Case No. C087892 (related to Case No. C088130)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

SIERRA WATCH

Plaintiff and Appellant,

v.

PLACER COUNTY and PLACER COUNTY BOARD OF SUPERVISORS

Defendants and Respondents,

and

SQUAW VALLEY REAL ESTATE, LLC, SQUAW VALLEY RESORT, LLC, and POULSEN COMMERCIAL PROPERTIES, LP

Real Parties in Interest and Respondents.

Appeal From a Judgment Entered in Favor of Respondents
San Francisco County Superior Court Case No. SCV0038917
Honorable Michael W. Jones, Judge

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL THIRD **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER: C087892 (related to C088130)
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APPELLANT/ PETITIONER: Sierra Watch RESPONDENT/ REAL PARTY IN INTEREST: Placer County et al.	

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2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
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Date: July 10, 2019

AMY J. BRICKER
(TYPE OR PRINT NAME)

/s/ Amy J. Bricker
(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

This suit seeks to remedy the Placer County Board of Supervisors' violations of the Ralph M. Brown Act open meeting law in approving a massive and controversial development project in Squaw Valley ("Project"). The County failed to alert the public that the Board would consider approving, in conjunction with the Project, an eleventh-hour deal concerning an issue of great public interest that County staff had hastily negotiated in secret with the Project applicant ("Developer") and the Office of the California Attorney General. Those negotiations were prompted by the Attorney General's notification to the County that it would file litigation challenging the Project unless the County conducted additional environmental review of—and imposed additional measures to minimize—the Project's adverse impacts on Lake Tahoe. Specifically, the Attorney General was concerned that the Project's addition of nearly 24,000 vehicle miles traveled *per day* to the Lake Tahoe Basin would significantly impact the Lake's famed clarity.

The last-minute agreement approved by the County requires the Developer to pay an air quality fee to the Tahoe Regional Planning Agency ("TRPA"), and for the County to enforce that fee ("Fee Agreement"). The undisputed facts show that the purpose of these commitments was to secure the Attorney General's agreement not to sue the County over its approval of the Project. However, instead of conducting its business in the "sunshine,"

as the Brown Act requires, the County buried this new Fee Agreement as an "insert" to the Project's proposed Development Agreement, which was already on the agenda for the Board's previously scheduled hearing to consider approving the Project.

The County violated the Brown Act in two ways. First, it violated Government Code Section 54957.5[1] by failing to make a key memorandum (the "Schwab Memorandum") regarding the new Fee Agreement "available for public inspection" at the same time this document 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 agreement and County staff's rationale for negotiating its terms and inserting them into the Project's Development Agreement—and placing it in the locked Office of the Clerk of the Board the night before the hearing. However, the undisputed evidence shows that the Schwab Memorandum was printed and left in the Clerk's Office *after* 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."

Second, the County violated Section 54954.2(a) by failing to provide any public notice of its consideration and approval of the new Fee

[1] Further statutory references are to the Government Code, unless specified otherwise.

Agreement. The Brown Act requires that an agenda for a Board hearing disclose, at least 72 hours in advance, "each item of business to be transacted or discussed at the meeting." The undisputed evidence shows that the Board discussed the new Fee Agreement at its November 15, 2016 hearing, and approved memorializing that deal—and making it enforceable by the County—as a separately signed and notarized "insert" to the Development Agreement. The undisputed evidence likewise demonstrates that the Fee Agreement is a "discrete" action that differs significantly from anything mentioned on the agenda or previously discussed throughout the Project's lengthy, four-year administrative process. Indeed, the evidence clearly shows 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 by having the Developer commit to pay the newly agreed upon fee.

The County and Developer contend that the County complied with the Brown Act because the Fee Agreement was inserted into the draft Development Agreement that was already on the agenda for the November 15 hearing and because the Attorney General was not expressly made a signatory to the Development Agreement. These arguments are red herrings. They sidestep the fact that the County provided no advance notice the Board would consider adopting, at its November 15 hearing, an entirely new agreement, which Board members themselves emphasized was both "a

precedent" and "a complete and separate issue" from the Development Agreement and other project approvals. Joint Appendix, Volume 4, pp. 1488, 1490 (hereinafter cited as "JA4:1488, 1490").

Simply inserting the terms of that new deal into the draft Development Agreement does not change the fact that it was a separate agreement—hastily conceived, negotiated, drafted, and finalized behind closed doors 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 record shows beyond any doubt both the County's and the Developer's understanding that the sole purpose of inserting the new agreement *into* the Development Agreement was to avoid litigation against the Project by the Attorney General. Indeed, the Developer and the County both repeatedly emphasized that they would not execute the new Fee Agreement without prior written assurance from the Attorney General's office that it would not file a lawsuit over the Project's approval. Thus, settling this litigation threat was a key factor in the Board's approval of the Project on November 15.

In short, when the Board hearing for the Squaw Valley Project began on November 15, the Board, the Developer, and the Attorney General's office all knew the Board would be considering an important new settlement agreement. The public, however, did not. Instead of involving the public in this key issue, the County gave the public no notice

whatsoever, thereby depriving them of the opportunity to meaningfully participate in discussions of this issue at the hearing.

Sierra Watch therefore respectfully requests that the Court reverse the decision below and issue a writ of mandate directing the County to rescind the Project approvals. Sierra Watch also requests a declaration that the County's actions here 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 ("Developer") began the four-year process that culminated in the County approving its controversial Project. *See* JA4:1616 (Stip. Facts ¶ 1). The Project, if allowed to proceed, would dramatically intensify resort development in North Tahoe. It would feature 1,493 new resort bedrooms 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") Vol. 3:1747, 1750, 1752-53.[2]

From the outset, public interest in the Project was widespread, intense, and sustained. Sierra Watch and many others offered substantive

[2] The trial court ordered that the parties could rely on documents from the administrative record in the related case, JA3:1029-30, which was designated as part of the record for this case on appeal. JA7:3369.

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. JA4:1616 (Stip. Facts ¶¶ 2-3). The draft EIR, for example, elicited over 300 comments. AR7:3885-96 (listing commenters); 39:22850-979 (Sierra Watch comments). Hundreds of organizations, public agencies, and individuals wrote letters critical of the Project and the EIR. *See* AR7:3885-96.

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 (AR79:46870-72), County Planning Commission (AR17:9897-10082, 10121), and County Board (AR16:9460-17:9711).

A central concern to Sierra Watch and many others was the Project's serious traffic impacts, including the associated impacts to the Lake and its famed clarity. *See, e.g.*, AR8:4364-77, 4387-92, 4610. The California Attorney General likewise expressed major concerns about the Project's impacts to the Tahoe Basin. JA4:1616 (Stip. Facts ¶ 4); AR38:22207-21. In a 15-page letter, then-Attorney General Kamala Harris warned the County that its analysis of increased vehicle use in the Basin as a result of the Project was inadequate. *See* AR38:22208-12.

II. The Attorney General warns the County that she intends to sue

On November 3, 2016—just twelve days before the Board of

Supervisors was to hold its final public hearing on the Project—Deputy Attorney General ("DAG") Nicole Rinke e-mailed County Counsel, reaffirming the Attorney General's concerns and warning the County that the State was prepared to sue over the Project:

> We remain concerned about the adequacy of the [Squaw Valley and another] 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 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.

