

MEMORANDUM

To: Tabatha Miller, City Manager

From: Keith Collins, City Attorney
By: Scott E. Porter, Assistant City Attorney

Date: September 20, 2021

Subject: AB 361 – Brown Act – Remote Meetings During State of Emergency

I. SUMMARY

On Friday, September 17, 2021, the Governor signed AB 361. Because the bill contained urgency findings, the law is now in effect. AB 361 allows local agencies to continue to conduct remote (“Zoom”) meetings during a declared state of emergency, provided local agencies comply with specified requirements.¹ Absent this legislation, local agencies would have had to return to traditional meetings beginning on October 1, 2021.

II. BACKGROUND

On March 4, 2020, Governor Newsom declared a state of emergency. That declaration is still in effect. Since March 12, 2020,² Executive Orders from the Governor have relaxed various Brown Act meeting requirements to allow remote meetings and to temporarily suspended the Brown Act provisions requiring the physical presence of members at the public meetings. The most recent extension of that authorization will expire at the end of this month.³

Starting October 1, and running through the end of 2023, to participate in remote meetings, public agencies must comply with the requirements of new subsection (e) of Government Code section 54953.⁴

¹ The bill also amends rules applicable to (a) the conduct of meetings of state bodies pursuant to the Bagley Keene Open Meeting Act (new Government Code § 11133) and (b) student body organizations at California State University (CSU) schools pursuant to the Gloria Romero Open Meetings Act of 2000 (new Education Code § 89305.6. Those amendments are not analyzed in this memorandum.

² On March 17, 2020, Executive Order N-29-20 superseded the March 12, 2020 Executive Order 25-20. *See* March 18, 2020 Jones & Mayer Memorandum *COVID-19 – Governor’s Order N-29-20*. Executive Order N-29-20 is available here: <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-N-29-20-EO.pdf>

³ See Executive Order, ¶42.

⁴ The text of new subsection (e) is within Section 3 of AB 361 and begins at the top of page 13/19 of this document: https://leginfo.legislature.ca.gov/faces/billPdf.xhtml?bill_id=20210220AB361&version=20210AB36192CHP. If SB 339 (which currently awaiting the Governor’s signature) is adopted in its current form, then subsection (a) of existing section 54953 will also be revised as follows:

“(a) All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local ~~agency~~, agency in person, except as otherwise provided in this chapter. Local agencies shall conduct meetings subject to this chapter consistent with applicable state and federal civil rights laws, including, but not limited to, any applicable language access and other nondiscrimination obligations.”

A. Remote Meeting Rules Through December 31, 2023

Cities and other local agencies have until September 30, 2021 to conduct remote public meetings pursuant to the Governor’s Executive Order.⁵ In most respects, SB 361 does not change how most local agencies will operate, except in one main respect.

1. New: Declaration of “Imminent Risks to Health or Safety of Attendees”

a. Initial Remote Meeting

For the first remote public meeting a legislative body on or after October 1, such meeting is only allowed if it is during a state of emergency⁶ proclaimed by the Governor, and at least one of the following is true:

- 1) “[S]tate or local officials have imposed or recommended measures to promote social distancing”⁷; or
- 2) The legislative body is holding a meeting for the purpose of determining “whether as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees.” That is, the legislative body will be determining whether there is such risk.
- 3) By “majority vote”⁸ the legislative body determined that “*as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees.*” That is, the legislative body already determined there is such risk.

The text of this rule states that it applies to any “legislative body” which is to meet remotely. The Brown Act defines “legislative body” broadly to include *every* body subject to the Brown Act, including City Councils, Planning Commissions, etc.⁹ Thus, taken literally, *every* body subject to the Brown Act (City Council, Planning Commission, etc.) must make its own determination of whether the emergency presents “imminent risks to the health or safety of attendees.” The League of California City’s Brown Act committee considered this language and interpreted it as meaning either (1) the city council may make the finding on behalf of all city committees; or (2) each committee in the city must make its own finding. Cities may wish to speak directly with their City Attorney to determine how best to proceed given this language.

