

Date of Hearing: July 3, 2019

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

SB 355 (Portantino) – As Amended May 2, 2019

SENATE VOTE: 38-0

SUBJECT: Joint powers agencies: County of Los Angeles or County of Ventura: meetings.

SUMMARY: Allows any joint powers authority (JPA) within the County of Los Angeles (LA County) or the County of Ventura (Ventura County) to designate alternate members of the JPA's legislative body, who are not members of a member agency's legislative body, to attend closed sessions of the JPA. Specifically, **this bill:**

- 1) Allows, until January 1, 2025, any JPA that is entirely within either LA County or Ventura County to designate alternate members of the legislative body of the JPA who are not also members of the legislative body of a local agency member to attend closed sessions of the JPA.
- 2) Finds and declares that a special statute is necessary and that a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique needs facing the Counties of Los Angeles and Ventura, in having sufficient members present to hold meetings.

EXISTING LAW:

- 1) Enacts the Joint Exercise of Powers Act (JPA law), which allows two or more public agencies to use their powers in common if they sign a joint powers agreement.
- 2) Allows federal agencies, state departments, counties, cities, special districts, school districts, federally recognized Indian tribes, and even other joint powers authorities to enter into joint powers agreements.
- 3) Allows a JPA to specify its own mission, structure, and governing board, the financial obligations of each member agency, and the provisions for members to enter and exit the JPA, among other items.
- 4) Enacts the Ralph M. Brown Act (Brown Act), which requires meetings of the legislative body of a local agency, including a JPA, to be open and public, with exceptions authorizing closed sessions for specified matters related to litigation, real estate negotiations, personnel issues, labor negotiations, certain disciplinary matters related to schools, grand jury testimony, license applicants with criminal histories, multi-jurisdictional drug cases, hospital peer reviews and related trade secrets, and threats to public security.
- 5) Requires local agencies to publicly report any action taken in closed session and the vote or abstention on that action of every member present.
- 6) Allows a designated alternate member of a JPA to attend closed sessions of the JPA, provided that the alternate is a member of the legislative body of the JPA's member agencies.

FISCAL EFFECT: None

COMMENTS:

- 1) **Bill Summary and Author's Statement.** This bill allows any JPA that is entirely within either LA County or Ventura County to designate alternate members of the legislative body of the JPA who are not also members of the legislative body of a local agency member to attend closed sessions of the JPA. The bill provides a sunset date of January 1, 2025. This bill is sponsored by the Clean Power Alliance of Southern California.

According to the author, "Local agencies belong to a number of JPAs, many of which address technical issues such as insurance coverage and retail electric power procurement. In light of the many meetings local elected (officials) are required to attend, and the technical issues addressed by some JPAs, many such agreements provide for the local agency member of that JPA to designate an alternate director that is not a member of that legislative body. This bill would permit such unelected alternates to participate in closed session discussions of that JPA so long as the JPA is located entirely within either the County of Los Angeles or the County of Ventura. Such a change would enhance the ability of JPA members to participate in closed session discussions."

- 2) **Background.** JPA law allows two or more public agencies to use their powers in common if they sign a joint powers agreement. Sometimes an agreement creates a new, separate government called a joint powers agency or joint powers authority (JPA). Agencies that can exercise joint powers include federal agencies, state departments, counties, cities, special districts, school districts, federally recognized Indian tribes, and even other JPAs.

Existing law allows a JPA to specify its own mission, structure, and governing board, the financial obligations of each member agency, and the provisions for members to enter and exit the JPA, among other items. An agreement typically delineates how member agencies are to be represented on the governing board of the JPA, usually by designating a member of the governing body of the member agency to sit on the board of the JPA. However, an agreement may allow member agencies to designate alternates who are not members of the governing body of the member agency, such as a staff member or member of the public with significant expertise in the policy area.

Clean Power Alliance is a community choice aggregator formed as a JPA in 2017. Founding members included Los Angeles County, Rolling Hills Estates, and South Pasadena. Clean Power Alliance has since grown to 31 members, including unincorporated areas of Los Angeles and Ventura Counties and the cities of Agoura Hills, Alhambra, Arcadia, Beverly Hills, Calabasas, Camarillo, Claremont, Carson, Culver City, Downey, Hawaiian Gardens, Hawthorne, Malibu, Manhattan Beach, Moorpark, Ojai, Oxnard, Paramount, Redondo Beach, Rolling Hills Estates, Santa Monica, Sierra Madre, Simi Valley, South Pasadena, Temple City, Thousand Oaks, Ventura, West Hollywood, and Whittier. Clean Power Alliance serves approximately three million customers and one million customer accounts.

Pursuant to its joint powers agreement, Clean Power Alliance board meetings must have a majority of members present in order to conduct business. Each member agency must designate one regular director and two alternates. The regular director must be an elected or

appointed member of the governing body of the member agency. Alternates may be one of the following:

- a) An elected or appointed member of the governing body of the member agency;
 - b) An appointed member of an advisory body of the member agency;
 - c) A staff member of the member agency; or,
 - d) A member of the public with demonstrated knowledge in energy-related matters through specified experience in one of several types of organizations, including private, governmental, non-profit, and academic entities.
- 3) **The Brown Act and Closed Sessions.** The Brown Act generally requires the meetings of local governments' legislative bodies to be "open and public." This ensures public access to information so that the people of this state can retain control over the public agencies that serve them. The Brown Act prohibits private discussions among a majority of a legislative body, unless expressly authorized for closed sessions.

Legislative bodies are authorized to meet in closed sessions only for narrowly specified purposes, such as matters related to litigation, real estate negotiations, personnel issues, labor negotiations, threats to public security, and other subjects that have been determined to merit an exception to open meetings due to their sensitive nature, their potential risk to the agency or the public, the necessity to maintain privacy of personal information, and so forth. Closed session items must be described on a posted agenda and the description must identify the specific statutory exemption allowing the closed session. The legislative body must make a public announcement before a closed session begins, and must provide an oral or written report on certain actions taken and the vote of every elected member present after a closed session.

The state has traditionally treated closed sessions with great care and deference to protecting the confidentiality of communications that occur during these meetings. In 1997, the Attorney General issued an opinion finding that it is improper for officials to publicly disclose information received during a closed session regarding pending litigation. The Attorney General also opined that officials have a fiduciary duty to protect the confidentiality of closed session discussions. Subsequent Attorney General's opinions also favored the confidentiality of closed session information by concluding that board members of local agencies whose boards are appointed by and consist of other local agency members (such as JPAs) are restricted from sharing closed session information with the boards of the underlying member agencies.

The Legislature furthered the protections of closed session confidentiality by approving AB 1945 (Simitian), Chapter 1119, Statutes of 2002. AB 1945 amended the Brown Act to explicitly provide that a person may not disclose confidential information obtained by attending a closed session, unless the legislative body authorizes the disclosure. It also clarified that disclosure violations could be addressed as follows:

- a) Injunctive relief to prevent the disclosure of confidential information;

- b) Disciplinary action against an employee who willfully discloses confidential information; and,
 - c) Referral to a grand jury of a member of a legislative body who has willfully disclosed confidential information.
- 4) **JPA's and Closed Sessions.** In the context of this generally protective approach to closed session information, a series of news articles in 2003 revealed that a JPA in Riverside County was involved in false documentation, illegal financial maneuvers, conflicts of interest, contract violations and audit irregularities. The JPA board held a series of closed session meetings regarding the situation. Because these discussions occurred in closed session and were confidential under the Brown Act, the primary source of information to the public – including local officials not on the JPA board – was the news media. Frustrated by their lack of access to information discussed in closed session of the JPA they created, some of the JPA's member agencies sought a legislative remedy to allow member agencies of a JPA to have access to the JPA's closed session information.

AB 2782 (Benoit), Chapter 784, Statutes of 2004, responded to this dilemma. In its analysis of the bill, the Senate Local Government Committee noted, "A JPA's member agencies are not responsible for contractual liabilities of the JPA, but case law has determined that they are responsible for tort liability." In seeking to balance the need to protect the information disclosed in closed sessions of a JPA and the need of JPA member agencies to protect their home agency's interests, AB 2782 clarified a number of issues. It expressly allowed a JPA to adopt a policy or bylaw or include in its joint powers agreement provisions that authorize the following:

- a) All information received by the legislative body of the local agency member in a closed session related to the information presented to the JPA in closed session shall be confidential. However, a member of the legislative body of a member local agency may disclose information obtained in a closed session that has direct financial or liability implications for that local agency to the following individuals:
 - i) Legal counsel of that member local agency for purposes of obtaining advice on whether the matter has direct financial or liability implications for that member local agency; and,
 - ii) Other members of the legislative body of the local agency present in a closed session of that member local agency;
- b) Any designated alternate member of the legislative body of the JPA who is also a member of the legislative body of a local agency member and who is attending a properly noticed meeting of the JPA in lieu of a local agency member's regularly appointed member to attend closed sessions of the JPA.

