



DAVID CHIU
City Attorney

PAUL ZAREFSKY
Deputy City Attorney

Direct Dial: (415) 554-4652
Email: paul.zarefsky@sfcityattty.org

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: Paul Zarefsky
Jon Givner
Deputy City Attorneys

DATE: January 10, 2023

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

For close to three years, special rules necessitated by the COVID-19 public health emergency have governed the meetings of City policy bodies. That period appears to be soon coming to a close. The Governor has announced that the statewide emergency he declared on March 4, 2020 will end on February 28, 2023. We understand that the Mayor's orders regarding the conduct of meetings of policy bodies, issued under the mayoral declaration of emergency of February 25, 2020, will also end on that date.

The purpose of this memorandum is to set forth the general legal rules that will govern meetings of policy bodies – including decision-making boards and commissions as well as advisory bodies – beginning on March 1, 2023, after the statewide emergency ends and the mayoral orders regarding public meetings terminate. The key question is whether policy bodies can choose to continue to hold “remote” meetings, whether fully remote or hybrid. Generally, policy bodies will “go back to the future,” with the new rules being the same as the pre-COVID-19 emergency rules. But there are some important differences based in part on changes to state law, as we discuss below. We will monitor state legislation for further changes, if any, in state law, and update this memorandum if appropriate.

SUMMARY

The general rule: In-person physical presence required of members to attend meetings. Members of policy bodies must generally be physically present in the same location at meetings of the body. The Charter requires that members of decision-making policy bodies be physically present at a meeting to participate, vote, and count toward a quorum. The Administrative Code similarly requires members of purely advisory bodies established by ordinance to be physically present at meetings. Beginning in March 2020, the Mayor suspended those rules in emergency orders relating to the pandemic. But the Charter and Administrative Code “presence” requirement will become fully operative again on March 1, 2023 when the emergency orders terminate.

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 2

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

Narrow exceptions to the physical presence requirement. There are three situations in which a member of a policy body may be able to attend a meeting remotely starting March 1, 2023:

- ***Certain bodies, including subcommittees of policy bodies:*** The “presence” requirement in the Charter and Administrative Code applies to all policy bodies that are considered “units of government” or that have been established by legislative action (i.e., by Charter amendment, Board of Supervisors ordinance, or initiative ordinance). If a policy body is neither, its members may attend a meeting remotely, but such a meeting must comply with Brown Act requirements for teleconferencing discussed below. An example of such a body would be a committee of the larger policy body.
- ***Policy body members taking parental leave:*** The Charter and Administrative Code authorize members of policy bodies to attend meetings remotely based on the member’s pregnancy, their child’s birth, or a related condition, or certain child care responsibilities. But members who attend meetings remotely under this exception must also comply with Brown Act requirements for teleconferencing.
- ***Policy body members with a disability subject to a reasonable accommodation:*** If a member of a policy body has a disability under federal law (the Americans with Disabilities Act), and their disability limits or precludes their in-person attendance at meetings – for example, if their disability confines them to their residence – then the City must make a reasonable accommodation to allow the member to participate in meetings remotely. In that situation, both City and state restrictions on attendance via teleconferencing must give way to the City’s duty under federal law to reasonably accommodate the disabled member. To request a reasonable accommodation, a policy body member must submit a request in advance of the meeting to the Department of Human Resources (“DHR”) to make a determination. DHR’s determination will depend in part on whether the member’s disability restricts their ability to attend meetings in person, and whether other accommodations that include in-person attendance would be reasonable and appropriate under federal law. Unlike the first two exceptions, only some – not all – of the Brown Act requirements for teleconferencing would apply to this exception.

Restrictions on teleconferencing under the three exceptions. In the three circumstances described above where members may attend meetings remotely, state law, including recent amendments, sets certain rules governing remote attendance of policy body members at meetings.

