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MEMORANDUM

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

FROM: Jon Givner, Deputy City Attorney
Anne Pearson, Deputy City Attorney
Bradley Russi, Deputy City Attorney
Paul Zarefsky, Deputy City Attorney

DATE: June 5, 2020

RE: Updated Advice Regarding Meetings of Policy Bodies during COVID-19 Emergency

Based on recent developments including a new emergency order regarding public meetings during the COVID-19 pandemic, in this memorandum we update and supersede our memorandum of April 10, 2020 on the same subject, which itself updated and superseded earlier memoranda dated March 13, 2020 and March 24, 2020.

On February 25, 2020, Mayor London N. Breed declared the existence of a local emergency relating to COVID-19. Since that declaration, the County Health Officer has issued a number of public health orders relating to COVID-19 including stay safe at home orders, the Governor and State Health Officer have issued overlay state orders, and the Mayor and Governor have issued emergency orders suspending select laws applicable to boards, commissions, and other policy bodies, including advisory bodies (collectively, "policy bodies").

In this memorandum, we address a number of questions that have arisen regarding policy body meetings during the emergency. The main change since the April 10 memorandum is that the Mayor issued an order on May 29, 2020 allowing policy bodies to hold remote public meetings without advance approval but prohibiting policy bodies other than the Board of Supervisors and its committees from meeting in person at a physical meeting location.

A. Orders and Recommendations of the Mayor, Governor, and County Health Officer Relating to Policy Body Meetings

The Mayor, the Governor, and the County Health Officer have issued the following emergency orders that specifically relate to meetings of policy bodies:

- On March 11, 2020, the Mayor supplemented her initial declaration of local emergency with an order to suspend select provisions of local law, including sections of the City Charter that prohibit teleconferencing by members of policy bodies, and extended deadlines in local law by which policy bodies must act.
- On March 12, 2020, the Governor issued an executive order suspending provisions of the Brown Act to allow members of policy bodies to participate in public meetings remotely and without noticing their remote locations, but requiring that there be a physical meeting place for members of the public. On March 18, 2020, the Governor issued another executive order

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superseding the previous order and authorizing policy bodies to meet by teleconference without having a physical meeting place for members of the public.

- On March 16, 2020, the County Health Officer ordered City residents to stay safe in their homes except for certain essential needs and services, and prohibiting all public and private meetings and travel, with certain exceptions. The Health Officer has modified and extended the order several times, and the order does not specify an end date. On March 19, 2020, the Governor issued an Executive Order also requiring all Californians to stay at home, with certain exceptions. The Governor's Executive Order also does not specify an end date.
- On March 17, 2020, the Mayor issued another supplemental order prohibiting all City policy bodies from holding public meetings without prior authorization from the Board of Supervisors, the Mayor, or the Mayor's designee. This order applied to all policy bodies other than the Board of Supervisors and its committees. The Mayor twice extended that order on April 1 and April 30, 2020, but it expired on May 31, 2020.
- On March 21, 2020, the Governor issued another executive order, suspending provisions of the Brown Act to allow a majority of members of a policy body to simultaneously receive briefings from local, state, or federal officials concerning information relevant to the COVID-19 emergency outside of a meeting of the policy body and to ask questions of such officials, so long as the members of the policy body do not discuss the COVID-19 emergency among themselves or take any action.
- On March 23, 2020, the Mayor issued another supplemental order suspending several provisions of local law regarding policy body meetings, including, among others: (1) the requirement for policy bodies to provide more than 24 hours' notice of special meetings; (2) the requirement for policy bodies to post their agendas and other information at the Main Library; (3) any requirement to televise meetings if televising is not reasonably feasible; (4) the requirement to provide a physical location for members of the public to attend or make public comment when all members of the policy body are teleconferencing from remote locations; (5) the requirement that each member of the public be provided an equal amount of time for public comment; and (6) other requirements that would impede policy bodies' compliance with the Governor's executive orders. The supplemental order also waived all requirements in the Sunshine Ordinance regarding gatherings of passive meeting bodies.
- On May 29, 2020, the Mayor issued another supplemental order allowing policy bodies to meet without prior approval starting June 1, with three conditions. First, the meetings must occur by teleconference or other electronic means without providing a physical meeting place, in compliance with all applicable laws regarding public attendance and comment. Second, policy body meetings must prioritize any urgent action items necessary for public health, safety, and essential government functions. Third, before scheduling a meeting, a policy body that is not established in the Charter must confer with the department that provides administrative and clerical support to the body, to ensure that the meeting will not unreasonably require the time of staff who are otherwise responding to the COVID-19 pandemic. The Mayor's May 29 order will remain in place until July 29, 2020 unless the Mayor terminates it or the Governor rescinds his executive order authorizing remote meetings. The Mayor's order does not apply to meetings of the Board of Supervisors and its committees.

