

RESOLUTION NO. _____

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE FINDING THE CONTINUED EXISTENCE OF THE NEED TO EXTEND AB 361 IMPLEMENTATION AND AMENDING THE CITY'S CONSOLIDATED OPEN GOVERNMENT AND ETHICS RESOLUTION NO. 77135 TO INCORPORATE THE GOVERNOR'S PROCLAIMED COVID STATE OF EMERGENCY TO ALLOW CITY LEGISLATIVE BODIES AND JOINT POWERS 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

WHEREAS, the Ralph M. Brown Act (California Government Code Sections 54950, et seq., hereinafter referred to as the "Brown Act") requires that public meeting agendas be posted at least 72 hours prior to a regular meeting and at least 24 hours prior to a special meeting; and

WHEREAS, on August 26, 2014, the Council of the City of San José ("City") adopted Resolution No. 77135 consolidating Open Government and Ethics Provisions, which imposes additional public meeting and document noticing requirements than those imposed by the Brown Act; and

WHEREAS, the Brown Act allows a local legislative body to hold public meetings by teleconference and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to attend and to address the local legislative body, as long as the following requirements are met: (1) each teleconference location from which a member is participating is noticed on the agenda; (2) each

teleconference location is accessible to the public; (3) members of the public must be able to address the body at each teleconference location; (4) at least one member of the legislative body must be physically present at the location specified in the meeting agenda; and (5) during teleconference meetings, at least a quorum of the members of the local body must participate from locations within the local body's territorial jurisdiction; and

WHEREAS, on March 17, 2020, Governor Gavin Newsom issued Executive Order N-29-20 which suspended the Brown Act teleconferencing requirements so that legislative bodies can hold public meetings solely by teleconference, or otherwise electronically, without listing the teleconference locations and without any physical location, as long as the agenda that is posted 72 hours in advance indicates that the members of the legislative body will be participating by teleconference, provides the teleconference or webinar access information by which the public may participate electronically, and lists the procedure for individuals with disabilities to request reasonable accommodations; and

WHEREAS, on April 21, 2020, the City Council, by Resolution No. 79485, incorporated Executive Order N-29-20 into the City's Consolidated Open Government and Ethics (Sunshine) Resolution No. 77135 to allow the City to utilize the suspension of the Brown Act teleconferencing requirements in Executive Order N-29-20; incorporated all future Governor's Executive Orders regarding the Brown Act into the City's Sunshine procedures, as deemed appropriate by the City Clerk and City Manager, without further action from the City Council; allowed public meeting agendas to be posted 72 hours prior to a regular meeting and at least 24 hours prior to a special meeting; allowed documents related to COVID-19, as determined by the City Manager and City Clerk, such as staff reports, ordinances and resolutions, to not be required to be posted 72 hours in advance of the meeting; allowed documents not related to COVID-19, as determined by the City Manager and City Clerk, to be posted at least 72 hours prior to a regular meeting and at least 24 hours prior to a special meeting; allowed only the City

Manager to place an item on the City Council Agenda after the Rules and Open Government Committee meeting, but at least 72 hours prior to the meeting, in compliance with a two-thirds (2/3) vote of Council to add items after Rules; and allowed the Mayor and Councilmembers to place an item on the City Council Agenda after the Rules and Open Government Committee meeting, but at least 72 hours prior to the meeting, if the Mayor, City Manager and City Attorney concur that the item requires immediate action, and Council authorizes its addition by a two-thirds vote; to be in effect while state or local public officials impose or recommend measures to promote social distancing; and

WHEREAS, on June 11, 2021, the Governor issued Executive Order N-08-21, which sunset the Brown Act provisions of Executive Order N-29-20 on September 30, 2021; and

WHEREAS, on September 17, 2021, Governor Newsom signed urgency ordinance AB 361 allowing a local agency to use 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 a Governor-proclaimed state of emergency pursuant to California Government Code Section 8625 et seq, if the state of emergency continues to directly impact the ability of the members of its legislative bodies to meet safely in person or state or local officials continue to impose or recommend measures to promote social distancing; and

WHEREAS, the City Council has made findings, beginning on March 10, 2020 and continuing every 60 days thereafter, most recently by Resolution No. 80262 adopted on October 19, 2021, for the continued 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; and

WHEREAS, Resolution No. 80262 continued the proclamation of local emergency until such time as conditions warrant termination of the local emergency by the City Council, in accordance with the Gubernatorial Declaration of Emergency that waived the 60-day renewal requirement under Government Code Section 8630(c); and

WHEREAS, the San José-Santa Clara Clean Water Financing Authority, a Joint Powers Authority for which the City serves as lead staffing agency, has adopted a Resolution to hold Public Meetings Solely by Teleconference or Otherwise Electronically Pursuant to AB 361 and Delegate the Declaration of Emergency to the San José City Council to adopt the ongoing emergency declarations as it does for all other San José Council Committees, Decision-Making Bodies, Boards, Committees, and Commissions, and Other Advisory Entities; and