⁵ Earlier today, Governor Newsom issued Executive Order N-15-21 to clarify that local agencies which are conducting remote meetings through September 30 *must* still conduct their actions in accord with Paragraph 42 of Executive Order N-08-21. The order is available here: <https://www.gov.ca.gov/wp-content/uploads/2021/09/9.20.21-executive-order.pdf>. He suspended the operative provisions in AB 361 until the end of the month, except that local agencies can opt to make the initial finding of the need to meet remotely under 54953(e)(1)(B), discussed on this page.

⁶ Gov’t Code §54953(g)(4) defines “state of emergency” as a state of emergency proclaimed by the Governor. California has been in a state of emergency since March 4, 2020, as authorized by Government Code § 8625.

⁷ It is important to distinguish social distancing recommendations (e.g., stay 6 feet apart) from other safety protocols such as masking and vaccines.

⁸ This would include a majority of a quorum. If, for example, there are 5 members of a legislative body, but only 3 are in attendance at a meeting, then 2 would constitute a majority of those in attendance, and therefore may vote to conduct the meeting remotely.

⁹ Gov’t Code 54952 defines “legislative body.”

b. Subsequent Remote Meetings

Any time after the first remote meeting of the legislative body, it can meet remotely if both of the following apply:

1. State/local emergency/social distancing. Either:
 - a. “a state of emergency remains active” or
 - b. “state or local officials have imposed or recommended measures to promote social distancing” and
2. 30 days. Within the last 30 days (which vote may occur at that meeting) the legislative body has made the following findings by majority vote “(A) *The legislative body has reconsidered the circumstances of the state of emergency. (B) Any of the following circumstances exist (i) The state of emergency continues to directly impact the ability of the members to meet safely in person. (ii) State or local officials continue to impose or recommend measures to promote social distancing.*”

Subsection (e)(3) states that after the legislative body makes this determination, the legislative body must make this determination “every 30 days thereafter.” That makes sense for legislative bodies which meet every 30 days – they can meet multiple times in that 30-day period without having to make the findings at every meeting.

But what if more than 30 days elapse between meetings? This may occur if a legislative body meets only intermittently, such as quarterly. Also, a meeting might get cancelled (which is especially likely during the holiday season). Likewise, if, for example, the legislative body meets only once a month on the “second Tuesday of the month”, and any particular month has 5 Tuesdays, you might have as many as 34 days between meetings, rather than the maximum of 30.

A plain reading of the statute means that *every* time a legislative body meets after the first such meeting, it must have a meeting within 30 days – even if the only item on the agenda is to determine the need to meet remotely. This is the safest route, given that this complies with the letter of the law.

But some cities are likely to find this impractical. Did the legislature truly intend to require legislative bodies to call a meeting for the sole purpose of preserving the right to future remote meetings? Courts are reluctant to attribute to the Legislature an intent to create “an illogical or confusing scheme.”¹⁰ If a city is willing to accept the legal risk for these situations, it can take the position that the statute was meant to still allow remote meetings if more than 30 days had passed, provided that at the very first meeting since the last time the findings were made, the legislative body makes the requisite findings. That is, the legislature did not mean what it said, and that the 30-day language was meant to help, rather than hinder the operation of local government.

¹⁰ *Landrum v. Superior Court*, 30 Cal.3d 1, 9 (1981). *Friedman v. City of Beverly Hills* (1996) 47 Cal. App. 4th 436 [Strict construction does not mandate unreasonable or absurd interpretations which frustrate the apparent intent of the Legislature].

In support of this position, the city could point out that the drafters failed to consider that by using the phrase “legislative bodies,” the text of the statute taken literally applies to all “legislative bodies” associated with an entity (e.g., Planning Commission) rather than just the primary legislative body (e.g., City Council) – they assumed that City Councils meet at least once a month. In making that determination, the legislature made the confusing (accidental?) decision that rather than allowing the City Council to make the decision on behalf of all the City’s legislative bodies, every legislative body must make that decision itself. This confusing scheme might be one piece of evidence that the legislature only intended the statute to apply to City Councils.

