



September 2021

BEYOND THE EXECUTIVE ORDER

Legislature Authorizes Temporary Renewable Board Meeting Teleconference Flexibility During Proclaimed State of Emergency

Executive Order N-29-20 (and subsequent orders extending its provisions) relaxed board meeting teleconferencing requirements and permitted remote public participation during the COVID-19 pandemic. With an original sunset date of September 30 approaching, the Legislature stepped in with legislation allowing for similar flexibility under Assembly Bill 361, which took effect as urgency legislation on September 16, 2021. There are several important differences between AB 361 and the Executive Order.

A. When is the Brown Act Flexibility Available Under AB 361? The flexibility allowed under AB 361 kicks in for meetings held during a “proclaimed state of emergency”ⁱ in three situations:

1. When state or local officials impose or recommend measures to promote social distancing. Thus, even if the state has not imposed or recommended social distancing, the flexibility can be used where, for example, a county public health officer recommends social distancing during a state of emergency.
2. When a board is meeting to determine whether, as a result of the emergency, meeting in person would present “imminent risks to the health or safety of attendees.”
3. When a board has met as authorized in Item 2 above and determines that as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees. Thus, even absent a state or local social distancing order or recommendation, a board could determine that conditions are such that it would be unsafe to meet in person. For example, a wildfire situation could trigger the use of this authority outside a social distancing context.

B. What is the Duration of the Flexibility? The teleconferencing flexibility is available for 30 days after first used, and then must be renewed every 30 days by majority vote of the board with findings that the board has reconsidered the circumstances of the state of emergency and one of the following applies:

- The state of emergency continues to impact the ability to meet safely in person.
- State or local officials continue to impose or recommend social distancing measures.

The statute itself remains in effect only until January 1, 2024, unless later extended.

Although AB 361 took effect on September 16 as urgency legislation, on September 20 the Governor issued Executive Order N-15-21 to suspend the application of AB 361 through September 30, 2021, which would then put it into effect only after the prior Executive Orders expire.

C. What Flexibility is Allowed Under AB 361? As under the Executive Order, several elements of the usual posting requirements for a teleconference can be dispensed with:

- The board is not required to post the agenda at all locations from which board members will participate remotely.
- The board is not required to identify each location from which board members will participate remotely.
- The locations from which board members participate remotely are not required to be accessible to the public.
- A quorum of the board is not required to participate from locations within district boundaries.
- The board is not required to provide an opportunity for members of the public to address the board at the locations from which board members participate remotely.

D. What Features Remain from “Old Style” Teleconferencing? The agenda must still be posted physically and on the district’s website in the same way as normally required, and under the same timeframes (at least 72 hours for a regular meeting and 24 hours for a special meeting). The teleconferenced meeting must be conducted in a manner that protects the statutory and constitutional rights of the parties and the public appearing before the board. All votes during a teleconferenced meeting must be by roll call.

E. How Does the Public Participate? The requirements for public participation are significantly different than under the Executive Order.

Advance Submission of Comments Cannot be Required. Boards are specifically prohibited from requiring that comments be submitted in advance. The new law requires that boards provide an opportunity for members of the public to “offer comment in real time.”

Registering with Third-Party Websites or Platforms. While members of the public are normally not required to “register” to attend or participate in a meeting, if the district uses a third-party internet website or online platform not under its control to broadcast the meeting or

facilitate public comment, a registration requirement to log into a teleconference imposed by the third-party site or platform is not prohibited.

It does not appear that a district-specific decision to require registration for meeting participants would be permitted.

Allowing Time for Comment and Registering. For boards that provide a “timed public comment period” for any agenda or non-agenda item, the public comment period cannot be closed until the timed public comment period (or the time to register with a third-party site) has lapsed. A timed public comment period would not appear to correspond to the per speaker and per topic limits typical in K=12 school districts.

Boards that do not provide a timed public comment period, but rather allow for comment separately on each agenda item, must allow a “reasonable amount of time” per agenda item to allow the public time to comment, including time to register with a third-party site or platform or otherwise be recognized for the purpose of commenting. It is not clear what a “reasonable amount of time” would be, or whether this means that a board cannot require those who wish to comment to make that clear at the beginning of the meeting so the board president can organize the discussion and time limits.

Notice of Means for Remote Participation. The teleconferenced meeting agenda and any other posting of the meeting time must provide notice of the means by which members of the public can access the meeting and offer public comment. The agenda must identify a call-in option or an internet-based service option.

F. What if the Ability to Broadcast the Meeting is Disrupted or a Disruption Within the District’s Control Prevents the Public from Offering Comments? In that situation, a board can take no “further action” on affected agenda items until public access is restored. The new law does not specifically prohibit “further discussion,” so it may be permissible to continue discussion so long as no action is taken.

Actions taken during a disruption of the broadcast of a meeting can be subject to a possible challenge under the Brown Act. The statute does not state that a disruption in the public comment function only would also trigger a possible challenge.

How this provision plays out remains to be seen (e.g., the board could be unaware of the lack of access during the meeting itself and thus be unable to forestall board action).

G. What About Emergency Meetings? Outside the teleconferencing context, the Brown Act still permits boards to hold “emergency meetings” on very little or no notice in defined circumstances (e.g., crippling disasters, disruption of public facilities, severe impact to public safety), etc.

H. What Agenda Language Should be Included to Signal use of this Flexibility? The following is some suggested language to signal that the meeting will be held via teleconference/internet-based service:

Notice of Teleconferencing Pursuant to Government Code section 54953(e). The Board will conduct this meeting via teleconference (via call-in or internet-based service) with one or more board members participating from remote locations. This meeting will be accessible to members of the public, and public comment will be allowed at appropriate times, via call-in or internet-based service by the following means [list phone number for call-in or link/method to access internet-based service such as Zoom].

I. How Should Extension of the Teleconferencing Flexibility be Agendized? As an open session action item, the extension should be agendized as follows:

Extension of Teleconference Flexibility During Proclaimed State of Emergency
(Government Code section 54953(e)(3))

The board will consider extending the time period for teleconferencing without complying with the usual requirements of Government Code section 54953(b)(3) by reconsidering the circumstances of the state of emergency and making a finding that the state of emergency continues to directly impact the ability of the members to meet safely in person, or that state or local officials continue to impose or recommend measures to promote social distancing.

Please contact our office if you need further information on this or related topics.

- Grant Herndon

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ⁱ AB 361 defines “state of emergency” as one proclaimed pursuant to Government Code section 8625. This section is part of the California Emergency Services Act and allows the Governor to make a state of emergency proclamation in an area affected or likely to be affected when the Governor finds that circumstances described in subdivision (b) of section 8558 exist and either the Governor is requested to do so by a mayor or chairman of a board of supervisors or county administrative officer, or the Governor finds that local authority is inadequate to cope with the emergency.

Section 8558(b) in turn defines “state of emergency” as the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state 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, the Governor’s warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy or conditions causing a “state of war emergency,” which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.