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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF PLACER

SIERRA WATCH,

Petitioner,

v.

PLACER COUNTY; PLACER COUNTY BOARD OF SUPERVISORS; and DOES 1-20,

Respondents.

SQUAW VALLEY REAL ESTATE, LLC; SQUAW VALLEY RESORT, LLC; POULSEN COMMERCIAL PROPERTIES, LP; DOES 21-40,

Real Parties in Interest.

Case No. SCV0038917
[Related to Case No. SCV0038777]

PETITIONER'S OPENING TRIAL BRIEF

[Ralph M. Brown Act, Gov. Code § 54950, et seq.; CCP § 1085 (alternatively § 1094.5)]

Date: March 6, 2018
Time: 8:30 a.m.
Dept.: 43
Judge: Hon. Michael W. Jones

Petition Filed: January 13, 2017

Filed Concurrently with Stipulation of Facts for Trial; Petitioner's Exhibits; Petitioner's Witness List

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INTRODUCTION

Sierra Watch brought this suit to remedy the Placer County Board of Supervisors' violations of the Ralph M. Brown Act open meeting law in approving a massive development project in Squaw Valley. The County failed to alert the public that the Board would consider approval of an eleventh-hour deal—negotiated in private between the County, the Office of the California Attorney General, and the Project applicant—to avoid litigation by the Attorney General against the County over its environmental review of the Project's adverse impacts on Lake Tahoe. This last-minute agreement requires the Project applicant to pay an air quality mitigation fee, enforceable by the County, in exchange for the Attorney General's agreement not to sue the County and the Project applicant over the County's approval of the Project ("Fee Agreement"). However, instead of conducting its business in the "sunshine," as the Brown Act requires, the County buried the Fee Agreement as an asserted "modification" to the Project's Development Agreement, which was already on the agenda for the Board's meeting.

The County violated the Brown Act in two ways. First, the County violated Government Code section 54954.2(a) by failing to provide any public notice of its consideration and approval of the new Fee Agreement. The Brown Act requires that an agenda for a Board meeting disclose, at least 72 hours in advance, "each item of business to be transacted or discussed at the meeting." The evidence will show that the Board discussed the Fee Agreement at its November 15, 2016 hearing, and approved memorializing that deal as part of the Development Agreement. The evidence will also show that the new Fee Agreement is a "discrete" action that differs significantly from anything mentioned on the agenda or previously discussed throughout the lengthy administrative process. Indeed, the evidence will show beyond any doubt that the November 15 hearing itself was the first time there was any public mention of a deal to avoid litigation by the Attorney General against the County.

The County contends that it complied with the Brown Act because the Fee Agreement was folded into the draft Development Agreement that was on the agenda for the November 15 hearing and because the Attorney General was not expressly made a party to the Development Agreement. These arguments are red herrings. They sidestep the fact that the County provided

no advance notice the Board would consider adoption of the last-minute Fee Agreement at its November 15 hearing. Simply inserting the terms of that deal into the draft Development Agreement does not change the fact that it was a separate agreement—hastily conceived, negotiated, drafted, and finalized after the agenda notice was posted—for which no advance public notice was given. Moreover, regardless of whether the Attorney General was expressly made a party to the Development Agreement, the hearing transcript shows beyond any doubt the Board's understanding that incorporating the Fee Agreement *into* the Development Agreement was an essential part of the deal necessary to avoid litigation against it by the Attorney General.

Second, and compounding its agenda violation, the County violated Government Code section 54957.5 by failing to make a key memorandum regarding the Fee Agreement "available for public inspection" at the same time this document ("Schwab Memorandum") was distributed to the Board. The County claims it complied with the Brown Act by printing a copy of the Schwab Memorandum—which described the new Fee Agreement and County staff's rationale for negotiating its terms and including those same terms in the Project's Development Agreement—and leaving it in the Office of the Clerk of the Board the night before the hearing. However, the undisputed evidence shows that the Memorandum was printed and left in the Clerk's Office *after* normal business hours, when the office was closed to the public for the day. Printing a document and placing a copy in a closed and locked building does not meet either the letter or spirit of the requirement to make that document "available for public inspection."

Instead of involving the public in a key issue—a settlement with the Attorney General purporting to address the Project's impact on the clarity of Lake Tahoe that cleared the way for Project approval—the County chose to conduct its business behind closed doors. Sierra Watch therefore respectfully requests that the Court issue a writ of mandate directing the County to rescind the Project approvals. Sierra Watch also requests a declaration that the County's practices were unlawful and violate the Brown Act.

