



Navigating the Brown Act During a Period of Local Emergency Due to COVID-19

As most of us know, the primary purpose of the Brown Act (codified in Government Code 54950 *et seq.*) is to provide that all meetings of a legislative body of a local agency are open and accessible to the public so that the public can attend and participate. In an effort to keep up with technology, the Brown Act specifically allows a legislative body to use any type of teleconferencing to meet and perform other functions. “Teleconference” is defined in the Brown Act 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.” (Government Code 54953(b)(4).)

During this period of local emergency due to COVID-19, we are all trying to respond to the crisis and remain in compliance with the law, including the Brown Act. Governor Gavin Newsom has issued several Executive Orders relating to COVID-19, including some which waive or suspend certain provisions of the Brown Act. The following is a summary of those Executive Orders that suspend or waive various requirements of the Brown Act and some guidance on what to be thinking about as some jurisdictions move to a more “virtual” meeting.

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Executive Order N-25-20 (“25-20”)

25-20 was signed by Governor Newsom on March 12, 2020, ten days after the Governor issued a State of Emergency. Governor Newsom invoked his authority under the State Constitution and Government Code sections 8567, 8571 and 8572 to issue 25-20, which among other things, suspends various provisions of the Brown Act and the Bagley-Keene Act (state’s equivalent of the Brown Act), to authorize a local legislative body or state body to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to attend and to address the body during the period in which measures to promote social distancing are in place. Paragraph 11 of 25-20 specifically waives the requirement in the Brown Act that a quorum of the legislative body be physically present at the location of the meeting as well as other notice requirements relating to teleconferencing on the conditions that 1) each legislative body must give advance notice of each public meeting in accordance with those timeframes prescribed in the Brown Act; and 2) the notice must

provide at least one publicly accessible location from which members of the public can observe and offer public comment at the meeting. As you will see below, while paragraph 11 of 25-20 has been withdrawn and superseded by Executive Order N-29-20, these provisions relating to waiver of quorum and noticing requirements are contained in Executive Order N-29-20.

Executive Order N-29-20 (“29-20”)

29-20 was signed by Governor Newsom on March 17, 2020, just fifteen days after the State of Emergency and three days before he issued Executive Order N-33-20 (“Stay At Home Order”). Paragraph 3 of 29-20 replaces paragraph 11 of 25-20 and continues to authorize a local legislative body or state body to hold public meetings via teleconferencing and to make public meetings accessible telephonically or through some other electronic means to all members of the public seeking to attend and to address the body during the period in which measures to promote social distancing are in place. However, 29-20 goes beyond 25-20 by providing that the legislative body “...need not make available any physical location from which members of the public may observe the meeting and offer public comment” so long as the legislative body allows telephonic or other electronic participation. Additionally, any legislative body conducting a meeting via teleconferencing must do the following: 1) implement a procedure for receiving and swiftly resolving requests for reasonable accommodation, consistent with the Americans with Disabilities Act (“ADA”); and 2) advertise the procedure for public participation and identify that procedure in each agenda.

29-20 is an important evolution in the tools that the Governor has provided to local legislative bodies during this period of emergency to enforce social distancing requirements and encourage people to stay at home. While 29-20 does not mandate that the legislative body exclude the public, it does allow the legislative body to take action to support the Governor’s Stay at Home Order, which generally prohibits travel and gatherings, by closing the meeting to the physical attendance of the public. If a local legislative body decides to continue to allow the public to physically attend the meetings, every effort to comply with social distancing requirements should be made, including requiring that everyone is at least 6 feet away from each other.

Executive Order N-35-20 (“35-20”)

35-20 was signed by Governor Newsom on March 21, 2020. Paragraph 2 of 35-20 waives certain restrictions on serial meetings and other provisions of the Brown Act and the Bagley-Keene Act to allow all members of a local legislative body or state body to receive simultaneous informational updates relevant to the declared

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 allows members of the body to ask questions of those federal, state, and local officials, in order to stay apprised of emergency operations and the impact of the emergency on their constituents. 35-20 specifically prohibits the body from taking any action on, or discussing amongst themselves, any item of business that is within the subject matter jurisdiction of the legislative body without complying with otherwise applicable requirements of the Brown Act or the Bagley-Keene Act. 35-20 also leaves intact paragraph 3 of 29-20, which authorizes a local legislative body or state body to hold public meetings via teleconferencing, as discussed above.

35-20 balances the need, during this period of emergency, to disseminate information efficiently and quickly to a legislative body with the public's right to access and attend a meeting of the legislative body. However, while 35-20 does not clarify the distinction between "ask[ing] questions of [] federal, state, and local officials" (which is permitted) and "discuss[ing] amongst themselves" (which is prohibited), this suspension of these Brown Act restrictions should be construed narrowly and if there is a question that is more of a topic of discussion, then the default should be to save that discussion for a public meeting.

Guidance for Future Virtual Meetings

In light of the foregoing Executive Orders, many public entities are starting to use teleconferenced meeting platforms that are commonly used for webinars, which allow the public to see the legislative body on a screen and allows comments to be easily typed in as the meeting progresses. Whatever method is used, there needs to be some consideration of how other areas of the Brown Act will be adhered to. Below are some areas of the Brown Act that may need to be addressed during a teleconferenced meeting:

- 1) **ADA Compliance:** In order to comply with 29-20, develop a procedure for receiving requests for reasonable accommodation. Consider what is offered currently during meetings and what may need to improve to allow people with disabilities access during a teleconferenced meeting. If you plan to use a remote conferencing service for online meetings, verify that the platform can satisfy ADA requirements.
- 2) **Public Access:** Letting people know how to access the meeting and submit public comments will be critical. Developing an easy step-by-step process to access the meeting electronically or telephonically and how the public will be able to submit public comments will be

critical. Posting that process on the website in multiple locations and on the agenda for each meeting will not only comply with 29-20 but will ensure transparency. Consider also offering a tutorial via telephone or webinar to walk members of the public through the access process, this type of education may be helpful for those members of the public who may be challenged or confused by the new “virtual” meeting approach.

3) **Public Comment:** If people are participating via telephone or electronic means, establishing a process for how those comments will be included in the record will be necessary. If the local government has a comment card that is requested to be filled out prior to public comment, consideration should be given to how that card can be filled out if the comment is submitted electronically or over the phone. Also, if the electronic comments are received before the item is called or during the meeting, someone should be designated to read those comments into the record. If multiple people are participating via telephone or in real time via a webinar type platform, establishing an order for the public comments will be helpful and ensure a smooth and uninterrupted public comment period.

4) **Submission of Documents at the Meeting:** Oftentimes staff or a member of the legislative body will show up to the meeting with a document to share with the entire body. If the meeting is a “virtual” meeting, it may be difficult to share this document with the entire body and the public. Government Code section 54957.5(c) requires that those documents distributed during a public meeting shall be made available for public inspection at the meeting, if prepared by the local agency or a member of its legislative body, or after the meeting, if prepared by some other person, and these documents may need to be made available in alternative formats upon request by a person with a disability. Normally, this would mean making copies of the document and placing those copies at the back of the room. During a teleconferenced meeting that is not physically accessible to the public, this is not possible. As such, a procedure should be developed to assure those documents submitted by staff or a member of the legislative body are made available online and accessible to the public during the meeting.

5) **Roll Call Votes:** None of the Executive Orders waive the requirement for roll call votes during a teleconferenced meeting, which are required pursuant to Government Code section 54953(c)(2). Thus, if one of the members of the legislative body is calling in or appearing via electronic means, then any vote should be taken via roll call.