CASE NO. C087892

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

SIERRA WATCH
Plaintiff and Appellant
v.
PLACER COUNTY, et al.
Defendants and Respondents
and
SQUAW VALLEY REAL ESTATE, LLC, et al.
Real Parties in Interest and Respondents

Appeal from Judgment of the Superior Court of California
County of Placer
Case No. SCV0038917
Honorable Michael W. Jones

RESPONDENTS AND REAL PARTIES IN INTEREST'S OPPOSITION 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
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 203083 NAME: Howard F. Wilkins III FIRM NAME: REMY MOOSE MANLEY, LLP STREET ADDRESS: 555 Capitol Mall, Suite 800 CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: (916) 443-2745 FAX NO.: (916) 443-9017 E-MAIL ADDRESS: cwilkins@rmmenvirolaw.com ATTORNEY FOR (*name*): Real Parties in Interest Squaw Valley Real Estate, LLC, et al.	SUPERIOR COURT CASE NUMBER: SCV0038917
APPELLANT/ Sierra Watch PETITIONER: RESPONDENT/ REAL PARTY IN INTEREST: Placer County, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Real Parties in Interest Squaw Valley Real Estate, et al.

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) KSL Capital Partners, LLC	Ownership interest of 10% or more in Squaw Valley Real Estate, LLC
(2) KSL Capital Partners, LLC	Ownership interest of 10% or more in Squaw Valley Resort, LLC
(3) ASC Next, LLC	Ownership interest of 10% or more in Squaw Valley Real Estate, LLC
(4) ASC Next, LLC	Ownership interest of 10% or more in Squaw Valley Resort, LLC
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 27, 2019

Howard F. Wilkins III
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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I. INTRODUCTION

In November 2016, after five years of planning, environmental review and scores of meetings, the Placer County Board of Supervisors (Board) certified an environmental impact report (EIR) and approved the Village at Squaw Valley Specific Plan (Project) to modernize development envisioned for Squaw Valley.

Appellant Sierra Watch opposed the Project from the start, and expected that the California Attorney General would join Sierra Watch in challenging Placer County's (County's) approval of the Project by filing a California Environmental Quality Act (Pub. Resources Code, § 2100 et seq.) (CEQA) lawsuit. However, Real Parties in Interest Squaw Valley Real Estate, LLC and Squaw Valley Resort, LLC (Squaw) entered into a settlement agreement with the Attorney General that addressed the Attorney General's concerns relating to the Project. Frustrated by the Attorney General's decision, and intent on blocking the Project by any means, Sierra Watch filed this action, alleging that the County violated the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) (Brown Act).[1] Apparently unable to conceive of any other reason for the Attorney General's decision not to sue, Sierra Watch accuses the Attorney General of conspiring with the County and Squaw to enter into an alleged secret agreement or "deal" to thwart Sierra Watch's attempts to stop the Project.

[1] Unless otherwise indicated, all statutory references are to the Government Code.

After multiple rounds of discovery—including an eleventh-hour deposition of a Deputy Attorney General—turned up no evidence to support the existence of any such secret "deal," Sierra Watch nevertheless forced the issue to trial. At trial, Sierra Watch doubled down on its secret "deal" theory, accusing a sworn officer of the Attorney General of falsely testifying. (See Reporter's Transcript (RT):13:11-24.) Following a bench trial, the Honorable Michael W. Jones found that Sierra Watch failed to present any evidence establishing the alleged secret deal or any violations of the Brown Act.

Sierra Watch now asks this Court to overturn the trial court's decision and issue a writ overturning all of the County's actions at the November 15, 2016, hearing, not just the actions Sierra Watch claims violated the Brown Act. Even if a Brown Act violation could be established—it cannot—Sierra Watch's exorbitant request of this Court has no basis in the law and evidences their true purpose: to delay the Project for as long as possible, in the hopes of forcing Squaw to abandon it. Even if Project approvals were overturned, however, the agreement between Squaw and the Attorney General would not be affected.

Appellant's Opening Brief (OB) misstates the law and facts and reshuffles Sierra Watch's trial arguments, but the hollow foundational claim remains the alleged three-way "deal." As shown at trial, confirmed by the Statement of Decision, and discussed below, no "deal" between the County, Squaw, and the Attorney General occurred.

Sierra Watch's strained interpretation of Brown Act would eviscerate an agency's ability to respond to public comments received after its agenda is posted, as well as its ability to address testimony and information provided at public hearings without indefinitely delaying projects. Nothing in the Brown Act mandates such an extreme result. The appeal should be denied.

II. Statement of Facts

A. Village at Squaw Valley Specific Plan and Development Agreement.

In 2011, Squaw proposed the Project to the County. In 2012, the County began preparing an EIR pursuant to CEQA. (AR:5:2505.)[2] Hearing from the community, Squaw reduced the Project from 3,187 bedrooms, to 1,493 bedrooms as approved. (AR:15:8826, 17:9868-9869 [residential units cut from 1,542 to 850].) Squaw also incorporated extensive Design Review Committee recommendations. (AR:15:8860-8861.)

Appellant, Sierra Watch opposed the Project from the start (AR 5:2646-2652), launching a publicity campaign that a former Sierra Watch employee characterized as "distorted." (See AR:75:44019.)

[2] Citations to the Administrative Record in related Case No. C088130, which was designated part of the record for this appeal (JA:7:3369), are designated by the abbreviation "AR" followed by a colon, the volume number, a colon, and the page number(s).

The County released the Final EIR on April 7, 2016. (JA:4:1616.)[3]

On August 9, 2016, days before a scheduled Planning Commission hearing on the Project, the Attorney General commented on the Final EIR and the Project. (JA:4:1616.) The Attorney General had not submitted comments on the Project, the Draft EIR, or the Final EIR before this date.

Two days later, the Planning Commission recommended approval of the Project on August 11, 2016. (AR:15:8813.)

The Attorney General notified the County on November 3, 2016, that it planned to file a lawsuit to challenge the EIR for the Project because it was "concerned about the adequacy of the Project's CEQA analyses with regard to impacts within the Tahoe Basin…." (JA:4:1791, 1616 7:3350.) It also requested a meeting with the County regarding the Project. (*Ibid*.)

On November 9, 2016, the County posted the agenda for the Board meeting on November 15, 2016, at the County Administrative Offices at 175 Fulweiler Avenue in Auburn, California. (JA:4:1616.) The agenda was posted in a window that is viewable by the public at all times. (*Ibid*.) The November 9, 2016, agenda packet for the Board meeting was also made available at the County Administrative Offices as indicated on the agenda. (*Ibid*.)

The agenda listed and described item A.7 as "Conduct a Public Hearing to consider a recommendation from the Placer County Planning

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[3] Citations to the Joint Appendix are designated by the abbreviation "JA" followed by a colon, the volume number, a colon, and the page number(s).

