

Date of Hearing: May 5, 2021

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Cecilia Aguiar-Curry, Chair
AB 361 (Robert Rivas) – As Amended April 6, 2021

SUBJECT: Open meetings: local agencies: teleconferences.

SUMMARY: Allows, in limited circumstances, a local agency to use teleconferencing without complying with the Ralph M. Brown Act's (Brown Act) physical access and quorum requirements for teleconferenced meetings. Specifically, **this bill:**

- 1) Allows a local agency to use teleconferencing without complying with the Brown Act's physical access and quorum requirements for teleconferenced meetings if the legislative body complies with the requirements outlined in 2), below, in any of the following circumstances:
 - a) The legislative body holds a meeting for the purpose of proclaiming or ratifying a local emergency;
 - b) The legislative body holds a meeting during a proclaimed state of emergency or declared local emergency, and state or local officials have imposed or recommended measures to promote social distancing; or,
 - c) The legislative body holds a meeting during a declared local emergency and the legislative body determines by majority vote that, as a result of the emergency, the attendance of one or more members of the legislative body in person is hindered, or meeting in person would present imminent risks to the health or safety of attendees.
- 2) Requires a legislative body that holds a meeting pursuant to 1), above, to do all of the following:
 - a) The legislative body shall give notice of the meeting and post agendas as otherwise required by the Brown Act;
 - b) The legislative body shall allow members of the public to access the meeting and the agenda shall provide an opportunity for members of the public to address the legislative body directly, pursuant to provisions of the Brown Act governing public comment;
 - c) In each instance in which notice of the time of the teleconferenced meeting is otherwise given or the agenda for the meeting is otherwise posted, the legislative body shall also give notice of the means by which members of the public may access the meeting and offer public comment;
 - d) The agenda shall identify and include an opportunity for all persons to attend via a call-in option or an internet-based service option;

- e) 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;
 - f) In the event of a disruption which prevents the public 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 submitting 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 internet-based service option is restored. Actions taken on agenda items during a disruption which prevents the public agency from broadcasting the meeting may be challenged, pursuant to provisions of the Brown Act governing the ability of a district attorney or interested person to seek a judicial determination that an action violates specified provisions of the Brown Act and is null and void; and,
 - g) The legislative body shall not require public comments to be submitted in advance of the meeting and must provide an opportunity for the public to address the legislative body and offer comment in real time.
- 3) Provides that the provisions outlined in b), c), d) and g) of 2), above, shall not be construed to require the legislative body to provide a physical location from which the public may attend or comment.
- 4) Requires a legislative body to make specified findings by majority vote not later than 30 days after teleconferencing for the first time under the bill's provisions and every 30 days thereafter in order to continue teleconferencing without complying with the Brown Act's physical access and quorum requirements, if a state of emergency or local emergency remains active or state or local officials have imposed or recommended measures to promote social distancing. The specified findings include:
- a) The legislative body has reconsidered the circumstances of the state of emergency or local emergency; and,
 - 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) The local emergency continues to present risks to the health or safety of members or the public if one or more members of the legislative body were to attend the meeting in person; or,
 - iii) State or local officials continue to impose or recommend measures to promote social distancing.

- 5) Provides the following definitions:
- a) “State of emergency” means a state of emergency proclaimed pursuant to Section 8625 of the California Emergency Services Act (ESA), as specified; and,
 - b) “Local emergency” means an emergency proclaimed by the governing body of a county or city and county, or by an official designated by ordinance adopted by that governing body pursuant to Section 8630 of the ESA, as specified, as a result of conditions existing in all or a portion of the jurisdiction of the local agency. Local emergency refers only to local emergencies in the jurisdiction in which the legislative body is located.
- 6) States the intent of the Legislature to improve and enhance public access to local agency meetings during the COVID-19 pandemic and future applicable emergencies, by allowing broader access through teleconferencing options consistent with the Governor’s Executive Order No. N-29-20 dated March 17, 2020, permitting expanded use of teleconferencing during the COVID-19 pandemic.
- 7) Finds and declares that this bill furthers, within the meaning of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the purposes of that constitutional section as it relates to the right of public access to the meetings of local public bodies or the writings of local public officials and local agencies and, pursuant to those specified provisions of the California Constitution, the Legislature makes the following findings: This act is necessary to ensure minimum standards for public participation and notice requirements allowing for greater public participation in teleconference meetings during applicable emergencies.

