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MEMORANDUM

TO: Honorable London N. Breed, Mayor
Honorable Members, Board of Supervisors
Carmen Chu, City Administrator
Angela Calvillo, Clerk of the Board of Supervisors

FROM: Jon Givner, Deputy City Attorney
Anne Pearson, Deputy City Attorney
Bradley Russi, Deputy City Attorney
Paul Zarefsky, Deputy City Attorney

DATE: September 28, 2021

RE: Updated Advice Regarding Meetings of Policy Bodies during COVID-19 Emergency

Over the past 18 months, the City Attorney's Office has issued a series of public memoranda summarizing the evolving laws that apply to meetings of policy bodies during the ongoing COVID-19 pandemic. Based on recently enacted State legislation and other developments, in this memorandum we update and supersede our memorandum of June 5, 2020 on the same subject, which itself updated and superseded earlier memoranda dated March 13, 2020, March 24, 2020, and April 10, 2020. We will continue to update this memorandum as appropriate to address other significant changes in the law around public meetings while the pandemic continues.

On February 25, 2020, Mayor London N. Breed declared the existence of a local emergency relating to COVID-19. Since that declaration, the County Health Officer has issued a number of public health orders relating to COVID-19, the Governor and State Health Officer have issued overlay state orders, and the Mayor and Governor have issued emergency orders suspending select laws applicable to boards, commissions, and other policy bodies, including advisory bodies (collectively, "policy bodies"). As background, we summarize those orders in a brief chronology, in subsection A below.

Then, in subsection B of this memorandum, we address and update a number of legal questions that have arisen regarding policy body meetings during the emergency. The main change since our June 5, 2020 memorandum is that the Legislature recently enacted AB 361, a bill that facilitates the ability of policy bodies to meet remotely during a state of emergency. Most notably, beginning on October 1, 2021, policy bodies must make specific findings at least once every 30 days to continue holding remote meetings without complying with restrictions in State law that would otherwise apply. In this memorandum, we summarize AB 361 at the end of subsection A, and discuss that new requirement in Question 1 in subsection B.

In this memorandum, we do not address the laws and rules that will apply when policy bodies return to in-person meetings. We will issue additional public guidance at that time.

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A. Chronology of Orders and Recommendations of the Mayor, Governor, County Health Officer, and State Legislation, Relating to Public Meetings

The Mayor, the Governor, and the County Health Officer have issued the following emergency orders that specifically relate to meetings of policy bodies:

- On March 11, 2020, the Mayor supplemented her initial declaration of local emergency with an order to suspend select provisions of local law, including sections of the City Charter that prohibit teleconferencing by members of policy bodies, and extended deadlines in local law by which policy bodies must act. This order will remain in place until the Mayor or the Board of Supervisors terminates it.
- On March 12, 2020, the Governor issued an executive order suspending provisions of the Brown Act to allow members of policy bodies to participate in public meetings remotely and without noticing their remote locations, but requiring that there be a physical meeting place for members of the public. On March 18, 2020, the Governor issued another executive order superseding the previous order and authorizing policy bodies to meet by teleconference without having a physical meeting place for members of the public. The Governor superseded that order with a similar executive order on June 11, 2021 (the “Brown Act Suspension Order”). As stated in executive orders dated June 11, 2021 and September 20, 2021, the Brown Act Suspension Order will terminate on October 1, 2021.
- On March 16, 2020, the County Health Officer ordered City residents to stay safe in their homes except for certain essential needs and services, and prohibited all public and private meetings and travel, with certain exceptions. The Health Officer modified and extended the order several times, and replaced it on June 11, 2021 with a new Safer Return Together order. The Health Officer’s current order does not specify an end date.
- On March 17, 2020, the Mayor issued another supplemental order prohibiting all City policy bodies from holding public meetings without prior authorization from the Board of Supervisors, the Mayor, or the Mayor’s designee. This order applied to all policy bodies other than the Board of Supervisors and its committees. The Mayor twice extended that order on April 1 and 30, 2020, and replaced it with subsequent orders on May 29, June 20, and July 31, 2020, as summarized below.
- On March 21, 2020, the Governor issued another executive order, suspending provisions of the Brown Act to allow a majority of members of a policy body to simultaneously receive briefings from local, state, or federal officials concerning information relevant to the COVID-19 emergency outside of a meeting of the policy body and to ask questions of such officials, so long as the members of the policy body do not discuss the COVID-19 emergency among themselves or take any action (the “Private Briefing Order”). In a subsequent executive order on June 11, 2021, the Governor announced that the Private Briefing Order will terminate on September 30, 2021.
- On March 23, 2020, the Mayor issued another supplemental order suspending several provisions of local law regarding policy body meetings, including, among others: (1) the requirement for policy bodies to provide more than 24 hours’ notice of special meetings; (2) the requirement for policy bodies to post their agendas and other information at the Main