Commission for APPROVAL of the following: ... [a]doption of an ordinance to approve the Development Agreement relative to the Village at Squaw Valley Specific Plan [VSVSP] …" (JA:4:1617.) The agenda also noted that the County would be considering certifying the EIR, adopting a mitigation and monitoring program, among other project entitlements. (*Ibid.*) On page 2, the agenda states that "[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 Office, 175 Fulweiler Avenue, Auburn, during normal business hours." (*Ibid*.)

That same day, November 9, 2016, representatives for the Attorney General (collectively, "Attorney General"), Squaw, and the County met to discuss the Attorney General's concerns. (JA:4:1617, 1805-1807 [Rinke Deposition, 12:12-14:15], 7:3350.) At the meeting, the Attorney General asked the County to adopt additional mitigation measures for the Project. Specifically, the Attorney General asked the County to require Squaw to pay a Tahoe Regional Planning Agency Air Quality Mitigation Fee (TRPA Fee) as mitigation for the Project's potential VMT [vehicle miles traveled] impacts in the Tahoe Basin. (JA:4:1617, 7:3350; see JA:4:1807 914:7-15], 1832-1833 [39:10-40:3].) The County told the Attorney General that the EIR analyzed the Project's potential VMT impacts in the Tahoe Basin, and explained that it did not believe the TRPA fee was required as mitigation. (JA:4:1834 [41:17-21], JA:4:1617, 7:3354 see also JA:5:1985-1986 [Schwab Memorandum explaining that additional mitigation was not

required and that the Project is not subject to TRPA regulation or the TRPA Fee because the Project is not within the Tahoe Basin.].)

The Attorney General's designated Person Most Qualified (PMQ) confirmed: "The County was clear that *it would not require the developer to pay the fee* but the developer could pay it voluntarily." (JA:4:1832-1833 [Rinke Deposition, 39:23-40:3] italics added.) She testified further that the County's position never changed, and throughout the Attorney General's communications on the Project, the County steadfastly refused to require the payment of the TRPA Fee. (JA:4:1833-1834 [40:20-41:16]; see JA:7:3354.)

No agreement or deal was reached between the County, the Attorney General, or the Applicant at the meeting. (JA:4:1847-1848 [Rinke Deposition, 54:15-55:3] ["I don't believe any agreement was reached during that meeting."].) Instead, Squaw's counsel offered to check with their client to see if they would be willing to voluntarily pay the TRPA fee to resolve the Attorney General's concerns. (JA:4:1617.)

Following the meeting, Squaw and the Attorney General discussed the possibility of an agreement solely between the Attorney General and Squaw, where Squaw would voluntarily pay the TRPA Fee of $440,862 in exchange for the Attorney General not filing a lawsuit over the Project. (JA:4:1835-1837 [Rinke Deposition, 42:24-44:1], 1840 [47:8-14] [Squaw, not the County, offered to pay the TRPA fee].) Squaw also offered to request an amendment to its proposed Development Agreement with the County by adding Section 3.19 to the Developer Obligations portions.

(JA:6:2912, 3058 [email from Squaw's attorney to Ms. Rinke stating that "We propose to include in the Development Agreement a provision that would commit the applicant to pay this fee. We are working with the County to draft a new section in the DA memorializing this commitment"].)

The Attorney General agreed with this approach in principle, but insisted on a separate written agreement with Squaw setting out Squaw's offer to pay the TRPA Fee. (JA:6:2913, 3052, 5:2093-2094, 2157-2167 [AG-Squaw Agreement], 7:3354 ["In fact, the Attorney General required the Applicant to execute a separate, stand-alone agreement after the Development Agreement was approved regarding the Applicant's promise to pay the TRPA Fee, and the Attorney General's authority to enforce the timing and payment of the TRPA Fee"].) The Attorney General required the separate written agreement with Squaw "to ensure that my office has the ability to enforce the developer's agreement to pay the air quality mitigation fee reflected in the development agreement." (JA:4:1842 [Rinke Deposition, 49:4-17], 5:2096.)

At 5:25 p.m. on November 14, 2016—the evening before the Board's hearing on the Project—the Attorney General confirmed that it reached an agreement with Squaw. (JA:6:3052, 7:3351.) The County was not a party to this agreement, and it never entered into any agreement with the Attorney General's office regarding the Project. (JA:4:1846 [Rinke Deposition, 53:2-18], 7:3354.) The County's counsel, upon learning of Squaw's agreement with the Attorney General to pay the TRPA Fee, sent Squaw's proposed addition to the Development Agreement to the Clerk of

the Board as well as a memorandum (Schwab Memorandum) explaining the proposed Section 3.19 and providing other information from the County's environmental consultants. (JA:5:1985-1987.)

Article 3 of the Development Agreement governs the Developer Obligations and includes commitments to improvements and dedications, as well as the payment of fees and contributions to the County and other agencies, including the Tahoe-Truckee Unified School District, and Tahoe Truckee Area Regional Transit (TART). (JA:6:2825-2835.) Section 3.19 added Squaw's agreement "to a voluntary payment of the Tahoe Regional Planning Agency ('TRPA') Air Quality Fee to be utilized for TRPA Environmental Improvement Projects ('EIP Payment')." (JA:7:3352; see JA:6:2951.) The pledge is followed by a notarized signature from Squaw's representative. (JA:7:3352.)

B. The County Provides the Schwab Memorandum to the Board and makes it available for public inspection

On November 14, 2016, at 5:36 p.m., the Schwab Memorandum and all attachments, including Squaw's proposed amendment to the Development Agreement, were made available for public inspection at the public office designated by the County for that purpose; specifically, the Clerk of the Board of Supervisors' Office. (JA:4:1617-1618, 5:2141 [Wood Deposition, 44:12-15], 2148 [51:22-25], 2184 [75:8-75:13], 6:2815, 7:3351-3352, 3358; see Gov. Code, § 54957.5, subd. (b)(2).)

The memo stated that "[i]n an effort to respond to the [Attorney General's] concerns, the proposed project applicant has agreed to voluntarily pay the TRPA Air Quality Fee…." (JA:4:1617-1618, 5:1986.)

No amendment to the County's obligations or other articles of the Development Agreement were proposed. (Compare JA:6:2954-3048 [amended Development Agreement], with JA:6:2817-2900 [original Development Agreement].) The memo recommended that the Board "[a]dopt the ordinance presented to the Board on November 15, 2016 to approve the Development Agreement by and between the County [and Squaw] relative to the VSVSP, as amended…." (JA:5:1987.)

