs only sought declaration that city violated Brown Act in the past.
 - Requested relief did not give greater or different relief than it gave the public.
 - Judgment in their favor would provide significant benefit to public and private enforcement was necessary because no one else challenged city's action.
 - Plaintiffs argued the allegations of complaint were irrelevant and court should focus on requested relief.

Anti-SLAPP – Public Interest Exception

Court of Appeal Ruling

- Plaintiffs had individual stake in outcome that defeats application of public interest exception.
- Totality of circumstances - allegations concerned plaintiffs' personal, narrow interests.
- “Personal relief” - lawsuit concerned plaintiffs' personal interest in preservation of a preferential parking district that excluded general public and provided private advantage to residents of particular street.
- A party's motivation is relevant.

Anti-SLAPP – Pros and Cons

■ Pros

- Moving defendant not limited to allegations of complaint and matters subject to judicial notice, as with demurrers. Rather, moving defendant may submit declarations and exhibits to support anti-SLAPP motion.

■ Cons

- Defendant who succeeds on an anti-SLAPP motion in a Brown Act case is not entitled to attorney's fees, except for a "frivolous case"^[6] as authorized by Section 54960.5. (§ 425.16(c)(2) ["Defendant who prevails on a special motion to strike in an action ... shall not be entitled to attorney's fees and costs if ... cause of action is brought pursuant to Section ...54960, or 54960.1 of ...Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to ... 54960.5, of the Government Code."].)

Brown Act – Attorney's Fees

■ Recovery by Plaintiff

- Under § 54960.5, a court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to § § 54960, 54960.1, or 54960.2.
- When action under § 54960.2 is dismissed with prejudice because legislative body has provided unconditional commitment pursuant to paragraph (1) of subdivision (c) of that section at any time after the 30-day period for making such a commitment has expired, the court shall award court costs and reasonable attorney fees to plaintiff if filing of action caused legislative body to issue unconditional commitment.
- Notably, § 54960.5 does not mandate fee award when agency agrees to cure and correct under section 54960.1.

■ Recovery by Defendant

- Court may award costs and reasonable attorney fees to *defendant* in action pursuant to § § 54960 or 54960.1 where defendant has prevailed and action was clearly frivolous and totally lacking in merit.

Brown Act – Attorney's Fees

- Courts have discretion to deny successful plaintiffs attorneys' fees, where defendant shows special circumstances exist that would make award unjust. (*Los Angeles Times v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1324.)
- Such circumstances include: (1) lack of necessity for lawsuit; (2) lack of injury to public; (3) likelihood problem would have been solved by other means; and (4) likelihood of recurrence of unlawful act in absence of lawsuit. (*Bell v. Vista Unified School Dist.*, 82 Cal.App.4th at p. 686; *Galbiso v. Orosi Public Utility Dist.*, 167 Cal.App.4th at p. 1083.)
- Fees not appropriate where purely personal interests are at stake. (*Bell v. Vista Unified School Dist.*, 82 Cal.App.4th 672, 691.)
- Plaintiff can be estopped from recovering fees

Thomas B. Brown, Esq.
Burke, Williams & Sorensen, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612
510.273.8780 | www.bwslaw.com
tbrown@bwslaw.com

Stephen A. McEwen, Esq.
Burke, Williams & Sorensen, LLP
1851 East First Street, Suite 1550
Santa Ana, CA 92705
949.265.3412 | www.bwslaw.com
smcewen@bwslaw.com

burke
BURKE, WILLIAMS & SORENSEN, LLP