

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: September 28, 2021
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Legal Update: Assembly Bill 361 amending the Ralph M. Brown Act

INTRODUCTION

In March 2020, in response to the public health threat caused by the novel coronavirus, Covid-19, Governor Gavin Newsom issued Executive Orders N-25-20 and N-29-20 (Executive Orders) suspending provisions of the Ralph M. Brown Act (Brown Act). The Executive Orders allowed local jurisdictions to hold teleconferenced public meetings and for members of the public to observe and address the legislative bodies during teleconferenced meetings. The Executive Orders expire September 30, 2021.

On September 16, 2021, the Governor signed Assembly Bill 361 (A.B. 361) into law. A.B. 361 amends the Brown Act to codify the temporary rules established by the Executive Orders and provide a mechanism for the Council of the City of San Diego (Council) and City boards and commissions to continue teleconferencing during a proclaimed state of emergency related to Covid-19.¹

BACKGROUND

The California State legislature adopted the Brown Act in 1953 to “aid in the conduct of the people’s business” by requiring that legislative bodies’ “actions be taken openly and that their deliberations be conducted openly.” Cal. Gov’t Code § 54950. Meetings of a legislative body must be “open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency” unless the Brown Act provides otherwise. Cal. Gov’t Code § 54953(a).

The Brown Act allows members of the legislative body to participate in meetings by teleconference provided that certain requirements as set forth in California Government Code section 54953(b) are met. In the absence of the Executive Orders and A.B. 361, the legislative

¹ The teleconferencing option in A.B. 361 applies to all legislative bodies in the City, defined in the Brown Act as including the City Council and commissions, committees, boards and other bodies, “whether permanent or temporary, decision making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body.” Cal. Gov’t Code § 54952.

body must provide notice of, and post the meeting agenda, at each teleconference location, which must be accessible to the public and allow members of the public to address the legislative body. Cal. Gov't Code § 54953(b)(3). The Executive Orders suspended these requirements and waived the requirement that at least a quorum of the members of the legislative body participate from locations within the boundaries of the body's jurisdiction. *Id.*

ANALYSIS

A.B. 361 adds new language to the Brown Act that creates a process for local agencies to use teleconferencing during a proclaimed state of emergency without complying with the Brown Act's requirement to provide notice and public access to each teleconference location.² For A.B. 361 to apply, the Governor must proclaim a state of emergency pursuant to California Government Code section 8625. Cal. Gov't Code § 54953(e)(4). It is not sufficient for the local agency to rely on a locally declared state of emergency. The legislative body may use teleconferencing during a proclaimed state of emergency if: (i) state or local officials have imposed or recommended measures to promote social distancing; or (ii) the legislative body determines, by majority vote, that "as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees."³ Cal. Gov't Code § 54953(e)(1).

During any teleconferenced meeting authorized by A.B. 361, the legislative body must allow members of the public to access the meeting and provide them an opportunity to address the legislative body directly. Cal. Gov't Code § 54953(e)(2)(B). Members of the public must be given a real-time opportunity for public attendance by a call-in or internet-based service option. Cal. Gov't Code § 54953(e)(2)(B). The legislative body is not required to provide a physical location for public attendance or comment during a teleconference meeting authorized by A.B. 361.⁴ Cal. Gov't Code § 54953(e)(2)(B) and (E). The meeting agenda and notice must include the method for members of the public to access the meeting and offer public comment.⁵ Cal. Gov't Code § 54953(e)(2)(B). The legislative body may not require public comments to be submitted in advance of the meeting. Cal. Gov't Code § 54953(e)(2)(E).

While teleconferencing pursuant to A.B. 361, the legislative body may not take action during a technology disruption that prevents broadcasting to the public through the provided call-in option or internet-based service option or during a disruption within the local agency's control that

² A.B. 361 remains in effect through January 1, 2024 when it automatically repealed.

³ The legislative body also may use teleconferencing during a state of emergency to meet to determine whether meeting in person would "present imminent risks to the health or safety of attendees." Cal. Gov't Code § 54953(e)(1)(B). A.B. 361 does not specify whether this determination must be made by each board or commission or by the City Council for all City boards and commissions.

