

Date December 9, 2021 (Agenda)

Assembly Bill 361 – Teleconference Participation at Commission Hearings

RECOMMENDATION

Hold a hearing pursuant to Government Code § 54953(e)(1)(A) & (B) and consider determination that 1) local health officials recommend social distancing to reduce transmission of COVID-19 and 2) as a result of the declared pandemic emergency, requiring in-person attendance at Commission hearings presents an imminent risk to the health and safety of attendees and, therefore, Commission meetings may be held via teleconferencing pursuant to Government Code § 54953(e)(2).

DISCUSSION

On November 4, 2021, the Commission determined, pursuant to Government Code section 54953(e), that there were sufficient grounds to allow teleconference participation at Commission hearings. The grounds were that due to a declared state of emergency: 1) the County Health Department recommended physical distance to reduce the risk of contracting COVID-19 and 2) requiring in-person attendance at Commission hearings presented an imminent risk to the health and safety of attendees.

Social Distancing Recommendation. The County Health Officer continues to recommend social distancing to reduce the risk of transmission of COVID-19. On September 28, 2021, the County Health Officials issued a social distancing recommendation entitled “HEALTH OFFICIALS AB 361 SOCIAL DISTANCE RECOMMENDATION.” (Attachment A.) This recommendation is still in effect.

Imminent Risk to Health & Safety of Attendees. The Commission previously relied on evidence cited in County Health Officer Order No. 2021-10.5, October 5, 2021 to determine that requiring in-person attendance at Commission hearings presented an imminent risk to the health and safety of attendees. The Order was primarily directed at requiring Face Covering of all individuals while at “Indoor Public Settings;” however, the evidence cited in the Order was found by the Commission to be sufficient to determine teleconferencing was warranted.

County Health Order No. 2021-10.5 was superseded and replaced by Order No. 2021-10.6, November 4, 2021. The new Order reaffirms previous orders; adding updated numbers regarding COVID-19 cases worldwide and in Santa Barbara County. The new Order can be found here: <https://publichealthsb.org/wp-content/uploads/2021/11/Health-Officer-Order-No.-2021-10.6-Signed.pdf>

30-Day Determination. It is noted that the Commission's determination is being made more than 30 days after teleconferencing was last authorized. This is not in strict compliance with Section 54953((e)(3), which requires "the legislative body *shall*, not later than 30 days after teleconferencing for the first time . . . and every 30 days thereafter . . ." make the required findings. Counsel's opinion is that use of the word "shall" in this context is "directory" rather than "mandatory." This distinction was observed by the United States Supreme Court in *Gutierrez De Martinez v. Lamagno*, (1995) 515 U.S. 417, 434 n.9, when the Court stated:

"Though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may.' See Mellinkoff's Dictionary of American Legal Usage 402-403 (1992) ('shall' and 'may' are 'frequently treated as synonyms' and their meaning depends on context); B. Garner, Dictionary of Modern Legal Usage (939 2d ed. 1995) ("[C]ourts in virtually every English-speaking jurisdiction have held - by necessity - that *shall* means *may* in some contexts, and vice versa.").

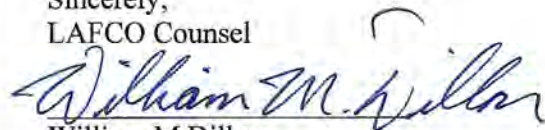
Designating a statute as "directory" or "mandatory" does not refer to whether a statutory requirement is permissive or obligatory; rather, it denotes whether failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action. (*City of Selma v. Fresno LAFCO* (2016) 1 Cal.App.5th 573, 584.) Failing to comply with a directory statutory timeline will not invalidate an action. (*Ibid.*)

Finding the AB 361 30-day provision to be directory is not inconsistent with the legislative findings, which mention but offer no rationale for the provision. Further, AB 361 does not apply the requirement to state agencies covered by the bill. Finally, finding the provision to be directory does not undermine the essential purpose of the urgency legislation, which is to allow legislative bodies to safely hold public meetings in a declared pandemic.

The practical problem many local legislative bodies are experiencing is they often meet monthly and, on a regular basis, more than 30 days will pass between regular meetings. If exceeding the 30-day timeline absolutely prohibited an agency from renewing the AB 361 teleconferencing, agencies would have to call special meetings in the interim for the sole purpose of revisiting the AB 361 determination. Or, if an agency for some reason cannot meet within 30 days of its last meeting, then the agency would be faced with the anomalous result of having to conduct an in-person meeting to determine if its meetings should be conducted via teleconferencing for safety reasons. Surely, this was not the intent of the legislature.

If the Commission approves the continuation of teleconferencing under AB 361, it will have adopted this interpretation of the statute. Please contact me if you have any questions.

Sincerely,
LAFCO Counsel



William M Dillon
Law Office of William Dillon

ATTACHMENT A



Public Health Administration

300 North San Antonio Road • Santa Barbara, CA 93110-1316
805/681-5100 • FAX 805/681-5191

Van Do-Reynoso, MPH, PhD Director
Suzanne Jacobson, CPA Chief Financial Officer
Paige Gatson, MA, PHN, RN Deputy Director
Darrin Eisenbarth Deputy Director
Dana Gamble, LCSW Interim Deputy Director
Polly Baldwin, MD, MPH Medical Director
Henning Ansorg, MD Health Officer


HEALTH OFFICIALS AB 361 SOCIAL DISTANCE RECOMMENDATION

Issued: September 28, 2021


COVID-19 disease prevention measures, endorsed by the Centers for Disease Control and Prevention, include vaccinations, facial coverings, increased indoor ventilation, handwashing, and physical distancing (particularly indoors).

Since March 2020, local legislative bodies-such as commissions, committees, boards, and councils- have successfully held public meetings with teleconferencing as authorized by Executive Orders issued by the Governor. Using technology to allow for virtual participation in public meetings is a social distancing measure that may help control transmission of the SARS-CoV-2 virus. Public meetings bring together many individuals (both vaccinated and potentially unvaccinated), from multiple households, in a single indoor space for an extended time. For those at increased risk for infection, or subject to an isolation or quarantine order, teleconferencing allows for full participation in public meetings, while protecting themselves and others from the COVID-19 virus.

Utilizing teleconferencing options for public meetings is an effective and recommended social distancing measure to facilitate participation in public affairs and encourage participants to protect themselves and others from the COVID-19 disease. This recommendation is further intended to satisfy the requirement of the Brown Act (specifically Gov't Code Section 54953(e)(1)(A)), which allows local legislative bodies in the County of Santa Barbara to use certain available teleconferencing options set forth in the Brown Act.



Henning Ansorg, MD
Public Health Officer
County of Santa Barbara



Van Do-Reynoso, MPH, PhD
Public Health Director
County of Santa Barbara