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OPINION	:	No. 14-1203
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of	:	January 19, 2016
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THE HONORABLE KEVIN MULLIN, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following questions:

1. Where applicable, the Ralph M. Brown Act’s regular meeting online agenda-posting provision requires a local agency’s legislative body to post the meeting agenda on the local agency’s website at least 72 hours before the scheduled meeting. Is this provision violated whenever the local agency’s website experiences technical difficulties (for example, due to a power failure, cyber attack, or other third-party interference) that cause the agenda to become inaccessible to the public for a portion of the 72 hours that precede the scheduled meeting?

2. If technical difficulties prevent a local agency’s legislative body from posting the regular meeting agenda on the local agency’s website for a continuous 72-hour period before the scheduled regular meeting, but the legislative body has otherwise substantially complied with the Brown Act’s agenda-posting requirements, may the legislative body lawfully hold its regular meeting as scheduled?

## CONCLUSIONS

1. The Ralph M. Brown Act's regular meeting online agenda-posting provision is not necessarily violated whenever the local agency's website experiences technical difficulties that cause the agenda to become inaccessible to the public for a portion of the 72 hours that precede the scheduled meeting.

2. If technical difficulties prevent a local agency's legislative body from posting a regular meeting agenda on the local agency's website for a continuous 72-hour period before the scheduled regular meeting, but the legislative body has otherwise substantially complied with the Brown Act's agenda-posting requirements, the legislative body may lawfully hold its regular meeting as scheduled. Whether an agency has substantially complied in a given case would require an analysis of the particular circumstances to determine whether the Brown Act's statutory objectives of ensuring open meetings and public awareness are satisfied.

## ANALYSIS

The Ralph M. Brown Act<sup>1</sup> "is designed to encourage public participation in government."<sup>2</sup> To that end, the Act requires the legislative bodies of local agencies to "conduct business and deliberate openly."<sup>3</sup> Here, we are concerned with the portion of the Act aimed at ensuring the public's right to attend regular meetings of local legislative bodies.<sup>4</sup> This purpose is accomplished, in part, by requiring local legislative bodies to provide notice of the time and place of their regular meetings, along with notice of what will be discussed at those meetings.<sup>5</sup> The relevant portion of Government Code section 54954.2 provides:

At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at

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<sup>1</sup> Gov. Code, § 54950 et seq.

<sup>2</sup> *Coalition of Labor, Agriculture & Business v. County of Santa Barbara Bd. of Sup'rs* (2005) 129 Cal.App.4th 205, 207.

<sup>3</sup> *Ibid.*

<sup>4</sup> See *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 293.

<sup>5</sup> Gov. Code, §§ 54954, 54954.2; see *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 825 (Brown Act keeps public informed of government activity by ensuring public's right to attend meetings).

the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public *and on the local agency's Internet Website, if the local agency has one.*<sup>6</sup>

A local agency's legislative body may not take action on or discuss items that are not listed and described on the posted agenda.<sup>7</sup> If someone believes that an agency's legislative body has acted in violation of the Brown Act's agenda-posting requirements, the interested person or the district attorney may seek a judicial determination that the action is null and void.<sup>8</sup> Actions will not be declared null and void, however, if the agency's legislative body substantially complied with the posting requirement<sup>9</sup> or if the complaining party had actual notice of the meeting within the 72 hours before the meeting.<sup>10</sup>

### **Question 1**

The first question is whether a local agency's governing body<sup>11</sup> necessarily violates the Act's online-posting requirement whenever a technical difficulty with the local agency's website<sup>12</sup> interferes with the online posting of a regular meeting agenda for part of the 72 hours that precede the scheduled meeting. We find that such

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<sup>6</sup> Gov. Code, § 54954.2, subd. (a)(1), italics added. The Brown Act also imposes an online-posting requirement for special meetings. (Gov. Code, § 54956, subd. (a).) We are not here asked about that provision.

<sup>7</sup> Gov. Code, § 54954.2, subd. (a)(2).

<sup>8</sup> Gov. Code, § 54960.1, subd. (a).

<sup>9</sup> Gov. Code, § 54960.1, subd. (d)(1).

<sup>10</sup> Gov. Code, § 54960.1, subd. (d)(5).

<sup>11</sup> The Brown Act defines a "local agency" as "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency." (Gov. Code, § 54951.) The online-posting requirement applies to the "governing body of a local agency or any other local body created by state or federal statute," and to commissions, committees, boards, or other bodies of a local agency if the members of the body are compensated for their appearance and at least one member is a member of the governing body of a local agency or a local body created by state or federal statute. (Gov. Code, § 54954.2, subds. (d)(1), (d)(2); Gov. Code, § 54952, subds. (a), (b).)