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 3

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

- ***The first two exceptions:*** If City law allows a policy body member to attend a meeting remotely under either of the first two exceptions, then the member may attend meetings by teleconference in accordance with the Brown Act. But the Act's requirements are detailed and stringent. The Brown Act's longstanding teleconference provision, which requires public access to all teleconference locations, including a policy body member's home, is generally not well suited to remote attendance by members, especially those who want to attend meetings from their home. A new Brown Act teleconference provision, AB 2449, enacted in 2022, provides greater opportunities for remote attendance, but also with significant restrictions. Under AB 2449, remote attendance must be required due to "just cause" or "emergency circumstances," terms that are strictly defined in the statute. There are certain procedural steps required for a policy body member to invoke these justifications for remote attendance, and AB 2449 limits how often the member may invoke them. Further, AB 2449 requires the City to permit members of the public to attend the meeting remotely when a member of the policy body is attending remotely.
- ***The exception based on reasonable accommodation of a policy body member with a disability:*** When the City provides a reasonable accommodation allowing a member to join a meeting remotely, some of the requirements for remote attendance under AB 2449 would apply, particularly the requirement that the member remain visible on screen while at the meeting. Other requirements would not apply. For example, there is no limit on the number of meetings that a member with a disability may attend remotely, and no requirement that members of the public have the option to attend the meeting remotely. Further, there is a different process than under AB 2449 for determining the policy body member's entitlement to attend meetings remotely.

Remote Public Attendance and Public Comment. Where a member of a policy body attends meetings remotely under AB 2449, the policy body must allow members of the public to attend remotely and offer public comment remotely. Otherwise, there is neither a requirement for – nor a prohibition on – allowing members of the public to attend meetings of a policy body remotely, except to the extent that disability law in some cases may require such an accommodation for members of the public who are disabled. The Board of Supervisors (the "Board") could adopt an ordinance setting a Citywide policy regarding remote attendance by members of the public. In the absence of an ordinance, each policy body may adopt its own policy after considering the logistical and staffing implications, and any legal implications. We recommend that any policy body consult with their staff, the City Administrator, and the Department of Technology before deciding to allow remote public comment. In any event, each agenda for meetings in which members of the public may attend remotely should describe how

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 4

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

members of the public may make public comment, that is, here, whether they can make public comment remotely and if so how.

Other rules that will apply on March 1, 2023. With the termination of the Mayor's emergency orders regarding the conduct of meetings of policy bodies, the Charter and Administrative Code presence requirements will be reinstated, and various provisions of the Sunshine Ordinance that had been suspended will become operative again. Most notably, four Sunshine Ordinance rules will be reinstated beginning on March 1: 1) the requirement for 72 hours' notice before a special meeting of a policy body; 2) the requirement for 15 days' notice before a special meeting at a location other than the policy body's regular meeting location; 3) the requirement that public commenters on an agenda item receive equal time; and 4) rules regarding gatherings of passive meeting bodies.

DISCUSSION

1. The "presence" requirement in the Charter and Administrative Code generally bars members of policy bodies from attending meetings remotely.

The City Charter requires the "presence" of members of an appointive board, commission, or other unit of government to constitute a quorum and transact business at a public meeting, and imposes a separate but identical requirement for meetings of the Board. (Charter §§ 4.104(b), 2.104.) Charter Sections 4.104(c) and 2.104(a) provide an exception to the "presence" rule, authorizing such policy bodies and the Board to enact parental leave policies "including, but not limited to, authorization to participate in meetings by teleconferencing or other electronic means...."

This Office has long opined that "presence," as referenced in Charter Sections 4.104(b) and 2.104, means physical presence – which, in turn, means that members of the body must attend the meeting in the same room, subject to open meeting laws. Indeed, the sentences in Sections 4.104(b) and 2.104(a) permitting teleconferencing in circumstances relating to "pregnancy, childbirth, or related condition" and childcare "after birth of the child, or after placement of the child with the member or the member's immediate family for adoption or foster care," originated as exceptions to the longstanding presence requirement. Those sentences were added to the Charter with the voters' adoption of Proposition B at the November 7, 2006 election. As the Ballot Simplification Committee's Digest for Proposition B stated:

The City Charter does not permit members of the Board of Supervisors or members of other boards and commissions to participate in meetings by teleconference or by other electronic means. Members must be physically present at the meeting to participate.

(*Voter Information Pamphlet, Consolidated General Election, November 7, 2006*, at 107 (Ballot Type 34).) To the same effect is the Controller's Statement on Proposition B ("Currently the Board of Supervisors and other City boards and commissions can only meet in person."). (*Id.*)

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 5

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

Charter Section 4.104(b) applies to “unit[s] of government,” rather than to all policy bodies. Thus, to state Section 4.104(b)’s presence requirement more precisely, it precludes members of policy bodies that are units of government from participating in meetings through teleconferencing. As a general rule, for purposes of Section 4.104(b), decision-making boards and commissions are considered “units of government.” By contrast, purely advisory bodies are generally not considered “units of government.”

