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MEMORANDUM

TO: LOCAL GOVERNMENT AGENCY CLIENTS
FROM: BARTKIEWICZ, KRONICK & SHANAHAN
RE: AB 361 (BROWN ACT TELECONFERENCE MEETINGS)
DATE: SEPTEMBER 24, 2021

This memo summarizes Assembly Bill No. 361 (AB 361; Stats. 2021, ch. 165) amending the rules for teleconference meetings (phone and virtual) under the Brown Act and provides guidance for complying with AB 361.¹ The bill was approved on September 16, 2021 and became effective immediately. The special rules under AB 361 remain in effect only until January 1, 2024.

Attached to this memo are a step-by-step guide to implementing AB 361 for your agency governing board and standing committees and a sample supporting staff report.

If you have any questions related to AB 361, please contact your principal BKS attorney for assistance.

I. Existing Rules for Teleconference Meetings under the Brown Act

Prior to COVID, the Brown Act provided limited authorization for local agency boards to meet by teleconference.² Specifically:

- Each teleconference location must be specifically identified in the regular meeting notice and agenda.

¹ All references in this memorandum are to Government Code section 54953 unless otherwise specified. As used in this memo and the Brown Act, “teleconference” means any meeting subject to the Brown Act held by electronic means, whether audio or visual. This includes the use of virtual meeting platforms such as Zoom, Microsoft Teams, and GoToMeeting.

² Gov. Code, § 54953, subd. (b)(3).

- The meeting notice and agenda must be posted at each teleconference location.
- Each teleconference site must be accessible to the public and provide opportunity for the public to make comments and hear the meeting at each site.
- At least a quorum of the members must participate from locations within the boundaries of the agency's territory.

During the COVID-19 public health emergency, the Governor issued Executive Orders N-29-20 and N-08-21 suspending most of the teleconference requirements through September 30, 2021. In response, local agency boards widely used audio and video teleconference (e.g., Zoom, Microsoft Teams, GoToMeeting) to conduct public meetings in lieu of in-person meetings at a physical location. On September 20, 2021, the Governor issued Executive Order N-12-21 clarifying that the teleconferencing requirements of previous Executive Order N-08-21 apply through September 30 and the provisions of AB 361 become effective October 1, 2021.

In sum, after October 1, 2021, the Brown Act's pre-COVID teleconference requirements outlined above apply again, except as modified by AB 361.

There is nothing in the Brown Act that precludes a local agency from allowing members of the public, staff, or consultants to participate in a governing board meeting via teleconference. So, if a governing board conducts in-person meetings with governing board members meeting in-person and the public having the ability to attend the in-person meeting location, the agency also could provide an option for the public and staff to monitor or speak at the meeting through teleconference technology (though it's not required). Such teleconference participation by non-board members would not be governed by AB 361 and also complies with the Brown Act's standard meeting rules.

II. AB 361's Changes to Teleconference Meetings under the Brown Act

Under AB 361 local agency boards may conduct meetings by teleconference subject to modified rules during a State-proclaimed state of emergency when either (1) social distancing measures are required or recommended by state or local officials, or (2) the governing board determines meeting in person would present imminent risks to the health or safety of attendees. The modified teleconference procedures include the following:

- Members of the local agency board may participate from any location (e.g., waiving the requirement that a quorum of board members participate in the meeting within the jurisdictional boundaries of the agency).
- No requirement that each teleconferenced location be accessible to the public or provide an opportunity for members to make in-person public comment.