WHEREAS, 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;” and

WHEREAS, on August 9, 2022, August 30, 2022, September 27, 2022, October 25, 2022, November 15, 2022, and December 13, 2022, the City Council adopted Resolution Nos. 80628, 80659, 80685, 80724, 80758, and 80809, respectively, amending Resolution No. 77135 to incorporate the Governor’s proclaimed COVID state of emergency to allow City legislative bodies to hold public meetings solely by teleconference or otherwise electronically pursuant to AB361, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, as of July 6, 2022, the entire nine-county Bay Area is at the high community risk level for COVID-19 at which federal regulators recommend everyone wear face masks indoors as newer and more immunity-evasive versions of the omicron variant spread; in addition, 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; and

WHEREAS, 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; and

WHEREAS, on July 28, 2022, Bay Area Rapid Transit reinstated its mask mandate effective immediately through October 1, 2022, which impacts the system's 50 stations in five Bay Area counties; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, 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 five Bay Area counties in which BART operates; and

WHEREAS, 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; and

WHEREAS, 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; and

WHEREAS, on September 26, 2022, and effective immediately, the Santa Clara County Superior Court rescinded its General Order requiring face coverings in courthouses, leaving to judicial officers the discretion in their individual courtrooms to require the use of face coverings and to allow persons to remove their own face coverings for periods of time to ensure the court reporter and/or electronic recording device can clearly report or record the proceedings and any other communication that occurs in the courtroom; and

WHEREAS, on September 29, 2022, and effective immediately, Governor Newsom signed AB 152 extending the requirement for all California employers with more than 25 employees to provide COVID-19 Supplemental Paid Sick Leave through December 31, 2022; and

WHEREAS, as of October 17, 2022, in Santa Clara County, only 12% of eligible people have received the updated booster since it was first offered in early September to fight the highly transmissible omicron variants leading to public health official fears of a winter surge with lagging booster vaccination rates and Santa Clara County Public Health Director Dr. Sara Cody urging residents to get an updated COVID-19 booster update if they are eligible to do so as the holiday season approaches; and

WHEREAS, as of October 25, 2022, a tripledemic comprising of the flu, coronavirus, and Respiratory Syncytial Virus (RSV) is putting some U.S. hospitals in crisis mode due to running out of pediatric Emergency Room beds; and

WHEREAS, as of November 8, 2022, an expansive new study shows that people who took the antiviral drug Paxlovid soon after infection can prevent disabling Long COVID, including fatigue, brain fog, or cardiac symptoms, with 26% less likely to have symptoms, but not enough patients were taking it due to physicians not prescribing the medication and too much media focus on the caveats and concerns of the medication; and

WHEREAS, as of November 10, 2022, the United States is heading into its third COVID-19 winter without some of the tools it has relied on in prior points in the pandemic, such as free at-home tests, and free COVID-19 vaccines and treatments will stop sometime in 2023; and

WHEREAS, as of November 10, 2022, with U.S. hospitals overwhelmed by the tripledemic comprising of the flu, coronavirus, and Respiratory Syncytial Virus (RSV), officials in some areas are launching drive-through testing sites for all three illnesses; and

WHEREAS, as of November 21, 2022, according to California Health and Human Services Secretary Dr. Mark Ghaly, transmission of the flu, COVID-19 and RSV have

been increasing statewide simultaneously, with COVID test positivity and case rates climbing by roughly 25 percent over the prior two weeks with evidence of increased transmission in the state's wastewater systems; and

WHEREAS, as of November 29, 2022, Bay Area hospitals have 613 patients with confirmed COVID-19, marking the first time since August that the figure topped 600, according to state data, with San Francisco, Marin, Sonoma, Alameda and Santa Clara counties reporting the steepest rises in hospitalizations; in addition, according to an analysis conducted by the Kaiser Family Foundation, most COVID deaths now occur in vaccinated people, highlighting the need to get regular booster shots to keep one's risk of death from the coronavirus low, especially for the elderly; and

WHEREAS, COVID infections and hospitalizations are increasing in the wake of the Thanksgiving holiday and U.S. health officials are strongly encouraging everyone who is eligible to get vaccinated against COVID and the flu as respiratory viruses surge this season, putting strain on hospital emergency departments; and

WHEREAS, at a December 6, 2022 briefing, Santa Clara County Public Health Officer Dr. Sara Cody stated that COVID numbers are "skyrocketing" in Santa Clara County wastewater and RSV is filling up pediatric beds with only two available pediatric intensive care beds and only six available pediatric hospital beds in Santa Clara County; and

WHEREAS, as of December 7, 2022, as COVID-19, flu and RSV cases rise heading into winter, parents are having a difficult time treating their children at home as over-the-counter medications become harder to find on store shelves; and

WHEREAS, on December 8, 2022, the Food and Drug Administration authorized COVID-19 vaccine boosters that target the Omicron variant for children as young as six months old; and