For purposes of this memorandum, the concept of a “purely” advisory body and its differences from other bodies that are units of government do not matter, because Section 1.29 of the Administrative Code also imposes a “presence” requirement regarding bodies, including advisory bodies, “created by legislative action,” and that requirement parallels Charter Section 4.104(b)’s “presence” requirement for units of government. Because the “presence” language in Administrative Code Section 1.29 parallels the language in Charter Section 4.104(b), it has the same meaning as the Charter language. The result is that members of policy bodies created by legislation must be physically present in the same location at meetings.

Thus, except in the limited circumstances discussed in points 2, 3, and 5 below, City law – the Charter and the Administrative Code – precludes members of the City’s many policy bodies from attending meetings remotely. If there is an interest in changing this general rule to provide greater opportunities for members of policy bodies to attend meetings remotely, that change must be done by Charter amendment, amendment of the Administrative Code, or possibly both, depending on the specifics of any such amendment.

2. Members of policy bodies that are not subject to the presence requirement in the Charter or Administrative Code may attend a meeting remotely, provided that the meeting complies with the Brown Act’s strict requirements for teleconferencing.

Some City policy bodies are not units of government and were not established by legislative action. Therefore, they are not subject to the presence requirement imposed by the Charter and Administrative Code respectively, and may attend meetings remotely to the extent permitted by the Brown Act (described in section 4, below).

The prime example of such a policy body is an advisory committee of a policy body, created by that parent policy body. Such a committee is typically not a unit of government, because its typical role is purely advisory. And it is not created by legislative action, within the meaning of Administrative Code Section 1.29, because it is created by the parent policy body, or possibly by the chair of the parent body on behalf of the body under its rules.

3. Policy body members taking parental leave may attend meetings remotely, but only in accordance with the Brown Act’s strict requirements for teleconferencing.

As stated in Charter Sections 2.104(a) and 4.104(b) and (c), members of a policy body may attend a meeting by teleconference as permitted by the Brown Act under an ordinance requiring that policy bodies adopt a parental leave policy. In 2021, the City implemented that provision by adopting Ordinance No. 156-21, adding Administrative Code Section 2.3 (pertaining to the Board) and Administrative Code Section 67B.1 (pertaining to boards,

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 6

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

commissions, and other multi-member units of government, as well as purely advisory policy bodies).

The teleconference provisions of Administrative Code Sections 2.3 and 67B.1 are identical:

- If the member is physically unable to fulfill their duties, including attending meetings of the body in person, due to the member's pregnancy, birth of a child, or related condition, as certified by a health care provider, the member is eligible for parental leave for a maximum of 32 weeks, or a lesser time if no longer eligible for parental leave on this basis. During the parental leave, the member may attend meetings by teleconference to the extent authorized by the Brown Act.
- If the member is absent to care for their child after birth of the child, or after placement of the child with the member or the member's immediate family for adoption or foster care, the member is eligible for parental leave for a maximum of 16 weeks, or a lesser time if no longer eligible for parental leave on this basis. During the parental leave, the member may attend meetings by teleconference, again to the extent authorized by the Brown Act.

Section 67B.1(h) provides that each policy body "shall amend its rules of order or other similar document to include the parental leave policy, and shall provide a copy to all [policy body] staff and newly-appointed [policy body] members." Failure to comply with this provision does not invalidate the teleconference options described above. Nevertheless, all policy bodies should take steps, if they haven't yet done so, to comply with this provision.

4. In the two circumstances described above where the presence requirement is not applicable, members of policy bodies may attend meetings by teleconference under the Brown Act, which provides two teleconference possibilities, including a new option suited to accommodate remote attendance, albeit with significant restrictions.

Once the Mayor has rescinded her emergency orders regarding the conduct of public meetings, the presence requirement under City law will be reinstated, with the result, as noted above, that almost all City policy bodies are no longer permitted to hold fully or partially remote meetings except in the two circumstances described above – and then only if the Brown Act allows remote attendance. Starting March 1, there will be two limited options under the Brown Act for policy body members to attend meetings remotely: the long-established process, codified at subsection (b) of Section 54953 of the California Government Code, and a new process, which is arguably less onerous but still very limited, codified at subsection (f) of Section 54953 (to be redesignated as subsection (e) on January 1, 2024).