- The notice and agenda do not need to identify each site where local agency board members will be teleconferencing from, nor does the agenda need to be posted at each teleconference site.³

In addition, AB 361 requires local agency boards to take specific actions that protect the public's right to participate including:

- The meeting notice and agenda must contain all information related to remote participation, including how the public can access the meeting and offer public comment by call-in option, internet-based option or both.⁴
- The board cannot require the public to register or sign-in in with the local agency prior to making public comment, but the board may require registration with a third-party online-platform used to host the meeting.⁵
- The board must allow a reasonable amount of time for public comment when public comment is taken separately for each agenda item, or, for those (rare) boards that provide a timed window for public comment, the board must allow the timed window to expire before closing public comment.⁶
- All meetings held by teleconference, whether under existing rules, executive order, or under AB 361, require a roll call vote for each action taken.⁷
- If technological issues arise during a meeting that prevent the broadcasting of the meeting and the public's ability to make comment, the board must stop the meeting and resolve the issue prior to taking any further action.⁸

Note that both the standard teleconference rule and the rules under AB 361 apply to "legislative bodies," which include both your agency's governing board and any committees subject to the Brown Act (e.g., standing committees). This memorandum uses the term "board" to apply to all such legislative bodies.

Finally, to use the teleconference procedures authorized by AB 361, each local agency board must initially authorize and then regularly renew or reauthorize meeting by teleconference under AB 361. The following section describes this process.

III. AB 361 Implementation

The general steps to implement meeting by teleconference by AB 361 are listed on the enclosed implementation guide.

³ Subd. (e)(1).

⁴ Subd. (e)(2) (B).

⁵ Subd. (e)(2) (F).

⁶ Subd. (e)(2)(G)(i)-(ii).

⁷ Subd. (b)(2).

⁸ Subd. (e)(2)(D).

Local agency boards must take certain actions in order to conduct a meeting pursuant to relaxed teleconference rules. A prerequisite to use of the AB 361 teleconference procedure is that there is a declared state of emergency. “State of emergency” means the “existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as ... epidemic...or disease,” which conditions empower the Governor, or in his or her absence, the Director of the Office of Emergency Services, to declare a state of emergency.⁹ When such a state of emergency exists, a board may hold a meeting by teleconference in three specific circumstances: (1) when state or local officials have imposed or recommend measures to promote social distancing; (2) when the board meets for the purpose of determining, by majority vote, whether meeting in person would present imminent risks to the health or safety of attendees; or (3) when in the past 30 days or less, the board has determined that meeting in person would present imminent risks to the health or safety of attendees.¹⁰

To meet by teleconference under AB 361, local agency boards must include an initial agenda item to consider finding that the circumstances allowing a teleconference meeting under AB 361 exist. After the initial meeting, if 30 days or less have elapsed since the last meeting, an agenda item should be included to renew the determination that meeting in person presents health risks. However, if more than 30 days have passed, an initial agenda item must be included to re-authorize meeting by teleconference under AB 361.

Note that AB 361 does not require the board to pass a resolution authorizing meeting by teleconference under AB 361. A staff report with the required information and motion are sufficient. A sample staff report is attached to this memorandum.

It is important to recognize that AB 361 provides limited flexibility only when there is a State-proclaimed state of emergency and the local agency determines that meeting in person would present imminent risks to the attendees’ health or safety. AB 361 does not allow for more flexible teleconference meetings for an agency’s mere convenience or preference. Absent such emergency and public health-risk circumstances, conducting a meeting pursuant to the regular Brown Act¹¹ teleconferencing rules (sec. I above) remains an option.

⁹ Gov. Code, §§ 8558, 8625.

¹⁰ Subd. (e)(1)(A)-(C).

¹¹ By “regular Brown Act,” we mean the Brown Act as it exists without the special AB 361 rules in section 54953, subd. (e).

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To be used by agency governing boards and other bodies subject
to the Brown Act, e.g., standing committees.

Step 1 **Is there a present state of emergency declared by the *State of California*?**

The declaration must be by the state. Local emergency declarations do not qualify under AB 361. If the answer to this question “no,” then AB 361 does not apply. The regular Brown Act rules for meetings, including limited teleconferencing, will apply.

As of September 23, 2021, the Governor’s March 4, 2020 Proclamation of a State of Emergency is in effect and qualifies as a state-declared emergency under AB 361.

Step 2 **Is one of the following two statements true?**

- i. Social distancing measures are required or recommended by state or local officials; or
- ii. Meeting in person would present imminent risks to the health or safety of attendees.