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Library; (3) any requirement to televise meetings if televising is not reasonably feasible; (4) the requirement to provide a physical location for members of the public to attend or make public comment when all members of the policy body are teleconferencing from remote locations; (5) the requirement that each member of the public be provided an equal amount of time for public comment; and (6) other requirements that would impede policy bodies' compliance with the Governor's executive orders. The supplemental order also waived all requirements in the Sunshine Ordinance regarding gatherings of passive meeting bodies.

- On May 29, 2020, the Mayor issued another supplemental order allowing policy bodies to meet without prior approval starting June 1, with three conditions. First, the meetings must occur by teleconference or other electronic means without providing a physical meeting place, in compliance with all applicable laws regarding public attendance and comment. Second, policy body meetings must prioritize any urgent action items necessary for public health, safety, and essential government functions. Third, before scheduling a meeting, a policy body that is not established in the Charter must confer with the department that provides administrative and clerical support to the body, to ensure that the meeting will not unreasonably require the time of staff who are otherwise responding to the COVID-19 pandemic.
- On June 20, 2020, the Mayor issued another order allowing a narrow exception to the prohibition on in-person meetings. The June 20 order allows policy body members to meet in-person without members of the public to consider a personnel-related item with advance permission from the Mayor. Finally, on July 31, 2020, the Mayor extended the prohibition on in-person meetings, and the narrow exception. The Mayor's July 31, 2020 order will remain in place until the Mayor or the Board of Supervisors terminates it. The Mayor's order does not apply to meetings of the Board of Supervisors and its committees.

On September 16, 2021, the Governor signed AB 361, a bill amending State law to allow policy bodies under certain circumstances to meet remotely without complying with the Brown Act's normal rules regarding teleconferencing. The bill authorizes modified Brown Act teleconferencing rules to allow remote meetings without providing a physical meeting place for members of the public to attend when the Governor has proclaimed a state of emergency and either (1) state or local officials have imposed or recommended measures to promote social distancing, or (2) meeting in person would present imminent risks to the health or safety of attendees. The bill requires each policy body to make two findings at least once every 30 days to allow the body to continue meeting remotely without complying with the Brown Act's teleconferencing rules: (1) that the policy body has considered the circumstances of the state of emergency, and (2) that one of the following circumstances exists: (a) the state of emergency continues to directly impact the ability of members to meet safely in person, or (b) state or local officials continue to impose or recommend measures to promote social distancing. AB 361 technically took effect on September 16, but the Governor subsequently issued an executive order that suspended AB 361 until October 1, 2021. AB 361 will remain in effect until January 1, 2024.

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B. Questions and Answers Regarding Policy Body Meetings during the Emergency

The orders and legislation described above have changed or suspended a number of rules that normally apply to policy body meetings. In this section of the memorandum we answer questions arising from the orders and legislation.

1. May policy bodies hold remote meetings during the emergency?

Yes. Under the Mayor's July 31, 2020 order, policy bodies may meet remotely without advance approval from the Mayor or the Board of Supervisors. But beginning on October 1, 2021, policy bodies must regularly adopt findings to continue holding remote meetings. Under normal circumstances, the Brown Act imposes special requirements for remote (teleconferenced) meetings—including requirements to provide special notice to the public and to allow members of the public to attend each teleconference location and observe each policy body member at the location calling into the meeting. AB 361 suspends those requirements if the Governor has proclaimed a state of emergency, provided that the policy body makes certain findings. Specifically, to invoke AB 361's provisions, so long as the Governor's emergency proclamation remains in effect, a policy body must make two findings at least once every 30 days:

- (1) it has considered (or reconsidered) the circumstances of the state of emergency; and either
- (2a) the state of emergency continues to directly impact the ability of policy body members to meet safely in person, or
- (2b) state or local officials continue to impose or recommend measures to promote social distancing.