FISCAL EFFECT: None.

COMMENTS:

- 1) **Background.** The Brown Act was enacted in 1953 and has been amended numerous times since then. The legislative intent of the Brown Act was expressly declared in its original statute, which remains unchanged:

“The Legislature finds and declares that the public commissions, boards and councils and other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

The Brown Act generally requires meetings to be noticed in advance, including the posting of an agenda, and generally requires meetings to be open and accessible to the public. The Brown Act also generally requires members of the public to have an opportunity to comment on agenda items, and generally prohibits deliberation or action on items not listed on the agenda.

The Brown Act defines “local agency” to mean a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.

The Brown Act defines “legislative body” to mean:

- a) The governing body of a local agency or any other local body created by state or federal statute;
- b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. Advisory committees composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies. Standing committees of a legislative body, irrespective of their composition, that have a continuing subject matter jurisdiction or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies; and,
- c) A board, commission, committee, or other multimember body that governs a private corporation, limited liability company, or other entity that either:
 - i) Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation, limited liability company, or other entity; or,
 - ii) Receives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency.

The Brown Act defines a “meeting” as “any congregation of a majority of the member of a legislative body at the same time and location, including teleconference locations, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.”

The Brown Act specifies that a member of the public shall not be required, as a condition of attending a meeting, to register a name, provide other information, complete a questionnaire, or otherwise fulfill any condition precedent to 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 during the meeting, it must state clearly that signing, registering, or completing the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers, or completes the document.

The Brown Act allows a district attorney or any interested person to seek a judicial determination that an action taken by a local agency’s legislative body violates specified provisions of the Brown Act – including the provisions governing open meeting requirements, teleconferencing, and agendas – and is therefore null and void.

- 2) **Teleconferencing and the Brown Act.** The Brown Act first allowed meetings to be conducted via video teleconference in 1988. At the time, San Diego County was considering the use of video teleconferencing for meetings and hearings of the board of supervisors due to concerns about the long distances that some of their constituents were having to travel to participate in board meetings. They were especially concerned that these distances were so great that they prohibited some people from attending meetings at all. AB 3191 (Frazee), Chapter 399, Statutes of 1988, responded to these concerns by authorizing the legislative body of a local agency to use video teleconferencing. Since that time, a number of bills have made modifications to this original authorization.

Presently, the Brown Act allows the legislative body of a local agency to use teleconferencing for the benefit of the public and the legislative body in connection with any meeting or proceeding authorized by law. The teleconferenced meeting or proceeding must comply with all requirements of the Brown Act and all otherwise applicable provisions of law relating to a specific type of meeting or proceeding. Teleconferencing may be used for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body. All votes taken during a teleconferenced meeting must be taken by rollcall.

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

During the teleconference, at least a quorum of the members of the legislative body must participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction, with specified exceptions. The agenda must provide an opportunity for members of the public at each teleconference location to address the legislative body directly pursuant to the Brown Act's provisions governing public comment.

“Teleconference” is defined as a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both.

- 3) **Agendas.** The Brown Act requires local agencies to post, at least 72 hours before a regular meeting, an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. The agenda must specify the time and location of the regular meeting and must be posted in a location that is freely accessible to members of the public and on the local agency website, if the local agency has one. No action or discussion may be undertaken on any item not appearing on the posted agenda, with specified exceptions.

If requested, the agenda must be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (ADA), and the federal rules and regulations adopted to implement the ADA. The agenda must include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made by a

person with a disability who requires a modification or accommodation in order to participate in the public meeting.

- 4) **Comment Periods.** The Brown Act generally requires every agenda for regular meetings to provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body. The legislative body of a local agency may adopt reasonable regulations to ensure that this intent is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.

However, when the legislative body of a local agency limits time for public comment, the legislative body must provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non-English speakers receive the same opportunity to directly address the legislative body of a local agency.

- 5) **Proposition 42.** Proposition 42 was passed by voters on June 3, 2014, and requires all local governments to comply with the Public Records Act and the Brown Act and with any subsequent changes to those Acts. Proposition 42 also eliminated reimbursement to local agencies for costs of complying with the Public Records Act and the Brown Act.
- 6) **Emergency Services Act.** The ESA gives the Governor the authority to proclaim a state of emergency in an area affected or likely to be affected when: a) conditions of disaster or extreme peril exist; b) the Governor is requested to do so upon request from a designated local government official; or c) the Governor finds that local authority is inadequate to cope with the emergency. Local governments may also issue local emergency proclamations, which are a prerequisite for requesting the Governor's Proclamation of a State of Emergency.