Minutes later, at 5:40 p.m., Ms. Rinke emailed Amy J. Bricker, counsel for Sierra Watch, and Shannon Eckmeyer of the League to Save Lake Tahoe (League) to notify them that the Attorney General had reached an agreement with Squaw whereby Squaw would pay the TRPA Fee and that the Attorney General would not challenge the Project pending "an enforceability agreement." (JA:4:1844-1845 [Rinke Deposition, 51:17-52:6], 5:2093-2094, 2341-2342 [Mooers Deposition, 14:5-15:16], 2436-2437 [109:13-110:19] [noting that Ms. Bricker was representing Sierra Watch and was acting on its behalf when she received the email from Ms. Rinke].) The Schwab Memorandum was transmitted to the County Board at 5:42 p.m., so Sierra Watch and the League learned of Squaw's agreement with the Attorney General before the County's Board knew of the agreement. (See JA:4:1618 [Board received Schwab Memorandum at 5:42 p.m.], 6:3054, 7:3358-3359; see also JA:5:2093-2094, 4:1844 [Rinke Deposition, 51:17-52:6] [Ms. Bricker received notification at 5:40 p.m.].)

County staff, although not obligated to do so, also made a copy of the Schwab Memorandum along with the other relevant Project documents

available for public inspection on a public table at the November 15, 2016, Board hearing. (JA:5:2133-2134 [Wood Deposition, 36:16-37:18], 2155-2156 [58:25-59:19].)

C. The November 15, 2016, Board of Supervisors Hearing

At the November 15, 2016, hearing, prior to public comments, Supervising Deputy County Counsel, Karin Schwab testified before the Board concerning the discussions with the Attorney General and Squaw's proposed amendment to the draft Development Agreement. (JA:4:1618, 6:2902-2904.) Ms. Schwab stated that "the applicant proposes to voluntarily pay this particular fee." (JA:6:2904.) Also at the November 15, 2016, Board Meeting, Whit Manley, representing Squaw, testified that Squaw had agreed to pay the TRPA Fee in exchange for the Attorney General agreeing that the payment of the fee addressed its concerns regarding the Project. (JA:6:2908-2910.) Neither described the agreement as involving the County. Ms. Eckmeyer and other members of the public provided comments at the hearing about the Attorney General's agreement. (See e.g., JA:6:2919-2921 [Ellie Hyatt]; 2932 [Ms. Eckmeyer]; see also AR:17:9680-9681.) However, when the employees of Sierra Watch testified at the hearing, hours after learning of the Attorney General's agreement, they did not speak about the Attorney General's agreement; nor did they request additional information or time to review the agreement before commenting on the Project. (JA:6:2917-2919 [Tom Mooers], 2923-2925 [Chase Schweitzer], 2925-2930 [Isaac Silverman], 5:2681-2682 [Silverman Deposition, 52:10-53:12] [testifying that he had the opportunity

to speak about the Attorney General agreement several hours after learning of the agreement, but chose not to talk about it], 2683-2684 [54:24-55:4], 2418-2419 [Mooers Deposition, 91:7-92:16].)

Also during the November 15, 2016, hearing, Chairperson Robert Weygandt asked "Squaw made an agreement directly with the Attorney General, and it's being enforced through the development agreement, but *the County is not directly a party to this agreement*, is that correct?" This question was echoed by Supervisor Jack Duran, who asked if "this is a complete and separate issue related to the relationship between Squaw and the DOJ, not through the County." Mr. Manley and Ms. Schwab confirmed that the County was not a party to the agreement between Squaw and the Attorney General. (JA:6:2912-2914 (italics added).) Mr. Manley also explained that Squaw had committed to enter into a written agreement directly with the Attorney General, which would allow the Attorney General to enforce the payment directly. (JA:6:2913.) At the end of the meeting, the Board took action on the items in the Agenda, and, when it came it item 7, the Board voted in favor of an ordinance approving the Development Agreement, including Section 3.19. (JA:7:3352.)

D. The Written Agreement Between Squaw and the Attorney General

On January 4, 2017, Squaw and the Attorney General entered into a written agreement regarding the Project. (JA:5:2157-2167 [AG-Squaw Agreement], 4:1839-1840 [46:11-47:4]; see JA:4:1848-1849 [55:21-56:2], 1852 [59:12-15].) The AG-Squaw Agreement states that Squaw agrees to pay the TRPA Fee and it grants the Attorney General "authority to enforce

the timing and payment of the" TRPA Fee. In exchange, the Attorney General agrees not to legally challenge the Environmental Impact Report for the Project. (JA:5:2158; see JA:7:3354.) The AG-Squaw Agreement is the only agreement, written or oral, relating to the Project that was entered into by the Attorney General's office, and the County is not a party to the agreement. (JA:4:1840 [47:8-14], 1852-1853 [59:19-60:16], 5:2157-2158; see JA:7:3354.)

III. Procedural History

On December 5, 2016, Sierra Watch, through its counsel, sent a letter to the County alleging that the County had violated Government Code sections 54954.2 and 54957.5, and demanding that the County "Cure and Correct" and "Cease and Desist" those violations, purportedly relating to the November 15, 2016, Board meeting. (JA:1:31.) The letter alleged that the Board had violated section 54954.2 by "vot[ing] to approve a new amendment to the Development Agreement, without announcing on the agenda that it was to consider a substantive amendment to the proposed Development Agreement, without the Planning Commission's consideration." (JA:1:31-32.)

The December 5 letter went on to allege that the Board violated Government Code section 54957.5 by considering the Schwab Memorandum, which was allegedly "not made public at the time it was distributed to the Board, or at any time before or during the meeting. Indeed, Sierra Watch and other members of the public had no idea the Board had this information until during the meeting." (JA:1:33.) The

County responded to the letter on or about December 30, 2016, explaining that the County had not violated the Brown Act or the Placer County Code, and thus, there was no need to either "Cure and Correct" or "Cease and Desist" its actions. (JA:1:37-40.)

Sierra Watch filed a Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief in this action on January 13, 2017. (JA:1:13-29.) The first cause of action alleged that the County violated the Brown Act because "the posted agenda listed no item of business describing that the Board would consider a substantive revision to the Planning-Commission approved Development Agreement." (JA:1:26.) After meeting and conferring, the County filed a demurrer, which the trial court granted on the first cause of action, with leave to amend. (JA:2:436-448.) The trial court found that "[n]o cases cited by petitioner support the contention that consideration of approval of the Development Agreement would be a separate item of business from consideration of approval of a Development Agreement with modifications." (JA:2:447-448.)

Sierra Watch filed the First Amended Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief (First Amended Petition), on June 19, 2017. (JA:2:451.) The First Amended Petition alleges that the County violated the Brown Act by "taking action on a last-minute, backroom deal—memorialized in a substantial change to the Development Agreement for the Project—that concerns matters of great importance to Sierra Watch and the public." (JA:2:453.) The First Amended Petition also alleges that the County's "[a]pproval of a new Fee

Agreement without including notice of that agreement's consideration in the agenda violates the Brown Act." (JA:2:461.)

