

## VALLEY CLEAN ENERGY ALLIANCE

### Staff Report - Item 9

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**TO:** Community Advisory Committee

**FROM:** Alisa Lembke, Board Clerk/Administrative Analyst

**SUBJECT:** Presentation by VCE general counsel on AB 992 and the Brown Act

**DATE:** April 22, 2021

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This is an information item.

This staff report provides a copy of a memorandum dated December 17, 2020 from VCE legal counsel Harriet Steiner of Best Best & Krieger (BBK) summarizing Assembly Bill (AB) 992, which deals with the Brown Act and social media platforms. AB 992 became effective on January 1, 2021, which applies to Board Members and the CAC. Ms. Steiner will be presenting a summary of AB 992 and the Brown Act at this meeting.

#### Attachments:

1. Memorandum dated 12/17/2020 re: AB 992 and the Brown Act
2. AB 992

**Memorandum**

**To:** Valley Clean Energy Alliance Board of Directors and Community Advisory Committee

**From:** Harriet A. Steiner

**Date:** December 17, 2020

**Re:** Social Media: AB 992, New Brown Act Restrictions on Both Elected and Appointed Members of Boards and Commissions, Including the VCE Board and the Community Advisory Committee

Over the last ten or more years, use of social media by both elected and appointed members of local agency boards and commissions has raised legal concerns under the Brown Act, California’s Open Meeting law. The concerns revolved around if, or how, board and commission members may interact on social media regarding issues that are within the subject matter jurisdiction of their boards or commissions.

AB 992, signed by the Governor on September 18, 2020 and effective January 1, 2021 addresses social media and the Brown Act. This is the first time that the Brown Act has addressed social media. Under this new law, a member of a board or commission is prohibited from directly discussing agency business with any other board member on social media. As discussed below, this prohibition includes even giving another board member’s post a “thumbs up” or a “like.”

Background. As you are all aware, the Brown Act prohibits a quorum (a majority) of a board from discussing business outside of a duly called meeting. Within this prohibition are “serial meetings” which occur when more than a quorum of the board forms a consensus outside of a meeting. However, less than a quorum of a board can meet, talk and communicate on agency business without violating the Brown Act. For example, if a board has five members, a quorum is three; two members are less than a quorum, and these two members may discuss any matter between themselves without violating the Brown Act. For VCE, the Board has eight members, the quorum is five, so four members is “less than a quorum.” The CAC has twelve seats; a quorum is seven and six is “less than a quorum..” This rule continues for face-to-face and for email, phone and teleconferenced meetings that are less than the quorum of the board and are not standing committees.

However, for social media, if a member posts a comment on social media no other board member may respond directly to that comment. Thus, any one board member directly responding will now be an express violation of the Brown Act. The new social media rules are much more stringent than the traditional Brown Act rules, which permit direct communication between or among members so long as it is among less than a quorum of the members, and the members communicating are not a “standing committee” of the board.

AB 992 Prohibition: Direct communication with even one other member of a board on social media is prohibited.

AB 992 provides that “A member of the legislative body shall not respond directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body.”

“Discuss among themselves” includes communications made, posted or shared on social media and includes comments or use of digital icons that express reactions to communications. This prohibition includes a mere “like” or use of a digital icon such as an emoji.

Social media is defined as platforms that are “open and accessible to the public.” “Open and Accessible” means that the general public can access and participate, free of charge, without the approval of the platform, including any forum or chatroom, and the user cannot be blocked, except where the platform has determined that an individual has violated its protocols or rules. Social media platforms include Instagram, Facebook, TikTok, Reddit, Snapchat and Twitter.

The new rules affect commenting, retweeting, liking, disliking, use of emoji and/or screenshots and reposting.

What Is Permitted:

AB 992 expressly permits board members to engage “in separate conversations or communications” on social media to:

1. provide information to the public;
2. solicit information from the public; and
3. answer questions

So long as members of the board do not use social media to discuss among themselves a matter that is within the jurisdiction of the board, and there is no direct communication between members, as outlined above.

Questions:

1. Does AB 992 apply to other means of communication such as texting or e mailing?

No. AB 992 only applies to social media platforms. However, emails or other means of communication may raise issues like serial meetings and release of emails under the public Records Act.

2. Can a board member still like a post from the Agency’s own Facebook page, Instagram post or tweet?

Yes. AB 992 does not prohibit a board member from liking or sharing the agency’s post. However, if one board member shares and another board member gives a like this may be deemed a prohibited direct communication on social media. AB 992 does not expressly address this issue.

3. Can a board member retweet or share another board member’s post without comment?

Probably not. Typically sharing or retweeting shows support for the prior post and this may be seen as a direct communication that is prohibited under AB 992. In addition, if a majority of the members retweet or share, even without comment, this may also be seen as a majority of the board “discussing” among themselves a matter within the agency’s jurisdiction and violates the serial meeting rules.

4. Can I post comments on my own Facebook page, or tweet my own comments?

Yes. However, you cannot use your own page to circumvent the “direct communication” prohibition. So whether a second posting close in time with the first posting violated AB 992 would become a question of fact based on the content of the posts and other relevant circumstances.

