

Memorandum

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TO: Chino Basin Watermaster Board Members

FROM: Brownstein Hyatt Farber Schreck

RE: **New Brown Act Rules for 2023: Teleconferencing Rules (AB 361 & AB 2449)**

As was discussed at the January 26, 2023 Board meeting, new legislation has been enacted pertaining to the Brown Act provisions regarding participation in meetings via teleconference. While Watermaster is not a public agency that is required to adhere to the provisions of the Brown Act, Watermaster's Rules and Regulations provide that as a matter of policy, Watermaster shall generally operate in accordance with the Brown Act's provisions. A summary of the new rules and procedures regarding participation in meetings by teleconference is presented below. Please do not hesitate to reach out to us should you have any questions.

I. Remote Participation Under the Brown Act

A. Traditional Brown Act Teleconferencing/Remote Participation Rules (pre COVID-19 pandemic):

Section 54953(b) of the Government Code allows for local agency officials to participate in a public meeting via teleconference, if the following occurs:

- At least a quorum of the legislative body will be participating in person in the local agency's jurisdiction;
- Each teleconference location must be specifically identified in the meeting notice and agenda, including the full address and room number (if in a hotel);
- Members of the public must be able to participate or address the legislative body at the teleconference location; and
- The meeting agenda is to be posted at the teleconference location. (Gov. Code § 54953(b).)

These provisions are still in effect and were not affected by either AB 361 or AB 2449. Instead, AB 361 and AB 2449 provided additional – and less stringent – options for teleconferencing and/or remote participation.

B. Governor Newsom’s Executive Orders (Effective 3/12/20 – 10/1/21):

- Commencing in March 2020, Governor Newsom issued a series of Executive Orders designed to contain the COVID-19 virus. These Executive Orders (N-25-20, N-29-20 and N-35-20) declared that California was under a State of Emergency and collectively modified or suspended the requirements of the Brown Act, including the provisions regulating teleconferencing, until October 1, 2021 (Executive Order N-08-21).

C. AB 361 (Effective 9/16/21 – 1/1/24):

In response to the Governor’s rescission of Executive Orders N-25-20, N-29-20 and N-35-20, the California legislature passed AB 361 allowing legislative bodies to continue to hold public meetings by teleconference – without full compliance of the Brown Act – as long as the following requirements are met:

- There is an existing “state of emergency,” as that term is defined by Section 54953(j)(5) of the Government Code;¹ and
- The legislative body can make findings (pursuant to majority vote) that 1) state or local officials have imposed or recommended measures to promote social distances; and/or 2) that, as a result of the state of emergency, meeting in public would present imminent risk to the health and safety of the public meeting attendees. (Gov. Code § 54953(e)(1).)

The legislative agency is required to make the required findings by a majority vote every 30 days to continue to use AB 361’s exemption under the Brown Act. (Gov. Code § 54953(e)(3).) Although the Governor’s COVID-19 State of Emergency is scheduled to end on February 28, 2023, AB 361’s allowances could be triggered by the issuance of a different state of emergency.

D. AB 2449 (Effective 1/1/23 – 1/1/26):

AB 2449 , which amends Section 54953 of the Government Code, provides another mechanism for public officials to participate in public meetings via teleconference

¹ Importantly, to meet this definition, the state of emergency must be issued by the Governor pursuant to Section 8625 of the Government Code.

without full compliance with the Brown Act’s traditional teleconferencing requirements.² Attached, we have developed a flow chart for authorizing remote participation under AB 2449.

The following are the teleconferencing requirements under AB 2449:

1. Quorum Requirement: There must be a quorum of the other members of the legislative body present at one physical location that is within the local agency’s jurisdiction. (Gov. Code § 54953(f)(1).)
2. Request for Remote Participation: The public official desiring to participate remotely must provide notice to the legislative body “at the earliest opportunity, including at the start of a regular meeting, of their need to participate remotely.” (Gov. Code § 54953(f)(2)(A)(i).) This request is to include a general description (not exceeding 20 words) of the circumstances relating to the need to appear remotely. (Gov. Code § 54953(f)(2)(A)(ii).) The official is not required to disclose any medical diagnosis or disability, or personal medical information in the written description. (Gov. Code § 54953(f)(2)(A)(ii).) The legislative body may approve the request at the start of the meeting. (Gov. Code § 54953(f)(2)(A)(ii)(I).)
 - a. If Request is Not on Agenda: AB 2449 also allows for the legislative body to consider the request if it does not appear on the 72-hour noticed agenda, as long as the request is due to emergency circumstances and there was not enough time to place the request on the noticed agenda. (Gov. Code § 54953(f)(2)(A)(ii)(II).) The vote to add the item to the agenda must be passed by 2/3 of members, or if less than 2/3 are present, by unanimous vote. (Gov. Code § 54954.2(b)(4).)
3. “Just Cause” or “Emergency Circumstances”: The request shall include one of the two reasons for the request, as set forth in Section 54953(f)(2)(A) of the Government Code:
 - a. “Just Cause” which means any of the following (Gov. Code § 54953(j)(2)):

² It is important to note that AB 2449 does not rescind AB 361; public agencies may still invoke the exemptions available under AB 361 until January 1, 2024. However, given that the Governor has announced that the COVID State of Emergency will end on February 28, 2023, one of the requisite findings to proceed under AB 361 will no longer be available and the Governor would need to issue another state of emergency in order for local agencies to rely on the more lenient teleconferencing and remote participation provisions authorized by AB 361.