The County and Sierra Watch exchanged multiple rounds of written discovery, and obtained four depositions, including the eleventh-hour deposition of Deputy Attorney General Nicole U. Rinke. (See, JA:5:1969-1983 [Written Discovery], 4:1794-1859 [Rinke Deposition], 5:2098-2155, 2168-2192 [Woods Deposition], 2328-2463 [Mooers Deposition], 2630-2729 [Silverman Deposition].) The parties agreed on a set of stipulated facts for trial. (JA:4:1615-1620.) Before trial, the Parties also filed briefs and submitted documentary evidence in the form of exhibits. (See, generally, JA:4:1621-7:3162.)

At trial, the parties argued the merits and moved their respective exhibits into evidence. (RT:46, 102-103.) The trial court took the matter under submission, (RT:142) and issued a statement of decision finding no violations of the Brown Act. (JA:7:3348-3360.) The trial court expressly found, "[t]he County is not a party to this subsequent agreement between the Applicant and the Attorney General. *No evidence has been presented* establishing that the Attorney General's agreement not to file litigation challenging the Project was contingent upon the County's ability to enforce Section 3.19 of the Development Agreement." (JA:7:3354, italics added;

see JA:7:3350-3351.) Judgment was entered on July 6, 2018. (JA:7:3345.)[4] Sierra Watch appealed. (JA:7:3364.)

IV. STANDARD OF REVIEW

Substantial evidence review governs an appeal from a statement of decision following a bench trial where the trial court had to evaluate competing evidence regarding disputed events. (*Estate of Young* (2008) 160 Cal.App.4th 62, 75-76.) This Court "'review[s] the trial court's findings of fact to determine whether they are supported by substantial evidence.'" (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 (*Palm Property*).) Substantial evidence is "'evidence of "ponderable legal significance, ... reasonable in nature, credible and of solid value."'" (*Estate of Young*, at p. 76.) "'The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record.'" (*Ibid*, italics omitted.)

"The appellate court must review the facts in the light most favorable to the respondents in order to determine whether or not substantial evidence exists which would support the conclusions reached by

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[4] Sierra Watch points out that, while the trial court repeatedly found that Sierra Watch presented "[n]o evidence" of its claims in ruling on the *merits* (JA:7:3354), it also stated that Sierra Watch "presented colorable legal arguments…" in denying Squaw's *post-judgment* motion for attorney fees. (JA:7:3381.) Drawing this distinction does not relieve Sierra Watch's burden of providing evidence of its claims, nor does it detract from the explicit language in the Statement of Decision, which found that Sierra Watch completely failed to do so. (JA:7:3354, 3357, 3360.)

the trial court." (*Manson v. Reed* (1986) 186 Cal.App.3d 1493, 1497.) However, "'[t]o the extent the trial court drew conclusions of law based upon its findings of fact, [appellate courts] review those conclusions of law de novo.'" (*Palm Property, supra*, 194 Cal.App.4th at pp. 1425-1426.) "If the appealed judgment or order is correct on any theory, then it must be affirmed regardless of the trial court's reasoning, whether such basis was actually invoked." (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1201.)

Lastly, "[i]t is incumbent upon an appellant who claims evidentiary insufficiency to set forth the evidence supporting the judgment and indicate wherein it is insufficient." (*Visnich v. County of Sacramento* (1979) 93 Cal.App.3d 626, 632; see also *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 388 (*Jacobson*).) "In furtherance of its burden, the appellant has the duty to fairly summarize all of the facts in the light most favorable to the judgment. [Citation.]"' (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) An Appellant's failure to so, waives the argument. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; see also *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 749; *Jacobson*, at p. 388.)

V. ARGUMENT

Sierra Watch alleges violations of two provisions of the Brown Act (Gov. Code, §§ 54954.2, 54957.5) and requests a writ of mandate ordering the County to rescind the Project approvals, as well as a declaration that the County's actions violated the Brown Act. (OB, pp. 27-59.) As discussed

below and affirmed by the trial court, Sierra Watch falls far short of meeting its burden of proof to demonstrate the County's approval of the Development Agreement did not fully comply with the Brown Act. Sierra Watch also fails to demonstrate the County's actions in making the Schwab memorandum available for public inspection violated the Brown Act. Finally, Sierra Watch fails to meet its burden of showing that the County has not demonstrated substantial compliance with the Brown Act, or that it was prejudiced by the County's approval. Therefore, the Court should affirm the trial court's judgment.

A. The County Complied with section 54954.2 in approving the Development Agreement for the Project.

Sierra Watch first cause of action alleges the County violated section 54954.2, which requires a local agency to post an agenda, at least 72 hours prior to a regular meeting.

Under the Brown Act, the County's agenda was required to include "a brief general description of each item of business to be transacted or discussed at the meeting." The statute goes on to state that "[a] *brief general description of an item* generally need not exceed 20 words." (Gov. Code, § 54954.2, subd. (a)(1), italics added; *see Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 525 (*Olson*) ["The Act does not require a local agency to describe the exact action it will take in its agenda, but requires the local agency to *generally* describe the 'item of business to be transacted or discussed"'] italics original.) The statute also prohibits a local agency from acting on or discussing "any item not

appearing on the posted agenda" with some exceptions. (Gov. Code, § 54954.2, subd. (a)(3).)

It is undisputed that the County's agenda for the November 15, 2016, hearing was posted more than 72 hours in advance, in compliance with the statute, and contained the following general descriptions of items of business the Board would consider at the hearing for the Project, including the Development Agreement:

> 1. Adoption of a resolution to certify the Village at Squaw Valley Specific Plan Final Environmental Impact Report (SCH# 2012102023) and Errata prepared pursuant to the [CEQA], adopt Findings of Fact and Statement of Overriding Considerations and the Mitigation Monitoring Reporting Program;
>
> 2. Adoption of a resolution to approve the Village at Squaw Valley Specific Plan;
>
> 3. Adoption of an ordinance to approve the Village at Squaw Valley Specific Plan Development Standards and Design Guidelines;
>
> 4. Adoption of a resolution to amend the Squaw Valley General Plan and Land Use Ordinance to (a) incorporate the Village at Squaw Valley Specific Plan ("VSVSP") land use designation, and (b) to add Goal VI.E.7 and Policies VI.E.7.1 and VI.E.7.2 related to emergency preparedness;
>
> 5. Adoption of an ordinance to rezone all acreage in the VSVSP area from the current zoning designations to SPL-VSVSP (Specific Plan - Village at Squaw Valley Specific Plan);
>
> 6. Approval of the Large-Lot Vesting Tentative Subdivision Map;
>
> 7. ***Adoption of an ordinance to approve the Development Agreement relative to the Village at Squaw Valley Specific Plan***, and;

> 8. Adoption of a resolution to approve a Water Supply Assessment.