5. Can I use social media to discuss personal matters or share family pictures and the like?

Yes. The Brown Act, including AB 992, does not prohibit personal or social interactions. Board members may still congratulate each other on personal matters, such as birthdays, milestones, etc.

6. How is AB 992 going to be enforced?

AB 992 does not add any new enforcement rules. Any violation is subject to the enforcement under the existing Brown Act enforcement provisions.

cc: Mitch Sears

## Assembly Bill No. 992

### CHAPTER 89

An act to amend, repeal, and add Section 54952.2 of the Government Code, relating to local government.

[Approved by Governor September 18, 2020. Filed with  
Secretary of State September 18, 2020.]

#### LEGISLATIVE COUNSEL'S DIGEST

AB 992, Mullin. Open meetings: local agencies: social media.

The Ralph M. Brown Act generally requires that the meetings of legislative bodies of local agencies be conducted openly. That act defines "meeting" for purposes of the act and prohibits a majority of the members of a legislative body, outside a meeting authorized by the act, from using a series of communications of any kind to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

This bill would provide that, until January 1, 2026, the prohibition described above does not prevent a member from engaging in separate conversations or communications outside of a meeting authorized by this act with any other person using an internet-based social media platform, as defined, to answer questions, provide information to the public, or to solicit information from the public regarding a matter that is within the subject matter jurisdiction of the legislative body, provided that a majority of the members do not use the internet-based social media platform to discuss among themselves, as defined, business of a specific nature that is within the subject matter jurisdiction of the legislative body, and that a member shall not respond directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body.

Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

The California Constitution requires local agencies, for the purpose of ensuring public access to the meetings of public bodies and the writings of public officials and agencies, to comply with a statutory enactment that amends or enacts laws relating to public records or open meetings and contains findings demonstrating that the enactment furthers the constitutional requirements relating to this purpose.

This bill would make legislative findings to that effect.

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

SECTION 1. Section 54952.2 of the Government Code is amended to read:

54952.2. (a) As used in this chapter, “meeting” means any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.

(b) (1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

(2) Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.

(3) (A) Paragraph (1) shall not be construed as preventing a member of the legislative body from engaging in separate conversations or communications on an internet-based social media platform to answer questions, provide information to the public, or to solicit information from the public regarding a matter that is within the subject matter jurisdiction of the legislative body provided that a majority of the members of the legislative body do not use the internet-based social media platform to discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body. A member of the legislative body shall not respond directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body.

(B) For purposes of this paragraph, all of the following definitions shall apply:

(i) “Discuss among themselves” means communications made, posted, or shared on an internet-based social media platform between members of a legislative body, including comments or use of digital icons that express reactions to communications made by other members of the legislative body.

(ii) “Internet-based social media platform” means an online service that is open and accessible to the public.

(iii) “Open and accessible to the public” means that members of the general public have the ability to access and participate, free of charge, in the social media platform without the approval by the social media platform or a person or entity other than the social media platform, including any

forum and chatroom, and cannot be blocked from doing so, except when the internet-based social media platform determines that an individual violated its protocols or rules.

(c) Nothing in this section shall impose the requirements of this chapter upon any of the following:

(1) Individual contacts or conversations between a member of a legislative body and any other person that do not violate subdivision (b).

(2) The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the local agency. Nothing in this paragraph is intended to allow members of the public free admission to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance.

(3) The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(4) The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(5) The attendance of a majority of the members of a legislative body at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(6) The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers.

(d) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.

SEC. 2. Section 54952.2 is added to the Government Code, to read:

54952.2. (a) As used in this chapter, “meeting” means any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953,

to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.

(b) (1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

(2) Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.

(c) Nothing in this section shall impose the requirements of this chapter upon any of the following:

(1) Individual contacts or conversations between a member of a legislative body and any other person that do not violate subdivision (b).

(2) The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the local agency. Nothing in this paragraph is intended to allow members of the public free admission to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance.

(3) The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(4) The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(5) The attendance of a majority of the members of a legislative body at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature



that is within the subject matter jurisdiction of the legislative body of the local agency.

(6) The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers.

(d) This section shall become operative on January 1, 2026.

SEC. 3. The Legislature finds and declares that Section 1 and Section 2 of this act, which amends and adds Section 54952.2 of the Government Code, respectively, impose a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

The limitations on the people's right of access set forth in this act are necessary to ensure the free flow of communications between members of a legislative body of a local agency and the public, particularly on internet-based social media platforms.

SEC. 4. The Legislature finds and declares that Section 1 and Section 2 of this act, which amends and adds Section 54952.2 of the Government Code, respectively, further, within the meaning of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the purposes of that constitutional section as they relate to the right of public access to the meetings of local public bodies or the writings of local public officials and local agencies. Pursuant to paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the Legislature makes the following findings:

This act is necessary to ensure the free flow of communications between members of a legislative body of a local agency and the public, particularly on internet-based social media platforms.