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During the course of the emergency, the Governor, Mayor, and County and State Health Officers might issue additional orders, and could extend the termination dates of the orders described above. We will update this memorandum as appropriate to address any changed circumstances.

B. Questions and Answers Regarding Policy Body Meetings during the Emergency

The orders described above have changed or suspended a number of rules that normally apply to policy body meetings. In this section of the memorandum we answer questions arising from those orders.

1. May policy bodies meet during the emergency?

Yes. Under the Mayor's May 29 order, policy bodies may meet without advance approval from the Mayor or the Board of Supervisors. But before scheduling a meeting, a policy body that is not established in the Charter must confer with the department that provides administrative support to the body, to ensure that the meeting will not unreasonably require the time of staff who are otherwise deployed or participating in the City's response to the COVID-19 pandemic.

2. May policy bodies hold meetings in-person at a physical meeting space?

No, with the exception of the Board of Supervisors and its committees. Otherwise, all policy body meetings must occur by teleconference or other electronic means (whether audio, video, or both) such as Zoom or Microsoft Teams without providing a physical meeting place. The Mayor and Governor have issued emergency orders suspending laws that would otherwise require members of policy bodies to attend meetings in person and provide a physical space for members of the public to attend.

The Mayor's orders do not prohibit the Board of Supervisors or its committees from holding meetings in person at City Hall or another meeting space. But we are not aware that the Board or its committees are planning to meet in person in the near future. When the Board or its committees decide to resume in-person meetings, we will issue further advice regarding the legal rules that would apply at those meetings.

3. Should policy body meeting agendas provide special information regarding public access to remote meetings?

When policy bodies hold remote meetings, they must ensure that the public is able to observe or listen and to offer public comment telephonically or through other electronic means. The policy body must disclose on any required meeting notice, and on the meeting agenda, the means by which the public may observe or listen and offer public comment in the meeting. The agenda should provide precise, prominent information explaining how members of the public can offer public comment during the meeting. And as with any meeting, the policy body must have a process for a member of the public to request a reasonable modification or accommodation under the Americans with Disabilities Act to observe or listen and offer public comment in the meeting, and that process must be disclosed on meeting notices and agendas.

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4. Where must notice and agendas of meetings of policy bodies be posted?

A policy body must post the notice and agenda for a meeting on the policy body's website. Also, the policy body must make a reasonable effort to post the notice and agenda in City Hall outside Room 244, the office for the Board of Supervisors, although that posting may not be feasible or effective while City Hall is largely closed to the public. Posting at the Main Library is not required at this time because the Main Library is currently not open to the public. When the Main Library opens to the public, policy bodies must resume the normal practice of posting notices and agendas there.

5. When must notice and agendas of policy body meetings be posted?

During the emergency, policy bodies must post a notice and agenda at least 72 hours before any regular meeting and at least 24 hours before any special meeting. And during the emergency, policy bodies are not required to post a special meeting notice 15 days in advance of holding a meeting at a location other than the building where the policy body holds regular meetings, including when a policy body meets by teleconference without providing a physical meeting place.

6. Can members of the public provide public comment by telephone, video call, email, or similar means?

As discussed above, policy bodies holding remote meetings must offer a means to allow the public to provide public comment telephonically or through other electronic means. Policy bodies may allow members of the public to comment by telephone, Zoom, Microsoft Teams, or similar electronic means, or may allow members of the public to send email messages for the clerk or chairperson to read aloud during the meeting.