In short, the city could argue that the legislature did not mean what it said – the problem with this position, of course, is that it is contrary to the plain wording of the statute. Courts tend to look first to the letter of the law, and only look to the purpose of the law if the court determines that the statute is unclear.¹¹

As a practical matter, if a city intends to conduct meetings remotely, the city should consider adding to every agenda for every legislative body (or just the City Council?) a consent calendar item to reaffirm the findings described above, which are required to allow the remote meetings. Otherwise, the city runs the risk of forgetting to include the reaffirmation on any particular meeting agenda. Even if the city were to closely track the 30-day period, it would be easy to go beyond 30 days. Some months have five Tuesdays. Some months have 31 days. Sometimes meetings are cancelled.

2. “New” Rules Which Will Not Change How Most Cities Have Been Conducting Remote Meetings

The rest of the requirements within AB 361 put into law what most cities were already doing in practice.

Noticed Public Meetings: A remote meeting must be noticed and allow members of the public to access the meeting and the agenda. The notice of the meeting must state how the public can access the meeting and offer public comment. The agenda must “identify and include an opportunity for all persons to attend via call-in or via an internet-based service option.” It is not required that the agenda be posted at the location of each public official participating in the meeting.

Due Process: Although this was already required pursuant to the common law, it is now a statutory requirement that “the legislative body shall conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties and the public appearing before the legislative body of a local agency.” This means, for example, in a quasi-judicial proceeding (e.g., hearing on a conditional use permit), the city must ensure that the applicant is given an opportunity to be heard, and to respond in real time to all evidence presented during the hearing. Likewise, all members of the public with a property interest or a liberty interest (e.g., neighbors commenting on a

¹¹ *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 818 [when the language of a statute is clear, there is no room for interpretation].

conditional use permit) likewise have a right to be heard. If the applicant or those immediately affected by the project are unable to hear or to participate in the meeting, depending upon the facts, this may constitute a due process violation, and the meeting should be suspended or delayed until full participation may once again occur.

Broadcasting Disruptions: If there is a disruption which prevents 1) the broadcasting of the meeting to the public or 2) which is “within the local agency’s control which prevents members of the public from offering public comments using the call-in option or internet-based service option”, the body shall take no further action on items appearing on the meeting agenda until public access to the meeting via the call-in option or via the internet-based service option is restored. If, for example, a sole member of the public is having their own isolated technical difficulties such that they are unable to offer public comment, because this is not under the city’s control, the city is not required to delay the meeting (unless that person has due process rights, as described above, which might require a delay).

Public Comments: The local agency cannot require public comments to be submitted in advance of the meeting, and must allow the public to address the local agency in real time. It is not required that the local agency provide a physical location from which the public may attend or comment.¹²

Registration to Comment: If the city uses a third-party internet website or other on-line platform (e.g., Zoom), and the third-party platform requires registration to log in to the meeting, the third-party platform may require them to provide that login information.

Timed Comments: Local agencies cannot close a timed public comment “until that timed public comment period has elapsed.” This rule is best interpreted as meaning that the city cannot have the practice of limiting public comment to only those who initially “raised their hands” to speak. Rather, the city must allow people to add themselves to the public commenting queue during the period in which other members of the public are commenting. For cities that do not limit public speakers to a specific amount of time, they are required to “allow a reasonable amount of time per agenda item” to allow public comment, to register, and to be recognized for public comment.

III. CONCLUSION

With one main exception, cities that were meeting remotely were already complying with the majority, if not all, of the procedures of the new law. The main difference is that now, to meet remotely, the legislative body must make an initial determination of whether “*as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees.*” A simple motion, approved by majority vote would be sufficient to make this initial finding. As described on page 2 of this memorandum, this finding is but one of three ways to initially participate, although it is recommended as the easiest way to guarantee legal compliance. Such motion could be on the consent calendar.

¹² Government Code § 54953(e)(2)(B).

If the legislative body has made that initial determination to conduct remote meetings, the simplest course of action thereafter is for each subsequent meeting (until there is no longer a desire to meet remotely), the legislative body approve a consent calendar item to make the legally required finding described in subsection (e)(3), to thereby allow that legislative body to continue to meet remotely. Such subsequent consent calendar agenda description could state the following:

Staff Recommendation: Find as follows: “The [insert name of legislative body] reconsidered the circumstances of the state of emergency declared by the Governor and at least one of the following is true: (1) The state of emergency, continues to directly impact the ability of the members of this legislative body to meet safely in person; and/or (2) State or local officials continue to impose or recommend measures to promote social distancing.”