JA4:1365 (emphasis added); *see also* JA4:1616 (Stip. Facts ¶ 5).

III. The County publishes the agenda for the November 15 Board meeting and makes associated documents available to the public

On November 9, 2016, the County posted on its website an agenda for the Board of Supervisors' November 15 hearing. JA4:1616 (Stip. Facts ¶ 7). At the same time, the County also made available on its website approximately 1,000 pages of documentation related to the agenda for that hearing. *Id.* (Stip. Facts ¶ 6). The agenda informed the public that the Board would "consider a recommendation from the Placer County Planning Commission for approval" of a set of motions necessary to grant the Developer entitlements for the Project. JA4:1617 (Stip. Facts ¶ 8); *see also* JA4:1504. The agenda listed each of the specific approvals that the Board

must make to allow the Project to go forward, such as certifying the environmental impact report for the Project and approving a subdivision map. *Id.*

The specific Project approvals forwarded by the Planning Commission also included "Adoption of an ordinance to approve the Development Agreement relative to the Village at Squaw Valley Specific Plan." *Id.* The agenda packet included the precise wording of the draft Development Agreement that the Planning Commission had recommended be approved. *See* JA4:1535-1569.

IV. The County, Attorney General, and Developer work feverishly to devise a deal to avoid litigation.

Neither the agenda nor any of the documents that the County posted with it on November 9 alerted the public to the possibility that the County was contemplating negotiating with the Developer and the Attorney General what they would later characterize as "the 'deal'" to avoid the Attorney General's threat of litigation. Nonetheless, on that very same day, the County, representatives of the Attorney General, and counsel for the Developer met privately for the first time to discuss the Attorney General's concerns about the Project and her threat of litigation. *See* JA4:1617 (Stip. Facts ¶ 10).

Over the course of the next six days leading up to the Board's November 15th hearing, the County, Developer, and Attorney General

secretly negotiated, drafted, and revised the terms of the Fee Agreement that would ultimately be inserted into the Development Agreement as a new "Section 3.19."

The public was provided no advance notice of—and no information about—the terms of this deal. As ultimately finalized, separately signed and notarized, inserted into the Development Agreement, and approved by the Board, Section 3.19 included two key terms: (1) a binding legal commitment by the Developer to pay a fee to TRPA for Environmental Improvement Projects (the "TRPA Fee"), and (2) the County's agreement to enforce payment of that fee and to confer, in writing, with the Attorney General regarding any proposed changes to Section 3.19. JA4:1399-1400. And, as detailed below, the undisputed facts show that the sole purpose of this new Section 3.19 was to secure the Attorney General's commitment not to sue the County over the Project.

The key steps in the County's negotiations with the Developer and the Attorney General regarding the Fee Agreement after the initial November 9 meeting include the following:

- Friday, November 11, 2016, 11:47 a.m.: Developer's counsel, Whit Manley, emails DAG Nicole Rinke to inform her that the Developer was "working with the County to draft a new section in the [Development Agreement] memorializing this commitment [to pay the TRPA Fee]." JA4:1476. Mr. Manley advised DAG Rinke that the proposal was "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.* Mr. Manley emphasized that it was "important to the County to receive this confirmation." *Id.*

- November 11, 2016, 1:02 p.m.: Mr. Manley emails DAG Rinke the language for the proposed new Section 3.19—drafted by the County and the Developer—to require the Developer to pay the TRPA Fee. *Id.* The email copied Deputy County Counsel Karin Schwab. *Id.*

- Saturday, November 12, 2016, 12:12 p.m.: DAG Rinke responds to Mr. Manley, copying Ms. Schwab, with feedback on the proposed new Section 3.19 and stating that she would "work to get confirmation ASAP" from the Attorney General's office that the County would not be sued. JA4:1475.

- November 12, 2016, 12:39 p.m. to 3:54 p.m.: The Developer and County exchange emails regarding DAG Rinke's requested revisions to the new Section 3.19 and proposed changes to the County's environmental analysis. JA4:1495-1500; *see, e.g.*, JA4:1497 (County Supervising Planner email at 1:22 p.m.: "If the applicant agrees to the full fee and the AG agrees that the analysis we prepared is adequate, then we can make this happen.").

- Sunday, November 13, 2016, 8:50 a.m.: Ms. Schwab emails the Developer's representatives and County staff to say that the County should work on providing an updated environmental analysis to address DAG Rinke's concerns. Ms. Schwab observes that, "[S]peaking for the 5th District Supervisor – *it goes without saying that if the [Attorney General] is not willing to provide written confirmation of satisfaction with the above, she will not be satisfied*. …[W]e need all of this to come together in time for me to revise docs and get copies to the Clerk for distribution to the Board members.")" JA4:1495 (emphasis added).

- November 13, 2016, 11:21 a.m.: Mr. Manley responds to Ms. Schwab's email, stating, "We agree that this needs to come together by noon. *We also agree that an essential element of* ***the 'deal'*** *is written confirmation from the [Attorney General] that her concerns have been addressed*." JA4:1494 (emphasis added).

- Monday, November 14, 2016, 9:37 a.m.: Mr. Manley's partner Howard "Chip" Wilkins emails DAG Rinke, copying Ms.

Schwab, confirming that the TRPA Fee payment secured by the Attorney General would be added to the Development Agreement as a new Section 3.19. JA4:1474. 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.*

- November 14, 2016, 12:50 p.m.: Ms. Schwab emails Mr. Wilkins additional proposed language for Section 3.19, on top of the language requiring payment of the TRPA Fee. JA4:1491-92. The new language drafted by Ms. Schwab reads: "The Developer expressly agrees that no changes will be made to this provision without prior CEQA review and noticed public hearing before the Board of Supervisors. The County agrees to confer, in writing, with the Attorney General if it receives a request from the Developer to amend or delete this provision prior to any such CEQA review." *Id.*; *see also* JA4:1400.

- November 14, 2016, 12:51 p.m.: Mr. Wilkins immediately forwards Ms. Schwab's email to DAG Rinke. JA4:1491.

- November 14, 2016, 2:23 p.m.: Ms. Schwab emails the County's environmental consultant and Developer's counsel noting that she has drafted "a backup memo to attach to a memo I am preparing for the Board should we *not* reach agreement with the [Attorney General]." JA7:3162.

- November 14, 2016, 2:24 p.m.: DAG Rinke replies directly 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 … ." JA4:1919.

- November 14, 2016, 2:31 p.m.: Ms. Schwab responds, "Nicole, I've made the change per your request." *Id.*; *see also* JA4:1400.

- November 14, 2016, 5:25 p.m.: DAG Rinke emails counsel for the Developer 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 the new Section 3.19 requiring payment of the TRPA Fee were enough for the Attorney General not to sue the County. JA4:1473-74.

- Specifically, DAG Rinke confirmed in her e-mail, as requested by the Developer's counsel (JA4:1474), 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 upon execution of these agreements, the Attorney General will not be filing litigation on Placer County's approval of the Project" (JA4:1473-74).

The new section to the Development Agreement was thereafter separately finalized and signed by the Developer's then-chief executive, Andrew Wirth, on November 14, 2016, the night before the Board of Supervisors hearing. JA4:1400.