7. Must a policy body allow all members of the public the same amount of time to speak during public comment?

No. Under the Mayor's March 23 order, policy bodies are not required to provide equal time for members of the public to speak during public comment, provided that any departure from the equal time rule is not designed to favor or discriminate against a particular viewpoint. Suspension of the equal time rule will give policy bodies greater flexibility in managing periods for public comment in the face of challenges that may be presented by telephonic or other electronic means of public comment, or if the emergency presents a need to shorten meetings. If a policy body is interested in departing from the equal time rule, the chairperson should first confer with the City Attorney's Office.

8. May a policy body continue to meet if technical challenges disrupt public comment?

Remote meetings sometimes present unique challenges caused by malfunctioning technology. If a policy body discovers during a meeting that members of the public generally are not able to provide comment in the manner described in the agenda, then the body should consult with the City Attorney's Office immediately. The policy body cannot take any action on an agenda item until public comment on that item is complete; and even a discussion item may not be concluded without an opportunity for public comment.

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While the staff attempts to correct the technical problem hindering public comment, the policy body may recess the meeting temporarily, may continue to discuss the agenda item (assuming the public is still able to observe or listen to the meeting), or may move on and discuss another agenda item, returning later in the meeting to the item that was interrupted. In no case may an agenda item be completed if there has not been an opportunity for public comment. If the staff cannot correct the problem, then the policy body should take no action on any outstanding items as to which there has not been an opportunity for public comment, and should recess the meeting to a later time or date and allow public comment when the meeting resumes.

9. Must a policy body televise meetings at which members are teleconferencing or videoconferencing from remote locations?

No. Under the Mayor's March 23 order, policy body meetings need not be televised if the chairperson of the body has determined that televising the meeting is not reasonably feasible. Before making that decision, the chairperson must consult with the Mayor's office or the staff of SFGovTV.

10. Must a policy body holding a remote meeting take action by roll call votes?

Yes. Under the Brown Act, policy bodies must take a roll call vote on every action during a remote meeting. Policy bodies may not approve actions "without objection" or "same house same call."

11. May a policy body receive a briefing regarding the emergency outside a public meeting?

Yes, subject to certain restrictions. Under the Governor's March 21 order and the Mayor's March 23 order, policy bodies may receive briefings from local, state, or federal officials concerning information relevant to the COVID-19 emergency. When a majority of members of a policy body gathers by telephone or other means to receive such a briefing, the gathering is not a meeting subject to the Brown Act and Sunshine Ordinance, as long as the members of the policy body do not engage in discussion among themselves or take any action during the gathering. Members of the policy body may ask questions of the officials giving the briefing but may not ask questions of one another.

12. Do legal deadlines for action by the policy body apply during the emergency?

State and local laws impose various deadlines on policy bodies. For example, many policy bodies are required to hold hearings on appeals within a specific number of days from the date of the notice of appeal. In her March 11 order, the Mayor suspended deadlines imposed by City law during the emergency and for 14 days following the termination of the emergency, if the policy body is unable to meet and take the required action due to the emergency. But deadlines imposed by state law are still in effect. Policy bodies that are bound by legal deadlines under City or state law should consult in advance with the City Attorney's Office to determine whether those deadlines have been waived or remain in effect.

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13. May there be remote gatherings of passive meeting bodies during the emergency?

Yes. This memorandum discusses rules that apply to the City's policy bodies during the emergency. The Sunshine Ordinance also normally requires limited public notice and public access to gatherings of "passive meeting bodies" that are not policy bodies. These "passive meeting bodies" include (1) 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; (2) social, recreational, or ceremonial occasions sponsored or organized by or for a policy body to which a majority of the body has been invited; and (3) gatherings of committees created by the initiative of a member of a policy body, the Mayor, or a department head, consisting solely of City employees, that are reviewing, developing, modifying, or creating City policies or procedures relating to public health, safety, or welfare, or to services for the homeless.

The Mayor's March 23 order suspended the notice and access rules that normally apply to gatherings of passive meeting bodies. Under the Mayor's order, these gatherings may occur, but public notice and attendance rules do not apply. Even though these gatherings are legally permissible under the Mayor's order, members generally should not meet in person in light of the County Health Officer's guidance and the stay safe at home orders, for the same reasons reflected in the Mayor's order prohibiting in-person meetings of policy bodies.