In the event that a JPA authorizes these provisions, AB 2782 clarified that the legislative body of the local agency member, upon the advice of its legal counsel, is then allowed to conduct a closed session in order to receive, discuss, and take action concerning information obtained in a closed session of the JPA that has direct financial or liability implications for that local agency.

When it was introduced, AB 2782 allowed *any* alternate to attend closed sessions of the JPA. However, this language was restricted in the final version to allow only alternates *who are members of the home agency's governing body* to attend closed sessions of the JPA and then share the specified information with their home agency, also in closed session.

5) **Policy Considerations.** The Committee may wish to consider the following issues:

- a) **Accountability.** When AB 2782 made its way through the legislative process 15 years ago, debate on the issue resulted in the language of the law today, which very narrowly allows only alternates who are members of the legislative body of member agencies (i.e., an elected or appointed official) to attend closed sessions of a JPA. Presumably this limitation was enacted to retain a measure of accountability to the public, to whom elected officials must ultimately answer. While the Brown Act does contain specific penalties for unlawful disclosure of closed session information, these penalties apply only to employees of a local agency and members of a legislative body who make an unlawful disclosure (injunctive relief – a preventive mechanism – applies generally). The Committee may wish to consider whether maintaining this limitation on which alternates may attend closed sessions of a JPA is a prudent method of protecting closed session information and preserving accountability to constituents.
- b) **Limitations on Disclosure.** In addition to the authority allowing only alternates who are members of the legislative body of member agencies to attend closed sessions of a JPA, existing law also specifies who can receive information disclosed in a closed session of a JPA and what kind of information can be shared. Specifically, the law limits disclosure as follows:
 - i) Disclosure is limited to information obtained in a closed session of a JPA that has *direct financial or liability implications* for the member local agency; and,
 - ii) Disclosure is limited to the following persons: other members of the legislative body of the local agency present in a closed session of that member local agency; or, legal counsel of a member agency specifically for purposes of obtaining advice on whether the matter has direct financial or liability implications for that member local agency.

The drafting of this bill is sufficiently vague as to be unclear that these authorizations and limitations would still apply when an alternate is not a member of a local agency member's legislative body. The Committee may wish to ensure that these authorizations and protections would still be in effect even if the restrictions on alternates are altered.

- c) **Who is Designating Alternates?** The language of this bill states that *any JPA* that is entirely within either the County of Los Angeles or the County of Ventura *may designate alternate members* of the legislative body of the JPA who are not also members of the legislative body of a local agency member to attend closed sessions of the JPA. However, pursuant to common practice and Clean Power Alliance's agreement, it is *member agencies, not the JPA*, that designate alternates. The Committee may wish to clarify this language.
- d) **Slippery Slope.** Clean Power Alliance is sponsoring this bill to allow all of its member agency alternates to attend closed sessions of Clean Power Alliance. However, this bill applies to any JPA in Los Angeles or Ventura County. The Committee may wish to

narrow this bill to apply only to Clean Power Alliance, to meet the needs of its sponsor while also allowing the Legislature to evaluate the practical effects of loosening the restrictions that apply to attendees of JPA closed sessions.

- 6) **Committee Amendments.** In order to address some of the policy issues raised above, the Committee may wish to amend this bill as follows:
- a) Narrow its application to Clean Power Alliance only;
 - b) Clarify that all of the existing authorizations and limitations regarding the type of information that may be disclosed and the people to whom it may be disclosed apply when an alternate is not a member of the member local agency's legislative body; and,
 - c) Require Clean Power Alliance, if it elects to open its closed sessions to alternates who are not members of a member local agency's legislative body, to establish a policy for these alternates that addresses conflicts of interest and breaches of confidentiality.
- 7) **Arguments in Support.** Clean Power Alliance, sponsor of this measure, states, "SB 355 seeks to remove language from the Government Code that currently precludes a JPA alternate representative from participating in closed session discussions of the JPA unless that alternate is a member of the member agency's legislative body. This bill significantly contributes to the ability of JPAs to conduct business and govern operations effectively and provide for continuity in participation from authorized decision makers, including staff of JPA member agencies and members of the public who have been selected by their communities to sit on a JPA board."
- 8) **Arguments in Opposition.** None on file.

REGISTERED SUPPORT / OPPOSITION:

Support

Clean Power Alliance of Southern California [SPONSOR]
California Association of Joint Powers Authorities
Cities of Camarillo, Carson, Claremont, Culver City, Manhattan Beach, Moorpark, Ojai,
Paramount, Rolling Hills Estates, Santa Monica, South Pasadena, Ventura, and West
Hollywood
Los Angeles County Division of the League of California Cities
Los Angeles County Supervisor Sheila Kuehl

Opposition

None on file

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