STATEMENT OF FACTS

I. The Controversial Squaw Valley Project.

In 2011, Real Party in Interest Squaw Valley Real Estate, LLC ("Applicant") began a

four-year process that would culminate in the County approving its controversial Project. *See* Stipulation of Facts for Trial ("Stip. Facts") ¶ 1. The Project, if allowed to proceed, would dramatically intensify resort development in North Tahoe. It would feature 1,493 new bedrooms of resort development concentrated in condo hotel high-rises, acres of parking garages, and 274,000 square feet of new commercial space, including a prominent 96-foot-tall, 90,000-square-foot indoor waterpark. *See* Admin. Record for *Sierra Watch v. Placer County*, Placer County Superior Court Case No. SCV0038777 ("AR") 3:1747, 1750, 1752-53.[1]

From the outset, public interest in the Project has been widespread, intense, and sustained. Sierra Watch and many others have offered substantive comments at every stage of the County's decision-making process, including on the draft environmental impact report ("EIR") circulated in May 2015 and on the final EIR issued in April 2016. Stip. Facts ¶¶ 2-3. The draft EIR, for example, elicited over 300 comments. AR 7:3885-96 (listing commenters); 39:22850-979 (Sierra Watch comments). Many other organizations, public agencies, and individuals wrote letters critical of the Project and the EIR. *See* AR 7:3885-96. Sierra Watch and many members of the public also attended every public meeting regarding the Project, including those of the Squaw Valley Municipal Advisory Council (AR 79:46870-72), the County Planning Commission (AR 17:9897-10082, 10121), and the Board (AR 16:9460-17:9711).

A central concern to Sierra Watch and many others was the Project's increased traffic impacts, including the associated impacts to the Lake and its famed clarity. *See, e.g.*, AR 8:4364-77, 4387-92, 4610). Notably, the Tahoe Regional Planning Agency ("TRPA") and the Attorney General expressed concerns with the Project's impacts to the Tahoe Basin. Stip. Facts ¶ 4; AR 7:4128-31, 38:22207-21.

On November 3, 2016, a Deputy Attorney General e-mailed County Counsel, stating:

> We remain concerned about the adequacy of the [Squaw and Martis Valley West] Projects' CEQA analyses with regard to impacts within the Tahoe Basin and would like to talk with you about whether Placer County would consider preparing and circulating for public comment additional analyses to fully address the

[1] Pursuant to the January 3, 2018 Stipulation and Order, the Court has ordered that the parties may rely on documents from the administrative record in the related case for this trial.

> individual and cumulative effects of these two projects on Lake Tahoe and the Basin. Absent additional analyses, my office plans to file litigation challenging the CEQA documents for both Projects based on the inadequate *disclosure to the public* and decision makers of how the two Projects will impact the Basin.

Exh. 1 (emphasis added); *see also* Stip. Facts ¶ 5.

II. The County's Last-Minute Deal and Its Failure to Properly Notify the Public.

On November 9, 2016, the County, representatives of the Attorney General, and counsel for the Applicant met privately to discuss the Attorney General's concerns with the Project and threat of litigation. *See* Stip. Facts ¶ 10. As a result of that meeting, the Attorney General, the County, and the Applicant discussed and ultimately agreed to a potential resolution, which consisted of three main components. First, the County agreed to prepare additional analysis regarding the Project's impacts to the Tahoe Basin. Stip. Facts ¶ 11. Second, the Applicant agreed to pay an Air Quality Mitigation Fee to TRPA ("TRPA Fee"). Stip. Facts ¶ 14. Third, at the Attorney General's request, the County and the Applicant agreed to memorialize the agreement to pay the TRPA Fee in the Development Agreement for the Project so that the County could enforce it. Exh. 2 at PLACER0004 (hereinafter, citations to documents with "PLACER" Bates stamps will be cited as "P" followed by the number); Exh. 3 at P0247; Exh. 4 at 00954-57. The County also agreed to include a provision in the Development Agreement that it would "confer, in writing, with the Attorney General if it receives a request from the Developer to amend or delete" the provision. Exh. 2 at P0037; Exh. 5 at P0257.

Over the following six days, the County, Applicant, and Attorney General hastily negotiated, drafted, and revised the terms that would memorialize this settlement in the Development Agreement as the Fee Agreement. Extensive email correspondence between and among the County, Attorney General, and Applicant documents the involvement of all three parties in negotiating and finalizing the terms of the Fee Agreement, as memorialized in the Development Agreement. All of these communications occurred in secret beginning on November 9, 2016, and continuing until the night before the Board's November 15 hearing.

For instance, two days after the November 9 meeting, on the morning of Friday, November 11, the Applicant's counsel, Whit Manley, emailed Deputy Attorney General Nicole

Rinke that the Applicant was "working with the County to draft a new section in the [Development Agreement] memorializing this commitment." Exh. 3 at P0247. Mr. Manley advised Ms. Rinke that the proposal was contingent on assurances that "if the County approves the project with this provision, the [Attorney General] will not be challenging the project" and that it was "important to the County to receive this confirmation." *Id.* That afternoon, Mr. Manley sent Ms. Rinke the language proposed to be inserted in the Development Agreement, which was drafted by the County and the Applicant. *Id.*

The following Monday morning, on November 14, Mr. Manley's partner Howard "Chip" Wilkins emailed Ms. Rinke, copying County Counsel Karin Schwab, confirming that the TRPA Fee commitment secured by the Attorney General would be added to the Development Agreement. Exh. 3 at P0245. Mr. Wilkins noted that "this proposal is contingent upon the [Attorney General's] confirmation that this commitment will address the [Attorney General's] concerns, and that if the County approves the project with this provision, the [Attorney General] will not be challenging the project." *Id.* He emphasized that it was important to receive this written confirmation from the Attorney General by the end of the day. *Id*; *see also* Exh. 6 at 023829-30 (County and Applicant agreeing that "an essential element of the 'deal' is written confirmation from the [Attorney General] that her concerns have been addressed.").

