

Presented at the December
10, 2024 ECRB Meeting

Michael Ng,
Senior Staff Attorney
michael.ng@bcdc.ca.gov

ENGINEERING CRITERIA REVIEW BOARD

ORIENTATION / LEGAL TRAINING

TOPICS OF TRAINING

Current ECRB regulations, as amended

Bagley-Keene Open Meeting Act

Robert's Rules of Order

Conflicts of interest (Political Reform Act)

Public Records Act

CURRENT ECRB REGULATIONS, AS AMENDED*

*BCDC regulations, including those pertaining to the ECRB, are codified at Title 14, Division 5 of the California Code of Regulations. On May 20, 2021 the Commission approved updates to the agency's regulations which were ultimately approved by the Office of Administrative Law on August 2, 2022, with the amended language taking effect on October 1, 2022.

MEMBERSHIP, FUNCTION OF ECRB (10271)

- (a) No more than 9 members, at least:
 - 1 geologist (or engineering geologist)
 - 1 civil engineer (specializing in soils)
 - 1 structural engineer
 - 1 coastal engineer
- (b) Advises re: safety of fills within Bay and certain waterways jurisdiction
- (c) 5 members constitutes quorum
- (d) Commission (Chair) may designate up to 4 alternates
- (h) Terms of members and alternates limited to 5 years, but may be renewed by ED for 2 successive 5-year periods
- (i) Ex parte communication principles apply to ECRB
 - Members should not have any communication re: a proposed project noticed to be considered by the ECRB w/ the applicant or other member of the public except at ECRB meeting.
 - If such communication occurs, inform legal counsel.

SUBMITTAL OF MATERIALS (10316)

Applicant for a project that requires ECRB review shall submit to staff, at least 30 days prior to the scheduled meeting at which the ECRB will review the project: geotechnical reports and geologic findings, structural plans, engineering analyses (including coastal engineering analysis), design calculations, and architectural renderings



BAGLEY-KEENE OPEN MEETING ACT

Government Code sec. 11120 *et seq.*

BASIC PURPOSE (11120)

Actions of state agencies are to be taken openly and deliberation conducted openly



BASIC RULES

WHY IS ECRB COVERED BY B-K?

- “State body” includes an advisory board if created by formal action of a state body and if consisting of 3+ persons (11121(c))
- Any person appointed who has not yet assumed duties shall conform his/her conduct to the requirements of B-K as if he/she has already assumed duties (11121.95)

WHAT IS A MEETING?

- “Meeting” includes a majority of a state body at the same time and place to hear, discuss, or deliberate upon any item within its subject-matter jurisdiction (11122.5(a))
 - Deliberation includes info gathering, analysis, debate, negotiation, and decision-making.*
 - Info gathering includes staff briefings, pre-meeting conferences, informal studies, training, facility tours, investigations, and fact-finding sessions.*

* <https://oag.ca.gov/system/files/media/bk-open-meeting-act-guide-2023.pdf>

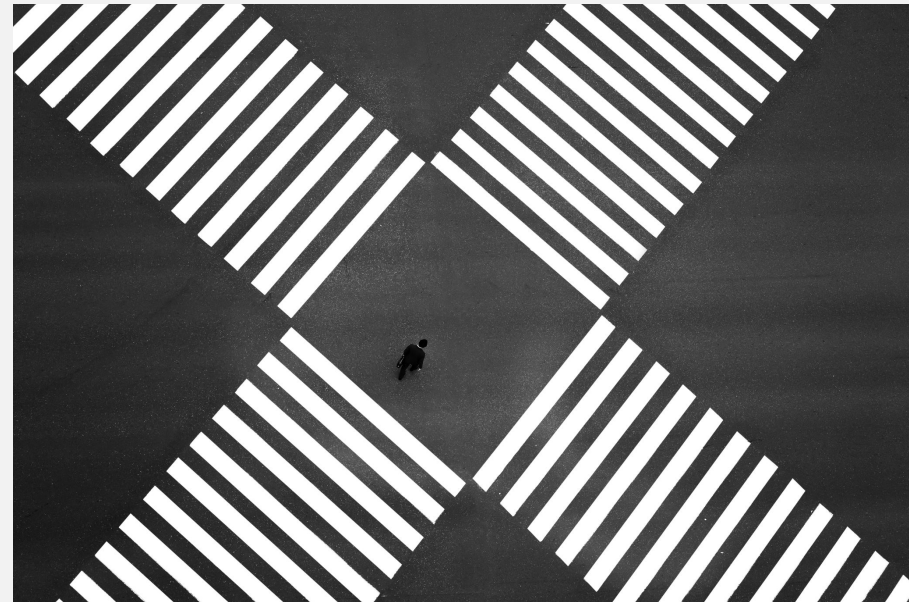
SERIAL MEETINGS (11122.5)

