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

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

Background – the Governor’s Executive Orders:

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Starting in March 2020, amid rising concern surrounding the spread of COVID-19 throughout communities in the state, California Governor Gavin Newsom issued a series of Executive Orders aimed at containing the novel coronavirus. These Executive Orders ([N-25-20](#), [N-29-20](#), [N-35-20](#)) collectively modified certain requirements created by the Ralph M. Brown Act (“the Brown Act”), the state’s local agency public meetings law.

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The orders waived several requirements, including requirements in the Brown Act expressly or impliedly requiring the physical presence of members of the legislative body, the clerk or other personnel of the body, or of the public as a condition of participation in or for the purpose of establishing a quorum for a public meeting.^{[1][2]} Furthermore, the orders:

- waived the requirement that local agencies provide notice of each teleconference location from which a member of the legislative body will be participating in a public meeting,
- waived the requirement that each teleconference location be accessible to the public,
- waived the requirement that members of the public be able to address the legislative body at each teleconference conference location,
- waived the requirement that local agencies post agendas at all teleconference locations, and,
- waived the requirement that at least a quorum of the members of the local body participate from locations within the boundaries of the territory over which the local body exercises jurisdiction.

Under the orders, local agencies were still required to provide advance notice of each public meeting according to the timeframe otherwise prescribed by the Brown Act, and using the means otherwise prescribed by the Brown Act. Agencies were – for a time – required to allow members of the public to observe and address the meeting telephonically or otherwise electronically. Local agencies were eventually explicitly freed from the obligation of providing a physical location from which members of the public could observe the meeting and offer public comment.^[3]

In each instance in which notice of the time of the meeting was given or the agenda for the meeting was posted, the local agency was required to give notice of the manner members of the public could observe the meeting and offer public comment. In any instance in which there was a change in the manner of public observation and comment, or any instance prior to the issuance of the executive orders in which the time of the meeting had been noticed or the agenda for the meeting had been posted without also including notice of the manner of public observation and comment, a local agency would be able to satisfy this requirement by advertising the means of public observation and comment using "the most rapid means of communication available at the time" within the meaning of California Government Code, section 54954(e); this includes, but is not limited to, posting the manner in which the public could participate on the agency's website.



The orders also provided flexibility for a legislative body to receive a “serial” or simultaneous communication outside of an open meeting, allowing all members of the legislative body to receive updates (including, but not limited to, simultaneous updates) relevant to the emergency (including, but not limited to, updates concerning the impacts of COVID-19, the government response to COVID-19, and other aspects relevant to the declared emergency) from federal, state, and local officials, and would be allowed to ask questions of those federal, state, and local officials, in order for members of the legislative body to stay apprised of emergency operations and the impact of the emergency on their constituents. Members of a local legislative body were explicitly not permitted to take action on, or to discuss amongst themselves, any item of business that was within the subject matter jurisdiction of the legislative body without complying with requirements of the Brown Act.[4]

The Brown Act Executive Orders Sunset – September 30, 2021

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On June 11, 2021, the Governor issued Executive Order N-08-21 which rescinds the aforementioned modifications made to the Brown Act, effective September 30, 2021.[5] After that date, local agencies are required to observe all the usual Brown Act requirements *status quo ante* (as they existed prior to the issuance of the orders). Local agencies must once again ensure that the public is provided with access to a physical location from which they may observe a public meeting and offer public comment. Local agencies must also resume publication of the location of teleconferencing board members, post meeting notices and agendas in those locations, and make those locations available to the public in order to observe a meeting and provide public comment.

AB 361 – Flexibility for Remote Open Meetings During a Proclaimed State Emergency

Assembly Bill 361, introduced in February 2021 by Assembly Member Robert Rivas (D-30, Hollister), and sponsored by the California Special Districts Association, provides local agencies with the ability to meet remotely **during proclaimed state emergencies** under modified Brown Act requirements, similar in many ways to the rules and procedures established by the Governor’s Executive Orders.