That afternoon, Ms. Schwab emailed Mr. Wilkins additional proposed language for the Development Agreement, on top of the language requiring payment of the TRPA Fee. Exh. 5 at P0257-58. This new addition obligated the County to confer with the Attorney General before amending or deleting the TRPA Fee provision in the Development Agreement. *Id.* at P0258. Mr. Wilkins immediately forwarded Ms. Schwab's email to Ms. Rinke. *Id.* at P0257. Ms. Rinke replied a few hours later to Ms. Schwab, stating, "Karin, While we are still working things out on this, I understand you need to get the [Development Agreement] finalized. The language you drafted is fine, with one minor modification – I'd prefer the second sentence read, Prior to any such CEQA review, the County agrees…" *Id.* Ms. Schwab then made the change the Attorney General requested to the Development Agreement. *Id.*; *see also* Exh. 2 at P0037.

A few hours later, at 5:25 p.m., Ms. Rinke emailed counsel for the Applicant and the

County informing them that, while the Attorney General was ultimately "not in substantive agreement" with the County's additional analysis of the Project's Tahoe Basin impacts, the new analysis and addition to the Development Agreement were enough for the Attorney General not to sue the County. Exh. 3 at P0244-45. Specifically, Ms. Rinke confirmed in her e-mail, as requested by the Applicant's counsel (Exh. 3 at P0245), that "payment of the TRPA Air Quality Mitigation fee for this Project will suffice to address our concerns regarding Lake Tahoe's water quality and, contingent on these agreements, the Attorney General will not be filing litigation on Placer County's approval of the Project." Exh. 3 at P0244-45.

Meanwhile—on the same day (November 9) that the County had commenced its secret meetings with the Attorney General and the Applicant that gave rise to the hastily negotiated Fee Agreement—the County posted on its website an agenda for the Board of Supervisors' November 15 hearing. Stip. Facts ¶ 7. On that date, the County also made available on its website approximately 1,000 pages of documentation related to the agenda for that hearing. Stip. Facts ¶ 6. One agenda item informed the public that the Board would consider a recommendation from the Planning Commission to approve a set of motions necessary to grant the Applicant entitlements for the Project. Stip. Facts ¶ 8; *see also* Exh. 7 at 007770. Specifically, the agenda stated that the Board would "[c]onduct a Public Hearing to consider a recommendation from the Placer County Planning Commission for APPROVAL of . . . the Development Agreement relative to the Village at Squaw Valley Specific Plan." *Id.* The agenda packet then included a draft ordinance approving the Development Agreement for the Project that the Planning Commission had reviewed at its recent public hearing. *See* Exh. 8 at 07800; The materials also included a copy of that draft Development Agreement that the Planning Commission had recommended be approved. *See* Exh. 9 at 008675-709.

Neither the draft ordinance nor the draft Development Agreement contained the terms of the subsequent Fee Agreement or any mention whatsoever of the Attorney General. *See id.* The agenda and accompanying materials likewise nowhere mentioned that the Board would be considering the Fee Agreement at the November 15 hearing—even though the Agreement would settle a very real litigation threat from the Attorney General regarding an issue of utmost

importance to the public. *See id.* Instead, the County shielded the Agreement from the public eye, announcing it for the first time only after the hearing had already begun and burying it as an "amendment" to a revised draft of the proposed Development Agreement that was distributed to the Board—but not to anyone else outside the County—after the close of business the previous day. *See* Exh. 4 at 09427-29 (announcing deal and addition to Development Agreement). Underscoring that this was a new, separate, and discrete issue—and not a mere "modification" of the Development Agreement—Ms. Rinke insisted that "the TRPA [air quality] mitigation fee be paid in full, rather than deducting the TART [air quality mitigation] payments your client has already committed to pursuant to the [Development Agreement]." Exh. 3 at P0246. Significantly, although the Fee Agreement was referred to as an "Insert" to the Development Agreement, the Applicant separately signed and notarized the Fee Agreement so that it could be recorded as a stand-alone document. Exh. 2 at 0036-38.

Compounding the problem, a 107-page memorandum from County Counsel Karin Schwab to the Board, which described the County's meetings with the Applicant and Attorney General's office and the resulting Fee Agreement, was not made available to the public when that information was sent to the Board of Supervisors, as the Brown Act requires.

The Clerk of the Board of Supervisors, Megan Wood, e-mailed the Schwab Memorandum to all members of the Board at 5:42 p.m. on November 14, 2016. Stip. Facts ¶ 17. The normal business hours of the Clerk's Office are 8:00 a.m. to 5:00 p.m. Monday through Friday. Stip. Facts ¶ 16. Yet, the Clerk admits that other than printing the Schwab Memorandum and leaving a copy in her closed office after normal business hours, she made no attempt to distribute the document to the public at the same time that she sent it to the Board. Exh. 10 at 54.

At the conclusion of the November 15 hearing, the Board enacted an ordinance adopting the amended Development Agreement that memorialized the Fee Agreement. Stip. Facts ¶ 22. In so doing, the Board acted without the benefit of Sierra Watch's or any member of the public's considered input on this important topic.