The ESA defines "state of emergency" and "local emergency" to mean the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state or territorial limits of a county caused by conditions such as air pollution, fire, flood storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, plant or animal infestation or disease, or earthquake, as specified.

The ESA grants the Governor certain special powers during a declared state of emergency, which are in addition to any other existing powers otherwise granted. For example, the ESA empowers the Governor to expend any appropriation for support of the ESA in order to carry out its provisions, as well as the authority to make, amend, and rescind orders and regulations necessary to carry out the ESA. The orders and regulations have the force and effect of law.

The ESA also allows a local emergency to be proclaimed by the governing body of a city, county, or city and county, or by an official designated by ordinance adopted by that governing body. A local emergency cannot remain in effect for a period in excess of seven days, unless it has been ratified by the governing body. The governing body must review the need for continuing the local emergency at least once every 60 days until the governing body terminates the local emergency. The governing body must proclaim the termination of the local emergency at the earliest possible date that conditions warrant.

- 7) **Executive Order N-29-20.** In March of 2020, the Governor issued Executive Order N-29-20, which stated that, “Notwithstanding any other provision of state or local law (including, but not limited to, the Bagley-Keene Act or the Brown Act), and subject to the notice and accessibility requirements set forth below, a local legislative body or state body is authorized to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to observe and to address the local legislative body or state body. All requirements in both the Bagley-Keene Act and the Brown Act expressly or impliedly requiring the physical presence of members, the clerk or other personnel of the body, or of the public as a condition of participation in or quorum for a public meeting are hereby waived.”

“All of the foregoing provisions concerning the conduct of public meetings shall apply only during the period in which state or local public health officials have imposed or recommended social distancing measures.”

- 8) **Author’s Statement.** According to the author, “When the COVID-19 pandemic started, local agency boards struggled to conduct their meetings in compliance with the Brown Act’s requirements while still abiding by stay-at-home orders. As a result, Governor Newsom issued an executive order (EO) to grant local agencies the flexibility to meet remotely during the pandemic. However, once the Governor’s EO expires, these flexibilities will not apply to future emergencies like wildfires, floods, toxic leaks, or other events that make in-person gatherings dangerous. Local agencies will again struggle to provide essential services like water, power, and fire protection at a time when constituents will need those services the most.

“AB 361 will guarantee that local boards do not have to rely on an executive order from the Governor to serve their communities remotely during future emergencies. This bill will also provide the opportunity for public to join via telephone or video conference to ensure that all members of the public can participate safely.”

- 9) **Bill Summary.** This bill allows a local agency to use teleconferencing without complying with the Brown Act’s physical access and quorum requirements for teleconferenced meetings when the legislative body holds a meeting under any of these circumstances:
- a) For the purpose of proclaiming or ratifying a local emergency;
 - b) During a proclaimed state of emergency or declared local emergency, and state or local officials have imposed or recommended measures to promote social distancing; or,
 - c) During a declared local emergency and the legislative body determines by majority vote that, as a result of the emergency, the attendance of one or more members of the legislative body in person is hindered, or meeting in person would present imminent risks to the health or safety of attendees.

If a legislative body holds a meeting under these circumstances, it must do all of the following:

- a) Give notice of the meeting and post agendas as otherwise required by the Brown Act;

- b) Allow members of the public to access the meeting, and provide in the agenda an opportunity for members of the public to address the legislative body directly, pursuant to provisions of the Brown Act governing public comment;
- c) Give notice of the means by which members of the public may access the meeting and offer public comment whenever notice of the time of the teleconferenced meeting is given or the agenda is posted;
- d) Identify and include in the agenda an opportunity for all persons to attend via a call-in option or an internet-based service option;
- e) 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;
- f) Cease action on agenda items if a disruption prevents the public agency from broadcasting the meeting to members of the public using the call-in or internet-based service option, or if a disruption within the local agency's control prevents members of the public from submitting public comments using the call-in or internet-based service option, until public access to the meeting via the call-in or internet-based service option is restored. The bill clarifies that actions taken on agenda items during a disruption may be challenged, pursuant to provisions of the Brown Act governing the ability of a district attorney or interested person to seek a judicial determination that an action violates specified provisions of the Brown Act and is null and void; and,
- g) Refrain from requiring public comments to be submitted in advance of the meeting, and provide an opportunity for the public to address the legislative body and offer comment in real time.