Remote attendance under pre-pandemic rules. The long-established process for teleconferencing permitted by the Brown Act remains an option for members of City policy

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 7

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

bodies not subject to the presence requirement. The requirements for teleconferencing under this option are as follows:

- The meeting agenda must be posted at each teleconference location.
- The meeting agenda must identify each teleconference location.
- Each teleconference location must be accessible to the public.
- Members of the public must have an opportunity at each teleconference location to directly address members of the policy body.
- A quorum of the members of the policy body must participate in the meeting from teleconference locations within the jurisdiction.
- All votes taken must be by roll call.
- The technology used for the teleconference may be audio only, or both audio and visual.

As is apparent from the above description, this option does not allow for a policy body member's remote attendance, as has typically occurred during the COVID-19 emergency. For example, if a policy body member were to attend the meeting electronically from their home, the home address would have to be published on the agenda, the home would have to be accessible to disabled persons, and the public would be entitled to enter the home to observe the member at the meeting and offer public comment from that location. With rare exceptions, this option would not work during the COVID-19 emergency.

Remote attendance for just cause or emergency circumstances under AB 2449. The limitations of this long-established process for teleconferencing led the Legislature in 2022 to enact AB 2449, which provides for a second teleconference option under the Brown Act. This option allows for members of City policy bodies that are not subject to the presence requirement under City law to remotely attend meetings, without having to make the location from which they attend known or accessible to the public. But the option is limited to two situations, both of which are significantly circumscribed by regulation: "just cause" and "emergency circumstances." And because it applies only to bodies that are not subject to the presence requirement, it has limited scope in any event.

AB 2449 defines "just cause" exclusively to mean one of the following:

- A childcare or caregiving need of a child, parent, grandparent, grandchild, sibling, or spouse, as those terms are defined in California Government Code Section 12945.2, or domestic partner, that requires the policy body member to remotely attend the meeting.
- A contagious illness that prevents the member of the policy body from attending the meeting in person.

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 8

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

- A need related to a physical or mental disability as defined in California Government Code Sections 12926 and 12926.1, the state disability law, if not otherwise accommodated under federal disability law.
- Travel while on official business of the policy body or of another state or local agency.

(Cal. Gov. Code § 54953(j)(2).)

AB 2449 also restrictively defines “emergency circumstances,” exclusively to mean “a physical or family medical emergency that prevents a member from attending in person.” (Cal. Gov. Code § 54953(j)(1).)

Further, AB 2499 establishes specific procedural requirements regarding these two avenues for members to remotely attend policy body meetings. To teleconference on the basis of “just cause,” these requirements apply:

- A notice requirement: The member must notify the policy body as soon as possible, including at the start of a meeting, of their need to attend the meeting remotely, including a general description of the circumstances relating to the need.
- A frequency limit: The member may use this option no more than two meetings per calendar year.

(Cal. Gov. Code § 54953(f)(2)(A)(i).) And, to teleconference on the basis of “emergency circumstances,” these requirements apply:

- A request requirement: As soon as possible, the member must request approval of the policy body, and must make a separate request for each meeting in which remote attendance is sought.
- A notice requirement: The member must provide to the policy body a general description of the circumstances relating to the need to attend the meeting remotely; the description generally need not exceed 20 words and the policy body may not require the member to disclose any medical diagnosis or disability, or any personal medical information that is exempt under existing law.
- An approval requirement: The policy body must approve the request, and should approve it at the earliest opportunity; if the request does not allow sufficient time to place this proposed action on the meeting agenda, the policy body may take action at the beginning of the meeting.

(Cal. Gov. Code § 54953(f)(2)(A)(ii).)

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 9

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

In addition to these requirements, there are a host of requirements that apply regardless of whether the policy body member's remote attendance is based on "just cause" or "emergency circumstances":

- A policy body member may not attend meetings remotely for more than three consecutive months or more than 20% of the policy body's meetings during the calendar year (or more than two meetings during the calendar year if the policy body meets fewer than 10 times per calendar year).
- The policy body member must disclose at the meeting, before any action is taken, whether any other individual 18 years of age or older is in the room at the remote location with the member, and the general nature of the member's relationship with any such individual.
- The policy body member must attend the meeting through both audio and visual technology.
- At least a quorum of the members of the policy body must attend the meeting in person from a single physical location clearly identified on the agenda; the location must be open to the public and situated within the jurisdiction.