Had Sierra Watch known of the Fee Agreement in advance, it would have analyzed and sought expert advice regarding the sufficiency of the TRPA Fee to mitigate the Project's impacts

and provided detailed comments to inform the Board's decision, as Sierra Watch had done throughout the process for this Project. *See* Exh. 11 ¶¶ 5-7; *see also* Exh. 12 at 103-04.

When Sierra Watch realized that the County had taken action to approve the Fee Agreement without providing the notice required by the Brown Act, it promptly notified the County of this violation. *See* Exh. 13. Specifically, in a letter dated December 5, 2016, Sierra Watch explained that the last-minute revision of the Development Agreement to include the separate Fee Agreement, and the failure to make the Schwab Memorandum available for public inspection at the same time it was distributed to the Board, violated the Brown Act. *Id.* Sierra Watch also demanded the County cure and correct these violations. *Id.* at 3-4

III. The Present Litigation and the County's Demurrers

Sierra Watch timely filed this lawsuit on January 13, 2017, alleging two causes of action: first, that the agenda failed to include notice of the Board's consideration of the Fee Agreement, and second, that the Schwab Memorandum was not made available to the public at the same time that information was received by the Board of Supervisors, as the Brown Act requires. The County demurred to both claims. The court (Commissioner Jacques) overruled the County's demurrer as to Sierra Watch's second cause of action, but sustained with leave to amend as to the first cause of action. *See* Order on Demurrer (filed June 9, 2017).

Sierra Watch then filed a First Amended Petition ("FAP"), and the County again demurred to the first cause of action. This Court overruled the County's demurrer, holding:

> "Petitioner alleges that the Fee Agreement involved issues that were outside of the scope of the Development Agreement, requiring approval of the Fee Agreement to be identified as a separate item of business on the agenda. In ruling on this demurrer, the court accepts these allegations as true. Accordingly, petitioner alleges sufficient facts to state a cause of action for violation of the Brown Act."

Order After Hearing on Demurrer & Status Conference (filed Sept. 6, 2017), at 4 (hereinafter, "Sept. 6 Demurrer Order"). The Court also found that Sierra Watch properly exhausted its administrative remedies. *Id.* The Court set a trial date of March 6, 2018.

During discovery, Sierra Watch requested all documents in the County's possession regarding the County's involvement in developing the amendment to the Development Agreement. The County provided some documents, including emails, in response to these

requests. However, it was not until months later—*after discovery had closed and in response to this Court's tentative ruling ordering the Attorney General's PMQ to appear for deposition and produce documents*—that the County provided two of the most revealing emails regarding the previously hidden extent of the County's involvement in drafting the amendment. *See* Exh. 14 (County email asserting that it only "recently recovered" these critical emails after this Court ordered the Attorney General to produce them); Exh. 5 (belatedly produced emails).

STANDARD OF REVIEW

The Brown Act is a cornerstone of California's democratic process. The Legislature specifically designed it to encourage public participation in government decision-making. *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 681. As California courts have repeatedly recounted, "[t]he Brown Act begins with a forceful declaration of the Legislature's purpose":

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

San Joaquin Raptor Rescue Center v. County of Merced (2013) 216 Cal.App.4th 1167, 1175 (quoting § 54950[2]). While Sierra Watch bears the burden to prove that the County violated the Act, the Court must construe the statute liberally to support transparency in government. *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.* (2001) 87 Cal.App.4th 862, 869.

With the passage of Proposition 59 in 2004, California voters codified this standard in the California Constitution, which now provides:

> (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, *shall be broadly construed if it furthers the people's right of access, and narrowly construed if it*

[2] Undesignated statutory references are to the Government Code.

limits the right of access.

Cal. Const. art. 1, § 3(b) (emphasis added). All the County had to do to comply with this constitutional mandate was to continue the hearing to give the public time to receive notice of and review the last-minute deal. Instead, the evidence will show the County rushed to approve the Fee Agreement and the Project, and denied the public its right to access to a public process.

ARGUMENT

I. The County Violated the Brown Act When Its Board of Supervisors Discussed and Acted Upon an Important Matter that Was Not Included in the Meeting Agenda.

The evidence shows that the County failed to list on its agenda an important and separate item of business that the Board later discussed and approved at its November 15 hearing: a last-minute Fee Agreement that had been negotiated among the County, the Attorney General, and Applicant *after* the posting of the agenda. The County has asserted that the new Fee Agreement was approved as a "revision" to a Development Agreement, which was on the agenda. The County's defense fails for two reasons. First, the County's theory contravenes the core purposes of the Brown Act. As the Court held in *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 208-09, a last-minute agreement such as this must appear as a *separate* item of business on the meeting agenda. Second, even if the Fee Agreement could somehow be considered covered by the agenda notice for the Development Agreement, such agenda notice still does not comply with the Brown Act because the modification to the Development Agreement was so significant that the public could not have been adequately informed as to what would transpire at the meeting.