Each policy body should adopt finding 1 and either finding 2a or 2b (or it could adopt both 2a and 2b) at its first meeting after September 30, 2021 and again every 30 days thereafter as long as the body continues to meet remotely. Policy bodies that meet less frequently than every 30 days should adopt the findings at the start of every meeting. If a policy body has subcommittees, the policy body may adopt findings governing the body and its subcommittees, so the subcommittees do not need to separately adopt findings.

A sample motion adopting findings is attached at the end of this memorandum. Policy bodies may modify the sample motion in consultation with the City Attorney's Office before adopting it. The City's Health Officer has confirmed the accuracy of the finding regarding social distancing recommendations.

Additionally, under the Mayor's orders, before scheduling a meeting, a policy body that is not established in the Charter must confer with the department that provides administrative support to the body, to ensure that the meeting will not unreasonably require the time of staff who are otherwise deployed or participating in the City's response to the COVID-19 pandemic.

2. May policy bodies hold meetings in-person at a physical meeting space?

No. With two exceptions described below, the Mayor's July 31, 2020 emergency order prohibits policy bodies from meeting in person, so policy body meetings must occur by teleconference or other electronic means (whether audio, video, or both) such as Zoom, Cisco

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WebEx, or Microsoft Teams without providing a physical meeting place. The Mayor's emergency orders and AB 361 temporarily suspend laws that would otherwise require members of policy bodies to attend meetings in person and provide a physical space for members of the public to attend.

The first exception: Under the Mayor's July 31, 2020 order, policy bodies may meet in person for the limited purpose of considering a personnel-related item, with advance permission from the Mayor. Members of the public cannot attend such a meeting in person.

The second exception: The Mayor's orders do not prohibit the Board of Supervisors or its committees from holding meetings in person at City Hall or another meeting space. The Board of Supervisors has held in-person meetings without members of the public on-site since July 2021 in compliance with local and State health orders.

3. Should policy body meeting agendas provide special information regarding public access to remote meetings?

When policy bodies hold remote meetings, they must ensure that the public is able to observe or listen and to offer public comment telephonically or through other electronic means. The policy body must disclose on any required meeting notice, and on the meeting agenda, the means by which the public may observe or listen and offer public comment in the meeting. The agenda should prominently provide precise information explaining how members of the public can offer public comment during the meeting. And as with any meeting, the policy body must have a process for a member of the public to request a reasonable modification or accommodation under the Americans with Disabilities Act to observe or listen and offer public comment in the meeting, and that process must be disclosed on meeting notices and agendas.

4. Where must notice and agendas of meetings of policy bodies be posted?

A policy body must post the notice and agenda for a meeting on the policy body's website. Also, the policy body must post the notice and agenda at the Main Library. This notice requirement was infeasible during the first year of the pandemic when the Main Library was largely closed, but the requirement applies now that the building is accessible to the public.

5. When must notice and agendas of policy body meetings be posted?

Under the Mayor's March 23, 2020 order, policy bodies must post a notice and agenda at least 72 hours before any regular meeting and at least 24 hours before any special meeting. And policy bodies are not required to post a special meeting notice 15 days in advance of holding a meeting at a location other than the building where the policy body holds regular meetings, including when a policy body meets by teleconference without providing a physical meeting place.

6. Can members of the public provide public comment by telephone, video call, email, or similar means?

As discussed above, policy bodies holding remote meetings must offer a means to allow the public to provide public comment telephonically or through other electronic means in real time. Policy bodies may allow members of the public to comment by telephone, Zoom, Cisco

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WebEx, Microsoft Teams, or similar electronic means. Policy bodies should take steps to ensure that members of the public providing remote public comment have an opportunity to access the meeting and be recognized. For example, the policy body should pause briefly before closing public comment to ensure that no remaining commenters are seeking to speak on an item. Policy bodies also may, but are not required to, allow members of the public to send email messages for the clerk or chairperson to read aloud during the meeting; but the opportunity for members of the public to submit written comments cannot replace their opportunity to provide comment in real time.

