COUNCIL AGENDA: 9/27/2022
FILE NO: 22-1170
ITEM: 2.7

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: TONI J. TABER, CMC CITY CLERK

SUBJECT: **SEE BELOW**

DATE: September 23, 2022

SUBJECT: Extension of AB 361 to Allow Teleconferenced Public Meetings and Modified COVID Sunshine Resolution and Procedures to Continue through October 27, 2022 during the Governor's Proclaimed COVID State of Emergency.

RECOMMENDATION

Adopt a resolution finding the continued existence of the need to extend AB 361 implementation and amending the City's Consolidated Open Government and Ethics (Sunshine) Resolution No. 77135 to incorporate the Governor's proclaimed COVID state of emergency to allow City legislative bodies and Joint Power Authority legislative bodies for which the City serves as lead staffing agency to hold public meetings solely by teleconference or otherwise electronically pursuant to AB 361; to modify agenda noticing and document posting; and to incorporate all future Governor's Executive Orders regarding the Brown Act into the City's open government procedures, as deemed appropriate by the City Clerk and City Manager, without further Council action.

OUTCOME

By adopting the attached resolution, effective immediately, the City Council incorporates provisions from AB 361 allowing for meetings of Joint Power Authority legislative bodies for which the City serves as lead staffing agency and City legislative bodies, including City Council, Council Committees, City Decision-Making Bodies, City Boards, Committees and Commissions, and City Other Advisory Entities, to hold meetings via video teleconference, and continues modified COVID Sunshine procedures through October 27, 2022 due to the proclaimed COVID state of emergency.

BACKGROUND

On September 17, 2021, Governor Newsom signed AB 361 amending Government Code Section 54953 to allow a local agency to use teleconferencing for public meetings without requiring the teleconference location to be accessible to the public or a quorum of the members of the legislative body of the agency to participate from locations within the boundaries of the agency's jurisdiction during a Governor-proclaimed state of emergency as long as the legislative body finds that 1) meeting in person would present imminent risks to the health or safety of attendees, or 2) state or local officials have imposed or recommended measures to promote social

distancing. In such circumstances, a legislative body is not required to make available a physical location from which members of the public may observe the meeting and offer public comment.

Since September 28, 2021, and effective through July 28, 2022, and starting again on August 9, 2022, the City Council adopted Resolution Nos. 80237, 80266, 80290, 80323, 80343, 80363, 80400, 80445, 80481, 80507, 80576, 80609, 80628, and 80659, amending the City's Consolidated Open Government and Ethics Resolution No. 77135 to incorporate the Governor's proclaimed COVID state of emergency to allow all City legislative bodies to hold public meetings solely by teleconference or otherwise electronically pursuant to AB 361; to modify agenda noticing and document posting; and to incorporate all future Governor's Executive Orders regarding the Brown Act into the City's open government procedures, as deemed appropriate by the City Clerk and City Manager, without further Council action.

Additionally, because the City's Modified COVID Sunshine Resolution No. 79485 for the placement of Council agenda items after Rules Committee was only in effect while social distancing is recommended or imposed, staff recommends that the substance of that resolution stay in effect during the Governor's proclaimed COVID state of emergency.

The City-wide AB 361 Resolution allowing all City legislative bodies to have teleconferenced meetings will expire on September 29, 2022. Therefore, this action is needed to be adopted by majority vote to allow members of City legislative bodies to attend via teleconference without posting the locations of each member's teleconferenced location on the posted agenda.

ANALYSIS

AB 361, an urgency measure that was effective October 1, 2021, amended Government Code Section 54953 to allow a local agency to use teleconferencing for public meetings without requiring the teleconference location (physical location of a participating member) be accessible to the public or a quorum of the members of the legislative body of the agency participate from locations within the boundaries of the agency's jurisdiction in the following circumstances:

- The legislative body holds a meeting during a proclaimed state of emergency, and state or local officials have imposed or recommended measures to promote social distancing.
- The legislative body holds a meeting during a proclaimed state of emergency to determine, by majority vote, whether as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees; or
- The legislative body holds a meeting during a proclaimed state of emergency and has determined, by majority vote, as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees.

The legislative body must make certain findings by majority vote every 30 days to continue using the relaxed Brown Act teleconferencing requirements. Because the City Council approved

Resolution No. 80659 on August 30, 2022, the next Council meeting in order to extend is September 27, 2022. Failure to approve this extension would result in Boards, Commissions, Other Advisory Entities, and Joint Power Authority legislative bodies for which the City serves as lead staffing agency being unable to meet fully virtual without exposing the locations of each member's teleconferenced location on the posted agendas.