A. The Purposes of the Brown Act's Agenda Requirements Are Open Government and Public Participation.

To facilitate governing in the "sunshine," the Brown Act imposes strict mandates on the noticing of meetings of governing bodies. One of the most important of these requirements is that the governing body, at least 72 hours before a meeting, must "post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting"—thereby giving notice to the public so they can attend and comment on items of business. § 54954.2(a). A description of an item of business on an agenda *may* be brief, but it *must* be

informative. It "is imperative that the agenda of the board's business be made public and in some detail so that the general public can ascertain the nature of such business." *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637, 644.

The Act prohibits a governing body from taking any action on—or even discussing—any matter that does not appear on the agenda for a meeting. § 54954.2(a)(3). This is because the Brown Act's "purposes include ensuring that the public is adequately notified of what will be addressed at a meeting in order to facilitate public participation and avoid secret legislation or decisionmaking." *San Joaquin Raptor,* 216 Cal.App.4th at 1177-78. Underscoring the importance of providing adequate public notice, the Act provides that any action taken on a matter not properly listed on the meeting's agenda is subject to invalidation. § 54960.1(a).

B. The Agenda Did Not Disclose the Board Would Consider Approving the Fee Agreement Negotiated among the County, Attorney General, and Applicant.

As explained above, in the days before the November 15 hearing, the County, the Attorney General, and the Applicant undertook private negotiations for an agreement, whereby the Applicant would pay, and the County would enforce, an air-quality fee in an attempt to avoid a lawsuit against the County by the Attorney General over the legal inadequacy of its CEQA analysis (the "Fee Agreement"). *See, e.g.*, Exhs. 2, 3, 4, 5, & 6. The Fee Agreement was a new agreement well outside the scope of the pre-existing and publicly available draft Development Agreement, which contains nothing to address the concerns over which the Attorney General threatened to sue the County. *Compare* Exh. 9 *with* Exh. 2 at P0015-52.

Critically, the County provided *no notice* whatsoever that the Board would consider the Fee Agreement at its November 15 hearing. Nor were any members of the public provided a copy of the 107-page Schwab Memorandum before the meeting. Nevertheless, the Board considered the Fee Agreement at that hearing. And, at the conclusion of the hearing, the Board approved the Fee Agreement when it adopted the ordinance approving the Development Agreement. As County Counsel explained, the Development Agreement expressly "memorialize[d]" the Fee Agreement. Exh. 2 at P0004; *see also* Exh. 4 at 009429. These facts show that the County violated section 54954.2 in adopting the Fee Agreement.

Courts have repeatedly held that an agency fails to comply with the Brown Act when its agenda gives the public no indication that certain matters will be discussed, even when a related topic is on the agenda. As this Court noted in its Order overruling the County's demurrer: "Violations of the Brown Act have been found where a public agency fails to separately identify an item that is 'plainly a distinct item of business, and not a mere component of project approval' in that it involves 'a separate action or determination' and concerns 'discrete, significant issues.'" Sept. 6 Demurrer Order at 3-4 (quoting *Hernandez,* 7 Cal.App.5th at 208).

Hernandez, which likewise involved an agency's failure to include on its agenda a last-minute deal with an outside party, is closely on point. There, a developer (Wal-Mart) had offered to pay the city to fund an election in which an initiative supported by Wal-Mart was on the ballot. 7 Cal.App.5th at 196. The city accepted the payment by adopting a Memorandum of Understanding ("MOU") at its regular council meeting, but that action did not appear on the meeting agenda or in the agenda packet. *Id.* at 196, 208. Instead, the agenda stated generally that the council would be giving directions to staff regarding the "Wal-Mart Initiative Measure." *Id.* at 197. Although many people attending the meeting objected to the Wal-Mart initiative—which was a matter of great local concern—no one provided substantive comments on the MOU. *Id.* at 205. An individual later sued under the Brown Act, noting that, had the agenda provided proper notice of the MOU, he would have submitted comments on that topic. *Id.* at 201, 202.

The court held that the city's actions violated the Brown Act, and it invalidated the council's actions with respect to the initiative. *Id.* at 209. While the MOU was related to the Wal-Mart initiative, which the agenda mentioned, nothing in the agenda or the agenda packet specifically gave notice to the public of the MOU—or that the city would be agreeing to accept money from Wal-Mart to fund an election. *Id.* at 208. Because the MOU was proposed to the council for the first time at the council meeting, no one at the meeting commented on the MOU or Wal-Mart's payment; indeed, Wal-Mart had offered the payment only *after* the agenda was posted. *Id.*

Similarly here, the County flouted the Brown Act by failing to include any information about the Fee Agreement in the Board's November 15, 2016 agenda or agenda packet. Like the

"Wal-Mart Initiative Measure" in *Hernandez,* the Project's "Development Agreement" was on the agenda, but the Fee Agreement was not; the County had negotiated the new Fee Agreement *after* the Board agenda was issued. *See, e.g.*, Exhs. 3, 5, & 6 (emails negotiating addition to Development Agreement between November 11 and 14, 2016). At the same time, the Fee Agreement was of great interest to the public. This Agreement for the Applicant's payment of an air-quality mitigation fee to TRPA, and the County's enforcement of the same, purported to resolve a litigation threat by the Attorney General against the County regarding the Project's environmental impacts. *See* Exh. 3 at P0244-25. Indeed, the removal of this threat of litigation by the Attorney General and the addition of a measure to mitigate the Project's air quality impacts likely influenced the Board's decision to approve the Project.