7. Must a policy body allow all members of the public the same amount of time to speak during public comment?

No. Under the Mayor's March 23, 2020 order, policy bodies are not required to provide equal time for members of the public to speak during public comment, provided that any departure from the equal time rule is not designed to favor or discriminate against a particular viewpoint. Suspension of the equal time rule gives policy bodies greater flexibility in managing periods for public comment in the face of challenges that may be presented by telephonic or other electronic means of public comment, or if the emergency presents a need to shorten meetings. But to our knowledge, no policy body has needed to depart from the equal time rule during the pandemic. If a policy body is interested in departing from the equal time rule, the chairperson should first confer with the City Attorney's Office.

8. May a policy body continue to meet if technical challenges disrupt public comment?

Remote meetings sometimes present unique challenges caused by malfunctioning technology. If a policy body discovers during a meeting that members of the public generally are not able to provide comment in the manner described in the agenda, then the body should consult with the City Attorney's Office immediately. The policy body cannot take any action on an agenda item until public comment on that item is complete; and even a discussion item may not be concluded without an opportunity for public comment.

While the staff attempts to correct the technical problem hindering public comment, the policy body may recess the meeting temporarily, may continue to discuss the agenda item (assuming the public is still able to observe or listen to the meeting), or may move on and discuss another agenda item, returning later in the meeting to the item that was interrupted. In no case may an agenda item be completed if there has not been an opportunity for public comment. If the staff cannot correct the problem, then the policy body should take no action on any outstanding items as to which there has not been an opportunity for public comment, and should recess the meeting to a later time or date and allow public comment when the meeting resumes.

9. Must a policy body televise meetings at which members are teleconferencing or videoconferencing from remote locations?

No. Under the Mayor's March 23, 2020 order, policy body meetings need not be televised if the chairperson of the body has determined that televising the meeting is not reasonably feasible. Before making that decision, the chairperson must consult with the Mayor's office or the staff of SFGovTV.

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10. Must a policy body holding a remote meeting act by roll call votes?

Yes. Under the Brown Act, policy bodies must take a roll call vote on every action during a remote meeting. Policy bodies may not approve actions “without objection” or “same house same call.”

11. May a policy body receive a briefing regarding the emergency outside a meeting?

No, beginning October 1, 2021. The Governor’s March 23, 2020 Private Briefing Order allowed policy bodies to receive briefings from local, state, or federal officials concerning information relevant to the COVID-19 emergency without compliance with the Brown Act. But that order terminates on September 30, 2021.

12. Do legal deadlines for action by the policy body apply during the emergency?

State and local laws impose various deadlines on policy bodies. For example, many policy bodies are required to hold hearings on appeals within a specific number of days from the date of the notice of appeal. In her March 11, 2020 order, the Mayor suspended deadlines imposed by City law during the emergency and for 14 days following the termination of the emergency, if the policy body is unable to meet and take the required action due to the emergency. But as remote meetings have become commonplace and policy bodies have become familiar with the technology for video meetings, policy bodies have not needed to invoke this rule. And deadlines imposed by state law are still in effect. Policy bodies that are bound by legal deadlines under City law should consult in advance with the City Attorney’s Office if they believe the Mayor’s order may have waived those deadlines.

13. May there be remote gatherings of passive meeting bodies during the emergency?

Yes. In this memorandum, we discuss rules that apply to the City’s policy bodies during the emergency. The Sunshine Ordinance also normally requires limited public notice and public access to gatherings of “passive meeting bodies” that are not policy bodies, such as, for example, gatherings of advisory committees or other multimember bodies created by the initiative of a member of a policy body, the Mayor, the City Administrator, a department head, or an elective officer. But the Mayor’s March 23, 2020 order suspended the notice and access rules that normally apply to gatherings of passive meeting bodies. Under the Mayor’s order, these gatherings may occur, but public notice and attendance rules do not apply. Even though these gatherings are legally permissible under the Mayor’s order, members generally should not meet in person for the same reasons reflected in the Mayor’s order prohibiting in-person meetings of policy bodies.