⁴ This Office is monitoring Assembly Bill 339 (A.B. 339), which was adopted by the State Legislature in September 2021 and is currently pending the Governor's signature. If adopted, it requires all open and public meetings of a city council governing a jurisdiction of at least 250,000 people to include an in-person public comment opportunity unless there are any laws that prohibit in-person government meetings during a declared state of emergency. We will provide additional legal guidance if the state of emergency is still in effect if A.B. 339 goes into effect on January 1, 2022.

⁵ A.B. 361 also establishes requirements for legislative bodies that provide timed public comment. See Cal. Gov't Code § 54953(e)(2)(G).

prevents members of the public from offering public comments. Cal. Gov't Code § 54953(e)(2)(D). When an internet-based service option, such as Zoom or Teams, or the call-in connection is disrupted, the legislative body must stop the meeting until connectivity and real-time public participation is restored.⁶ *Id.*

If the legislative body chooses teleconferencing pursuant to A.B. 361, the legislative body must reconsider the circumstances of the emergency every 30 days after teleconferencing for the first time. Cal. Gov't Code § 54953(e)(3). During such reconsideration, the legislative body must make findings that either: (i) the state of emergency continues to “directly impact the ability of members to meet safely in person”; or (ii) state or local officials continue to impose or recommend measures to promote social distancing. *Id.* A finding that the state of emergency continues to directly impact members’ ability to meet safely could be made based on Covid-19 hospitalizations, transmission rates, or the like. Social distancing measures could include guidance from state or county officials that require or recommend the City promote social distancing.

CONCLUSION

For the duration of the Governor’s declared state of emergency related to the Covid-19 pandemic, the Council and the City’s boards and commissions may use teleconferencing in compliance with A.B. 361 if social distancing recommendations are in effect or if the Council adopts a resolution determining that meeting in person would present imminent risks to the health or safety of attendees.

Options for the Council’s consideration include:

- Since A.B. 361 does not require the use of teleconferencing, Council may resume in-person meetings with in-person attendance by the public. Council could work with the Mayor’s Office to enforce social distancing recommendations already in place for City employees or require proof of vaccination for members of the public, with appropriate exemptions in compliance with state law. We suggest announcing social distancing and/or vaccination requirements with sufficient lead time so that impacted City staff and contractors, like third-party security guards, may prepare.
- Council may rely on the Governor’s state of emergency and the State’s recommended measures to promote social distancing to hold teleconferenced or hybrid meetings for 30 days. Hybrid meetings could include some Councilmembers attending in-person and others attending using teleconferencing. Hybrid meetings could include Councilmembers all attend in-person and members of the public join by

⁶ The legislative body is not required to stop the meeting in the event a televised broadcast is disrupted as long as the call-in service or internet-based service option are still functioning. If possible, this Office recommends the broadcast direct viewers to join the meeting through the available call-in or internet-based service options during broadcast disruptions.

teleconferencing. The Council must reconsider the circumstances of the state of emergency within 30 days of the first teleconference meeting pursuant to A.B. 361.

- Council may take action to determine whether meeting in person would present “imminent risks to the health or safety of attendees.” This option would be the best mechanism to establish hybrid meetings with some or all Councilmembers present and members of the public teleconferencing because it would include findings to support teleconferenced public attendance. For example, Council could determine whether there is an imminent risk to the health or safety of attendees if the public participates in-person if the intent is to maintain social distancing among the Councilmembers and City staff participants. If Council chooses this option, this Office recommends the Council consider whether to apply that determination to meetings of other City boards and commissions for consistency and clarity.

If Council chooses to teleconference in compliance with A.B. 361, the Council must reconsider that decision and the circumstances of the state of emergency every 30 days. This Office is available to assist Council with taking any of the necessary steps to resume in-person meetings or continue teleconferencing in compliance with A.B. 361.

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By /s/ Heather M. Ferbert

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