- (b) A majority of members of a state body shall not, outside of a meeting, use a series of communications to discuss, deliberate, or take action on any item of business within its subject matter
 - *E.g.*, for a 5-person state body, if A talks to B who talks to C, this is a serial meeting*
 - *E.g.*, if A separately talks to B and C, this is also a serial meeting*
- An executive officer may receive spontaneous input from board members, but problems arise if there are systematic communications through which a quorum of the body acquires information or engages in deliberative process*
- ECRB members should **not** email each other to discuss current topics (except procedural issues, e.g., time, date, location of meeting) **even if** also sent to staff or ED, posted on the agency's website, and printed for the next ECRB meeting*

*<https://oag.ca.gov/system/files/media/bk-open-meeting-act-guide-2023.pdf>

CONSIDER RELEVANCE OF EX PARTE COMMUNICATIONS...

- Prohibitions of B-K do not apply to individual contacts between a member of a state body and any other person (11122.5(c)(1))
- If a member of the public meets individually but separately w/ enough members to constitute a quorum, these separate communications are still not a meeting.
 - *However, consider that ex parte communication rules are likely implicated here*



MEETING REQUIREMENTS

NOTICE AND AGENDA (11125)

- (b) Notice must include a specific agenda for the meeting, containing a brief description of items of business to be transacted or discussed
- (c) Notice shall be given and made available on the internet at least 10 days in advance of the meeting

PUBLIC PARTICIPATION

- Persons are not required, as a condition of attendance of a meeting, to register his/her name (11124)
- State bodies shall provide opportunity for members of the public to directly address the body on each agenda item before or during the body's discussion or consideration of the item (11125.7(a))

ROBERT'S RULES OF ORDER

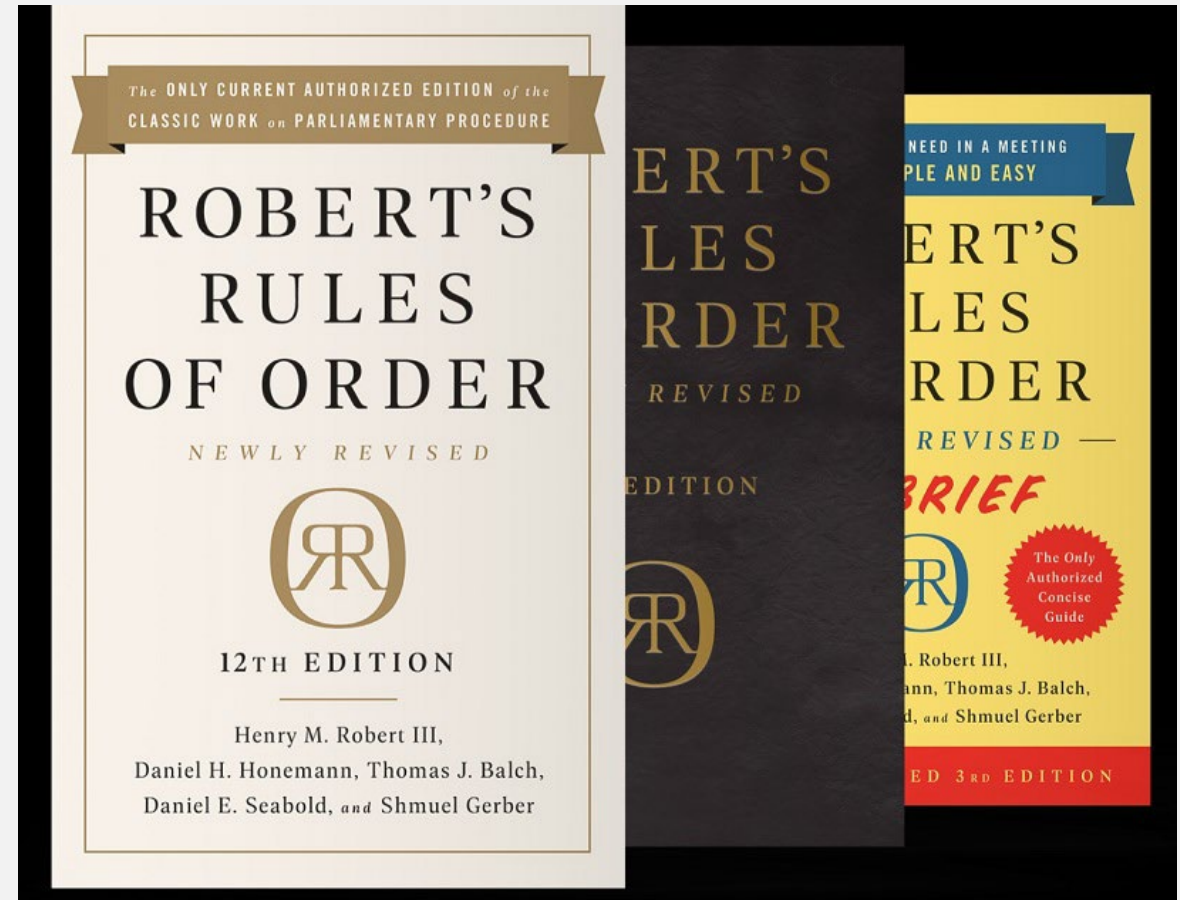
Reference 14 CCR sec. 10242(a)