V. The County provides notice of the new section in the Development Agreement containing "the 'deal'" *to the Board*, but does *not* provide any notice to the public.

Minutes after the new Section 3.19 was signed and DAG Rinke assured the Developer and County that the Attorney General would not sue if the Board approved it, notice of the agreement between the County, Developer, and Attorney General was provided to the Board of Supervisors. Specifically, at 5:42 p.m. on November 14, the night before the hearing, Clerk of the Board Megan Wood emailed to the members of the County Board of Supervisors a new version of the Development Agreement including the new Section 3.19 insert and a 107-page memorandum (with attachments) describing the County's meetings with the Developer and

Attorney General's office and the resulting deal, along with additional environmental analysis ("Schwab Memorandum"). JA4:1617 (Stip. Facts ¶ 13); JA4:1478-80 (County Counsel describing memorandum to Board of Supervisors).

Despite the Brown Act's express requirement that all such documents must be made "*available for public inspection* … at the time the writing is distributed to" the Board (§ 54957.5(b)(1) &(2)), these documents were *not* emailed or otherwise provided to any member of the public the same evening.

Instead, the Clerk simply printed out the Schwab Memorandum and attached documents and left a copy in her office, which was closed to the public because it was already after normal business hours. JA4:1618 (Stip. Facts ¶¶ 15-16) (The Clerk's office is open 8:00 a.m. to 5:00 p.m. on weekdays.). As the Clerk acknowledged, she made no attempt to distribute the documents to the public at the same time that she sent them to the Board. JA4:1574.

VI. The Board of Supervisors Hearing on November 15, 2016, and its aftermath

The Board's hearing on the Project commenced the following morning (November 15) at 9:00 a.m. Unlike the County and the Developer, the public did not know—or have any way of knowing—about the newly negotiated deal to settle the Attorney General's litigation threat by requiring

the Developer to pay the TRPA Fee. Indeed, it was not until nearly a full hour *into* the hearing that County Counsel Schwab disclosed this new "addition" to an unsuspecting public for the first time.

At that point, Ms. Schwab announced that "since last Wednesday, through and including the weekend, our office, as well as legal representatives for the [Developer], have had extensive discussions, both in person and via e-mail, with the attorney general, to address the attorney general's" concerns about the Project. JA4:1478. Underscoring just how unexpected the new deal was, the Developer's Counsel (Mr. Manley) emphasized: "This really did literally come together yesterday." JA4:1484. He then quoted Ms. Rinke's 5:25 p.m. email from the night before, which had assured that the Attorney General would not sue the County if the Fee Agreement was executed and if the Developer also executed a separate agreement with the Attorney General. *Id.*

Mr. Manley and Ms. Schwab also explained to the Board that the fee payment was included as an "addition" to the Development Agreement to make the obligation enforceable by the County. JA4:1486-87. "By including this in the [D]evelopment Agreement," Ms. Schwab emphasized, "the County has the right to enforce it, and will enforce it, and will ensure that it is paid or no building permit will be issued." JA4:1487.

The Board members' comments at the November 15 hearing acknowledged the game-changing nature of this new Fee Agreement. For

instance, in discussing the new proposal to resolve the Attorney General's litigation threat, Supervisor Weygandt commented that, although "we have had similar comments from the Attorney General's Office over the years, in this neck of the woods before. It never before has resulted in any action." JA4:1490. Supervisor Montgomery affirmed: "[T]he Attorney General's Office has always had the ability to weigh in on any of these projects and go directly to a project proponent. Historically, they just haven't." *Id.*

The Board also acknowledged, and indeed emphasized, that while the new Fee Agreement was proposed for insertion *into* the Development Agreement, it was a new and separate issue distinct from the Development Agreement that the Planning Commission had reviewed and that had been noticed for approval in the County's November 9 agenda: "[T]his *is a complete and separate issue* related to the relationship between Squaw and the DOJ …." JA4:1488 (emphasis added).

But while the County, the Developer, and the Attorney General all knew in advance that the Board would be considering this "complete and separate" last-minute deal, Sierra Watch and the rest of the public did not. That is because the County failed to provide any advance notice to the public of this important issue.

At the conclusion of the November 15, 2016 hearing, the Board enacted an ordinance adopting the amended Development Agreement, which included the "insert" of the new Section 3.19 that memorialized the

Fee Agreement. JA4:1619 (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. *See* JA4:1580-81; *see also* JA4:1584-85 (Sierra Watch executive director Tom Mooers describing what research and advocacy organization would have done if it had notice of the deal).

The Attorney General was the only party of the three involved in negotiating the Fee Agreement who attempted to give any member of the public notice of the last-minute deal. Specifically, at 5:40 p.m. on November 14, DAG Rinke emailed Sierra Watch's counsel Amy Bricker to give her "[a] heads up" that the Developer had agreed to pay a "mitigation" fee for the Project's impacts on the Tahoe Basin and that the Attorney General thus would not be filing litigation over the Project. JA6:3078-79; 5:2093. However, Ms. Bricker had already left the office for the day prior to DAG Rinke sending the email, and thus she did not see the email until approximately 9:10 a.m. the next morning, after the hearing had begun. JA6:3078-79. She immediately forwarded the email to Sierra Watch, whose members were already at the hearing and thus did not see the email until after the hearing was already underway. *Id.*

VII. Sierra Watch manages to obtain copies of the Fee Agreement and related documents, but not until two days after the Board had approved the Agreement

The first time Sierra Watch or its counsel actually saw the Schwab Memorandum or the text of the new Section 3.19 was on November 17,

2016, two days *after* the Board had approved the Development Agreement with this new section. Specifically, in response to a request from Ms. Bricker, DAG Rinke emailed her the documents, with the following message:

> These are the documents that Placer included in the record and provided to the Board, *though apparently not the public*, at the hearing. They are public documents. I was not aware that this is how they were going to handle it.

JA6:3081 (emphasis added).

VIII. Procedural history of the litigation

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. *See* JA4:1589-93. Sierra Watch explained that the approval of Section 3.19, 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 these violations. *Id.* at 1591-92. The County refused to do so.

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. JA1:13-29. The County demurred to both claims. The court overruled the County's demurrer as to Sierra Watch's second cause of action, but sustained with leave to amend as to the first. JA2:440, 446-48. Sierra Watch then filed a First Amended Petition (JA2:451-69), and the County again demurred to the first cause of action (J:2:612-27). The court overruled the County's demurrer, holding that Sierra Watch had alleged sufficient facts to state a cause of action for violation of the Brown Act. JA2:989-93.

Judge Michael Jones held a bench trial on both claims, and thereafter issued his Statement of Decision denying the petition. JA7:3326-37. Judgment was entered on July 6, 2018. JA7:3344-46.

The Developer subsequently filed a motion for an award of attorneys' fees under the Brown Act, arguing that Sierra Watch's lawsuit had been "frivolous" and "totally lacking in merit." JA7:3381. Judge Jones denied the motion, holding that Sierra Watch "presented colorable legal arguments based on both stipulated facts and evidence obtained through discovery." *Id.*

Sierra Watch timely appealed. JA7:3364.

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment entered on July 6, 2018. JA7:3344-46. Code Civ. Proc. § 904.1(a)(1) (an appeal may be taken from a final judgment); *see also* California Rules of Court, Rule 8.104.