(Cal. Gov. Code §§ 54953(f)(1); 54953(f)(2)(B) and (C); 54953(f)(3).)

There is one final, and important, feature of that legal regime: the requirement that members of the public be able to attend the meeting remotely and offer public comment remotely whenever a member of the body is attending remotely under AB 2449. A number of provisions ensure this right, including most importantly:

- The policy body must provide either 1) a two-way audiovisual platform, or 2) a two-way telephonic service and a live webcasting of the meeting, so that the public may remotely hear and visually observe the meeting, and remotely address the policy body.
- In each instance in which notice of the time of the teleconferenced meeting is otherwise given or the agenda for the meeting is otherwise posted, the policy body must also give notice of the means by which members of the public may access the meeting and offer public comment.
- The agenda must identify and include an opportunity for all persons to attend and address the policy body directly 1) via a call-in option, 2) via an internet-based service option, and 3) at the in-person location of the meeting.

(Cal. Gov. Code §§ 54953(f)(1)(A), (B), and (C).) Other provisions of AB 2449 address other logistics implementing the right of the public to attend the meeting of the policy body remotely, and to offer public comment remotely. (Cal. Gov. Code §§ 54953(f)(1)(D), (E), and (F).)

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 10

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

In sum, because of all these requirements, this option under AB 2449 likely has very limited practical application.

Remote attendance based on the COVID-19 emergency. Finally, we note that for the last 15 months, City policy bodies have met remotely under a separate exception in the Brown Act – AB 361, the state law enacted in 2021 to permit remote attendance upon adoption of findings every 30 days regarding the COVID-19 emergency declared by the Governor. (California Government Code § 54953(e).) There is a question whether AB 361, standing alone, permits remote attendance at policy body meetings after the Governor’s state of emergency ends as of March 1. But in San Francisco, the presence requirement in the Charter and Administrative Code limits AB 361’s impact. And, even if AB 361 were interpreted to permit remote meetings after March 1, it would require policy bodies to make a finding that state or local officials continue to impose or recommend measures to promote social distancing. (California Government Code § 54953(e)(3).) While local and state health orders continue to recommend precautions like wearing a well-fitted mask to minimize the risk of COVID transmission, they do not require or recommend physical distancing. If policy body members have questions about the interpretation of AB 361, they should contact our Office.

5. Policy body members with a disability that precludes their attending meetings in person may attend meetings remotely, subject to requirements guaranteeing their full participation in the meeting and their visibility to the public.

Title II of the Americans With Disabilities Act (“ADA”) provides that “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” (42 U.S.C. § 12132.) Courts and administrative authorities typically treat membership on public bodies as covered by Title II. (*E.g.*, *Crawford v. Hinds Cty. Bd. of Supervisors*, 1 F.4th 371, 376 (5th Cir. 2021) (jury); *State v. Morrow* (Ct. Crim. App. Tenn. 1998) 1998 WL 917802 (grand jury); *Herschaff v. New York Bd. of Elections* (E.D.N.Y. 2001) 2001 WL 940923 (E.D.N.Y. Aug. 13, 2001), *aff’d sub nom. Herschaff v. New York Bd. of Elections*, 37 F. App’x 17 (2d Cir. 2002) (city council); *Silver v. City of Alexandria* (W.D. La. 2020) 470 F.Supp.3d 616 (same); *Hernandez v. Enfield Board of Education* (2022) 2022 WL4104037 (school board); *Chew v. Legislature of Idaho* (D. Idaho 2021) 512 F.Supp.3d 1124 (state legislature) *Opinion No. 7318*, 22 Mich. OAG (2022) 2022 WL412112 (boards and commissions generally).) See also 28 C.F.R. § 35.130(b)(1)(vi) (regulation of U.S. Attorney General listing as a violation of Title II “[d]eny[ing] a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards”).) Hence, disqualifying a person from attending and participating in meetings of a City policy body – in effect, disqualifying them from service on the body – because their disability precludes them from attending meetings in person, would come within the ambit of Title II’s provisions.