If a state of emergency or local emergency remains active or state or local officials have imposed or recommended measures to promote social distancing, the bill requires a legislative body to make specified findings by majority vote within 30 days after teleconferencing for the first time and every 30 days thereafter in order to continue teleconferencing without complying with the Brown Act's physical access and quorum requirements.

This bill is sponsored by the California Special Districts Association.

10) **Policy Considerations.** The Committee may wish to consider the following:

- a) **Let's Be Clear and Consistent.** This bill allows a legislative body of a local agency to meet without complying with the Brown Act's physical access and quorum requirements for teleconferenced meetings if the legislative body holds a meeting during a declared local emergency and the legislative body determines by majority vote that, as a result of the emergency, the attendance of one or more members of the legislative body, in person, is hindered, or meeting in person would present imminent risks to the health or safety of attendees. The term "hindered" is undefined in the bill and could be open to broad interpretation. Furthermore, this sets different standards for members of a legislative

body and members of the public regarding the safety of each in attending local agency meetings. The Committee may wish to consider amending the bill to address this issue.

- b) **Potential Unintended Consequences?** This bill specifies that, if a disruption prevents a public agency from broadcasting a meeting to members of the public or if a disruption within the local agency's control prevents members of the public from submitting public comments, the body cannot take further action on items appearing on the agenda until public access is restored. It further clarifies that any action taken on an agenda item during such a disruption may be challenged pursuant to the provisions of the Brown Act that allow a district attorney or interested person to seek a judicial determination that an action violates the Brown Act and is therefore null and void.

It is possible that a local agency's governing body might not be immediately aware of such disruptions. At what point would the actions of the governing body be subject to legal challenge? And how is it to be determined whether a disruption is "within the local agency's control?" The Committee may wish to consider the potential unintended consequences of these provisions and need for more clarity moving forward.

- 11) **Committee Amendment.** In order to address some of the policy considerations, above, the Committee may wish to adopt the following amendment:

54953. (e)(1)(C) The legislative body holds a meeting during a declared local emergency and the legislative body determines by majority vote that, as a result of the emergency, ~~the attendance of one or more members of the legislative body in person is hindered, or~~ meeting in person would present imminent risks to the health or safety of attendees.

- 12) **Related Legislation.** AB 339 (Lee & Christina Garcia) requires, until December 31, 2023, all open and public meetings of a city council or a county board of supervisors, the jurisdiction of which contains at least 250,000 people, to provide the public with an opportunity to comment in person and remotely via a telephonic or an internet-based service option. AB 339 was heard in this Committee on April 28, 2021, and passed with a vote of 7-0.

AB 703 (Rubio) alters in-person public access and quorum requirements for teleconferenced meetings under the Brown Act. AB 703 is pending in this Committee.

- 13) **Arguments in Support.** The California Special District's Association, sponsor of this measure, writes, "While California Government Code § 54953 authorizes the use of teleconferencing, this code section does not adequately address the demands of an emergency situation. California Government Code § 54953 requires the physical posting of meeting notices and agendas in locations where the physical safety of agency members and/or staff cannot be guaranteed. Furthermore, the Code requires that each of the remote meeting locations be accessible to members of the public, a mandate that runs counter to the practice of social distancing and quarantining as recommended by state and local health officials.

"The Orders, recognizing the dilemma posed by this situation, waived these requirements. By providing relief from these requirements, this bill will allow local agencies to conduct business without exposing local agency board members, staff, or the public to potential harm. This bill also provides for members of a local agency's legislative body to participate in a

remote meeting from beyond the agency’s jurisdiction consistent with the conditions posed in an emergency. The governor’s March 2020 Orders facilitated local agencies’ transition to remote meetings so that they could continue to operate while observing directives meant to help slow the spread of disease during a pandemic. The changes made by the orders were integral to allowing local agencies to meet; without them, local agencies would potentially have been forced to make tough decisions about meeting cancellations, potential exposures of agency board members and staff, compliance with health directives, and more. This bill strikes an appropriate balance between the intent of these executive orders – to allow local agencies to continue to meet and do business during an emergency – and the spirit of the protections woven throughout the Brown Act.”