STANDARD OF REVIEW

This appeal concerns purely legal questions regarding whether, based on stipulated and undisputed facts, Placer County violated the Brown Act when it (1) failed to make documents available to the public at the same time they were made available to the Board; and (2) discussed and approved inserting into the Development Agreement the new Section 3.19—which memorialized the Fee Agreement—without providing advanced notice to the public.

Because this appeal does not challenge the trial court's factual findings—only its legal conclusions based on the undisputed facts—the standard of review is de novo. *Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 516 ("[W]here, as is the case here, the facts are undisputed, we determine a local agency's compliance [with the Brown Act] de novo."); *see also Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765 ("Questions of statutory interpretation, and the applicability of a statutory standard to undisputed facts, present questions of law, which we review de novo.") (citation omitted); *accord Taxpayers for Livable Communities v. City of Malibu* (2015) 126 Cal.App.4th 1123, 1126.

ARGUMENT

I. The County violated the Brown Act when it failed to make the Schwab Memorandum "available for public inspection" at the same time the memorandum was distributed to the Board of Supervisors.

When a county provides a public record to its board of supervisors less than 72 hours before a meeting, the Brown Act requires it to make that document "*available for public inspection* at a public office or location … *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) (emphasis added). Sierra Watch contends that the County violated this requirement with respect to the Schwab Memorandum. The facts relevant to this contention are not in dispute. *See* JA4:1617-18; 7:3358-60.

It is undisputed that the "Schwab Memorandum was a writing related to an agenda item that was distributed less than 72 hours prior to the meeting [and t]hus it was required to be made available for public inspection pursuant to Government Code section 54957.5(b)(2)." JA7:3358 (Statement of Decision, citing Stipulated Facts). It is also undisputed that the only action the County took to allegedly comply with this provision was to place the Schwab Memorandum inside the Clerk's locked office after business hours. JA4:1618; 7:3358-59. The only question before this Court is thus a legal one, reviewed de novo: whether the County's placement of the Schwab Memorandum inside a closed and locked office constitutes

making a document "available for public inspection" under the Brown Act. It does not.

A. The Constitution mandates that the term "available for public inspection" must be construed broadly "to further the people's right of access" to, and transparency in, governmental decision-making.

The "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, [we] must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-87.

The Legislature specifically designed the Brown Act 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 thus 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) (emphasis added).

With the passage of Proposition 59 in 2004, California voters codified this standard in the California Constitution, which 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 limits the right of access*.

Cal. Constr. art. 1, § 3(b) (emphasis added). Thus, the Court must interpret the term "available for public inspection" within section 54957.5(b) broadly to encourage open government and public participation in agency decision-making.

B. The undisputed facts show the Schwab Memorandum was physically inaccessible to the public at the time it was made available to the Board, and no member of the public had an opportunity to review it prior to the November 15 hearing.

It is uncontested that Clerk of the Board Megan Wood received the Schwab Memorandum on November 14, 2016 at 5:36 p.m., the night before the hearing, and emailed it to all the members of the Board of Supervisors

six minutes later at 5:42 p.m. JA4:1617-18 (Stip. Facts ¶¶ 13, 17). At the same time (5:42 p.m.), the Clerk printed the Schwab Memorandum and placed it in her office at 175 Fulweiler Avenue, Auburn, California. JA4:1618 (Stip. Facts ¶ 15). It is also 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. JA4:1504, 1573, 1618 (Stip. Facts ¶ 16); 4:1573 (Wood Deposition Transcript); 7:3336 (Statement of Decision).

Further, it is undisputed that, other than placing the document in the Clerk's Office after business hours, the County did not take any other actions prior to the public hearing on the Project to make the Schwab memorandum available for public inspection. *See* JA4:1574; 7:3358-59. Indeed, the trial court expressly held as much: "It is undisputed that the general public could not access the Schwab Memorandum the evening prior to the Board of Supervisors hearing, for the simple reason that it did not become available until after normal business hours." JA7:3359.

The hearing on the matter began at 9:00 a.m. the following day (November 15, 2016) in Kings Beach, located approximately 80 miles from the Clerk's Office in Auburn. JA4:1618 (Stip. Facts ¶¶ 16, 18). Thus, it would have been physically impossible for the public to access the Schwab

Memorandum in the Clerk's Office prior to the hearing.[3]

C. The County's placement of the Schwab Memorandum in a locked office that no member of the public could access failed to comply with its obligation to make that document "available for public inspection."

At trial, the County and Developer (collectively, "Respondents") claimed, and the trial court agreed, that Ms. Wood's placement of the Schwab Memorandum in her office at 5:42 p.m. on November 14, 2016 satisfied the Brown Act's requirement to make the document "available for public inspection." *See* JA7:3335-37 (Statement of Decision). This conclusion is wrong as a matter of law.

As detailed above, the Brown Act's forcefully stated legislative intent is that public agencies' "actions be taken openly and that their deliberations be conducted openly." § 54950. Thus its terms must be construed "liberally in favor of openness in conducting public business." *Shapiro v. Bd. of Directors* (2005) 134 Cal.App.4th 170, 180-81..

With these principles in mind, the meaning of the Brown Act's requirement that the County make a public record "available for public inspection" is plain. 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

[3] At trial, the County asserted that it had placed one copy of the Schwab Memorandum on a table inside the Board's hearing room and that members of the publicly allegedly could have accessed it *at that time*. JA4:1640.

(last visited June 15, 2019); *see also International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 295 (relying on dictionary to interpret undefined term in Brown Act). 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 June 15, 2019).

Thus, by definition, to make something "available for public inspection" means that the document must be ready for immediate use by the public to view closely. It necessarily follows that, by definition, placing a document in a closed office—where it cannot be viewed at all, let alone immediately or closely—does *not* mean making it "available for public inspection."

The County's November 15 agenda notice confirms that the County itself understood this plain meaning. That agenda states as follows: "Materials 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*." JA4:1617 (Stip. Facts ¶ 9) (emphasis added). If documents are "available for public inspection" "during normal business hours," that means they are *not* available for public inspection outside of normal business hours, when the Clerk's Office is closed and

locked.

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 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.*

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 by the Board.

The trial court declined to follow the reasoning of this Attorney General opinion. Instead, it inexplicably held that because the Legislature did not specify that documents distributed to the Board must be "freely accessible" at the time they are distributed to the Board, that allowed the Board to make documents "available for public inspection" by placing them in a locked office closed to the public. JA7:3336 (Statement of Decision).

However, assuming arguendo that the phrase "available for public inspection" at the time the document is distributed to the Board may mean something different than "freely accessible" under the Brown Act, "available for public inspection" certainly does not mean the document may be completely *unavailable* to the public. Such a reading is absurd, and it would render meaningless the Brown Act's express requirement that agencies make materials "*available for public inspection*" at the same time they are provided to the Board. § 54957.5(b)(2) (emphasis added). *See Dyna-Med*, 43 Cal.3d at 1386-87 (statute must be read to give meaning to all of its words).

If the Legislature had desired only that the document be placed in a public office—open to the public or not—it could have said as much, and required only that the document be left in a certain location. Instead, the Legislature expressly stated, *twice*, that the agency must make the document "*available for public inspection*" at that location. § 54957.5(b)(1)-(2). Likewise, if the Legislature intended that the materials need only be available during normal business hours, it could have so provided. Instead, the Legislature required that they be made available for public inspection "at the time the writing is distributed to all, or a majority of all, of the members of the body." § 54957.5(b)(1).