<sup>12</sup> For purposes of our analysis, we assume the local agency at issue has a website within the meaning of Government Code section 54954.2, subdivision (a)(1).

circumstances do not automatically or inevitably lead to a Brown Act violation, but that a further evaluation of the particular circumstances is required in order to determine whether the local legislative body has substantially complied with agenda-posting requirements.

Our analysis is guided by well-established rules of statutory construction. The “first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, [we] must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.”<sup>13</sup> If the statutory language is clear, we “follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.”<sup>14</sup> On the other hand, “[w]here uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation.”<sup>15</sup> Moreover, the statutory language must be read “in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment.”<sup>16</sup>

The Legislature declared its general intent in enacting the Brown Act:

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

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.<sup>17</sup>

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<sup>13</sup> *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387 (*Dyna-Med*).

<sup>14</sup> *Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 186, internal quotation marks and citations omitted.

<sup>15</sup> *Dyna-Med, supra*, 43 Cal.3d at p. 1387.

<sup>16</sup> *Ibid.*

<sup>17</sup> Gov. Code, § 54950.

The online-posting requirement furthers this legislative intent by directing that, “[a]t least 72 hours before a regular meeting,” a local agency is to post the agenda for a meeting of its governing body “on the local agency’s Internet Web site, if the local agency has one.”<sup>18</sup> But what if the website experiences technical difficulties during the 72 hours that precede the scheduled meeting? Would a brief glitch causing the agenda to become temporarily unavailable during this period result in a Brown Act violation, regardless of the circumstances? Because the broad terms of the online-posting provision leave us with some uncertainty about the resolution of these questions, we consider the consequences of differing interpretations, and read the provision in the context of the larger statutory scheme, as aids to determining its “scope and purpose.”<sup>19</sup>

To adopt the strictest possible interpretation of the statute and find a violation in all cases where an online agenda was temporarily inaccessible during the 72-hour posting timeframe would effectively penalize local agencies for maintaining websites. Meetings might need to be rescheduled because of trivial website issues, resulting in significant practical problems for both the agencies and the public. This could conceivably induce some agencies not to maintain websites at all, which would reduce the availability of information to the public, contrary to the Brown Act’s goals. Or members of the public who had seen the notice and agenda of a meeting—either online or in a traditional public posting—might appear for meetings that had subsequently been canceled because of website problems. Such confusion could be a disincentive to public attendance at meetings—again, contrary to the Brown Act’s goals.

We reach a more desirable result when we interpret the online-posting requirement in conjunction with Government Code section 54960.1, subdivision (d)(1), which directs that agency actions are not null and void if the agency *substantially complied* with posting requirements. Substantial compliance “means actual compliance in respect to the substance essential to every reasonable objective of the statute.”<sup>20</sup> Although no published court decision has applied this standard to the online-posting requirement, nor to the Brown Act’s 72-hour traditional posting requirement, we find guidance in decisions interpreting the standard in connection with the Bagley-Keene Open Meeting Act, which imposes similar requirements on state bodies.<sup>21</sup>

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<sup>18</sup> Gov. Code, § 54954.2, subd. (a)(1).

<sup>19</sup> *Dyna-Med, supra*, 43 Cal.3d at p. 1387.

<sup>20</sup> *Stasher v. Harger-Haldeman* (1962) 58 Cal.2d 23, 29.

<sup>21</sup> Gov. Code, § 11125, subds. (a) (written notice must be provided on request, and notice must be available online, 10 days before meeting) & (b) (notice shall include specific agenda with brief descriptions of items to be discussed and business to be transacted).

In *North Pacifica LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416 (*North Pacifica*), a developer sought to invalidate a Coastal Commission action on the basis that the Commission had not complied with Bagley-Keene notice requirements. Like the Brown Act, the Bagley-Keene Act does not authorize nullification of agency action where the action was taken “in substantial compliance” with its notice provisions.<sup>22</sup> The court observed that “state actions in violation of [the notice] requirements should not be nullified, so long as the state agency’s reasonably effective efforts to notify interested persons of a public meeting serve the statutory objectives of ensuring that state actions taken and deliberations made at such meetings are open to the public.”<sup>23</sup> Applying this principle, the court declined to invalidate the Coastal Commission’s action where the Commission had mailed notice of the date and location of the meeting to the developer 22 days before the meeting; posted the agenda and supplemental information on its website more than 10 days before the meeting; and mailed the developer a notice “that complied in all respects with the notice requirements of the Bagley-Keene Act” except that it was mailed 8 rather than 10 days before the meeting. The court noted that there was no evidence that the Commission was attempting to thwart the objectives of the Bagley-Keene Act by concealing its actions, but rather, the Commission had demonstrated a good faith effort to notify interested persons.<sup>24</sup> “In doing so, the Commission acted in a manner that was consistent with the open meeting objectives of the Bagley-Keene Act and thereby substantially complied with the Act’s notice requirements.”<sup>25</sup>