- 14) **Arguments in Opposition.** A coalition including Leadership Counsel for Justice & Accountability, ACLU California Action, and a number of additional organizations write, “AB 361 would permanently codify into statute provisions drawn from Executive Order No. N-29-20. This Executive Order reflects one temporary policy decision that was made quickly under the pressure and turmoil of a newly declared state of emergency to respond to an unprecedented global pandemic last year. The premise of the bill appears to be that an executive order tailor-made for the COVID-19 pandemic should be blanketly applied to all future declared emergencies. We believe this is unwise. Whether or not E.O. N-29-20 is good policy, it should be remembered that the Governor’s temporary suspension of the Brown Act was intended to meet the specific challenges posed by a previously unknown and highly contagious airborne virus. Should AB 361 pass, this attempt at a one-size-fits-all approach would fail to respond to the nuanced conditions of a unique local or state emergency.

“Moreover, the bill would empower members to avoid their public meetings obligations whenever they declare a local emergency, regardless of the circumstances or the impact on the ability of the public meeting to be conducted safely. Further, the bill would allow local public officials to evade their legal obligations not only by declaring a local emergency but also by exploiting an emergency that may be legitimate but does not actually prevent the local body from complying with the otherwise applicable provisions of the Brown Act. For example, a city council could assert that it need not comply with the Brown Act because the county in which it is located has declared an emergency, perhaps on the other side of the county, that makes the attendance of a member somewhat more complicated or difficult – i.e., ‘hinders’ that member’s attendance. Likewise, the local agency could evade the Brown Act if some state or local official has merely recommended some undefined type of ‘social distancing,’ even if it is nevertheless safe for people to meet.”

REGISTERED SUPPORT / OPPOSITION:

Support

California Special Districts Association [SPONSOR]
Alameda County Mosquito Abatement District
Alameda County Water District
Alpine Fire Protection District
Alpine Springs County Water District
Association of California Healthcare Districts
Association of California Water Agencies
Auburn Area Recreation and Park District

Big Bear Area Regional Wastewater Agency
Big Lagoon Community Services District
Biola Community Services District
Calaveras Public Utility District
California Association of Joint Powers Authorities
California Association of Public Authorities for IHSS
California Downtown Association
California Municipal Utilities Association
California State Association of Counties
Cameron Estates Community Services District
Cameron Park Community Services District
City Council Member Zach Hilton, City of Gilroy
City of Chino Hills
City of Huntington Beach
Coachella Valley Mosquito and Vector Control District
Costa Mesa Sanitary District
Cucamonga Valley Water District
Eastern Municipal Water District
Eden Township Healthcare District
El Dorado Hills Community Services District
Elsinore Valley Municipal Water District
Fallbrook Regional Health District
Fresno Mosquito and Vector Control District
Grizzly Flats Community Services District
Honey Lake Valley Resource Conservation District
Hornbrook Community Services District
Humboldt Community Services District
Jackson Valley Irrigation District
Keyes Community Services District
Kinneola Irrigation District
League of California Cities
Los Angeles County Sanitation Districts
Mammoth Community Water District
Mesa Water District
Metropolitan Water District of Southern California
Mountain Counties Water Resources Association
Mt. View Sanitary District
Municipal Water District of Orange County
Murphys Fire Protection District
Napa County Regional Park and Open Space District
North County Fire Protection District
North Tahoe Fire Protection District
Olivenhain Municipal Water District
Orange County Employees Association
Orange County Sanitation District
Palmdale Water District
Palos Verdes Library District
Rural County Representatives of California
Sacramento Suburban Water District

San Diego County Water Authority
Santa Clara Valley Water District
Saratoga Fire District
Stege Sanitary District
Tahoe Resource Conservation District
Three Valleys Municipal Water District
Town of Discovery Bay Community Services District
Truckee Fire Protection District
Urban Counties of California
Valley-wide Recreation and Park District
Ventura County Transportation Commission
Vista Fire Protection District
Vista Irrigation District
Water Replenishment District of Southern California
Western Municipal Water District

Opposition

ACLU of California
Asian Pacific Environmental Network (APEN)
Californians Aware: the Center for Public Forum Rights
Center on Race, Poverty & the Environment
Central Valley Air Quality Coalition
Courage California
Faith in the Valley
First Amendment Coalition
Fresno Barrios Unidos
Hmong Innovating Politics
Inland Congregations United for Change
Leadership Counsel for Justice & Accountability
Public Advocates, INC.
Yalla Indivisible

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