(JA:6:2815, emphasis added.) As the trial court correctly determined, the agenda sufficiently describes the item of business that the Board discussed and transacted regarding the Development Agreement for the Project, and does so in a succinct manner not exceeding 20 words. (See JA:7:3352 ["At the November 15, 2016, Board of Supervisors meeting, the Board voted in favor of an ordinance approving the Development Agreement, including the amendment adding Section 3.19. (Stip. Facts, ¶ 22.)"].) In reaching, its decision, the trial court found:

> The purported deal between the County, the Applicant, and the Attorney General, is referred to by petitioner as the "Fee Agreement." Petitioner argues that the County negotiated, and was a party to the Fee Agreement. *The evidence presented to the court does not support either contention.* The Attorney General asked the County to impose the TRPA Fee on the Applicant, but the County refused. Thereafter, the County's involvement appears limited to working with the Applicant to draft an amendment to the Development Agreement memorializing both the Applicant's agreement to pay the TRPA Fee, and the County's ability to enforce the payment through the default provisions of the Development Agreement. *No evidence has been presented which suggests that the Attorney General demanded or even requested an amendment to the Development Agreement, or relied on the County's ability to enforce payment in agreeing not to file litigation to challenge the Project.* In fact, the Attorney General required the Applicant to execute a separate, standalone agreement after the Development Agreement was approved regarding the Applicant's promise to pay the TRPA Fee, and the Attorney General's authority to enforce the timing and payment of the TRPA Fee. (Trial Exh. I.) The County is not a party to this subsequent agreement between the Applicant and the Attorney General. (Id.) *No evidence has been presented establishing that the Attorney General's agreement not to file litigation challenging the Project was*

contingent upon the County's ability to enforce Section 3.19 of the Development Agreement.

(JA:7:3354, italics added.)

Sierra Watch claims that it "does not challenge the trial court's factual findings—only its legal conclusions…" and contends that the facts are "undisputed." (OB, p. 26.) Yet, despite claiming it is not challenging the trial court's factual findings, Sierra Watch devotes much of the Opening Brief to arguing about an alleged, three-way deal between the Attorney General, County, and Squaw (OB, pp. 36-52) that the trial court correctly found did not occur. (JA:7:3354.)[5] The evidence demonstrates that Sierra Watch's allegations that the County violated the Brown Act in approving Section 3.19 of the Development Agreement have no factual or legal basis as the trial court held.

1. Sierra Watch cites no factual basis for its allegations regarding a "secret" agreement or "deal" between the County, the Attorney General, and Squaw.

Sierra Watch continued to allege—as they did below—that the County violated the Brown Act because, by approving the proposed

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[5] Continuing to argue about the nonexistent "deal," in spite of the standard of review championed by Sierra Watch "is a concession of a lack of merit." (*Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948 ["Arguments should be tailored according to the applicable standard of appellate review"].) Sierra Watch's Opening Brief reveals that Sierra Watch *does* dispute the facts. It cannot have it both ways. (See *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1046 (*Treasure Island*) [rejecting appellants' "strenuous efforts to reframe the issues" to obtain a more favorable standard of review].)

Development Agreement with Section 3.19, the County was actually approving a "secret" settlement agreement between the County, Attorney General and Squaw—whereby Squaw agreed to pay the TRPA Fee, the County agreed to enforce, and the Attorney General agreed not to sue (the alleged Fee Agreement)—that was not listed on the agenda as a separate item of business. (OB, pp. 11, 36-59.) As the trial court found, Sierra Watch failed to prove the existence of any "deal" between the County and the Attorney General, much less a "secret" agreement as alleged in Sierra Watch's First Amended Petition. (JA:7:3354.)

Sierra Watch argued vigorously below that a "secret" deal was reached between the parties at the November 9, 2016, meeting between representatives for the Attorney General, Squaw, and the County. (JA:7:3354 ["The purported deal between the County, the Applicant, and the Attorney General, is referred to by petitioner as the 'Fee Agreement'"]; see JA:5:1778.) Sierra Watch alleges that the County entered into an agreement with the Attorney General, "to require the Applicant to pay" the TRPA Fee, which it characterizes as the "'Fee Agreement.'" (JA:2:460, 7:3354; see OB, pp. 37-39.) However, this assertion is contradicted by the testimony of the Attorney General's designated PMQ, who stated that the Attorney General did not have any agreement with the County and also confirmed that the County was adamant that it would not require Squaw to pay the TRPA Fee. (JA:4:1832-1834 [Rinke Deposition, 39:23-41:16], 1846 [53:2-53:18], JA:4:1847-1848 [54:15-55:3].) No "deal" took place,

but Squaw's counsel did offer to check with their client to see if they would pay the TRPA Fee voluntarily. (JA:4:1617, 7:3350-3351.)

As recounted in detail in the Statement of Facts above, the County's only action with regards to Squaw's voluntary TRPA Fee payment, was, at Squaw's request, to add Section 3.19 to the proposed Development Agreement. (See JA:4:1619, 6:2934, 2944, 7:3356.) The County stated plainly during the November 9, 2016, meeting that it would not require the TRPA Fee as mitigation for the project. (*Id.*; JA:4:1617, 7:3354 ["The Attorney General asked the County to impose the TRPA Fee on the Applicant, but the County refused"].) The Attorney General's PMQ confirmed: "The County *was clear that it would not require the developer to pay the fee* but the developer could pay it voluntarily." (JA:4:1832-1833 [39:23-40:3] italics added; see JA:7:3354.)

Notably, Sierra Watch's Executive Director was unable to express what, exactly, the alleged "Fee Agreement" is. (JA:5:2347 [Mooers Deposition, 20:5-6], 2405 [78:7-10] ["Q: …The agreement you're referring to here is the agreement between the AG's office and Squaw Valley; is that correct?" "A: That's my understanding"], 2421 [94:9-19], 2423-2424 [96:23-97:7] ["A: …the parties to the fee agreement are the applicant and the County" "Q: But not the attorney general?" "A: As I recall"].) Mr. Mooers admitted that he had no information to support the allegations in the First Amended Petition relating to the alleged "secret" agreement and the "parties" alleged, purposeful attempt to evade the Brown Act, other than the Schwab Memorandum's description of the amendment to the

Development Agreement, (JA:5:2407-2408 [80:2-81:2], 2435-2436 [108:4 to 109:9]) and that the County did not email him the Schwab Memorandum before the hearing. (JA:5:2409-2410 [82:20-83:7].)[6]

Sierra Watch attempts to sidestep these undisputed facts by claiming the issue is a "red herring" and that "the absence of a single, three-way agreement is irrelevant." (OB, p. 46.) Not so. This is one of several "changes of tack" for Sierra Watch, who, after successfully pleading around the County's demurrer by alleging the three-way agreement (JA:2:453; see JA:2:991 ["Petitioner alleges that the agenda did not inform the public that the Board 'would be considering approval of an agreement with the Attorney General's Office…"']), spent months searching high and low for evidence of just such a three-way deal—to no avail (JA:7:3354), devoted the bulk of their briefing and oral argument at trial to establishing the alleged "deal," and objected to the statement of decision because the trial court found no evidence of such a deal. (JA:3:1329-1336, 1339-1345 [Petitioner's Opening Trial Brief], 6:3064-3072 [Petitioner's Response Trial Brief], 3067-3068 ["That there was a three-way agreement among the County, the Attorney General, and the Applicant in which each gave and