Although it is not legally required, some cities may prefer that both the initial determination, and all subsequent determinations be made via resolution of that legislative body. If this is the desire of the city, attached as **Exhibit A** is a model resolution for the initial determination. **Exhibit B** is a model resolution for each subsequent determination. The resolutions could also be approved via the consent calendar.

Should you have any questions or comments, feel free to contact your City Attorney or Scott E. Porter at (310) 666-8893.

EXHIBIT A – MODEL RESOLUTION FOR INITIAL MEETING

RESOLUTION NO. ____

A RESOLUTION OF THE [*NAME OF LEGISLATIVE BODY*] OF THE CITY OF _____ MAKING THE LEGALLY REQUIRED FINDINGS TO AUTHORIZE THE CONDUCT OF REMOTE “TELEPHONIC” MEETINGS DURING THE STATE OF EMERGENCY

WHEREAS, on March 4, 2020, pursuant to California Gov. Code Section 8625, the Governor declared a state of emergency;

WHEREAS, on September 17, 2021, Governor Newsom signed AB 361, which bill went into immediate effect as urgency legislation;

WHEREAS, AB 361 added subsection (e) to Section 54953 to authorize legislative bodies to conduct remote meetings provided the legislative body makes specified findings;

WHEREAS, as of September 19, 2021, the COVID-19 pandemic has killed more than 67,612 Californians;

WHEREAS, social distancing measures decrease the chance of spread of COVID-19;

WHEREAS, it is appropriate for this body to make the findings specified in subsection (e)(1) of section 54953, to thereby authorize this body to meet remotely.

NOW, THEREFORE, IT IS RESOLVED by the [*name of legislative body*] of the City of _____ as follows:

1. This legislative body finds that as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees.

PASSED, APPROVED AND ADOPTED this _____ day of _____, 2021 by the following roll call vote:

AYES:

NOES:

ABSENT:

Name: _____

Title: _____

ATTEST:

APPROVED AS TO FORM:

Name: _____

Title: _____

Name: _____

Title: _____

EXHIBIT B – MODEL RESOLUTION FOR SUBSEQUENT MEETINGS

RESOLUTION NO. ____

A RESOLUTION OF THE [*NAME OF LEGISLATIVE BODY*] OF THE CITY OF _____ MAKING THE LEGALLY REQUIRED FINDINGS TO CONTINUE TO AUTHORIZE THE CONDUCT OF REMOTE “TELEPHONIC” MEETINGS DURING THE STATE OF EMERGENCY

WHEREAS, on March 4, 2020, pursuant to California Gov. Code Section 8625, the Governor declared a state of emergency;

WHEREAS, on September 17, 2021, Governor Newsom signed AB 361, which bill went into immediate effect as urgency legislation;

WHEREAS, AB 361 added subsection (e) to Section 54953 to authorize legislative bodies to conduct remote meetings provided the legislative body makes specified findings;

WHEREAS, as of September 19, 2021, the COVID-19 pandemic has killed more than 67,612 Californians;

WHEREAS, social distancing measures decrease the chance of spread of COVID-19;

WHEREAS, this legislative body previously adopted a resolution to authorize this legislative body to conduct remote “telephonic” meetings;

WHEREAS, Government Code 54953(e)(3) authorizes this legislative body to continue to conduct remote “telephonic” meetings provided that it has timely made the findings specified therein.

NOW, THEREFORE, IT IS RESOLVED by the _____ of the City of _____ as follows:

1. This legislative body declares that it has reconsidered the circumstances of the state of emergency declared by the Governor and at least one of the following is true: (a) the state of emergency, continues to directly impact the ability of the members of this legislative body to meet safely in person; and/or (2) state or local officials continue to impose or recommend measures to promote social distancing.

PASSED, APPROVED AND ADOPTED this _____ day of _____, 2021 by the following roll call vote:

AYES:

NOES:

ABSENT:

Name: _____

Title: _____

ATTEST:

APPROVED AS TO FORM:

Name: _____

Title: _____

Name: _____

Title: _____