WHEREAS, on December 9, 2022, much of California, including the entire Bay Area, the Central Valley, and Southern California, entered the CDC's high transmission level for COVID-19, and Santa Clara County, San Benito County and Santa Cruz County reached the high community risk level, which reflects the COVID-19 impact on local hospitals; California's COVID hospitalizations have reached the peak seen over the summer, but case counts are not capturing the current spike because so many are testing at home; and

WHEREAS, as of December 13, 2022, Santa Clara County, Alameda County, Contra Costa County, Solano County and Napa County, require masks for jails, prisons, detention centers, homeless or emergency shelters, and cold-weather shelters, because those counties have reached the CDC medium or high community risk level, at which state law requires masks in such high-risk settings; and

WHEREAS, on December 14, 2022, Bay Area hospitals are dealing with the third largest wave of COVID positive patients (940), with the flu and RSV adding to surges at medical facilities; and

WHEREAS, as of December 23, 2022, COVID-19 cases and deaths are at a fraction of the levels seen around the same time in 2020 and 2021; and

WHEREAS, as of January 5, 2023, due to the surge of COVID-19 cases in China, the United States will require all travelers from China to show a negative COVID-19 test result before flying to the United States, and passengers flying to the U.S. from China will need to present proof of a negative COVID-19 test taken less than two days before flying; and

WHEREAS, on January 5, 2023, the World Health Organization is warning that a new Omicron subvariant known as XBB.1.5 is the most transmissible strain to date, making up about 75% of new cases in the Northeast United States; preliminary research

indicates that this new subvariant may be more immune evasive and contagious than previous Omicron variants; and

WHEREAS, Government Code Section 54953(e)(3) requires that the City Council review the need and make findings for continuing the teleconferencing without complying with the agenda posting and public comment requirements at least once every thirty (30) days until the Governor terminates the state of emergency; and

WHEREAS, the associated emergency conditions are on-going and there is a need to implement 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 and if approved, will be in effect for 30 days and will expire on February 9, 2023 unless staff returns to City Council on or before February 7, 2023 to request to continue the need for teleconferencing;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

1. The City Council hereby finds that the state of emergency conditions related to COVID-19, as set forth in Resolution No. 80262 adopted on October 19, 2021 and incorporated herein by reference, are on-going.
2. The City Council finds that there is a need to implement 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.
3. The City Council finds that the state of emergency continues to directly impact the ability of members of the City's 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.

4. City officials continue to 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.
5. 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, are authorized to use teleconferencing, or other electronic means, to hold its public meetings without noticing the teleconferenced locations on the agenda, without making teleconferenced or physical locations accessible to the public, without posting agendas at teleconferenced locations, without requiring members of the legislative bodies to be physically present at the meeting, and without requiring a quorum of the members of the legislative body to participate from locations with the City's jurisdiction, as long as the agenda that is posted at least 72 hours in advance indicates that members of the legislative body may be participating electronically, provides the teleconference or webinar access information by which the public may participate electronically, and lists the procedure for individuals with disabilities to request reasonable accommodations, in compliance with AB 361, Government Code Section 54953(e).
6. The City's Sunshine procedures are amended to incorporate all future Governor's Executive Orders regarding the Brown Act, as deemed appropriate by the City Clerk and City Manager, without further action from the City Council.
7. The City's Consolidated Open Government and Ethics Resolution No. 77135 is amended to modify the public meeting agenda and document posting

requirements such that public meeting agendas would be posted at least 72 hours prior to a regular meeting and at least 24 hours prior to a special meeting; documents related to COVID-19, as determined by the City Manager and City Clerk, such as staff reports, ordinances and resolutions, would not need to be posted 72 hours in advance of the meeting; and documents not related to COVID-19, as determined by the City Manager and City Clerk, would need to be posted at least 72 hours prior to a regular meeting and at least 24 hours prior to a special meeting.

8. The City's Consolidated Open Government and Ethics Resolution No. 77135 is amended to provide that only the City Manager—not Mayor and Council Offices—can request the City Clerk place an item on the City Council Agenda after the date of the hearing of the Rules and Open Government Committee, but at least 72 hours prior to the meeting, in compliance with the Rules of Conduct Resolution No. 79870 Rule 3(d) which requires a two-thirds (2/3) vote of Council to add items after Rules during the current Governor-proclaimed COVID-19 state of emergency.
9. The City's Consolidated Open Government and Ethics Resolution No. 77135 is amended to provide that the Mayor and Councilmembers can request the City Clerk place an item on the City Council Agenda after the date of the hearing of the Rules and Open Government Committee, but at least 72 hours prior to the meeting, if the City Clerk utilizes the procedures authorized in the City's Consolidated Open Government and Ethics Resolution No. 77135, Section 2.3.2.1.E to allow items to be so added if the Mayor, City Manager, and City Attorney concur that the item requires immediate action, and Council authorizes its addition by a two-thirds (2/3) vote during the current Governor-proclaimed COVID-19 state of emergency.

10. The City Clerk is hereby directed to report to the City Council within thirty (30) days on the need to further 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.

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ADOPTED this _____ day of _____, 2023, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

MATT MAHAN
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk