

TAHOE REGIONAL PLANNING AGENCY
LEGAL COMMITTEE

TRPA
Zoom

February 22, 2023

Meeting Minutes

CALL TO ORDER AND DETERMINATION OF QUORUM

Chair Williamson called the meeting to order at 8:55 a.m. on February 22, 2023.

Members present: Ms. Aldean, Ms. Williamson, Mr. Hicks, Ms. Faustinos, Ms. Gustafson, and Mr. Rice (Mr. Rice arrived at 9:00 a.m.).

Members absent: None.

I. APPROVAL OF AGENDA

Mr. Marshall stated there were no changes to the agenda.

Ms. Williamson deemed the agenda approved as posted.

II. ELECTION OF VICE CHAIR

Ms. Gustafson nominated Ms. Aldean to serve as Vice Chair of the TRPA Legal Committee. Ms. Aldean accepted the nomination.

Committee Member Comments

None.

Public Comment

None.

Ms. Gustafson made a motion to elect Shelly Aldean as Vice Chair of the TRPA Legal Committee.

Ayes: Ms. Aldean, Ms. Williamson, Mr. Hicks, Ms. Faustinos, Ms. Gustafson, and Mr. Rice.

Nays: None.

Motion carried unanimously.

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III. APPROVAL OF MINUTES

Ms. Aldean indicated that she submitted some corrections to Marja Ambler, TRPA Governing Board clerk. Ms. Aldean made a motion to approve the December 14, 2022 Legal Committee meeting minutes as amended.

Motion carried by unanimous voice vote.

IV. BRIEFING ON UPDATES TO TELECONFERENCING RULES

TRPA General Counsel John Marshall presented this item to the Legal Committee. He noted this item is specifically on teleconferencing because the Agency's standard practice since the COVID-19 Emergency Orders is coming to an end. [Slide 9] Per the Tahoe Regional Planning Compact Article III(d) directs the Agency that "All meetings shall be open to the public to the extent required by the law of the State of California or the State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held." First, Mr. Marshall drew the committee's attention to the first part of the sentence that "All meetings shall be open to the public to the extent required by the law of the State of California...and Nevada". This does incorporate either Nevada Open Meeting Law ("OML") or the State of California equivalent. "Open to the public" is what TRPA is focusing on here, not necessarily all of the agenda requirements which TRPA has rules for in their own Rules of Procedure. Next, "...applicable to local governments..." which means the Nevada OML and in California, the Brown Act as opposed to Bagley-Keene. TRPA follows the Brown Act if they're following the local law in California because that's what's applicable to local governments.

On to the imposition of the "greater requirements"; TRPA has historically followed the Nevada OML because it has more restrictive provisions for when you can go into a closed session. Otherwise, [both states requirements] are about the same. Mr. Marshall will be presenting that, for teleconferencing, that may be slightly different now. What TRPA has done regarding teleconferencing is adopted it's own rule: Article 2.16 of the Rules of Procedure ("ROP"). [Slide 10] Mr. Marshall has prepared a generalized comparison of the Nevada OML, the California Brown Act, and TRPA's ROP 2.16 regarding teleconferencing. Because the emergency declarations in both states, which allowed local governments to work remotely during the pandemic, are coming to an end and, more specifically, the emergency declaration for the Brown Act in California is ending at the end of this month [February]. Therefore, next month TRPA moves back to operating under ROP 2.16 for remote participation in meetings. The left most column of the chart is a shorthand for different requirements that arise under law when members want to appear remotely. This does not apply to staff, only to the public members of a public body. ROP 2.16 currently has some provisions that the Board may be interested in changing out for future meetings.

The first requirement for justification and approval required, this is for when individual members can participate remotely. Under the Nevada OML, there is no specific requirement as to a justification for the individual members. Under the new provisions of the California Brown Act AB 2449, there are two different provisions. There is a "just cause" provision which allows members to appear remotely for "just cause" which is things like childcare, taking care of family members, etc. Then there's an emergency basis for which criteria isn't provided but typically has to be something more extreme than just cause. For example, for pandemics, not necessarily bad snow days. Another new element is that approval is required for a member to appear remotely under the Emergency provisions of the Brown Act. This means that a member would need to

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make a small presentation to Board members and the a vote would need to be taken to allow the member to appear remotely. TRPA has a hardship requirement which is essentially Just Cause and Emergency and adverse road conditions. Under TRPA ROP, if it's unsafe to drive, that's an acceptable justification for a member to appear remotely.

Next, Mr. Marshall discusses the quorum requirement; if a quorum in person is required when there are some members remote. In Nevada OML, there's no requirement that the quorum be in person i.e. physically present in the meeting room. In California, there is a requirement that a quorum be physically present; only a minority of the Board or committee members may appear remotely. Under TRPA ROP, a quorum needs to appear within the jurisdictions within the local agencies. That means that members can appear remotely as long as that remote location is within the local jurisdiction i.e. Placer County, El Dorado County, Douglas County, etc.

Ms. Aldean points out that 2.16.3 says that during teleconference, a quorum of the members shall participate from within the Tahoe Basin which would preclude a member participating from Carson City even though that's within Douglas County. Mr. Marshall confirms. Mr. Marshall wants to discuss with the Legal Committee whether they want to update the quorum requirement since it makes remote participation available to a minority of TRPA Board members. Particularly in winter conditions, commuting in[to the Basin] is the major hardship.

The next requirement is whether the remote location is open to the public and if the agency is required to allow public comment in the remote location. In both the California Brown Act and the Nevada OML, the answer is no. In TRPA ROP 2.16 the answer is yes; the remote location has to be open to the public and the members have to allow any public comment from commenters who are present at that [remote] location. That used to be a requirement of the Brown Act but California no longer requires that individual locations be open. The next requirement is remote posting of agenda and materials which is not required under Nevada OML or the Brown Act but is required under TRPA ROP. Where this raises some concern is requiring Board members to post something on the outside of their houses and being able to provide for materials that are handed out during the meeting. Electronic provision may work here but it's a little unclear.

The requirement for remote opportunity to comment is new for California. The Brown Act now requires California local jurisdictions need to provide a call-in number, a web-based participation, and in-person capabilities in real time. The next one is a frequency restriction; under Nevada and TRPA rules, there's no limit on the amount of times that a Board member may appear remotely. Under California, there are two different limitations. There's a 2 times per year limitation for the just case justification, and the maximum under either justification is 3 times in row. The next requirement which is new in California is a required disclosure of persons 18 and over in the remote location room and what that person's relationship is to the member. This is to resolve when members of the public are no allowed to access the remote location that there's a disclosure of any potential of people with conflicts of interest or someone who has a specific interest being in the room.

The final requirement to discuss is committees. Neither Nevada OML nor California Brown Act distinguishes committees but TRPA does. There are fewer restrictions under TRPA's current rule and there's more flexibility provided to committees. Mr. Marshall reminds the committee that the Compact directs TRPA to follow the stricter of the two laws. When TRPA added ROP 2.16 is essentially codify the prior Brown Act which allowed the Agency to follow the Nevada OML for everything else because California was more strict than Nevada for remote participation. California's law is still more strict and right now the California Brown Act in some provisions is more strict than the TRPA ROP. On the other hand, is less strict regarding quorum and whether

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or not your personal location is open to the public. Mr. Marshall invites the discussion from the Legal Committee of how ROP 2.16 should be amended. He proposes several options. He clarifies that TRPA cannot use the Nevada OML for teleconferencing. Either the Agency has to develop something that more suits members' needs but is consistent with the Brown Act or simply follow the Brown Act. That allows the Agency to maintain the same compliance with the Nevada OML. The Agency could eliminate ROP 2.16 and follow the Brown Act for all requirements but there may be a middle ground that satisfies the Brown Act.

Mr. Marshall suggests the committee discusses whether the Just Cause/Emergency provisions should be expanded to allow hardship as TRPA defines it including road conditions and other unsafe conditions including fire. He also suggests the committee discuss if there is a need for a frequency restriction and if the committee members are comfortable with the required disclosure which most likely will need to be included. The frequency requirements in the Brown Act have a formula to follow but, essentially, for TRPA Board members, the just cause justification can be used 2 times per year. Mr. Marshall informs the committee that any rules update will need to stick quite close to the California Brown Act requirement regarding frequency of remote appearances.

Committee Member Questions & Comments

Ms. Aldean comments that the objective is to have sufficient people participating so that a meeting wouldn't need to be cancelled due to lack of quorum. She understands that TRPA has chosen to follow the stricter of the two open meeting laws and she wonders if it is possible to apply to maximums to the California members of the Governing Board?

Mr. Marshall responds that this is not possible. Article III(d) of the Compact applies to the Agency as a whole so it's impossible to make distinctions between members. Mr. Marshall corrects Ms. Aldean that TRPA does not have the discretion to follow the stricter of the two laws; the Agency is required to by the Compact. TRPA does have some discretion in how the ROP are crafted in order to follow the stricter of the two state laws as it best serves the Agency.

Ms. Williamson wonders if the Compact could be amended to follow the Nevada OML.

Mr. Marshall responds that the Compact has only been amended 3 times; in 1969, 1980, and more recently as part of the mechanism to keep the two states together within the Compact. It is a difficult task. Perhaps, the next time an amendment to the Compact is brewing, TRPA could attach a change to the Open Meeting Law requirements.

Ms. Williamson thinks that having the remote option has been a game changer in a good way. She's attended meetings under evacuation orders, while stuck in snowstorms and caring for small children. She feels it's important to have everyone's voice participate in anyway they're able.

Ms. Gustafson suggests using "hardship" as a justification and add more to the frequency available for that option, perhaps not to exceed 6 times a year, and then stay with the California Brown Act for the just cause justification or 3 times in a row total. She'd like to find a way to craft an update to the ROP to meet the intent of the Brown Act but understands Tahoe's geography, weather, and fire.

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Mr. Marshall responds that the Board has discussed the remote participation requirements in the past and, when it was debated then, there was an express policy of the Board to get members in-person together since it only happens once per month. He thinks Ms. Gustafson's suggestions could work. He cautions that the requirement to not appear remotely more than 3 times in a row is pretty express and most likely will need to be followed. He feels the Board can live with this requirement. The maximum use of just cause twice a year along with the quorum requirement to have members within the bounds of a local jurisdiction in the Brown Act suggests that the Act does not contemplate an entity such as TRPA where members are coming from significantly further away from the jurisdiction. He feels that TRPA may be able to include flexibility there recognizing that difference.

Ms. Gustafson continues that the question to the Board would be what is the appropriate maximum number of times to allow members to appear remotely. She agrees there's value in getting members together with each other and with staff, in person.

Ms. Aldean wonders if there's an opportunity to carve out an exception for TRPA at the California legislative level?

Executive Director Regan responds that she was in Sacramento yesterday and that this is a hot topic around the State capital. There are a lot of interest groups engaged with members because California has a lot of Commissions, for example the Sierra Nevada Conservancy Board. There's a large advocacy arm of the disabled community who's been able to participate on Boards more because of the remote and virtual opportunities and there are a few bills moving through the legislature. So there's an opportunity for TRPA to engage if that's the will of the Board for either a carve out or engaging so that TRPA's wishes are harmonized into whatever legislative vehicle might flow into the next few months. TRPA will track it either way but staff still needs a sense of where the Board is going with these new provisions in order to engage constructively to take care of TRPA needs as well. These kinds of issues originally weren't contemplated but they have emerged with other constituencies within the State in recent years.

Mr. Marshall distinguishes that, absent the Board directing staff not to, TRPA will continue with remote participation for members of the public. They are not discussing here removing those remote participation opportunities. TRPA sees the value of expanding people's ability to participate without having to come physically to this location. This is focusing on Board members and their ability to appear remotely. Absent direction from the Board, TRPA will continue to satisfy the requirements for remote opportunities to comment.

Ms. Gustafson notes she would like to remove the requirement for Board members to post materials at their remote location.

Mr. Marshall agrees that that requirement could be removed. The trade-off for that is complying with the disclosure requirement.

Ms. Faustinos states that the most significant consideration for members outside of the Basin is the hardship justification for weather, etc. that could prevent them from attending in person. She feels comfortable with all the other discussed changes. Ms. Gustafson asks Ms. Faustinos if setting maximum on remote attendance is agreeable. Ms. Faustinos replies that a maximum of three in row is reasonable and appreciates that it would encourage Board members to attend meetings in person to the best of their ability. She notes that an extensive health issue could be an exception to that requirement.

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Mr. Marshall notes that there's a provision in the Compact that states that if Board members miss more than three meetings in a row, they lose their seat. That's not remote participation but missing meetings entirely.

Mr. Rice wonders about alternates being able to participate in Board meetings given that he, along with other Board members, participate on many other Boards. Mr. Marshall responds that TRPA allows alternates for Board members unless the individual is named as the Board member. Mr. Marshall notes that there's a distinction between hardship and convenience. Convenience may not be a bad thing as a justification to appear remotely if TRPA wants to adopt the widest rules possible; that's nearly how TRPA has been practicing to date. Coming out of the Emergency Declarations, at least in California, they're moving back to a world where convenience does not allow you to participate remotely. This requirement doesn't exist in Nevada. Mr. Marshall states that TRPA should maintain the hardship provisions especially if TRPA wants to propose a specific carve out for hardship provisions.

Ms. Gustafson wants to clarify the remote quorum requirements and proposes that members could appear anywhere within their local jurisdiction i.e. the Douglas County Commissioner could be anywhere within Douglas County. Mr. Marshall responds that for the quorum issue that the Brown Act's requirement that the quorum be within the jurisdiction can be worked with because it doesn't recognize that TRPA jurisdiction is unique and the TRPA Board members are not required to be residents of the TRPA jurisdiction unlike in most local governments. Ms. Gustafson proposes that TRPA Board members who are state representatives simply have to be within their appointing state and the local representatives have to be within their local jurisdiction in order to be remote but also count towards maintaining a quorum. Mr. Marshall agrees to look at the proposal that a quorum has to be present within their representative jurisdictions even when appearing remotely.