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[6] Mr. Mooers also admitted that he had no information to support the First Amended Petition's contention that it was the County's "standard practice" to post items like the Schwab Memorandum to the County's website or email them to "notice lists." (JA:5:2407 [80:20-25], 2414 [87:2-8, 13-25] [admitting that "[u]sually a specific document will be sent to us by the County if we've requested it in particular"].)

received consideration and each assumed obligations is beyond dispute"]; RT:11:6-8 ["[Mr. Schwartz:] Sierra Watch challenges the three-way agreement reached between the Developer, the Attorney General, and the County"], 11:24-26 ["The Court: You are saying there was an agreement between the County and the Attorney General? Mr. Schwartz: There absolutely was, your honor."]; see RT:11-44; JA:7:3302-3306 [Petitioner's Objections].)

At trial, Sierra Watch agreed that its burden of proof in this matter was proof by a preponderance of the evidence. (RT:141:28-142:5; see also JA:4:1630 [Joint Trial Brief].) The trial court found that, not only had Sierra Watch failed to show a preponderance of the evidence supporting the existence of the alleged "deal," it found that "[n]o evidence has been provided establishing" Sierra Watch's claims. (JA:7:3354.) Sierra Watch does not challenge the trial court's application of that burden of proof in its Opening Brief. Regardless, the inescapable fact remains that there was no "deal" between the County, Squaw, and the Attorney General.

2. The Trial Court correctly held that Section 3.19 of the Development Agreement was not a separate item of Business from the Development Agreement itself under the Brown Act.

Essentially admitting that there is no evidence of any agreement between the County and the Attorney General, much less an actual settlement agreement, Sierra Watch now claims that Section 3.19 was a separate item of business because it was "wholly unrelated to the remainder of the Development Agreement, which concerned development rights

regarding the Project." (OB, p. 51.) If the Court address Sierra Watch's new theory, it fails too.

The Development Agreement describes the permitted uses and granted entitlements for the Project, as well as the obligations of both Squaw and the County. (JA:4:1884-1903.) Article 3 of the Development Agreement included Squaw's obligation to pay various fees, make dedications and improvements, comply with the Conditions of Approval, and mitigate Project impacts. (JA:4:1886-1887, 1889-1897.) Section 3.19 is a similar type of commitment by Squaw, though the payment will be to TRPA. (JA:4:1898.) Thus, Sierra Watch's claims that Section 3.19 is "wholly unrelated to the remainder of the Development Agreement," and did not include similar financial commitments by Squaw (see e.g., JA:4:1892 [payment to TART]) fails to accurately portray the record.

Sierra Watch further argues the Section 3.19 was a separate item of business because it was adopted to avoid a lawsuit by the Attorney General—a purpose entirely distinct from, and outside the scope of, the Development Agreement. Sierra Watch misrepresents the record in advancing this theory too. As explained above, the County did not take action on any "agreement designed to avoid litigation by the Attorney General." (OB, p. 51; see JA:4:1832-1833 [Rinke Deposition, 39:23-40:3], 1835-1837 [42:24-44:1], 1840 [47:8-14], 6:2913-2914, 7:3354.) As the trial court found, the only "agreement" to that effect was the agreement solely between Squaw and the Attorney General. (JA:7:3354; see JA:5:2157-2167.) Importantly, the Brown Act does not require the County to notify the

public of an agreement solely between Squaw and the Attorney General. (See *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1122 [private parties were "not a legislative body of a local agency; therefore no 'action taken' by [them] occurred"].)

Nor did the Attorney General's "threat" of litigation influence the Board's decision in this case, as Sierra Watch suggests. (See OB, pp. 37-39.) The County was adamant that it would not enter into any agreement with the Attorney General, and staunchly defended their environmental analysis of the Project in response to the Attorney General's critiques. (JA:6:2902 ["it's the County's position that the Final EIR does address vehicle miles traveled and the potential impacts to the basin"]; see JA:6:3056 [explaining that the County "already ha[s] the analysis that [the Attorney General] is requesting"], 3060 [County working with EIR consultant on supplemental response to the Attorney General's comments], 4:1832-1833 [Rinke Deposition, 39:23-40:3], 4:1840 [47:8-14], 7:3354.)

Sierra Watch takes statements made by Board members and County staff out of context to conjure support for its specious claims. (E.g., OB, pp. 37-39.) As described above, the Board wanted to ensure that the County was *not* a party to the agreement between the Attorney General and Squaw. (JA:6:2912-2914.) County staff confirmed that was the case. (*Ibid*.) Moreover the "precedent" the County was worried about was "overreach by the AG, the attorney general, and/or TRPA in terms of jurisdiction that they don't have" and "conced[ing] jurisdiction to TRPA on issues like this." (JA:4:1487-1488.) County staff confirmed that the Attorney General's

suggestion that the payment of the TRPA fee be included as mitigation was "rejected" and that the County "explained to the AG, we are not subject to jurisdiction within the basin." (JA:4:1488.) Staff went on to explain that, in considering the proposed amendment to the Development Agreement, they "were very, very careful to ensure that there was no stepping over that line to subject the County, either in this project or future projects, to the jurisdiction within the basin for out-of-basin projects." (JA:4:1488-1489.) The Board was satisfied that such "precedent" would not be set. (JA:4:1489, 7:3159-3160.)

Sierra Watch also misstates the record in claiming that "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." (OB, p. 52.) Specifically, Sierra Watch claims that, because the description of item 7 describes the Board's action as adopting "an ordinance to approve *the* Development Agreement..." (JA:6:2815, italics added) the Board was legally prohibited by the Brown Act from amending the Development Agreement. (E.g., OB, p. 37 ["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…"]; 47-52.) This argument is both hypertechnical and specious.[7]

As Sierra Watch stipulated (JA:4:1617), the agenda's description of item 7 states "7. Adoption of an ordinance to approve the Development Agreement relative to the Village at Squaw Valley Specific Plan …" (JA:6:2815.) No tortured reading of the agenda supports Sierra Watch's claim that it described "very specific provisions of a Development Agreement [that] would be considered." (OB, p. 52.)