If a member of a policy body is disabled, and their disability precludes their in-person attendance at meetings of the body – threshold questions – the key question under Title II is whether remote attendance at a meeting of a policy body by a disabled member who cannot

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 11

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

attend the meeting in person because of their disability is a reasonable accommodation that would not fundamentally alter the member's role. The answer is yes. In enacting AB 2449, the Legislature determined that remote participation by policy body members in various circumstances constituting "just cause" or an "emergency" is compatible with their service on the policy body. It is now clear that remote attendance at policy body meetings by a member with a disability would not fundamentally alter the role of that policy body member.

More than 20 years ago, the California Attorney General addressed a similar question, and gave a different answer. In 2001, the Attorney General concluded that "[a] city is not required under the [ADA] to provide, as an accommodation for a disabled member of its city council or an advisory board who is unable to attend a regularly scheduled meeting of the council or board, a teleconferencing connection at the member's place of residence where members of the public would not be permitted to be present." (*Opinion No. 00-1210*, 84 Ops.Cal.Atty.Gen. 181, 2001 WL 1477931 at 1 (November 14, 2001).) But Attorney General opinions are not binding on the courts, and in any event changed circumstances and changes in the law make the analysis in that opinion obsolete.

Technology has advanced to facilitate remote attendance by policy body members at meetings in which members attending remotely are readily visible to the public. And many remote policy body meetings, whether fully remote or hybrid, have occurred during the COVID-19 emergency, with rights of the public to observe the meeting and offer public comment scrupulously honored. Of greatest importance, the law has fundamentally changed since the Attorney General Opinion was issued in 2001. At that time, no provision of the Brown Act authorized a policy body member to attend a meeting remotely; even the Act's teleconference provisions required the policy body member to physically attend the meeting, in full view of the public, in person, just at a different location than where other members of the body were attending the meeting. AB 2449 has changed that.

The final question is what specific accommodations for the disabled policy member are reasonable. Stated another way, what requirements must the member satisfy to attend remotely rather than attending a meeting in person? It is reasonable to require the policy body member to attend the meeting remotely through both audio and video technology, to guarantee that the member may fully interact with other members of the body, be fully visible to them and the public, and be able to hear public comment. It is also reasonable to require, consistent with AB 2449, that the policy body member disclose at the meeting, before any action is taken, whether any other individual 18 years of age or older is in the room at the remote location with the member, and the general nature of the member's relationship with any such individual. But most if not all of the other requirements imposed by AB 2449 are not reasonable in this context, including, for example, the limitation on frequency of meetings that may be attended remotely, and the requirement that members of the public be allowed to attend meetings remotely.

To ensure fair and uniform treatment of accommodation requests from disabled members of policy bodies, DHR will process and resolve such requests, including determinations whether a policy body member is disabled, whether their disability precludes their in-person attendance at

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 12

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

meetings, and what is a reasonable accommodation of their disability. Not every policy body member with a disability is necessarily legally entitled to the accommodation of attending meetings remotely. DHR's analysis will depend in part on whether the member's disability restricts their ability to attend meetings in person, and whether other accommodations that include in-person attendance are reasonable and appropriate under federal law. In making these determinations, DHR may consult, as it deems appropriate, with the Mayor's Office on Disability, the City Attorney's Office, and other appropriate City officials or departments.

6. Policy bodies are not required to allow remote attendance and remote public comment by members of the public at meetings, except where their remote attendance is required under AB 2449, or where it may be required in certain circumstances to reasonably accommodate a request by a member of the public who is unable to attend a meeting in person due to a disability.

With the two caveats stated below, there is not a legal requirement that the City allow members of the public to attend meetings of a policy body remotely and to provide remote public comment. We recommend that any policy body consult with their staff, the City Administrator, and the Department of Technology before deciding to allow remote public comment, when not required by law.

The first caveat is that, as has been discussed in this memorandum, where a member of a policy body is attending a meeting remotely in accordance with AB 2449, there are corresponding requirements that members of the public be permitted to attend remotely and offer public comment remotely.