An additional provision of AB 361 states that in the event of a disruption that prevents the local agency from broadcasting the remote meeting, or in the event of a disruption within the local agency's control that prevents members of the public from offering public comments using the call-in option or internet-based service option, the legislative body is prohibited from taking any further action on items appearing on the meeting agenda until public access to the meeting via the call-in or internet-based options is restored.

These new provisions are only operative until January 1, 2024, at which point they are repealed, and the standard Brown Act teleconferencing requirements become effective again.

Beginning on March 10, 2020 and continuing every 60 days thereafter, most recently Resolution No. 80180 adopted on August 17, 2021, and Resolution No. 80262 adopted on October 19, 2021, the City Council has continued its proclamation of local emergency based on substantial evidence that the public interest and necessity require the continuance of the proclamation of local emergency related to COVID-19.

Since September 21, 2021, "in light of the continued state of emergency related to COVID-19, the [Santa Clara] County Public Health Officer continues to recommend that public bodies meet remotely to the extent possible, specifically including use of newly enacted AB 361 to maintain remote meetings under the Ralph M. Brown Act and similar laws."[1]

Effective May 6, 2022, due to an increase in positive COVID-19 cases in the City employee workforce and local community, the City reinstated the mandatory mask mandate for all City employees. Since May 9, 2022, the Santa Clara County Superior Court has had in effect a General Order reiterating and emphasizing that all persons, including Court staff and judicial officers, must wear a proper face covering in all areas of the court open to the public, or when members of the public are present. On May 13, 2022, Bay Area health officers from the counties of Alameda, Contra Costa, Marin, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, Sonoma and the City of Berkeley urged residents to wear face masks in indoor public settings as COVID-19 infections driven by highly contagious virus variants multiply throughout the region. Since June 28, 2022, California's COVID-19 positivity rate has continued to climb, surpassing anything the state has seen this year, as new, more transmissible variants grow throughout the state. The fast-spreading omicron subvariants BA.4 and BA.5 can partially evade immunity and are 10% more transmissible than the earlier BA.2 subtype. As of July 6, 2022, the entire nine-county Bay Area is at the high community risk level for COVID-19

[1] "Recommendation Regarding Continued Remote Public Meetings of Governmental Entities," (County of Santa Clara Public Health Department, Issued by Health Officer Sept. 21, 2021, *available at* https://covid19.sccgov.org/sites/g/files/exjcpb766/files/documents/health-officer-recommendation-re-public-governmental-meetings-09-21-21.pdf.

at which federal regulators recommend everyone wear face masks indoors as newer and more immunity-evasive versions of the omicron variant spread. Bay Area health officials said infections remain at February 2022 elevated levels with no signs of declining, with COVID hospitalizations including significant numbers admitted for other health issues whose COVID infections were found through routine screening tests. As of July 17, 2022, COVID hospitalizations have more than quadrupled in the past three months, up to 4,432 patients from a low of 949 on April 16. On July 28, 2022, Bay Area Rapid Transit reinstated its mask mandate effective immediately through October 1, 2022.

As of August 1, 2022, data from California's public health department show that in the first three weeks of July, there were more than 50,000 documented reinfections, accounting for 1 in 7 (14%) of new COVID cases. As of August 3, 2022, the Centers for Disease Control and Prevention reported that nationwide, only 4% of the 19 million U.S. children under age 5 have received a first dose of the Pfizer or Moderna vaccines since the agency recommended the shots on June 18. As of August 5, 2022, data from California's public health department show that California crossed over 10 million official COVID cases, but there have been likely 44.6 million to 52 million unofficial COVID cases since early 2020 due to undercount with many positive at-home test results going unreported. As of August 10, 2022, while COVID-19 death rates have fallen consistently over the last two and a half years, COVID-19 is still about three times deadlier than official flu rates and COVID-19 is the third-leading cause of death in the U.S. this year. On August 11, 2022, the Centers for Disease Control and Prevention streamlined its guidance for COVID exposure to recommending that everyone, regardless of vaccination or past infection, wear a high-quality mask for 10 days and get tested on day five after exposure to the virus. As of August 24, 2022, as California schools reopen for the fall semester with loosened COVID-19 protocols and low student vaccination rates among younger children, health experts are watching to see how schools do in the coming weeks as some experts expect another rise in cases when winter arrives.