Here, the County could have easily complied with the Brown Act's requirement, but simply chose not to. For example, 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, in addition to making the agenda available in the Clerk's office on November 9, 2016, the County on that same date posted on its website both the meeting agenda and the text of the Development Agreement and related documents that the Planning Commission recommended for approval on November 9, 2016. JA4:1616 (Stip. Facts ¶ 7). But the County refused to also post on its website the Schwab Memorandum or the proposed new Section 3.19 to that Development Agreement.

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 and the proposed Fee Agreement in advance of the Board's decision on the matter. Again, the County chose not to do so.

Here, as a factual matter, it is undisputed—and indisputable—that the County distributed the Schwab Memorandum (including the proposed new Section 3.19) to the Board without making those documents available to the public at that time. In so doing, the County violated Section 54957.5(b)(1)-(2). Accordingly, pursuant to Section 59460(a), the Court should reverse and direct the Superior Court to issue a declaratory

judgment that the County violated the Brown Act by failing to make the Schwab Memorandum available to the public at the same time it was distributed to the Board of Supervisors.

II. The County violated the Brown Act because the Fee Agreement adopted in Section 3.19 was a discrete item of business distinct from the Development Agreement that was identified on the agenda and included in the agenda packet.

In addition to violating the Brown Act by failing to make the Schwab Memorandum available to the public at the time it was provided to the Board, the County violated the Act by failing to provide the required agenda notice to the public that the Board would be considering approval of the Fee Agreement.

The Act requires that an agenda for a Board meeting provide, at least 72 hours in advance, "a brief general description of *each item of business* to be transacted or discussed at the meeting." § 54954.2(a) (emphasis added). 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 (quoting *Carlson v. Paradise Unified Sch. Dist.* (1971) 18 Cal.App.3d 196, 200). 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).

Under the applicable case law and undisputed facts of this case, the Fee Agreement memorialized in the Section 3.19 "insert" for the Development Agreement constituted a separate "item of business," which the Brown Act requires to be separately listed on the agenda. The agenda for the November 15 hearing identified and attached a very specific Development Agreement to be considered by the Board. This Development Agreement did not include Section 3.19 or anything remotely similar to it.

Indeed, at the time the agenda was posted on November 9, neither the County nor anyone else contemplated that anything like Section 3.19 might be conceived, negotiated, drafted, and placed before the Board for consideration at the November 15 hearing. To the contrary, as the Board itself emphasized, the Fee Agreement memorialized by Section 3.19 was a "complete and separate issue"—as well as a potentially troubling "precedent" that had never before been considered in this or any other project approval. Nevertheless, despite the public being kept completely in the dark regarding the Board's consideration of the Fee Agreement, the Board approved it at the hearing. The Brown Act prohibits such a result.

A. The purpose of Section 3.19 was to avoid a lawsuit by the Attorney General—a purpose entirely distinct from, and outside the scope of, the Development Agreement.

The undisputed evidence shows that Section 3.19 is the product of eleventh-hour negotiations between the County, the Developer, and the Attorney General's office to avoid litigation the Attorney General had

stated she would file unless the County undertook additional environmental review of, and required the Developer to further mitigate, the Project's significant environmental impacts on Lake Tahoe. *See* Statement of Facts, Parts II-VI.

About an hour into the Board's November 15 hearing, Deputy County Counsel Karin Schwab summarized the negotiations that led to the drafting of Section 3.19 in a memorandum distributed to the Board—but not to the public—the night before the hearing. *See* JA4:1478-80; *see also* JA4:1366-68 (Schwab Memorandum). These negotiations and the new Section 3.19 were announced to the public for the first time during the November 15 hearing. *See* JA4:1478-80.

At the hearing, Board Supervisors expressed concern over the "precedent"-setting nature of this agreement with the Attorney General without having "gone through an appropriate public process and a policy development." JA4:1487-88. County Counsel assured the Board that the Developer's purportedly "voluntary" agreement to pay the fee could and would be enforced by the County. JA4:1487 ("[T]he County has the right to enforce it, and will enforce it, and will ensure that it is paid or no building permit will be issued.").

County Counsel also confirmed a statement from one of the Supervisors that the payment of the fees set forth in the Fee Agreement is a "complete and separate issue" from what would normally be required by

the County in a Development Agreement. JA4:1488 (Supervisor Duran asking Deputy Counsel Schwab whether the Developer's agreement to pay the fees required by the Fee Agreement "*is a complete and separate issue* related to the relationship between Squaw and the DOJ…") (emphasis added); *id.* (Ms. Schwab: "That's correct.").

Likewise, after repeatedly emphasizing the last minute nature of this new "deal,"[4] the Developer's attorney assured the Board that, if the County approved the new Section 3.19 requiring the Developer to pay the TRPA Fee, the Attorney General would not sue the County for approving the Project. JA4:1484. The Developer's attorney even read to the Board an email from the Attorney General's office stating that "contingent upon execution of the agreements, the [A]ttorney [G]eneral will not be filing litigation on Placer County's approval of the Project." *Id.*; *see also* JA4:1473-74 (email).

In short, the undisputed facts show that the Fee Agreement memorialized in Section 3.19 was a "complete and separate issue" from the Development Agreement posted on the County's website with the agenda on November 9, was separately conceived, drafted, and signed and notarized by the Developer after that agenda was posted (JA4:1400), and constituted an unprecedented new type of approval for which no public

[4] *See, e.g.*, JA4:1484 ("This really did literally come together yesterday."); JA4:1482 (same).

notice was provided.

B. *Hernandez* and *San Joaquin Raptor* are controlling and compel the conclusion that the Fee Agreement constituted a separate "item of business" under the Brown Act.

Whether the last-minute adoption of a deal related to a previously noticed action on a development proposal constitutes a separate "item of business" under the Brown Act is not an issue of first impression. To the contrary, *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194 addressed this very situation and is directly on point. There, an agenda for a Town council meeting stated generally that the council would be giving direction to staff regarding a proposed initiative measure that would allow a development by Walmart. *Id.* at 197. The agenda packet posted online with the agenda—and provided to the public—summarized the initiative and the three resolutions staff recommended the council adopt to place the initiative on the ballot. *Id.* at 199-200, 209. The agenda packet also attached those three resolutions, as well as the text of the initiative. *Id.* at 199, 208. (The Court assumed, for the purposes of its decision, that the "Brown Act allows for the submission of an agenda packet with the agenda in order to conform with the [ ] Act['s]" notice requirements. *Id.* at 208.)

However, after the agenda was posted and the resolutions were made available to the public in the agenda packet, Walmart offered to pay the Town to fund a special election for the initiative. *Id.* at 204. At the meeting noticed in the agenda, the Town council adopted the three resolutions that

had been included in the agenda packet. *Id.* at 197, 208-09. At that same meeting, the council also adopted a Memorandum of Understanding ("MOU") accepting Walmart's late-offered payment to fund the special election. *Id.* at 196, 208. The MOU did not appear on the meeting agenda or in the agenda packet. *Id.* Rather, like the Developer's offer to pay the TRPA Fee here, Walmart's offer to pay for the election did not arise until after the agenda was posted. *See id.*

The court in *Hernandez* held that the Town violated the Brown Act, and it accordingly invalidated the council's actions with respect to the initiative. *Id.* at 209. While the MOU *was related to* the 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 Town would be agreeing to accept money from Walmart to fund an election. *Id.* at 208.