**RESOLUTION MAKING FINDINGS TO ALLOW TELECONFERENCED
MEETINGS UNDER CALIFORNIA GOVERNMENT CODE SECTION
54953(e)**

WHEREAS, California Government Code Section 54953(e) empowers local policy bodies to convene by teleconferencing technology during a proclaimed state of emergency under the State Emergency Services Act so long as certain conditions are met; and

WHEREAS, In March, 2020, the Governor of the State of California proclaimed a state of emergency in California in connection with the Coronavirus Disease 2019 (“COVID-19”) pandemic, and that state of emergency remains in effect; and

WHEREAS, In February 25, 2020, the Mayor of the City and County of San Francisco (the “City”) declared a local emergency, and on March 6, 2020 the City’s Health Officer declared a local health emergency, and both those declarations also remain in effect; and

WHEREAS, On March 11 and March 23, 2020, the Mayor issued emergency orders suspending select provisions of local law, including sections of the City Charter, that restrict teleconferencing by members of policy bodies; those orders remain in effect, so City law currently allows policy bodies to meet remotely if they comply with restrictions in State law regarding teleconference meetings; and

WHEREAS, On September 16, 2021, the Governor signed AB 361, a bill that amends the Brown Act to allow local policy bodies to continue to meet by teleconferencing during a state of emergency without complying with restrictions in State law that would otherwise apply, provided that the policy bodies make certain findings at least once every 30 days; and

WHEREAS, While federal, State, and local health officials emphasize the critical importance of vaccination and consistent mask-wearing to prevent the spread of COVID-19, the City’s Health Officer has issued at least one order (Health Officer Order No. C19-07y, available online at www.sfdph.org/healthorders) and one directive (Health Officer Directive No. 2020-33i, available online at www.sfdph.org/directives) that continue to recommend measures to promote physical distancing and other social distancing measures, such as masking, in certain contexts; and

WHEREAS, The California Department of Industrial Relations Division of Occupational Safety and Health (“Cal/OSHA”) has promulgated Section 3205 of Title 8 of the California Code of Regulations, which requires most employers in California, including in the City, to train and instruct employees about measures that can decrease the spread of COVID-19, including physical distancing and other social distancing measures; and

WHEREAS, Without limiting any requirements under applicable federal, state, or local pandemic-related rules, orders, or directives, the City’s Department of Public Health, in coordination with the City’s Health Officer, has advised that for group gatherings indoors, such as meetings of boards and commissions, people can increase safety and greatly reduce risks to the health and safety of attendees from COVID-19 by maximizing ventilation, wearing well-fitting masks (as required by Health Officer Order No. C19-07), using physical distancing where the vaccination status of attendees is not known, and considering holding the meeting remotely if feasible, especially for long meetings, with any attendees with unknown vaccination status and where ventilation may not be optimal; and

WHEREAS, On July 31, 2020, the Mayor issued an emergency order that, with limited exceptions, prohibited policy bodies other than the Board of Supervisors and its committees from meeting in person under any circumstances, so as to ensure the safety of policy body members, City staff, and the public; and

WHEREAS, [Insert name of Board/Commission] has met remotely during the COVID-19 pandemic and can continue to do so in a manner that allows public participation and transparency while minimizing health risks to members, staff, and the public that would be present with in-person meetings while this emergency continues; now, therefore, be it

RESOLVED, That [insert name of Board/Commission] finds as follows:

1. As described above, the State of California and the City remain in a state of emergency due to the COVID-19 pandemic. At this meeting, [Insert name of Board/Commission] has considered the circumstances of the state of emergency.
2. As described above, State and City officials continue to recommend measures to promote physical distancing and other social distancing measures, in some settings.

3. As described above, because of the COVID-19 pandemic, conducting meetings of this body [and its committees] in person would present imminent risks to the safety of attendees, and the state of emergency continues to directly impact the ability of members to meet safely in person; and, be it

FURTHER RESOLVED, That for at least the next 30 days meetings of [insert name of Board/Commission] [and its committees] will continue to occur exclusively by teleconferencing technology (and not by any in-person meetings or any other meetings with public access to the places where any policy body member is present for the meeting). Such meetings of [insert name of Board/Commission] [and its committees] that occur by teleconferencing technology will provide an opportunity for members of the public to address this body [and its committees] and will otherwise occur in a manner that protects the statutory and constitutional rights of parties and the members of the public attending the meeting via teleconferencing; and, be it

FURTHER RESOLVED, That the [clerk/secretary/staff] of [insert name of Board/Commission] is directed to place a resolution substantially similar to this resolution on the agenda of a future meeting of [insert name of Board/Commission] within the next 30 days. If [insert name of Board/Commission] does not meet within the next 30 days, the [clerk/secretary/staff] is directed to place a such resolution on the agenda of the next meeting of [insert name of Board/Commission].