If neither statement is true, then AB 361 does not apply. The regular Brown Act rules, including teleconferencing, apply.

In light of the current state of the COVID-19 emergency as of September 2021, the imminent risk test is likely more appropriate for most agencies. As of September 23, 2021, state officials are no longer requiring or recommending social distancing measures. However, county officials in your jurisdiction may require or recommend such measures. If not, then your agency would be need to proceed under the second statement regarding imminent risks.

Step 3 **Determine if an AB 361 teleconferencing meeting needs to be authorized, renewed, or re-authorized.**

If step 2 is satisfied, a meeting under AB 361 is allowed, subject to compliance with the procedural requirements below.

Depending on how many days pass between the board’s meetings, the board may need to **authorize, renew, or re-authorize** meeting by teleconference under AB 361. Although the procedures for each are similar, they rely on different sections in AB 361 and care should be taken to choose the correct procedure and agenda item **for each meeting**.

- **Authorize:** For an initial meeting after September 30, 2021, teleconferencing under AB 361 must be initially authorized. Include an initial agenda item (regular or consent) for the board to consider making the findings required by AB 361 and

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authorizing meeting by teleconference. The enclosed sample staff report includes the necessary findings and a recommended motion.

Sample Agenda Item: Consider finding by a majority vote under Gov. Code, § 54953, subd. (e)(1)(B) that as a result of the COVID-19 emergency: (i) meeting in person would present imminent risks to the health or safety of attendees; and (ii) the meeting is authorized to be held by teleconference pursuant to Gov. Code, § 54953, subd. (e)(1)(C).

Sample Motion: *“I move that we find for the reasons stated in the staff report that, as a result of the COVID-19 emergency, meeting in person would present imminent risks to the health or safety of attendees, and the meeting should be held by teleconference as authorized by subdivision (e)(1)(C) of section 54943 of the Government Code.”*

- **Renew:** If 30 or fewer days have elapsed since board’s last teleconference meeting under AB 361, then the board should consider renewing the authorization to hold teleconference meetings under AB 361 so that the authorization does not lapse by passage of time. Include an agenda item (regular or consent) for the board to consider (a) finding that the conditions in the initial authorization to teleconference under AB 361 are continuing, and (b) renewing the authorization to meet by teleconference.

Sample Agenda Item: Consider finding by a majority vote under Gov. Code, § 54953(e)(3) that a result of the continuing COVID-19 emergency: (i) the board has reconsidered the circumstances of the state of emergency; (ii) renew prior findings that meeting in person would continue to present imminent risks to the health or safety of attendees; and (iii) the authorization for meetings to be held by teleconference pursuant to Gov. Code, § 54953, subd. (e)(1)(C) is renewed.

Sample Motion: *“I move that we find that we have reconsidered the state of the COVID-19 emergency, meeting in person continues to present imminent risks to the health or safety of attendees, and the board renews the prior authorization for meetings to be held by teleconference as authorized by subdivision (e)(1)(C) of section 54943 of the Government Code.”*

- **Re-Authorize:** If more than 30 days have passed since the board’s last teleconference meeting under AB 361, then the board must re-authorize holding teleconference meetings under AB 361. Follow the **Authorize** steps above for authorizing teleconference meetings under AB 361.

Because of AB 361’s 30-day rule, boards that meet frequently may only need to authorize meeting under AB 361 once and then renew the authorization at least every 30 days. However, boards that meet infrequently may be required to follow the authorization process each time they meet.

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Step 4 Prepare the agenda and staff report.

Include the necessary teleconference information in the meeting agenda and provide an appropriate staff report supporting recommendation for holding a teleconference meeting under AB 361.

Step 5 Start the meeting by teleconference and continue if the authorization passes.

The board initially may meet by teleconference under AB 361 (even if after September 30, 2021) for the purpose of determining whether the rest of the meeting may continue by teleconference. Any authorization or re-authorization action should be the first item on the meeting agenda (after roll call).