The second caveat is more complicated. The Brown Act requires that each policy body have a procedure for receiving and swiftly resolving requests for reasonable accommodation for persons with disabilities consistent with the ADA, and, further, that the policy body "resolv[e] any doubt in favor of accessibility." (Cal. Gov. Code § 54953(g).) There is an associated notice requirement: in each instance in which notice of the time of the meeting is otherwise given or the agenda for the meeting is otherwise posted, the policy body must also give notice of the procedure for receiving and resolving requests for accommodation. (*Id.*)

But it may not always be obvious what constitutes a reasonable accommodation of the person's disability. There may be significant costs and administrative disruptions involved in potential accommodations; and there may be a range of means by which a member of the public could attend a policy body meeting remotely. The City should address requests for accommodation on a case-by-case basis rather than apply hard-and-fast rules that may not be well calibrated to individual situations. If a policy body receives an accommodation request from a member of the public seeking to attend a meeting and comment remotely and has questions about how to handle that situation, we recommend that the body confer with the City Attorney's Office and, if necessary, the Mayor's Office on Disability.

Subject to the above caveats, the Board could adopt an ordinance setting a Citywide policy regarding remote attendance and public comment. In the absence of an ordinance, each policy body may adopt its own policy after considering the logistical and staffing implications,

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 13

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

and consulting with this Office on any legal concerns. If remote attendance and remote public comment are permitted, each meeting agenda should describe how members of the public may access the meeting remotely and make public comment remotely.

7. Other rules regarding public meetings and gatherings of passive meeting bodies will become operative again beginning on March 1.

During the course of the COVID-19 emergency, the Mayor imposed numerous rules regarding meetings of policy bodies. Some of them have expired. But some remain. When the Mayor terminates her emergency orders regarding public meetings, those, too, will expire, and several additional rules regarding public meetings will become operative again. Most notably, as this memorandum has indicated, the presence requirement imposed by the Charter and Administrative Code will be reinstated, restricting the ability of members of policy bodies to attend meetings remotely except in limited circumstances. In addition, these provisions of the Sunshine Ordinance will be reinstated:

- 72 hours' notice for special meetings: The requirement that there be 72 hours' notice and posting of the agenda for special meetings will be reinstated. (Administrative Code § 67.6(f).) The Mayor had suspended this rule, with the result that the Brown Act requirement of 24 hours' notice for special meetings applied by default.
- 15 days' notice for off-site special meetings: The requirement that there be 15 days' notice of a special meeting to be held at a location other than the policy body's regular meeting location will be reinstated. (Administrative Code § 67.6(f).) The Mayor had suspended this rule, with the result that there was no added notice requirement for this type of special meeting.
- Equal public comment time: The requirement that members of the public have equal time to comment on an agenda item will be reinstated. (Administrative Code § 67.15(c).) The Mayor had suspended this rule, subject to the proviso that any departure from the rule not be intended to favor or discriminate against a particular viewpoint. Absent the rule, policy bodies had somewhat greater flexibility in managing public comment.
- Passive meeting body rules: The Sunshine Ordinance 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. (Administrative Code §§ 67.3(c), 67.4.) These rules will be reinstated, including the requirement that gatherings of passive meeting bodies occur in a physical space. (Administrative Code § 67.4(a) (references to "facilities in which [gatherings] occur" and "space

MEMORANDUM

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

DATE: January 10, 2023

PAGE: 14

RE: Legal Rules Governing Remote Participation by Members of Policy Bodies in Meetings Beginning March 1, 2023

available ... consistent with legal and practical restrictions on occupancy”).) The Mayor had suspended the passive meeting body rules, with the result that passive meeting bodies could essentially set their own rules. The rules regarding passive meetings are discussed in more detail in Part III, Section V(H) of the City Attorney’s Good Government Guide.

* * * *

In this memorandum we provide general advice and guidance for all City policy bodies. There are many such bodies, and many differences among them, in terms of powers, functions, composition, and customary meetings practices, among other things. It is possible – indeed likely – that as the City transitions to the meetings rules for policy bodies that will apply starting March 1, 2023, specific questions will arise that are not addressed here, or special circumstances involving particular policy bodies or their members may warrant more of an in-depth look at an issue that is addressed in general terms here. When questions arise, we encourage policy bodies to contact their assigned Deputy City Attorney for further advice and guidance on legal issues; and if it is unclear whether an issue has a legal component, we advise erring on the side of caution and contacting the attorney. In addition, the Good Government Guide, which we are in the process of updating, offers useful guidance on many of the legal questions that arise regarding meetings of policy bodies.

cc: Carol Isen, Director of Human Resources