Sierra Watch nonetheless argues that the agenda was "'fatally misleading'" because the revision to the Development Agreement was not voted on by the Planning Commission, and cites the Placer County Code. (OB, p. 50.) As explained in the County's demurrer, Sierra Watch misstates the language of the County Code. (JA:1:68.) The County Code expressly states that the Board "may accept, modify, or disapprove" a draft Development Agreement recommended by the Planning Commission, and "may, *but shall not be required to*, refer matters not previously considered by the planning commission during its hearing back to the commission for report and recommendation." (JA:1:68; see Placer County Code, § 17.58.240, italics added.) As required by law, the authority to approve a

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[7] Sierra Watch itself acknowledges that, "[w]hen interpreting the Brown Act, courts do not 'elevate form over substance.'" (OB, p. 45, quoting *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.* (2001) 87 Cal.App.4th 862, 872.)

development agreement lies with the Board. (See Gov. Code, § 65867.5, subd. (a).) Neither the County Code, nor the Brown Act subjugates the Board's authority to the Planning Commission, such that the Commission was required to review the proposed revision to the Agreement.

Nor does a reference to the County Code in the agenda *packet* make the agenda itself "fatally misleading." (See Gov. Code, § 54954.2, subd. (a) [the *agenda* must contain "a brief general description of each item of business to be transacted or discussed at the meeting"].) Nothing in the agenda's description of item 7 mislead the public into thinking that the Development Agreement could not be modified by the Board or that it would be sent back to the Planning Commission if the Board proposed any changes. (See JA:6:2815.)

As in *Olson*, "the description leaves no confusion as to the essential nature of the District's action." (33 Cal.App.5th at p. 520; see *id*. at p. 525 ["The Act does not require a local agency to describe the exact action it will take in its agenda, but requires the local agency to *generally* describe the 'item of business to be transacted or discussed"'].) Here, the essential nature of that action was to "*Adopt an ordinance* to approve the Development Agreement relative to the Village at Squaw Valley Specific Plan…" (JA:6:2815, italics added; see JA:7:3352, 3356 ["No separate action was taken with respect to Section 3.19, nor has it been shown that separate action by the County was necessary"].) Contrary to Sierra Watch's suggestion, the description of the Development Agreement on the

agenda did not leave anyone confused about the essential nature of the County's actions here.

Sierra Watch's attempt to analogize the amendment to the proposed Development Agreement to the desegregation plan in *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 335 (*Santa Barbara*) also fails. (OB, pp. 48-49.) In *Santa Barbara*, the school board committed to closing two schools when it adopted an orally presented desegregation plan that "differed radically from all the previous plans in many respects," which was not noticed in its agenda. (*Id*. at p. 333-335.) There, an entirely different desegregation plan—which "by its very nature involves complete reworking of the school system" was presented. (*Id*. at p. 334.) Here, the half-page "insert" at issue did not change any other provisions in the Development Agreement. (Compare JA:6:2954-3048 [amended Development Agreement], with JA:6:2817-2900 [original Development Agreement].) As the trial court noted below, *Santa Barbara* "stated that 'if the agenda had simply indicated the adoption of a Desegregation/Integration Plan for the Elementary District' instead of referring to a sequence of procedures, notice would have been adequate." (JA:7:3357.) Here, the agenda *did* provide notice of the adoption of an ordinance to approve the Development Agreement. (JA:6:2815.)

For the same reasons, Sierra Watch's citation to *Olson*, is inapt. The agenda that Sierra Watch cites *Olson* for listed nine specific bills that the Board would authorize payment of, and when the Board authorized payment of a bill not on the list, it did so in violation of the Brown Act. (33

Cal.App.5th at pp. 520-521.) Contrary to Sierra Watch's claims, the agenda here *did not* list "very specific provisions of a Development Agreement." (Cf. OB, p. 52; see JA:6:2815.)

Moreover, Sierra Watch's arguments miss the point of holding public meetings to discuss proposed development projects. If a local agency could not make changes to a proposed project in response to public or other agency concerns (as the Board did here) without violating the Brown Act, public comments received in the three or more days between the posting of the agenda and the agency's decision would be for naught. Such a result would "'preclude[ ] informed decisionmaking and public participation, [and] the goals of CEQA [would be] thwarted.'" (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220; see *Treasure Island*, *supra*, 227 Cal.App.4th 1062 ["this is the way CEQA is supposed to work—the public comment process may reveal new and unforeseen insights about the project that will affect the final Project design"].) Nothing in the Brown Act requires such a result.

Finally, Sierra Watch's argument (OB, p. 39) that the alleged "Fee Agreement" was a separate action also ignores the fact that the Board did not vote on any "Fee Agreement." (JA:7:3354, 3356; cf. *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 197-198 (*Hernandez*); *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1171 (*San Joaquin Raptor*).) As evidence of its alleged "separate" nature, Sierra Watch notes that the proposed amendment "was separately conceived, drafted, and signed and notarized by the Developer."

(OB, p. 39.) But the entire proposed Development Agreement was pre-signed by Squaw in preparation for possible Board approval. (JA:7:3124-3127.) Further, the County was not required to separately sign the "insert" adding Section 3.19 to the proposed Development Agreement. (See JA:7:3121-3122.) Rather, the Board approved and entered into the proposed Development Agreement as a whole, including Section 3.19, through one vote. (JA:7:3117-3118, 3159-3160; see Gov. Code, § 54952.6.)[8] The County did not violate section 54954.2. (See JA:7:3356.) None of the evidence cited by Sierra Watch supports a contrary result.

First, the Schwab Memorandum speaks for itself, and—regardless of Sierra Watch's "presumptions" as to its meaning (see JA:5:2406 [79:15-19])—the Schwab Memorandum does not describe any agreement on the part of the County. (JA:6:2942-2944, 4:1846 [Rinke Deposition, 53:2-18].) As explained above, the Schwab Memorandum describes Squaw's agreement with the Attorney General (JA:4:1618, 5:1985-1987 [Schwab Memorandum]), and the County's efforts, through its consultant Ascent, to respond to the Attorney General's comments on the EIR and defend its adequacy. (JA:6:2943, see also JA:6:2902-2904.)

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[8] "Action taken" is defined as "a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (Gov. Code, § 54952.6.)

Further, as discussed above, in response to Supervisors' questions at the hearing on this topic, both County counsel and Squaw's representative confirmed that the County was not a party to the agreement between the Attorney General and Squaw. (JA:6:2902-2904, 2908-2915.) Both explained that the County Counsel's Office had been involved with discussions with the Attorney General and Squaw, but the County's roll in those discussions was "to address the attorney general's comments in their letter dated August 9th, 2016" by informing the Attorney General that "it's the County's position that the Final EIR does address vehicle miles traveled and the potential impacts to the basin." (JA:6:2902; see JA:4:1617, 6:3056, 3060; 4:1840.) Squaw's counsel also explained that, after the Attorney General's senior staff returned from Washington, D.C., Squaw and the Attorney General would sign a written agreement. (JA:6:2913; see JA:6:3052, 4:1848-1849 [Rinke Deposition, 55:21-56:2], 1852 [59:12-59:15].) Notably, Sierra Watch's executive director admitted that he was present at the hearing for these discussions and that this is how Squaw's agreement with the Attorney General was characterized. (JA:5:2427 [Mooers Deposition, 100:8-15].)