If Sierra Watch had known of the Fee Agreement, it could have reviewed its terms and consulted with experts to assess whether the Agreement resolved the environmental concerns about the Project. Exh. 11 at ¶¶ 5-6; Exh. 12 at 103-04. It then would have provided the Board with informed comments on the wisdom and legality of approving the Project in light of this newly proposed fee. Exh. 11 at ¶¶ 6-7. Indeed, this is part of the purpose of the Brown Act's 72-hour notice requirement: not only to let the public know what is to be discussed, but to give the public time to prepare and assist the government body in its decisionmaking.

The County has attempted to portray the Board's action as a mere "revision" to the Development Agreement and part of the normal course of business for the Board's consideration of an agenda item. *See* Respondents' Memorandum In Support of Demurrer to FAP (filed July 25, 2017), at 6 (hereinafter, "Resp. Demurrer"). This tack cannot succeed. The Board approved the new, eleventh-hour deal to settle potential CEQA claims the Attorney General threatened to bring against the County. This subject had nothing to do with the pre-existing Development Agreement, which nowhere mentioned the Attorney General or the payment of a TRPA Fee. Slipping the Fee Agreement's terms into the Development Agreement to "memorialize" it does not absolve the County of its duties under the Brown Act—to properly notice on the agenda this new, significant agreement to avoid litigation by the Attorney General. That the Fee Agreement was separately signed and notarized by the Applicant for recording separate from the

Development Agreement belies any notion that the Fee Agreement was a mere "modification."

Notably, under the County's theory, *any* new issue could be considered at the last minute by the Board without agenda notice as long as the County embodied that issue in a pre-existing item on the agenda. The County could do so, no matter how tenuous the relationship between the new issue and the previously agendized item, and no matter how significant the public interest in the new issue. Yet state law forbids this sort of evasion. "Such an approach would allow a potentially controversial issue to be quietly proposed and decided without having to open the discussion to meaningful public input," and "[t]hat is one of the evils the Brown Act was designed to prevent." *San Joaquin Raptor,* 216 Cal.App.4th at 1178; *id.* at 1177-79 (meeting agenda inadequate and misleading where it identified a project to be discussed, but failed to identify that CEQA document for the project would be discussed and approved). Numerous other cases are in accord. *See, e.g.*, *Moreno v. City of King* (2005) 127 Cal.App.4th 17, 26-27 (agenda item for "employment contract" "provided no clue that the dismissal of a public employee would be discussed at the meeting"); *Carlson v. Paradise Unified Sch. Dist.* (1971) 18 Cal.App.3d 196, 200 (agenda item "Continuation school site change … was entirely inadequate notice to a citizenry which may have been concerned over a school closure.").

Here, the County provided no public notice that the Board would be considering a separate, controversial issue. The Fee Agreement was intended to guarantee that the Attorney General would not sue the County over the Project. Entering the Fee Agreement very well could have led the Board to approve the Project despite widespread concerns as to the Project's adverse impacts. Burying this new agreement in a separate agenda item prevented meaningful public participation concerning this important matter, undermining the core purposes of the Brown Act. For all these reasons, the County violated the Brown Act by not listing the Fee Agreement as a separate item of business on the agenda for the November 15 meeting.

C. Even If the Fee Agreement Could Have Been Considered As Part of the Development Agreement, the County's Agenda Was Still Improper.

Even assuming arguendo the County could have relied on an agenda item regarding approval of a "Development Agreement" to add a new provision to avoid litigation, the agenda

item in the present case was still insufficient under the Brown Act. Here, the agenda stated not just that *a* Development Agreement would be considered, but that a *specific* Development Agreement would be considered. That is, the agenda explicitly stated that the Board would "consider a recommendation from the Placer County Planning Commission for approval" of the Development Agreement previously reviewed by the Commission. Stip. Facts ¶ 8; Exh. 7 at 007770. The agenda packet then attached the Development Agreement to be considered, which *did not include* the Fee Agreement or for that matter any mention of the Attorney General. *See* Exh. 9. For those such as Sierra Watch who were familiar with the agenda and the Development Agreement that was reviewed and recommended for approval by the Planning Commission, they would have no reason to believe that Development Agreement would be significantly amended to include a whole new provision to avoid litigation by the Attorney General.

The California Supreme Court addressed a similar issue in *Santa Barbara School Dist. v. Superior Court of Santa Barbara County* (1975) 13 Cal.3d 315, 335-36. There, an agenda item for a school board meeting stated that the board would be examining plans for desegregation/integration that had been presented at an earlier May 4 meeting. *Id.* However, the school administration proposed a last-minute amendment to the desegregation plan, which involved two school closures that were not part of the previously presented plans. The board then adopted the amended plan at its May 18 meeting. Reviewing a challenge to the board's actions under an analogous provision of the Education Code[3], the Supreme Court held that the agenda was "fatally misleading" by referring to the earlier presentation of plans because the public had "no notice" that a plan amendment involving two school closures would be considered for adoption on May 18. *Id.* at 335-36. The Supreme Court also noted that the board's adopted process for the presentation of the proposals confirms that the agenda misled the public by allowing consideration of a last-minute substantial amendment. *Id.* at 333. Thus, the Court held the school board should have amended the agenda and postponed the meeting for the requisite amount of time to give adequate notice of the changes. *Id.* at 335-36.