BASIC PURPOSE

Manual of parliamentary procedure for conducting meetings (used by the Commission)

Reference 14 CCR sec. 10242(a)

*Note that the ECRB is **not** required to follow Robert's Rules of Order, but they can provide, through formality of the Rules, clarity and order to the ECRB's meetings if followed*



COMMON ACTIONS*

	Class	Interrupt Speaker	Must be seconded	Debatable	Amendable	Vote required
Propose motion	Main	N	Y	Y	Y	Majority
Amend motion	Subsidiary	N	Y	Y	Y	Majority
Close debate	Subsidiary	N	Y	N	N	2/3
Point of Order	Incidental	Y	N	N	N	Chair
Withdraw or modify	Incidental	Y	Y if made by requestor	N	N	Majority
Adjourn	Privileged	N	Y	N	N	Majority

* https://www.lacba.org/docs/default-source/board-governance-book/lacba-_-roberts-rules-_-cheat-sheet.pdf



BASIC PROCEDURE FOR MAIN MOTIONS*

- (1) Motion
 - Chair recognizes the moving member
- (2) Second
 - Another member seconds the motion
- (3) Restate motion
 - Chair restates the motion
- (4) Debate
 - Members debate the motion
- (5) Vote
 - Chair restates the motion and asks for votes
- (6) Announce vote
 - Chair announces result of vote

* <https://www.boardeffect.com/blog/roberts-rules-of-order-cheat-sheet/>

CONFLICTS OF INTEREST

Political Reform Act (Government Code sec. 81000 *et seq.*)

BASIC PURPOSE

Public officials should perform their duties in an impartial manner, free from bias caused by their own financial interest or those of persons who have supported them (81001(b))

Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting (81002(c))



CONFLICT OF INTEREST RULES (87302)

WHY DOES THIS APPLY TO ECRB?

- (a) Each agency's conflict of interest code (COIC) must enumerate positions which involve the making or participation in making of decisions which may foreseeably have a material effect on any financial interest
- Per BCDC's COIC, ECRB members are in Disclosure Category I
 - Real property interests if any part is within 2 miles of BCDC's jurisdiction
 - Investments and business positions, and sources of income from entities doing business within BCDC's jurisdiction

REPORTING (FORM 700)

- (b) Each new designated employee shall file a statement within 30 days after assuming office
- (b) Each designated employee shall file an annual statement
- (b) Every designated employee who leaves office shall file, within 30 days of leaving office, a statement
- Disclosure/reporting occurs on FPPC's Form 700 (via BCDC's electronic filing system eDisclosure:
<https://sanfranciscobcdc.southtechhosting.com/eDisclosure/>)