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Important Note: *AB 361’s provisions can only be used in the event that a gubernatorial **state of emergency** 1) has been issued **AND** 2) remains active. It is **not sufficient** that county and/or city officials have issued a local emergency declaration – the emergency declaration must be one that is made pursuant to the California Emergency Services Act (CA GOVT § 8625).*

Specifically, AB 361 suspends the requirements located in California Government Code, section 54953, subdivision (b), paragraph (3). What does this mean for local agencies? This means that, during a state of emergency, under specified circumstances, local agencies can meet pursuant to modified Brown Act requirements. Each of these modifications is broken out below.

The provisions enacted by AB 361 providing flexibility to meet remotely during a proclaimed emergency will sunset on January 1, 2024. This is subject to change if a future Legislature and Governor elect to extend the sunset or make the provisions permanent.

AB 361 IMPACTS ON LOCAL AGENCY COMPLIANCE WITH THE BROWN ACT

Brown Act Requirement

If the legislative body of a local agency elects to use teleconferencing, it shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of a local agency.

Requirement under AB 361

Agendas not required to be posted **at all teleconference locations**

Meeting must still be conducted in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of a local agency

In the context of an emergency, members of the legislative body of a local agency may be teleconferencing from less-than-ideal locations – e.g., the private domicile of a member, a hotel room, an evacuation shelter, from a car, etc. The nature of the emergency may



this issue, as was the case during the COVID-19 outbreak and the necessity to implement social distancing measures. To address this issue, AB 361 provides relief from the obligation to post meeting agendas at all conference locations.

Although local agencies are relieved from this obligation, local agencies should endeavor to post meeting agendas at all usual locations where it remains feasible to do so.

Important Note: Local agencies must still provide advance notice of public meetings and must still post meeting agendas consistent with the provisions of the Brown Act. AB 361 does nothing to change the fact that meetings must still be noticed and agendized in advance.

Brown Act Requirement

Requirement under AB 361

If the legislative body of a local agency elects to use teleconferencing, each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public.

Agendas are not required to identify each teleconference location in the meeting notice/agenda
Local agencies are not required to make each teleconference location accessible to the public

Emergencies can – and often do – happen quickly. As was the case with the 2018 Camp Fire, individuals fleeing a disaster area may end up in disparate locations throughout the state. These impromptu, ad hoc locations are not ideal for conducting meetings consistent with the usual Brown Act requirements, which may impede local agencies seeking to meet promptly in response to calamity. To that end, AB 361 removes the requirement to document each teleconference location in meeting notices and agendas. Similarly, local agencies are not required to make these teleconference locations accessible to the public.

Brown Act Requirement

Requirement under AB 361



If the legislative body of a local agency elects to use teleconferencing, during the teleconferenced meeting, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction.

No requirement to have a quorum of board members participate from within the territorial bounds of the local agency’s jurisdiction

The purpose of AB 361 is to assist local agencies with continuing their critical operations despite facing emergencies that pose a risk to human health and safety – emergencies which oftentimes correspond with advisory or mandatory evacuation orders (e.g., wildfires, earthquakes, gas leaks, etc.). An emergency which drives individuals from an area could make meeting within the bounds of a local agency impossible to do feasibly or safely. Accordingly, AB 361 allows for local agencies to disregard quorum requirements related to members of a legislative body teleconferencing from locations beyond the local agency’s territory.

Brown Act Requirement

If the legislative body of a local agency elects to use teleconferencing, the agenda shall provide an opportunity for members of the public to address the legislative body directly at each teleconference location.

Requirement under AB 361

In each instance in which notice of the time of the teleconferenced meeting is given or the agenda for the meeting is posted, the legislative body shall also give notice of the manner by which members of the public may access the meeting and offer public comment

The agenda shall identify and include an opportunity for all persons to attend via a call-in option or an internet-based service option

The legislative body shall allow members of the public to access the meeting, and the agenda shall include an opportunity



for members of the public to address the legislative body directly

In the event of a disruption which prevents the local agency from broadcasting the meeting to members of the public using the call-in option or internet-based service option, or in the event of a disruption 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 legislative 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 internet-based service option is restored

Written/remote public comment must be accepted until the point at which the public comment period is formally closed; registration/sign-up to provide/be recognized to provide public comment can only be closed when the public comment period is formally closed

The right of individuals to attend the public meetings of local agencies and be face-to-face with their elected or appointed public officials is viewed as sacrosanct, only able to be abrogated in the most extraordinary of circumstances. Under normal conditions, local agencies are required to allow members of the public to participate in a public meeting from the very same teleconference locations that other board members are using to attend that meeting.