Hernandez is squarely on point here. As with the initiative in that case, various resolutions and ordinances relating to the Project approvals were on the agenda here. But Section 3.19 was not. Neither was there any mention of the possibility of a Fee Agreement in the agenda packet. Rather, just as Walmart had offered to pay for the election in *Hernandez* only after the agenda was posted, here the Developer offered to commit to "voluntarily" pay the TRPA Fees in this case only after the Board agenda was issued. *See, e.g.*, JA4:1473-77, 1491-1502 (emails negotiating addition to Development Agreement between November 11 and 14, 2016);

Statement of Facts, *supra*, Part IV.

Indeed, underscoring the discreteness of this agreement, its key terms were separately signed, dated, and notarized apart from the Development Agreement, before being physically "inserted" into that Agreement. JA4:1400-01. And, just like the MOU to fund the election in *Hernandez*, the litigation settlement was entirely outside the scope of the Development Agreement, whose purpose was to "establish[] certain development rights in the Property which is the subject of the development project application." JA4:1538.

Finally, as in *Hernandez*, it is "conceivable"—if not highly likely—that removing the Attorney General's threatened litigation influenced the Board's decision to approve the Project. *Hernandez*, 7 Cal.App.5th at 208 (That the MOU "was first proposed at the meeting[,] as Walmart offered the gift the day after the agenda was posted [ ] is troublesome[,] as it is conceivable this was a major factor in the decision to the send the matter to the electorate."). Thus, under *Hernandez*, Section 3.19 was a separate "item of business" that should have been, but was not, listed on the County's agenda notice. *Id.* at 209 ("In none of the documents [posted with the agenda packet] was the 'item of business' that Town Council was going to accept a gift from Walmart in order to pay for a special election to pass the Initiative. [The public] was given no notice that this important 'item of business' was going to be voted on at the Town council meeting").

San Joaquin Raptor likewise is closely on point. It held that an agenda's listing of a subdivision approval for consideration is insufficient to give public notice that a related item of business—review of an environmental document for that project—would be discussed and approved. The court held the environmental document was "plainly a distinct item of business, and not a mere component of project approval, since it (1) involved a separate action or determination by the commission and (2) concerned discrete, significant issues of CEQA compliance and the project's environmental impact," which "issues often motivate members of the public to participate in the process and have their voices heard." *San Joaquin Raptor*, 216 Cal.App.4th at 1177. "Of course," the court observed, "that is exactly what the Brown Act seeks to facilitate." *Id.* at 1178.

The court emphatically rejected the notion that the listing of the "project approval" on the agenda alone was sufficient to notify the public:

> Even assuming for the sake of argument that a person could have speculated from what appeared in the agenda (i.e., the project's approval) that the adoption of the [environmental document] might possibly be considered at the meeting, that would not make the agenda legally adequate. The Brown Act mandates that each item of business be described on the agenda, not left to speculation or surmise.

Id.

So too, here. Like the environmental review documents in *San Joaquin Raptor,* Section 3.19—which the Board itself emphasized was

"precedent"-setting and which was undeniably of great interest to the public—"concerned discrete, significant issues;" which the County considered separately from the other project approvals.

The trial court nevertheless concluded that *Hernandez* and *San Joaquin Raptor* were inapplicable here and that Section 3.19 was "merely a component of Project approval." JA7:3356. It reasoned that "[h]ad Section 3.19 been part of the Development Agreement when the agenda and agenda packet were made available to the public on November 9, 2016, it is clear that the agenda item to consider approval of the Development Agreement would have sufficiently notified the public of the nature of the business to be considered and conducted at the Board of Supervisors meeting." *Id*. But this rationale has it precisely backwards.

Here, the salient point is that Section 3.19 *was not* part of the Development Agreement presented in the agenda packet. Thus, the more pertinent question is whether, if Section 3.19 had been presented to the Board for approval on November 15 in a separate resolution—but with exactly the same text and executed by exactly the same parties (the Developer and the County)—would that constitute a violation of the Brown Act under *Hernandez* and *San Joaquin Raptor*? Based on the reasoning and holdings in those cases, the answer is clearly "Yes."

Should that same agreement nevertheless escape public notice simply because the County cleverly captioned the newly conceived—and

separately negotiated, drafted, signed, and notarized Section 3.19—as an "INSERT" into the previously noticed Development Agreement (JA4:1399), rather than as a separate document? Any such holding would not only elevate form over substance, but also undermine the central purpose of the Brown Act's notice requirement as well the undisputed fact that the Fee Agreement was—in the words of a Board Supervisor and as confirmed by County Counsel—a "complete and separate issue" from the Development Agreement into which it was inserted. JA4:1488; *see Hernandez*, 7 Cal.App.5th at 209 (finding a Brown Act violation because "[i]n none of the documents was the 'item of business' that Town Council was going to accept a gift from Walmart in order to pay for a special election to pass the Initiative").

When interpreting the Brown Act, courts do not "elevate form over substance" or "turn a blind eye to such a subterfuge [that] would allow [an agency] (and, potentially, other elected legislative bodies in the future) to circumvent the requirements of the Brown Act, a statutory scheme designed to protect the public's interest in open government." *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.* (2001) 87 Cal.App.4th 862, 871-72 (liberally interpreting Brown Act term to avoid such a loophole). The Court should decline to turn such a blind eye here.

C. The absence of a single, three-way agreement is irrelevant to the County's Brown Act violation.

At trial, the County and Developer made much of the fact that there was no single three-way agreement between the County, the Attorney General, and the Developer enshrining the terms of the understanding memorialized in Section 3.19. *See* JA4:1633. This is a red herring. While the County's approval of such a three-way agreement without notice at the hearing would have been sufficient in and of itself to demonstrate a violation of the Brown Act, an explicit three-way agreement is not necessary to prove such a violation. Rather, all that must be shown is that the County discussed or took action on an item of business that did not appear on the agenda. § 54954.2(a). That is exactly what happened here.

The trial court also downplayed the County's role in the agreement, stating that "the County's involvement appears limited to working with the [Developer] to draft an amendment to the Development Agreement memorializing both the [Developer's] agreement to pay the TRPA Fee, and the County's ability to enforce the payment through the default provisions of the Development Agreement." JA7:3354. But these actions—along with the undisputed facts that (1) the County discussed and took action to adopt Section 3.19 without prior notice to the public, and (2) the purpose of the amendment was to avoid litigation by the Attorney General, an entirely separate issue from the Development Agreement—were sufficient to

demonstrate a Brown Act violation. *See Hernandez*, 7 Cal.App.5th at 208-09. Indeed, the last-minute MOU in *Hernandez* required nothing more from the Town than the acceptance of a similar "gift" from Walmart, in that case to pay for an election. *Id*.

D. The specificity of the Development Agreement included in the agenda packet further underscores the County's Brown Act violation here.