BASES FOR RECUSAL

- No public official shall in any way attempt to use his/her official position to influence a governmental decision in which he/she knows or has reason to know he/she has a financial interest (87100)
- “Financial interest” means if it is reasonably foreseeable the decision will have a material financial effect, distinguishable from the effect on the public, on the official, their immediate family, or any of the following (87103)
 - (a) Any business entity in which the official has a direct or indirect investment of \$2,000+
 - (b) Any real property in which the official has a direct or indirect interest of \$2,000+
 - (c) Any source of income aggregating \$500+ provided or promised to the official within 12 months prior to the time the decision is made
 - (d) Any business entity in which the official holds any position of management
 - (e) Any donor of a gift aggregating \$590+ provided or promised to the official within 12 months prior to the time the decision is made (ref. 2 CCR sec. 18700(c)(6)(E))

RECUSAL: FOUR-STEP PROCESS (2 CCR SEC. 18700(d))

- (1) Is it reasonably foreseeable the governmental decision will have a financial effect on the public official's financial interests?
- (2) Will the reasonably foreseeable financial effect be material?
- (3) Can the public official demonstrate that the material financial effect on his/her financial interest is indistinguishable from its effect on the public generally?
- (4) If after applying the above analysis and determining the public official has a conflict of interest, absent an exception, he/she may not in any way attempt to use his/her position to influence the government decision
- *Conflict of interest questions can be highly complex; contact Jenn and Michael ASAP for any assistance*

COMMON LAW CONFLICTS OF INTEREST

- Not based in the Political Reform Act, but common law (developed by judicial opinions)
- Common law conflicts of interest can also require recusal*
- Doctrine applies to nonfinancial personal interests*
- A permit applicant has right to fair and unbiased decisionmaker as matter of due process*
 - *E.g.*, Right likely impaired where ECRB member considers project for which he/she wrote critical op-ed*



* https://www.calcities.org/docs/default-source/city-attorneys/conflict-of-interest-guide/240b84a-e02b-4ba3-9b4b-909ae4713742.pdf?sfvrsn=bb62333c_8

PUBLIC RECORDS ACT

Government Code sections 7920 *et seq.*

BASIC PURPOSE

The people have the right of access to information re: conduct of the people's business, and writings of public officials and agencies shall be open to public scrutiny (Cal. Const., art. I, sec. 3(b))

Access to information re: conduct of the people's business is a fundamental and necessary right of every person in the state (7921)



RELEVANT DEFINITIONS

PUBLIC RECORDS (7920.530(a))

- Includes any writing containing info re: conduct of the public's business prepared, owned, used, or retained by any state agency regardless of physical form or characteristics

WRITING (7920.545)

- Any handwriting, typewriting, printing, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication, regardless of manner in which the record has been stored

RIGHTS OF THE PUBLIC

INSPECTION

- Every person has a right to access public records (7921)
- No limitation on access to records based on requester's purpose (7921.300)
- BCDC's public-facing Guidelines for Access to Public Records:
<https://bcdc.ca.gov/about/public-records/>

MAKING A REQUEST

- May be made orally or in writing (*LA Times v. Alameda Corridor Trans. Auth.* (2001) 88 Cal.App.4th 1381, 1392)
- No magic words to trigger a records request

RESPONDING TO A REQUEST

- Within 10 days from receipt of a request, the agency must determine whether the request seeks disclosable public records in the agency's possession and notify the requester of its determination and reasons (7922.535(a))
- Records "retained" by an agency include actual and "constructive" possession (*City of San Jose v. Sup. Ct.*)
 - Includes records "retained" on personal devices or accounts if they otherwise meet the "public record" definition
- Withholding any part of a record requires identification of a specific exemption (7922.000)
 - *BCDC Legal makes any decisions re: withholding*
 - *PRA requests are typically received by agency staff; if applicable to the ECRB, Jenn, and Michael will coordinate with the ECRB*
 - *Assume external communications are disclosable*
 - *Assume communications with BCDC staff are also disclosable, unless perhaps seeking attorney advice*



QUESTIONS?