AB 361 solves the specific problem of what to do in circumstances when local agencies are holding their meetings remotely during an emergency and it would be unsafe to permit access to members of the public to the remote teleconference locations. AB 361 permits local agencies to meet without making teleconference locations available to members of the public, **provided that** members of the public are afforded the opportunity to provide public comment remotely as well.

Importantly, local agencies must ensure that the opportunity for the public to participate in a meeting remains as accessible as possible. This means that local agencies cannot discriminate against members of the public participating either remotely or in-person. In practice, this means:

- Local agencies must clearly advertise the means by which members of the public can observe a public meeting or offer comment during a meeting remotely, via either a call-in or internet-based option

Importantly, local agencies are required to provide the relevant remote access information to members of the public looking to attend a meeting of a local agency legislative body. This information includes, but is not limited to: phone numbers, passwords, URLs, email addresses, etc. Using this information, members of the public must be able to attend the meeting remotely. Any of the information related to participation must be included in the relevant meeting notice(s) and meeting agenda(s). If an agency fails to provide one or more of these key pieces of information in a meeting notice or agenda, the agency should not proceed with the meeting as-is, as it could result in any subsequent action being rendered null or void.

- Agencies whose meetings are interrupted by technological or similar technical disruptions must first resolve those issues before taking any other action(s) on items on the meeting agenda

In a notable departure from the terms of the Governor's orders, AB 361 explicitly requires that local agencies must first resolve any remote meeting disruption before proceeding to take further action on items appearing on a meeting agenda. In the event that a public comment line unexpectedly disconnects, a meeting agenda was sent out with the incorrect web link or dial-i

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local agency’s internet connection is interrupted, or other similar circumstances, a local agency is required to stop the ongoing meeting and work to resolve the issue before continuing with the meeting agenda.

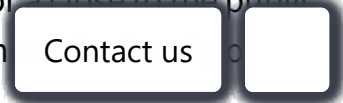
Local agencies should ensure that the public remains able to connect to a meeting and offer public comment by the means previously advertised in the meeting notice or agenda. This may require directing staff to monitor the means by which the public can observe the meeting and offer comment to ensure that everything is operating as intended.

In the event that a meeting disruption within the control of the agency cannot be resolved, a local agency should not take any further action on agenda items; the local agency should end the meeting and address the disruption in the interim, or it may risk having its actions set aside in a legal action.

Important Note: *Test, test, test! Local agencies should be testing their remote meeting setup in advance of (and during) every meeting to ensure that there are no apparent issues. Local agency staff should attempt to attend the meeting in the same way(s) made available to members of the public and demonstrate that everything is working as intended. The fact that staff tested the system before and during a meeting and failed to detect any problems may become a key factor in any potential legal action against the agency.*

- Local agencies cannot require that written comments be submitted in advance of a meeting

It is not permissible to require that members of the public looking to provide public comment do so by submitting their comment(s) in advance of a meeting – in fact, not only is this a violation of AB 361’s terms, it is also a violation of the Brown Act generally. Both AB 361 and the Brown Act explicitly require that members of the public be given the opportunity to provide public comment **directly** – that is, live and at any point prior to public comment being officially closed during a public meeting. Until such time during a meeting that the chairperson (or other authorized person) calls for a close to the public comment period, members of the public are allowed to submit their public comment directly, orally, written, or otherwise.



- Local agencies may only close registration for public comment at the same time the public comment period is closed, and must accept public comment until that point

Local agencies cannot require that individuals looking to provide public comment register in advance of a meeting (though agencies may extend the **possibility** of advance registration or commenting as a **non-mandatory** option). Nor may local agencies require that individuals looking to provide public comment register in advance of the agenda item being deliberated by a local agency. Local agencies may only close registration for public comment at the same time that they close the public comment period for all. Until the public comment period is completely closed for all, members of the public must be permitted to register for, and provide, public comment.