The County's agenda was also inadequate because the Development Agreement listed on it was substantially altered without notice, thereby misleading the public. To fulfill the Act's objective, "agenda drafters must give the public a fair chance to participate in matters of particular or general concern by providing the public with more than mere clues from which they must then guess or surmise the essential nature of the business to be considered by a local agency." *San Diegans*, 4 Cal.App.5th at 643.

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 specific Development Agreement previously reviewed and recommended for approval by the Planning Commission on August 11, 2016. JA4:1617 (Stip. Facts ¶ 8); *id.* at 1504, 1523. The agenda packet then attached the specific Development Agreement to be considered, which *did not include* Section 3.19 or any mention of the Attorney General. *See*

JA4:1535-69. Members of the public—such as Sierra Watch's members and staff—who were familiar with the agenda and the specific Development Agreement that the Planning Commission had reviewed and recommended for approval would thus have absolutely 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 District v. Superior Court of Santa Barbara County* (1975) 13 Cal.3d 315. 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.* at 335-36. 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. *Id.* at 335. The board then adopted the amended plan at its May 18 meeting. *Id.* at 320.

Reviewing a challenge to the board's actions under an analogous provision of the Education Code,[5] 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 336.

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

The Supreme Court also noted that the board's own process for presentation of such 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.

This Court's recent holding in *Olson*, *supra*, is to the same effect. There, a challenged agenda for a special district board meeting listed an item to "'[a]pprove bills and authorize signatures on Warrant Authorization Form for' various bills listed on the agenda, not including an AT&T bill." 33 Cal.App.5th at 510. At the hearing, the district secretary "announced that since the time the agendas for the meeting were posted, she had received an additional bill from AT&T that she wanted to 'add' to the agenda as a consent item." *Id*. The district's board then authorized the payment of the AT&T bill at the hearing, along with the other bills. *Id.* at 510-11.

This Court found this last-minute addition of the AT&T bill without agenda notice violated the Brown Act. The Court reasoned: "the Board indicated it would be approving a specific list of payments. … Those interested in payments not listed would not know to attend the September 2016 meeting so they could comment on the subject." *Id.* at 521.

Here, as did the agencies in *Santa Barbara* and *Olson*, the Board

considered a last-minute "addition" to an item on the agenda—the Section 3.19 insert into the Development Agreement—but did not timely inform the public of the change. Without advance notice, there would be absolutely no way for the public to know that the Board was intending to discuss a major modification to the Development Agreement that was presented to the Planning Commission. It was that *specific* Development Agreement that was referenced on the agenda. *See* JA4:1504. That Development Agreement did not include Section 3.19 or *any hint* that the Development Agreement would ultimately include a provision to avoid threatened litigation by the Attorney General. *See* JA4:1365, 1791; *see also* JA4:1616 (Stip. Facts ¶ 5).

Further, as in *Santa Barbara*, the County has adopted specific procedures for consideration of the item in question (here, a Development Agreement). The Placer County Code calls for initial review and approval of any proposed development agreement by the Planning Commission before presentation to the Board, and then allows for reconsideration by the Commission should significant substantive amendments be proposed. *See* JA4:1601 (Placer County Code § 17.58.240(B)). These provisions were referenced in the agenda packet. *See* JA4:1526. Thus, if the agenda was supposed to have covered the new Section 3.19, it was "fatally misleading" because it referenced the specific Development Agreement that had been voted on by the Planning Commission, which did not include the last-

minute addition of Section 3.19 that would ultimately be adopted by the Board.

The trial court concluded as a matter of law that, based on the undisputed facts, the addition of Section 3.19 was not "radical[ ]" enough of a change to merit new agenda notice pursuant to *Santa Barbara*. JA7:3356-57. This conclusion misconstrues both the undisputed facts and the law. The addition of Section 3.19 was no minor modification to the Development Agreement. Rather, it contains an entirely new agreement designed to avoid litigation by the Attorney General over significant environmental concerns. This topic was wholly unrelated to the remainder of the Development Agreement, which concerned development rights regarding the Project. *See generally* JA4:1380-1415 (Development Agreement).

Equally important, this Court's recent decision in *Olson* demonstrates that whether a last-minute addition "differs radically" is not the test for agenda notice under the Brown Act. Rather, the question is whether the public would be sufficiently informed, based on the notice, that such an amendment may be considered. Although payment of the additional AT&T bill at issue in that case, when the City was already paying other bills, was not radically different from the payment of those other bills, the agency's failure to notify the public about this change violated "the rule that local governing bodies, elected by the people, exist to

aid in the conduct of the people's business, and thus their deliberations should be conducted openly and with due notice with few exceptions." *Olson*, 33 Cal.App.5th at 525 (citation omitted). Here, the agenda notice informed the public that very specific provisions of a Development Agreement would be considered, leaving the public no clue that an additional provision, with an entirely new objective, would also be considered. The Brown Act prohibits such a result. *Id.*

III. The County did not substantially comply with the Brown Act.

At trial, the County attempted to avoid the consequences of its violations by claiming that it "substantially" complied with the Brown Act. JA4:1630-31; 1636-37.[6] It did not.

To begin, "substantial compliance" does not eradicate a Brown Act violation. *See Olson*, 33 Cal.App.5th at 522-25. Rather, it operates only as a "safe harbor" to prevent a rescission of an agency action where an agency's agenda gives "fair notice of the essential nature of what an agency will consider" at the meeting. *Id.*; *San Diegans*, 4 Cal.App.5th at 645. The substantial compliance rule allows an agency's action to stand where there are merely "technical errors or immaterial omissions" in the agenda. *San Diegans*, 4 Cal.App.5th at 644-45; *see also Castaic Lake v. Newhall County Water Dist.* (2015) 238 Cal.App.4th 1196, 1206-07 (agency action will not

[6] The trial court did not reach the issue of substantial compliance.

be overturned where the violation involved only minor or "hypertechnical" errors).

By contrast, the doctrine does not excuse an agency's failure to properly notify the public where, as here, a significant new agreement has been reached. *See Hernandez*, 7 Cal.App.5th at 209; *Olson*, 33 Cal.App.5th at 521; *San Joaquin Raptor*, 216 Cal.App.4th at 1176–79; *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 919-24 ("substantial compliance" cannot excuse failure to describe a separate "item of business" on closed session agenda).

Here, the County's violations were no mere hypertechnical errors. Rather, they involved the same exact situation that the court in *Hernandez* found particularly "troublesome." 7 Cal.App.5th at 208. The agenda gave the public no clue that the County would be approving a last-minute agreement to avoid litigation by the Attorney General over an issue of great public importance: the Project's environmental impacts on Lake Tahoe. Rather, the agenda only notified the public that the County would be considering a particular Development Agreement that had been reviewed and recommended for approval by the Planning Commission. JA4:1504. That Development Agreement did not include the last-minute "insert" to settle the differences with the Attorney General, which County Counsel added at the hearing. *Compare Hernandez*, 7 Cal.App.5th at 209 ("In none of the documents was the 'item of business' that Town Council was going

to accept a gift from Walmart in order to pay for a special election to pass the Initiative. [The public] was given no notice that this important 'item of business' was going to be voted on at the Town council meeting");[7] *see also Olson*, 33 Cal.App.5th at 521(finding no substantial compliance where the agenda identified that the agency would by paying certain bills, but failed to list a last-minute addition of a bill from AT&T).

