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Memorandum

To: Robb Etnyre & Lauren Tapia, TTAD
From: Best Best & Krieger LLP
Date: November 23, 2022
Re: Brown Act – Teleconferencing Guidance

BACKGROUND

The Brown Act establishes rules and procedures for all meetings of public bodies, including cities, counties, special districts, and other local agencies. In particular, the Brown Act provides certain procedures through which a public legislative body may hold a teleconference meeting where one or more members of that body attend from a remote location via phone call or videoconferencing. This memorandum provides a summary and outline of the requirements for teleconferencing under the Brown Act, both while the state of emergency remains active and after it has been rescinded.

ANALYSIS

1. “Traditional” Teleconferencing Rules

Government Code section 54953(b)(1) sets forth certain baseline requirements for holding a meeting where one or more members are attending by teleconference. As a general rule, unless attendance is remote because of a declared state of emergency or recommended social distancing measures (see section 2) or because a member of the body has “just cause” or is experiencing a personal emergency (see section 3), these are the procedures that will apply:

- The agenda must identify each location from which a member will be calling in, even if this is the member’s home or place of business (for this reason, we suggest having the member call in from a location they don’t mind sharing the address for, like a public library meeting room or other public space).
- An agenda must be posted at each location a member is calling in from.
- Each teleconference location must be accessible to the public, and any members of the public who do show up at the teleconference location(s) must be allowed to address the public body directly from that location.



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- At least a quorum of the body must participate from locations within the agency's territory, whether that means attending in person at the ordinary meeting location or teleconferencing from a location within the area that the agency has jurisdiction over (and, this inherently means that if less than a quorum are attending remotely, they may do so from areas outside of the agency).
- The rights of the public attending the meeting must be protected, meaning the public must be allowed to "access" the meeting (whether in person or remotely) and make public comments on matters before the governing body.
- All votes during the meeting must be taken by rollcall, and no secret ballots are permitted.
- The body must publicly report when an action is taken during the meeting, and how each member voted (or whether there were abstentions or absences) on that item.

2. Teleconferencing Rules During State of Emergency or While State/Local Officials Continue to Recommend Social Distancing Measures

Under Government Code section 54953(e), if the body is meeting during a proclaimed state of emergency, or while state or local officials are recommending social distancing measures for public safety reasons, certain teleconference rules described in section 1 are relaxed or waived. This set of rules mirrors those that were implemented in 2020 and that remained in place on a temporary basis during the COVID-19 pandemic; the State has now codified a version of this rule in the event that COVID-19 continues to constitute a state of emergency, or officials continue to recommend social distancing measures. Recently, the Governor announced that the current state of emergency will lift on February 28, 2023. Accordingly, unless state or local officials continue to recommend social distancing measures, this teleconference option will not be available after February 28, 2023.¹

To qualify for these relaxed rules, one of these situations must be present:

- The body is meeting during a state of emergency, and local officials are imposing or recommending social distancing measures.
- The body is meeting during a state of emergency for the express purpose of determining by a majority vote of the body whether meeting in person would present imminent risks to the health or safety of attendees.

¹ For instance, Cal OSHA continues to recommend social distancing, which can support a finding of continued remote meetings, although these recommendations are also set to sunset Dec. 31, 2022. (<https://www.dir.ca.gov/dosh/coronavirus/Revisions-FAQ.html>). Bodies interested in continuing to rely on this exception should consult with counsel to determine if there are applicable state/local recommendations in place. In addition, these rules will sunset January 1, 2024 in any case.



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- The body is meeting during a state of emergency and has determined, by majority vote, that meeting in person would present imminent risks to the health or safety of attendees.
- State or local officials continue to recommend or impose social distancing measures, and the body is willing to make findings that, based on those recommended measures, meeting in person would pose a health or safety risk to attendees. To qualify for this exception, the agency must have first met remotely during a state of emergency and then continues to make findings at least once every thirty days.