On August 31, 2022, the U.S. Food and Drug Administration authorized Moderna (for individuals 18 years of age and older) and Pfizer-BioNTech (for individuals 12 years of age and older) Bivalent COVID-19 vaccines for use as a single booster dose at least two months following primary or booster vaccination. As of September 5, 2022, COVID-19 transmission rates remain high throughout the Bay Area and 89% of U.S. counties, according to the Centers for Disease Control and Prevention, though community risk levels reflecting the virus' burden on hospitals have fallen to low levels in the Bay Area's largest counties. On September 10, 2022, as COVID-19 positive cases trended downward in Santa Clara County and among City of San Jose employees, and COVID-19 related hospitalizations remained relatively low and stable, the City lifted its mandatory masking requirement to only strongly recommending that employees continue to wear masks in all indoor public spaces. As of September 15, 2022, Moderna's bivalent booster supply had been temporarily delayed to nonprofit and private pharmacies like Kaiser, CVS and Safeway which are directly supplied by the federal government, while Santa Clara County's health system had supplies available in part because they are supplied by both the state and federal governments. As of September 20, 2022, a new more transmissible COVID strain, BF.7, short for BA.5.2.1.7, is outpacing nearly all other variants of interest that scientists are tracking in the U.S. this fall. On September 22, 2022, BART's Board of Directors voted to

end its mandatory face covering policy effective October 1, 2022 and authorized its general manager with future masking authority upon certain conditions being met, including COVID-19 cases surging locally or nationwide, or if mask mandates are reinstated in any of the give Bay Area counties in which BART operates. As of September 22, 2022, although daily death rates from COVID-19 have ticked down slightly from August, updated federal data shows that the U.S. is still losing on average 350 Americans to COVID-19 every day, and 225,000 people in the U.S. have been lost to the virus since the start of 2022. As of September 23, 2022, COVID-19 cases and hospitalizations are increasing in Northern Europe where colder and wetter weather is first being felt, with Belgium's health authority saying its modeling points to a new COVID-19 wave hitting in mid-October, though data published that same day suggests the first ripples of this wave have already arrived.

These associated emergency conditions are on-going and there is a need to continue teleconferencing for public meetings without posting the teleconferencing locations on the agenda and without requiring the teleconference locations to be accessible to the public during the current Governor-proclaimed COVID-19 state of emergency. The state of emergency continues to directly impact the ability of members of the City Council, Council Committees, City Decision-Making Bodies, City Boards, Committees and Commissions, City Other Advisory Entities, and Joint Power Authority legislative bodies for which the City serves as lead staffing agency to meet safely in person. City officials continue to impose or recommend measures to promote social distancing in City facilities, and meeting in person would present imminent risks to the health and safety of attendees due to COVID-19.

EVALUATION AND FOLLOW-UP

Approval of this resolution allows the Joint Power Authority legislative bodies for which the City serves as lead staffing agency, City of San José's City Council, Council Committees, City Decision-Making Bodies, City Boards, Committees and Commissions, and City Other Advisory Entities to meet virtually through the COVID-19 state of emergency as declared by the Governor, provided the public has the ability to participate virtually, and the City Council adopts a resolution every 30 days to continue using the relaxed Brown Act teleconferencing requirements. City staff recommends moving forward with Joint Power Authority legislative bodies for which the City serves as lead staffing agency, City Decision-Making Bodies, City Boards, Committees and Commissions, and City Other Advisory Entities remaining fully virtual, with City Council and Council Committee meetings continuing with the hybrid meetings. Recognizing the health risks posed to our immunocompromised officials should the state emergency declaration expire before the spread of COVID-19 is significantly controlled, staff will continue legislative advocacy efforts to extend the remote meeting exemption for immunocompromised individuals beyond the expiration of a statewide emergency declaration.

PUBLIC OUTREACH

This memo and resolution will be posted with the agenda for September 27, 2022.

COORDINATION

Preparation of this report has been coordinated with the City Attorney's Office and City Manager's Office.

CLIMATE SMART SAN JOSE

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

COMMISSION RECOMMENDATION/INPUT

No commission recommendation or input is associated with this action.

COST SUMMARY/IMPLICATIONS

Approval of this resolution may result in a small cost savings from staff and equipment required for in person hybrid meetings.

CEQA

Not a Project, File No. PP17-010, City Organizational and Administrative Activities resulting in no changes to the physical environment

TONI J. TABER, CMC
City Clerk

If you have any questions, please contact the Office of the City Clerk at 408-535-1260.