- (1) Providing childcare or caregiving of a child, parent, grandparent, grandchild, sibling, spouse or domestic partner that requires the official to participate remotely;
 - (2) A contagious illness that prevents a member from attending in person;
 - (3) A need related to a physical or mental disability; or
 - (4) Travel while on official business of the legislative body or another agency.
 - b. “Emergency Circumstances” which means a physical or family medical emergency that prevents a member from attending in person. (Gov. Code § 54953(j)(1).)
4. Limits on Number of Remote Meetings: AB 2449 limits the number of times a public official can use its teleconference procedures. (Gov. Code §§ 54953(j)(2)(A)(i) and (j)(3).)
- a. “Just Cause”: A public official may only invoke the “Just Cause” exception a maximum of two meetings per calendar year. (Gov. Code § 54953(j)(2)(A)(i).)
 - b. Cumulative Limit: Notwithstanding the above, a public official may not rely on the provisions of AB 2449 to participate remotely for a period of more than three consecutive months, or 20% of the regular meetings within a calendar year, or more than two meetings if the body only meets fewer than 10 times a calendar year. (Gov. Code § 54953(f)(3).)
5. Disclosure of Others Present at Remote Location: The remotely participating official must also disclose whether any individual over the age of 18 is present at the remote location. (Gov. Code § 54953(f)(2)(B).)
6. Other Provisions of AB 2449:
- a. AB 2449 also requires that the legislative body provide either a two-way audiovisual platform or a two-way telephonic service and a live webcasting of the meeting to allow the public to remotely hear and

visually observe the meeting remotely. (Gov. Code § 54953(f)(1)(A).) The remotely attending official must also participate through both audio and visual technology. (Gov. Code § 54953(f)(2)(C).)

- b. No action can be taken if a disruption event prevents the legislative body from broadcasting the meeting remotely. (Gov. Code § 54953(f)(1)(D).)

FLOW CHART FOR AUTHORIZING REMOTE PARTICIPATION UNDER AB 2449

STEP 1: Board Member requests remote participation to the Board.

- **When:** ASAP (at earliest opportunity) up to start of a regular meeting
- **What:** Generally describe reason for request (not to exceed 20 words). Request does **not** need to disclose medical or personal information. Must either qualify as:
 - **Just Cause:**
 - providing childcare or caregiving of immediate family,
 - contagious illness,
 - physical or mental disability,
 - official business travel for public agency, **OR**
 - **Emergency Circumstances:**
 - Physical or family medical emergency.

STEP 2: Is the request to participate remotely agendaized?

- If **yes**, then Board can consider at appropriate time on agenda. Go to **Step 3** below.
- If **no**, then Board must add **urgency item** to agenda as follows:
 - Describe that there is a request by a Board Member to participate remotely.
 - Describe the reason for the request (Just Cause or Emergency Circumstances).
 - Explain that this item came up after the 72-hour agenda deadline.
 - Board will then need to take action by: (a) finding the item is urgent and needs immediate action and was discovered after the agenda deadline, and (b) voting.
 - Must pass by 2/3 vote of Board.

STEP 3: Board acts on remote participation request.

- **Findings:** Board must make the following four findings:
 - The remotely participating Board Member must disclose whether anyone over 18 years old is present at the remote location.
 - At least a quorum of the other Board Members must be present at one physical location within Watermaster's jurisdiction.

- The remotely participating Board Member cannot have exceeded the annual limit:
 - Cannot have used the “Just Cause” exception for more than two meetings in any calendar year.
 - Cannot use the “Just Cause” and/or “Emergency Circumstances” exception for more than three consecutive months, or 20% of the regular meetings, or more than two meetings if Board meets fewer than 10x a year.
- The Board must provide a two-way audiovisual platform or two-way telephone service + live webcasting so the public can remotely hear and visually observe the meeting.
- **Vote:** If these findings can be made, then the Board votes on whether the Board Member may participate remotely.
 - A majority vote is required.

STEP 4: Repeat Steps 1-3 for additional Board Members who wish to participate remotely, if necessary.

STEP 5: Resume the meeting as agendized with Board Members participating remotely.

- All votes at a meeting with a remote Board Member must be taken by **roll call**.
- No action can be taken if the remote broadcast of the meeting is disrupted.