At trial, Respondents relied on *San Diegans for Open Government*. But that case is inapposite. The agenda there notified the public that the agency would consider an "agreement 'to provide a mechanism to share Transient Occupancy Tax (TOT) generated by the Project'; and a report, required by statute, 'documenting the amount of subsidy provided to the developer, the proposed start and end date of the subsidy, the public purpose of the subsidy.'" 4 Cal.App.5th at 640-41. The court held that, "considered as a whole, [the agenda] gave the public and press more than a 'clue' the city planned to provide the project developer with a substantial and ongoing financial subsidy for the resort project." *Id*. (citation omitted).

By contrast here, the agenda gave *no clue* that the Development Agreement would include a new provision to settle a potential lawsuit by

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[7] While the town in *Hernandez* conceded that the MOU was not included in the agenda packet and thus relied solely on a substantial compliance defense (*see Hernandez*, 7 Cal.App.5th at 207), here it is undisputed that Section 3.19 was likewise not included in the agenda packet or mentioned in the agenda notice.

the Attorney General over her environmental concerns.

IV. Sierra Watch was prejudiced by the County's Brown Act Violations.

Respondents also claimed at trial that Sierra Watch allegedly suffered no prejudice from the County's defective agenda. Again, they are wrong.

As with "substantial compliance," a showing of prejudice is only relevant to the nullification of the County's action, and not to Sierra Watch's request for declaratory relief. *See* §§ 54960.1(d)(1), 54960.2.

Regardless, Sierra Watch has demonstrated ample prejudice to require the County to rescind its Project approvals. *Hernandez* is again controlling. There, the Court of Appeal affirmed the trial court's legal finding of prejudice and invalidated the town's actions where the agenda failed to notify the public that the town would consider and approve a last-minute MOU memorializing a voluntary payment from Walmart to fund an election regarding an initiative. *Hernandez*, 7 Cal.App.5th at 208-09. Although numerous people attended the hearing and objected to the initiative, "[n]o one at the meeting discussed the matter [of the funding] or commented on the MOU." *Id*. at 200, 208. Nor did anyone "rais[e] the issue that [Hernandez] wanted to raise at the meeting. For example, he had 'serious concerns about Walmart making a mockery of the normal administrative process by trying to pay money to circumvent the process.'"

Id. at 204-05. Furthermore, the Court noted that it is "conceivable" that the voluntary payment may have been a "factor in the decision to send the matter to the electorate" and that this possibility was "troublesome." *Id*. at 208.

Similarly here, although numerous people attended the Project hearing to object to the Project approval, none of them had any clue that the Board would also be considering a last-minute agreement that accepted payment from the Developer to avoid litigation by the Attorney General. Thus, no one in attendance, including Sierra Watch, was able to provide substantive comments on that agreement. *See* JA4:1584-85. Had Sierra Watch and others been given proper notice that the Board would be approving this agreement, they could have engaged experts (including legal counsel) and thoroughly reviewed the proposal and provided detailed comments. *See* JA4:1580-81; *see also* JA4:1581 (Mooers testimony that to submit meaningful comments on the Fee Agreement, Sierra Watch would have had to consult with its attorneys and experts in air and water quality), 1587 (Mooers testimony explaining he had no way to evaluate the Fee Agreement at the hearing).

With time to review Section 3.19, Sierra Watch or its counsel could also have explained to the Board that the proposed fees payment would do little to resolve the Project's impacts and that it should be rejected along with the Project's entitlements. JA4:1580-81. 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. Furthermore, it is certainly conceivable that the voluntary payment, which led to the removal of the threat of litigation from the California Attorney General's office, influenced the Board's decision to approve the controversial Project.

At trial, the County and the Developer cited two e-mails from Deputy Attorney General Rinke to argue that Sierra Watch had sufficient notice of Section 3.19 directly from the Attorney General's office, but nevertheless *chose* not to comment on the matter at the hearing. JA4:1641-42. Their claims are demonstrably erroneous. First, the November 3, 2016 email from DAG Rinke to Sierra Watch's counsel, Amy Bricker, did not give Sierra Watch *any* notice of the Fee Agreement. *See* JA4:1641. In that email, DAG Rinke said, "Just as an fyi, I am requesting a meeting with Placer [County]. I will let you know if anything comes of it." JA4:1791. The email did not mention the possibility of any agreement for payment of the TRPA Fee—enforced by the County—to purportedly alleviate the Project's impacts on Lake Tahoe. *See id*.

Nor did DAG Rinke's after-hours email to Ms. Bricker the night before the hearing—the only follow-up Ms. Bricker received about the requested meeting—provide notice. That email, sent after close of business at 5:40 p.m., revealed that the Attorney General had agreed to not sue the

County but did not identify the terms of the Fee Agreement or attach a copy of it. *See* JA5:2093. Moreover, Ms. Bricker, who did not attend the hearing, did not see the email until approximately 9:10 a.m. the next morning, after the hearing had already begun, at which time she forwarded it to Sierra Watch. JA6:3078-79.

The more probative email from DAG Rinke is the one she sent to Sierra Watch's counsel on November 17, two days *after* the Board had approved the Development Agreement with the new Section 3.19. Sent in response to Sierra Watch's request for the text of Section 3.19 and the related Schwab Memorandum, that email implicitly acknowledged the harm to Sierra Watch:

> These are the documents that Placer included in the record and provided to the Board, *though apparently not the public*, at the hearing. They are public documents. *I was not aware that this is how they were going to handle it*.

JA6:3081 (emphasis added).

The County and Developer also argued that their counsels' introduction of the Fee Agreement *during the hearing* provided Sierra Watch sufficient notice to comment on Section 3.19, and thus it was not prejudiced. JA4:1641. Not so. If all that was required to avoid prejudice was announcing a new item of business *during* the actual meeting, an agency could evade the Brown Act by simply introducing the new item during the meeting. The Act's 72-hour notice requirement would be

meaningless. *Cf*. § 54960.1(d)(5) (approval may stand only if petitioner "had actual notice of the item of business at least 72 hours prior to the meeting at which the action was taken").

CONCLUSION

Sierra Watch respectfully requests that this Court reverse and direct the trial court to issue: (1) a writ of mandate ordering the County to rescind the Project approvals; and (2) a declaration that the County's actions here were unlawful and violated the Brown Act.

DATED: July 10, 2019

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CERTIFICATE OF WORD COUNT
(California Rules of Court 8.204(c))

I certify that this brief contains 12,349 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to produce this brief.

DATED: July 10, 2019

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PROOF OF SERVICE

Sierra Watch v. Placer County et al.
Case No. C087892 (related to Case No. C088130)
California Court of Appeal, Third Appellate District
Placer County Superior Court, Case No. SCV0038917
(related to Case No. SCV0038777)

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On July 10, 2019, I served true copies of the following document(s) described as **APPELLANT'S OPENING BRIEF** on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and

mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 10, 2019, at San Francisco, California.

/s/ Patricia Larkin
PATRICIA LARKIN

SERVICE LIST

Sierra Watch v. Placer County et al.
Case No. C087892 (related to Case No. C088130)
California Court of Appeal, Third Appellate District
Placer County Superior Court, Case No. SCV0038917
(related to Case No. SCV0038777)

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