More recently, in *Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196 (*Castaic v. Newhall*), the Court of Appeal looked to *North Pacifica*’s description of substantial compliance for guidance in evaluating a claim that a water district had acted without providing an adequate description on its agenda in violation of the Brown Act.<sup>26</sup> The agenda stated that the district would be meeting in closed session with its legal counsel to discuss potential litigation, but cited the wrong subdivision of the Government Code section as authorizing the closed session.<sup>27</sup> The court determined that the notice was in substantial compliance with the statute because it advised the public that the water district would be meeting in closed session with its legal

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<sup>22</sup> Gov. Code, § 11130.3, subd. (b)(3).

<sup>23</sup> *North Pacifica*, *supra*, 166 Cal.App.4th at p. 1432.

<sup>24</sup> *Id.* at pp. 1432-1433.

<sup>25</sup> *Id.* at p. 1433.

<sup>26</sup> *Castaic v. Newhall*, *supra*, 238 Cal.App.4th at pp. 1204-1206.

<sup>27</sup> *Id.* at pp. 1206-1207.

counsel to discuss potential litigation, and the erroneous statutory citation “could not possibly have misled or confused anyone.”<sup>28</sup>

Guided by *North Pacifica* and *Castaic v. Newhall*, as well as Government Code section 54960.1, subdivision (d)(1), we believe the relevant inquiry is not whether there has been a technical violation of the Brown Act’s online-posting requirement, but rather whether the local legislative body substantially complied with that requirement. This interpretation “comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid[s] an interpretation that would lead to absurd consequences.”<sup>29</sup> Thus, we conclude in response to the first question that the Brown Act’s online agenda-posting provision for regular meetings is not necessarily violated whenever the local agency’s website experiences technical difficulties that cause the agenda to become inaccessible to the public for a portion of the 72 hours that precede the scheduled meeting.

## Question 2

We are next asked whether a local legislative body may lawfully hold its regular meeting as scheduled under circumstances where technical difficulties cause the regular meeting agenda to become inaccessible on the local agency’s website for a portion of the 72-hour period before the scheduled meeting, but the agency has otherwise substantially complied with the Brown Act’s agenda-posting requirements. The answer to this second question flows quickly from our analysis of the first: so long as the local legislative body has substantially complied with the Brown Act’s agenda-posting requirements, its actions are not at risk of being declared null and void,<sup>30</sup> and the body may therefore hold its scheduled meeting.

Of course, the determination whether a local legislative body *has* substantially complied in a given case would require an analysis of the particular facts and circumstances to determine whether the Brown Act’s statutory objectives of ensuring open meetings and public awareness are satisfied. This inquiry would necessarily involve a fact-specific examination of whether the agency or its legislative body made “reasonably effective efforts to notify interested persons of a public meeting,” through online posting and other available means, serving the statutory objectives of ensuring that

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<sup>28</sup> *Id.* at p. 1207.

<sup>29</sup> *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, internal quotation marks and citations omitted.

<sup>30</sup> Gov. Code, § 54960.1, subd. (d)(1).

local agencies act and deliberate openly, and that the public is informed.<sup>31</sup> This would include an evaluation of how long a given technical problem persisted, the efforts made to correct the problem or otherwise ensure that the public was informed, and the actual effect the problem had on public awareness, among other factors. Because of the fact-specific nature of this inquiry, we cannot conclusively state whether a given technical difficulty will result in a Brown Act violation, or be remedied by the local body's efforts to provide the public with sufficient notice, but we are confident that fleeting or trivial technical issues will not typically require the cancellation of meetings.<sup>32</sup>

Thus, in response to the second question, we conclude that, where technical difficulties prevent a local agency's legislative body from posting the regular meeting agenda on the local agency's website for a continuous 72-hour period before the scheduled regular meeting, but the legislative body has otherwise substantially complied with the Brown Act's agenda-posting requirements, the legislative body may lawfully hold its regular meeting as scheduled.

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<sup>31</sup> Gov. Code, § 54950.

<sup>32</sup> In assessing their own compliance, agencies and their legislative bodies should be mindful of the potential public confusion caused by various technical problems. (See *Castaic v. Newhall*, *supra*, 238 Cal.App.4th at pp. 1207-1207 [finding substantial compliance with Brown Act notice requirements where no risk that public was confused or misled by erroneous statutory interpretation]). In other words, the agency should evaluate whether citizens looking for a meeting notice or agenda might have been misled or confused, or mistakenly believed that no meeting was scheduled. If the risk of public confusion is high, the statutory objectives would likely not be served, and the agency should reschedule its meeting.