Mr. Hicks wonders about participating while on a vacation out of state. Mr. Marshall reminds him that this requirement is about maintaining a quorum, not restricting from where a member could appear remotely. The intent of that provision is to drive people together and the Board needs to consider how much they'd like to relax that purpose. It also serves a public disclosure purpose. Mr. Marshall states that the Compact sets the Board quorum requirements at four members per state.

Ms. Aldean states that she is supportive of Ms. Gustafson's recommendations. She wonders if, rather than getting a legislative change, could this be submitted to the Attorney General of California for an opinion letter. Mr. Marshall states that those are very hard to get and take a long time. That request would also force the question out of the Attorney General if whether or not what TRPA proposes to adopt would be consistent with their view of the relatively strict provision within the Compact. He does not recommend that course of action. He recommends going through the State agencies and making certain that State agency partners are comfortable with what TRPA is proposing.

Ms. Aldean continues that while the committee is looking at TRPA ROP 2.16, 2.16.6 states that all votes taken at a teleconference meeting shall be by roll call. This is not what TRPA has been doing on votes like adjourning; that's done by acclamation. Perhaps this provision should be revised. Mr. Marshall agrees to draft a revision.

Mr. Rice asks what the consequences would be to a member who violated the OML or the Brown Act. Mr. Marshall responds that the most severe consequences, without discussing the criminal implications, is threatening the integrity of the Board's decision-making. It could

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undermine Code changes or potentially project-level decisions; it could make decisions subject to reversal for not following the stricter of the two laws.

Mr. Marshall continues that the question Mr. Rice poses is whether the individual liability provisions, particularly in the Nevada OML, would apply. He thinks there are good arguments to say that those provisions are not incorporated. He would argue that those remedy provisions lie outside of what is incorporated by Article III(d) of the Compact. Nevertheless, Mr. Marshall can't say that individual members would be free from liability from knowing actions.

Ms. Aldean wonders historically how many times has the Agency not been able to take action on an item because of lack of quorum due to inclement weather or extenuating circumstances. As an Agency, TRPA needs to take action on certain important issues and if the only way to do that at times is to be a little more lenient with respect to teleconferencing, it seems like a worthy trade-off.

Mr. Marshall responds that TRPA can't do that in an *ad hoc* fashion unless there's a specific rule that allows it and he recommends against because there is no opportunity to do that and stay in compliance with the stricter of the two state laws. Rather the Agency plans around those quorum issues by putting action items first and undertaking other strategies to ensure appropriate quorums for the Board to take action. He reminds the committee that the quorum and voting requirements are in the Compact so if the Agency has a rule about remote quorums that is sufficiently consistent with the Brown Act, the Agency will achieve the requirements of the Compact. Mr. Marshall states that this discussion needs to be had with the full Board when adopting the updated rule for teleconferencing quorum requirements and not on an *ad hoc*, case-by-case basis. That would potentially lead to inconsistencies in application and the threat of invalidation of the action taken. Mr. Marshall states that there are ways to ensure a quorum presence without putting the decision made at risk.

Ms. Aldean states that she's not suggesting Board action when there isn't a quorum but rather using that as a rationale for using a technology that wasn't available 20 years ago. Mr. Marshall agrees that that is evident in California's amendments to the Brown Act. Ms. Gustafson states that the Brown Act is really crafted for local agencies and for the public being able to show up and talk to their elected officials; it's not set up necessarily for the state-wide and Bistate issues. She states that this makes sense since it's not the Brown Act that applies to California state entities; it's Bagley-Keene.

Mr. Marshall suggests that it could be a potential fix in a future Compact amendment to clarify which California open meeting law applies to TRPA.

Mr. Marshall states that he will be bringing some rule changes forward but until those are approved, TRPA will be following ROP 2.16 with regards to teleconferencing procedures.

Public Comment

None.

Presentation can be found here: <https://www.trpa.gov/wp-content/uploads/documents/Legal-Committee.pdf>

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V. CLOSED SESSION WITH COUNSEL TO DISCUSS EXISTING AND POTENTIAL LITIGATION

Ms. Gustafson made a motion to move the committee to closed session.

Motion carried by unanimous voice vote.

VI. POTENTIAL DIRECTION REGARDING AGENDA ITEM NO. 5

No direction.

VII. COMMITTEE MEMBER COMMENTS

None.

VIII. PUBLIC INTEREST COMMENTS

None.

IX. ADJOURNMENT

Mr. Hicks moved to adjourn.

Meeting adjourned at 10:01 a.m.

Respectfully Submitted,

A handwritten signature in black ink that reads "K. Huston". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Katherine Huston
Paralegal

The above meeting was recorded in its entirety. Anyone wishing to listen to the recording may find it at <https://www.trpa.gov/meeting-materials/>. In addition, written documents submitted at the meeting are available for review. If you require assistance locating this information, please contact the TRPA at (775) 588-4547 or virtualmeetinghelp@trpa.gov.