- If the vote to authorize, renew, or re-authorize meeting by teleconference under AB 361 **passes**, then the board may (a) proceed to hold the rest of the meeting by teleconference under AB 361, and (b) continue to meet by teleconference under AB 361 for up to 30 days.
- If the vote to authorize or re-authorize meeting by teleconference under AB 361 **fails**, then no further business may be conducted by teleconference and the meeting must be adjourned and rescheduled in compliance with the regular Brown Act.
- If the vote to renew a meeting by teleconference **fails**, then the board may proceed by teleconference under AB 361 with the meeting and any further meetings that occur within 30 days of the last successful vote to authorize, renew, or re-authorize meeting by teleconference under AB 361. But any later meetings would need to be noticed and conducted in accordance with the regular Brown Act.

Sample Staff Report

To: Board of Directors or Standing Committee
From: Agency Staff
Re: Agenda Item No. 1 – (see the recommended actions below)
Date: [insert date]

For authorization or re-authorization: Consider finding by a majority vote under Gov. Code § 54953, subd. (e)(1)(B) that as a result of the COVID-19 emergency: (i) meeting in person would present imminent risks to the health or safety of attendees; and (ii) the meeting is authorized to be held by teleconference pursuant to Gov. Code, § 54953, subd. (e)(1)(C).

For renewal: Consider finding by a majority vote under Gov. Code § 54953(e)(3) that a result of the continuing COVID-19 emergency: (i) the board has reconsidered the circumstances of the state of emergency; (ii) renew prior findings that meeting in person would continue to present imminent risks to the health or safety of attendees; and (iii) the authorization for meetings to be held by teleconference pursuant to Gov. Code, § 54953, subd. (e)(1)(C) is renewed.

In light of the Governor’s declaration that a state of emergency exists due to the incidence and spread of the novel coronavirus, and the pandemic caused by the resulting disease COVID-19, the board should consider whether meeting in person would present imminent risks to the health or safety of meeting attendees.

The Centers for Disease Control indicates that COVID-19 is a highly transmissible virus that is spread when an infected person breathes out droplets and very small particles that contain the virus, and such droplets and particles are breathed in by other people.¹² Since June of 2021, a more infectious variant of the virus, known as the Delta Variant, has emerged and now accounts for the vast majority of COVID-19 cases.

Although effective vaccines have been approved by the U.S. Food and Drug Administration for emergency use, vaccination rates are slow and have not yet reached a point to significantly control community transmission. As of _____, only _____% of Californians who are eligible to be vaccinated are fully vaccinated.¹³

Those who become infected with COVID-19 are at risk of serious illness and death. As of _____, over _____ Americans have died from the virus.¹⁴ Many more have been hospitalized with serious illness. Currently, in _____ County, _____ people are hospitalized with COVID-19. Additionally, _____% of intensive care beds are in _____

¹² www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html

¹³ State of California Covid-19 Dashboard <https://covid19.ca.gov/vaccination-progress-data/>

¹⁴ Johns Hopkins University Coronavirus Resource Center <https://coronavirus.jhu.edu/>

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use. (Check your County's COVID-19 public health website/dashboard to insert this specific statistic.)

Conducting meetings by teleconference would directly reduce the risk of transmission among meeting attendees, including members of the public and agency staff, which has the ancillary effect of reducing risk of serious illness and death as well as reducing community spread of the virus.

If the authorization to meet by teleconference is not approved by a majority vote, then the meeting will adjourn after this item and the remaining agenda items will be rescheduled to a future in-person meeting.

Recommendation:

For authorization or re-authorization: Move that the board find that, as a result of the COVID-19 emergency, meeting in person would present imminent risks to the health or safety of attendees, and the meeting should be held by teleconference as authorized by subdivision (e)(1)(C) of section 54943 of the Government Code.

For renewal: Move that the board find that it has reconsidered the state of the COVID-19 emergency, meeting in person continues to present imminent risks to the health or safety of attendees, and the board renews the prior authorization for meetings to be held by teleconference as authorized by subdivision (e)(1)(C) of section 54943 of the Government Code.