Local agencies that agendize a comment period for each agenda item cannot close the public comment period for the agenda item, or the opportunity to register to provide public comment, until that agendized public comment period has elapsed.

Local agencies that do not provide an agendized public comment period but instead take public comment separately on an informal, ad hoc basis on each agenda item must allow a reasonable amount of time per agenda item to allow public members the opportunity to provide public comment, including time for members of the public to register or otherwise be recognized for the purpose of providing public comment.

Local agencies with an agendized general public comment period that does not correspond to a specific agenda item (i.e., one occurring at the start of a meeting, covering all agenda items at once) cannot close the public comment period or the opportunity to register until the general public comment period has elapsed.

Brown Act Requirement

Requirement under AB 361



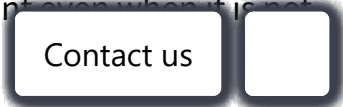
A member of the public shall not be required, as a condition to attendance at a meeting of a legislative body of a local agency, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

If an attendance list, register, questionnaire, or other similar document is posted at or near the entrance to the room where the meeting is to be held, or is circulated to the persons present during the meeting, it shall state clearly that the signing, registering, or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers, or completes the document.

An individual desiring to provide public comment through the use of an internet website, or other online platform, not under the control of the local legislative body that requires registration to log in to a teleconference, may be required to register as required by the third-party internet website or online platform to participate

“Zoom meetings” became ubiquitous during the COVID-19 pandemic – for good reason. The Zoom video teleconferencing software was free (with some “premium” features even made temporarily free to all users), easily deployed, and user-friendly. All one needed was a Zoom account and then they’d be able to make use of the platform’s meeting services, hosting and attending various meetings as they pleased.

Unfortunately, the Brown Act has long prohibited the use of mandatory registration or “sign-ups” to attend public meetings or to provide public comment. Privacy and good governance concerns prohibit such information gathering from members of the public seeking to remain anonymous while also engaging with their government. Accordingly, it would normally be a concern to use any teleconference platform which may require participants to register for an account even when it is not the local agency establishing that requirement.



AB 361 resolves this issue by explicitly allowing local agencies to use platforms which, incidental to their use and deployment, may require users to register for an account with that platform so long as the platform is not under the control of the local agency.

Important Note: *Just because you “can” doesn’t mean you “should.” There are products on the market that do not require individuals to sign up for/sign in to an account to participate in a remote meeting. Local agencies are heavily discouraged from contacting their remote meeting platform vendor in an attempt to uncover information about meeting attendees.*

RESOLUTIONS: ENACTING ASSEMBLY BILL 361

A local agency wishing to rely on the provisions of AB 361 must meet one of the following criteria:

(A) The local agency is holding a meeting during a proclaimed state of emergency, and state or local officials have imposed or recommended measures to promote social distancing; or

(B) The local agency is holding a meeting during a proclaimed state of emergency for the purpose of determining, by majority vote, whether as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees; or

(C) The local agency is holding a meeting during a proclaimed state of emergency and has determined, by majority vote, that, as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees.

These criteria permit a local agency to schedule a remote meeting to determine whether meeting in person during the state of emergency would pose imminent risk to the health or safety of attendees. [Contact us](#)

that remote meeting, a local agency may determine by majority vote that sufficient risks exist to the

health or safety of attendees as a result of the emergency and pass a resolution to that effect. These criteria also permit a local agency to meet remotely in the event that there is a state of emergency declaration while state or local officials have recommended or required measures to promote social distancing.

If a local agency passes a resolution by majority vote that meeting in-person during the state of emergency would present imminent risks to the health or safety of attendees, the resolution would permit meeting under the provisions of AB 361 for a maximum period of 30 days. After 30 days, the local agency would need to renew its resolution, consistent with the requirements of AB 361, if the agency desires to continue meeting under the modified Brown Act requirements, or allow the resolution to lapse.