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[3] Courts apply both statutes' agenda requirements similarly. *San Diegans*, 4 Cal.App.5th at 644.

Here, the County likewise considered a last-minute, significant amendment to the Development Agreement and did not inform the public of the change. Without advance notice, there would be absolutely no way for the public to know that the County was intending to discuss a major modification to the Development Agreement that was presented to the Planning Commission as referenced on the agenda and that the Agreement would ultimately include a provision to avoid litigation from the Attorney General on an important environmental issue thereby allowing the County to sidestep real concerns about the deficiencies in its environmental review. Further, as in *Santa Barbara*, the County has adopted specific procedures for adoption of Development Agreements, including Placer County Code provisions calling for initial review and approval by the Planning Commission and then reconsideration by the Commission should significant substantive amendments be proposed. *See* Exh. 15 (Placer County Code § 17.58.240(B)). These provisions were referenced in the agenda packet. *See* Exh. 8 at 007792. Thus, as in *Santa Barbara*, the agenda was "fatally misleading" because it referenced a prior presentation of the Development Agreement and failed to reference a significant, last-minute amendment that would ultimately be adopted. The County must therefore rescind its approvals and refrain from acting upon them unless and until it issues an adequate agenda notice.

D. The County Did Not Substantially Comply with the Brown Act, and the County's Violation Prejudiced Petitioner.

The County has attempted to avoid the consequences of its violations by claiming that it "substantially" complied with the Brown Act. Resp. Demurrer at 7-8. It did not.

An agency substantially complies with the Brown Act when its agenda gives "fair notice of the essential nature of what an agency will consider" at the meeting. *San Diegans*, 4 Cal.App.5th at 645. The substantial compliance rule allows an agency's action to stand despite "technical errors or immaterial omissions" in the agenda. *Id.* at 644-45. For example, in *Castaic Lake v. Newhall County Water*, where an agency's agenda cited an incorrect statutory provision, the court found no Brown Act violation because the agenda item, as a whole, informed the public that the agency planned to discuss litigation in closed session. (2015) 238 Cal.App.4th 1196, 1206-07. The agenda "plainly advised" members of the public of the agency's discussion

and "could not possibly have misled or confused anyone." *Id.* To invalidate an action for such a minor error would be "hypertechnical and elevates form over substance." *Id.* at 1207.

By contrast here, the County's violation was no mere "technical error or immaterial omission" that could not have misled anyone. Instead, the agenda gave the public no clue that the County would be approving the last-minute Fee Agreement, which involved an issue of great importance to them: the Project's environmental impacts on Lake Tahoe. Had Sierra Watch and others any notice that the Board would be approving this Fee Agreement as part of the Project, it would have thoroughly reviewed the proposal to see whether it did, indeed, help Lake Tahoe, and would have provided detailed comments. *See* Exh. 11 at ¶¶ 5-6; Exh. 12 at 103-04. With time to review the Fee Agreement, Sierra Watch could have explained to the Board that the Fee Agreement would do little to resolve the Project's impacts and why the Fee Agreement should be rejected along with the Project's entitlements. Exh. 11 at ¶¶ 5-7. Depriving the public of an opportunity to comment on such important issues is exactly the sort of subversion the Act is intended to prevent. *See Hernandez*, 7 Cal.App.5th at 208-09 (prejudice under Brown Act where parties denied opportunity to provide substantive comment due to lack of notice).

II. The County Violated the Brown Act When It Failed to Make the Schwab Memorandum "Available for Public Inspection" at the Same Time as the Memorandum Was Distributed to the Board of Supervisors.

Compounding the County's failure to provide public notice of the Fee Agreement, the County also failed to provide the critical Schwab Memorandum to the public at the same time it was distributed to the Board. The Brown Act requires that the County "make . . . available for public inspection" any public records provided to the Board less than 72 hours before a meeting "at the time the writing is distributed to all, or a majority of all, of the members of the body." § 54957.5(b)(1)-(2). Here, indisputable evidence shows that the County did not make the Schwab Memorandum "available for public inspection" when it was made available to the Board.

It is uncontested that Clerk of the Board of Supervisors Megan Wood received the Schwab Memorandum on November 14, 2016 at 5:36 p.m. and distributed it to all the members of the Board of Supervisors by electronic mail at 5:42 p.m. Stip. Facts ¶¶ 13, 17. The County

claims Ms. Wood also made the Schwab Memorandum "available" for public inspection at the same time at the Clerk's office at 175 Fulweiler Avenue, Auburn, California. *See* Resp. Demurrer at 2. But the facts show this could not be true.

It is undisputed that the normal business hours of the Clerk's office are from 8:00 a.m. to 5:00 p.m. Monday to Friday, and the building is generally locked outside of normal business hours. Stip. Facts ¶ 16; Exh. 10 at 8, 52; Exh. 7 at 007770 (November 15 hearing agenda stating: "[m]aterials related to an item on this Agenda submitted to the Board after distribution of the agenda packet *are available for public inspection* at the Clerk of the Board of Supervisors Office, 175 Fulweiler Avenue, Auburn, *during normal business hours*.") (emphasis added).