If one of these criteria is present, the body may use teleconferencing subject to these relaxed requirements:

- Comply with ordinary agenda-posting requirements (72 hours for a regular meeting, 24 hours for a special meeting), although the agenda does not need to identify each teleconference location, the members attending remotely do not need to post an agenda at each location, and the public does not need to be permitted to access and provide comments at each member's remote location.
- The agenda must still provide the opportunity for public access and comment through some means – for instance, if the body will be meeting via Zoom, the agenda must provide a call-in number or video access link for the public. The body is not required to provide a physical location from which the public can attend or comment in person.
- The rights of the public attending the meeting must be protected, meaning the public must be allowed to “access” the meeting (including by telephone or internet) and make public comments (in real time) on matters before the body.
- If a disruption occurs such that the public is prevented from accessing the meeting (i.e., the Zoom link stops working, or the public cannot hear the audio of the meeting, or the internet goes out in general), the body must take no further action on agenda items until access to the meeting is restored.
- When hearing and acting on agenda items, the body must make sure it allows members of the public enough time to make comments (in practice, this means the body should wait a minute or so each time it calls for public comment, to make sure anyone who wants to comment has time to unmute themselves and do so).
- All votes during the meeting must be taken by rollcall, and no secret ballots are permitted.
- The body must publicly report when an action is taken during the meeting, and how each member voted (or whether there were abstentions or absences) on that item.
- If the body wants to continue to meet remotely because the state of emergency remains ongoing or local/state officials continue to recommend social distancing measures,



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after the first meeting the body must make certain findings by majority vote every 30 days for the duration of using this teleconference exception (i.e., adopt a resolution at each meeting to reconfirm that a state of emergency exists, or social distancing measures continue to be recommended, and so the body will continue to meet in person to protect the health and safety of attendees, as was the case for remote meetings during the COVID-19 pandemic).

3. Teleconferencing Rules for “Just Cause” or Personal Emergency

Under the recent AB 2449 amendments to the Brown Act (i.e., Government Code section 54953(f)), which take effect January 1, 2023, if one or more members of the body need to attend a meeting remotely for reasons consisting of an emergency or “just cause,” certain teleconference rules described in section 1 are relaxed or waived. To qualify for these relaxed rules, one of these situations must be present:

- A member has notified the body (at the earliest possible opportunity, up to the beginning of the meeting) that they have just cause for attending remotely. Just cause is specifically defined as (1) a childcare or caregiving need for a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner; (2) a contagious illness; (3) a need related to a physical or mental disability for which the body cannot otherwise make a reasonable accommodation; or (4) travel while on official business for their agency or another state or local agency. A member may only rely on this remote attendance option for two meetings per calendar year.
- A member requests (at the earliest possible opportunity) to be allowed to participate remotely due to emergency circumstances, and the body takes action (at the earliest possible opportunity, including at the beginning of the meeting) to approve the request.
- Taken together, no member may use either the just cause or personal emergency remote attendance exceptions (or a combination thereof) to attend meetings remotely for more than 3 consecutive months, or 20% of the body’s regular meetings within a calendar year.

If one of these criteria is present, the body may use teleconferencing subject to these relaxed requirements:

- Comply with ordinary agenda-posting requirements (72 hours for a regular meeting, 24 hours for a special meeting), although the agenda does not need to identify each teleconference location, the members attending remotely do not need to post an agenda at each location, and the public does not need to be permitted to access and provide comments at each member’s remote location.
- At least a quorum of the members are participating in person from a single physical location clearly identified on the agenda (i.e., the body’s ordinary in-person meeting location), and the location is open to the public for in-person attendance.



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- The body provides the public with either a two-way audiovisual attendance option (such as Zoom) or a two-way telephone conference line and a live webcast of the meeting (the key is the public must be able to access both audio and visual of the meeting).
- When a member has given notice of remote attendance prior to the agenda being published, the agenda must identify the ways in which the public can access and provide comments (in real time) at the meeting (in-person, by conference call or audiovisual platform, etc.)
- Any member attending remotely must do so by both audio and visual means (call-in only is not permitted).
- All votes during the meeting must be taken by rollcall, and no secret ballots are permitted.
- The body must publicly report when an action is taken during the meeting, and how each member voted (or whether there were abstentions or absences) on that item.
- Before any action is taken at the meeting, any member who is attending remotely due to just cause or an emergency must publicly disclose whether any individuals age 18 or older are present in that remote location with the member, and the general nature of the relationship (i.e., “my wife is also in the room with me”).

CONCLUSION

A public agency’s legislative body may opt to hold a full or partial teleconference meeting under any of the three scenarios described in this memorandum. Our office is available to advise on specific questions that may arise, including when the state of emergency, just cause, or personal emergency exemptions are available, and which agenda requirements apply in certain circumstances, so please do not hesitate to reach out with any questions or concerns.

JOSH NELSON
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