Important Note: Consider referencing *this sample resolution* in crafting your agency's initial resolution effecting the transition to these modified Brown Act requirements. While this sample resolution is provided for the benefit of local agencies, consult your legal counsel to review your agency's resolution before its consideration at a public meeting.

After 30 days, a local agency is required to renew its resolution effecting the transition to the modified Brown Act requirements if it desires to continue meeting under those modified requirements.

Importantly, the ability to renew the resolution is subject to certain requirements and conditions. In order to renew the resolution, a local agency must:

- Reconsider the circumstances of the state of emergency
- Having reconsidered the state of emergency, determine that either
 - The state of emergency continues to directly impact the ability of the members to meet safely in person, or
 - State or local officials continue to impose or recommend measures to promote social distancing

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AB 361 requires that the renewal of the resolution effecting the transition to the modified Brown Act requirements must be based on findings that the state of emergency declaration remains active, the local agency has thoughtfully reconsidered the circumstances of the state of emergency, and the local agency has either identified A) ongoing, direct impacts to the ability to meet safely in-person or B) active social distancing measures as directed by relevant state or local officials.

Important Note: Consider referencing this sample resolution in crafting your agency's renewal resolution renewing the transition to these modified Brown Act requirements. While this sample resolution is provided for the benefit of local agencies, consult your legal counsel to review your agency's resolution before its consideration at a public meeting.

Important Note: If your agency does not meet again before the 30 day period during which the resolution remains active, the resolution will lapse for lack of action by the agency. After a resolution has lapsed, if the agency seeks to meet remotely again under the modified Brown Act requirements, it must pass a new initial resolution effecting the transition to the modified Brown Act requirements, subject to the same substantive and procedural requirements as before.

AB 361 PROCESS: AN EXECUTIVE SUMMARY

1. An emergency situation arises. The specific nature of the emergency produces an imminent risk to public health and safety.
2. A state of emergency is declared (pursuant to CA GOVT § 8625).
3. A local agency wishes to meet remotely via teleconferencing as a result of the emergency. A meeting notice/agenda are produced and posted, with an agenda item dedicated to consideration of a resolution to transition to teleconferenced meetings consistent with the terms of CA GOVT § 54953, subdivision (e). For this meeting, the modified Brown Act requirements apply (e.g., meeting notices/agendas do not need to be posted at all teleco

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4. A resolution is passed consistent with the terms of CA GOVT § 54953, subdivision (e), paragraph (1), subparagraph (B) (i.e., a resolution passed by majority vote determining that meeting in person would present imminent risks to the health or safety of attendees).¹This resolution is valid for 30 days.
5. 30 days later: if the state of emergency remains active, a local agency may act to renew its resolution effecting the transition to teleconferenced meetings by passing another resolution, consistent with the terms of CA GOVT § 54953, subdivision (e), paragraph (3) (i.e., a resolution which includes findings that legislative body has both 1) reconsidered the circumstances of the state of emergency, and 2) the state of emergency continues to directly impact the ability of the members to meet safely in person.²

¹ Alternatively, in lieu of a resolution finding that meeting in person would present imminent risks to the health or safety of attendees, a local agency may use modified Brown Act procedures when state/local officials recommend/require measures to promote social distancing.

² Should state/local officials continue to impose or recommend measures to promote social distancing, this may instead be used as a basis for renewing a resolution (as opposed to the fact that the state of emergency continues to directly impact the ability of the members to meet safely in person).

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[1] **Executive Order N-25-20**, <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf>

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[2] **Executive Order N-29-20**, <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-N-29-20-EO.pdf>

[3] *Ibid*

[4] **Executive Order N-35-20**, <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.21.20-EO-N-35-20.pdf>

[5] **Executive Order N-08-21**, <https://www.gov.ca.gov/wp-content/uploads/2021/06/6.11.21-EO-N-08-21-signed.pdf>

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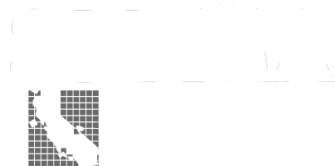


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