Thus, even though Ms. Wood printed a copy of the Schwab Memorandum and placed it in her office at the same time she distributed it to the Board (*see* Stip. Facts ¶ 15), that document was not "available for public inspection" at that time within the meaning of the Brown Act (or the County's own public notice) because 5:42 p.m. is *after* "normal business hours."

Providing a memorandum at an office that is *closed to the public* satisfies neither the plain language nor the purposes of the Brown Act. According to Merriam-Webster, "available" is defined as "present or ready for immediate use." *See* "Available," Merriam-Webster Online, *available at* https://www.merriam-webster.com/dictionary/available (last visited Feb. 21, 2018). Further, to "inspect" means "to view closely in critical appraisal: look over." *See* "Inspect," Merriam-Webster Online, *available at* https://www.merriam-webster.com/dictionary/inspecting (last visited Feb. 21, 2018). Thus, to make something "available for public inspection" clearly means that the document must be ready for immediate use by the public to view closely. A document in a closed office cannot be viewed at all—let alone immediately or closely. This is especially true when construing the Brown Act liberally in favor of public disclosure and involvement, as the Court must. *See Epstein*, 87 Cal.App.4th at 869.

In opining on a similar Brown Act issue, the Attorney General concluded that providing an agenda notice in a public building that is locked during evening hours did not satisfy the Brown Act's plain requirement that the agenda be "posted in a location that is freely accessible to members of the public" for 72 hours prior to the meeting. 78 Ops.Cal.Atty.Gen. 327, 330-32

(1995). The Attorney General found that "freely accessible" is commonly defined as "capable of being reached," which could not happen if the building was locked. *Id.* at 331. The Attorney General also found that providing notice in a locked building did not satisfy "the Act's central purpose [which] is to promote openness in government." *Id.* Given this purpose, the Act's requirements for public disclosure must be "strictly interpreted." *Id.* Similarly here, the Act's requirements to make a document "available for public inspection" "at the time the writing is distributed to all, or a majority of all, of the members of the body" must be strictly interpreted to mean that the document is immediately viewable by the public at the same time as the Board. This cannot be accomplished by leaving the document in a closed or locked office.

Here, the County had several options whereby it could have made the Schwab Memorandum available to the public at the same time as the Board—none of which the County chose to implement. First, the County could have posted the Memorandum in the same "window" as the meeting agenda, which is viewable by the public at all times. *See* Exh. 10 at 19; *see also* 78 Ops.Cal.Atty.Gen. at 332 at fn.5 (noting "agenda may be posted on the outside of the building in a lighted display case if necessary"). The Schwab Memorandum, without attachments, was only three pages long and easily could have been placed with the agenda in the window, along with a notice directed the public to access the lengthier exhibits online. *See* Exh. 2 at P0003-5. However, the County declined to take this simple step to make the document available for public inspection at the same time the document was distributed to the Board and, instead, kept the document in a closed and locked office.

Second, the Brown Act explicitly states that in addition to making the document available in a designated location, the agency "may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting." § 54957.5(b)(2). Pursuant to this authority, the County posted the meeting agenda and the original 1,000-paged agenda packet on its website on November 9, 2016. Stip. Facts ¶ 7. But the County refused to also post the Schwab Memorandum, which concerned a significant new item for the meeting. The County could have also e-mailed the document or a link to it to the service list for the Project, as it did with the notice for the meeting. *See* Exh. 16

at 10233-35 (e-mail notification service list for Project hearing). Indeed, on November 9, 2012, Sierra Watch had notified the County that it wanted to be notified of all Project-related events. *See* Exh. 17 at 002652. But again the County chose not to do so.

Alternatively, the County could have postponed the hearing on the Project to allow sufficient time for both the Board and the public to review the Schwab Memorandum in advance of the Board's decision on the matter. Again, the County chose not to do so.

The failure to provide the Schwab Memorandum to the public at the same time as the Board is not merely a technical error. The Board received the document in sufficient time to at least presumably be prepared to make a decision on the Project at the meeting the following day. Neither Sierra Watch nor any other member of the public, however, had that opportunity. Therefore, Sierra Watch and the public were denied the ability to review the Memorandum and make comments prior to the Board's decision on this important Project.

In light of the County's failure to make documents available to the public at the same time it provides those documents to its Board, and in light of the County's insistence that it need not do so in any manner calculated to further the purposes of the Brown Act, Sierra Watch requests that Court declare the County violated the Brown Act by failing to make the Schwab Memorandum available to the public when it was made available to the Board. *See* § 59460(a).

CONCLUSION

This Court should issue a writ of mandate directing the County to vacate and set aside its November 15th Project approvals and to comply with the Brown Act's requirements for making documents available to the public at the same time they are provided to the Board; declare the Board's November 15th actions and approvals regarding the Project null and void for failure to give proper agenda notice; and declare that the County violated the Act by failing to make the Schwab Memorandum available to the public when it was made available to the Board.

DATED: February 22, 2018

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