In sum, Squaw and the County agree that Sierra Watch's alleged three-way deal "is a red herring" and that the Court—as the trial court did—should focus on whether the County violated the Brown Act by taking action on an "item of business" not listed on described in the agenda. As the trial court correctly concluded, Sierra Watch has presented "no evidence" supporting its claims. (JA:7:3357-3360.)

3. Hernandez and San Joaquin Raptor do not compel the conclusion that the Fee Agreement constituted a separate "item of business" under the Brown Act.

Sierra Watch argues that *Hernandez, supra,* 7 Cal.App.5th and *San Joaquin Raptor , supra,* 216 CaI.App.4th are controlling and on point. Sierra Watch is wrong.

Here, as the trial court found, "the Board of Supervisor's consideration of the Development Agreement as amended by Section 3.19 did not involve a discrete, significant issue of CEQA compliance, as in *San Joaquin Raptor*, nor did it involve a separate action or determination by the governing body, as in *Hernandez*. No separate action was taken with respect to Section 3.19, nor has it been shown that separate action by the County was necessary. Rather, Section 3.19, memorializing Squaw's promise to the Attorney General to pay the TRPA Fee, was merely a component of Project approval." (JA:7:3356.) Indeed, the Board took only one action here, as there was one "collective decision made by a majority of the members of [the Board]" and one "actual vote by a majority of the members of [the Board]" regarding the Development Agreement. (JA:7:3159-3160; see Gov. Code, § 54952.6.)

This Court's recent decision in *Olson, supra,* 33 Cal.App.5th at p. 526 further demonstrates why Sierra Watch's reliance on *Hernandez* and San *Joaquin Raptor* misses the mark. In *Olson*, the board's "agenda described that the Board would '[a]pprove bills and authorize signatures on Warrant Authorization Form for District expenses received through January 24, 2017."' (*Ibid*.) This Court, in reviewing the trial court's grant of a demurrer, determined whether the pleadings stated a cause of action under

Government Code section 54960. (*Id*. at pp. 522-528.) In *Olson*—as the trial court did here (JA:7:3355-3356)—this Court analyzed whether the description of the "item of business" in the agenda complied with section 54954.2 in the light of *Hernandez, supra,* 7 Cal.App.5th at p. 209 and *San Joaquin Raptor, supra,* 216 CaI.App.4th at pp. 1177-1178. The Court found that the violation in both *Hernandez* and *San Joaquin Raptor* was that "the local agency took separate action on a discrete item other than that published." (*Olson,* at p 527.) *Olson* also looked to the definition of "action taken" in section 54952.6 to determine whether the agendas sufficiently described each "item of business" discussed and transacted by the agency at the meeting. (*Ibid*.) The Court concluded that, because "the Board took one action" the January 24, 2017, agenda complied with section 54954.2. (*Olson,* at p. 527.)

Olson also analyzed whether the pleadings stated a cause of action under Government Code section 54960.1, and found that as to one of the challenged agendas, the pleading did state a cause of action. (33 Cal.App.5th at pp. 517-522.) As stated above, the first described an item of business to "'[a]pprove bills and authorize signatures on Warrant Authorization Form for District expenses received through January 24, 2017.'" (*Olson,* at p. 520.) The second, from September 2016, described an item of business as the Board's act to "'[a]pprove bills and authorize signatures on Warrant Authorization Form for:' nine specific payments that did not include an AT & T bill" that the Board also "took action" on. (*Id*. at p. 521.) In comparing the two agenda descriptions this Court found that

"[w]hereas an interested person would know the Board would approve any bill received the previous month, including an AT & T bill, by reading the January 2017 agenda, the same cannot be said of the description in the September 2016 agenda. There, the Board indicated it would be approving a specific list of payments." The Court concluded that second agenda "did not substantially comply with the Act." (*Ibid*.)

Thus, Government Code section 54954.2's requirement of "[a] brief general description … not exceed[ing] 20 words" means exactly what it says. (*Olson*, *supra*, 33 Cal.App.5th at p. 514, 519 ["'[A]n agenda that said simply "Public Employee Dismissal" would have provided adequate public notice of a closed session at which the Council would consider [the finance director's] dismissal'"].) As explained above, the description of item 7 on the agenda here complied with this requirement, as "an interested person would know the Board would approve" the Development Agreement in its entirety, not "a specific and exhaustive list" of the proposed Development Agreement provisions like the September 2016 agenda in *Olson*. (JA:4:1617, 6:2815; *Olson*, at p. 521.) The Board "took action" by adopting an ordinance to approve the Development Agreement as a whole. It did not act separately on the proposed addition of Section 3.19, nor was a separate action required. (JA:7:3159-3160; see JA:7:3352, 3356.)

Contrary to Sierra Watch's argument, nothing in the Brown Act prohibits changes to agenda items that do not require separate approvals between the posting of the agenda and the ultimate agency action on those items. (See Gov. Code, § 54957.5, subd. (b) [providing that any "writing"

related to agenda items may be "distributed less than 72 hours prior to the meeting" so long as they are made available upon request and available for public inspection at a designated public office].) Indeed, Government Code section 54954.2, subdivision (a)(1)'s use of the language "item of business to be transacted or discussed" necessarily implies more than the mechanical approval or disapproval of the listed item of business before the Board.[9] The Board is free to raise concerns and request that the applicant or staff address them, which can include revisions to the item that has been noticed and which the Board is discussing and transacting. Had the Legislature intended to limit an agency's ability to modify items listed in the agenda, as Sierra Watch suggests, it would have done so explicitly. The Court should reject Sierra Watch's attempt to add such a requirement. (See *Coalition of Labor, Agriculture & Business v. County of Santa Barbara Bd. of Sup'rs* (2005) 129 Cal.App.4th 205, 210 (*Coalition of Labor*) ["Rewriting the Brown Act to add provisions the Legislature omitted would not advance the Legislature's purpose and would be an unwarranted intrusion of the judiciary on the legislative branch."].)

In sum, there was one "action taken" here with respect to the approval of the Development Agreement as the trial court found. (JA:7:3356.) The Board had one discussion of the Development

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[9] This is further reinforced by the definition of "action taken" in Government Code section 54952.6, relied on by this Court in *Olson*, *supra*, 33 Cal.App.5th at p. 527.

Agreement, including the proposed amendment, and then held a single vote to adopt an ordinance to approve the Development Agreement, just as the agenda described. (JA:7:3159-3160; see JA:6:2815; e.g., JA:6:2908-2915.)

Sierra Watch, in rehashing its trial arguments, makes no attempt to show a lack of substantial evidence supporting the trial court's factual findings. (*Jacobson*, *supra*, 69 Cal.App.3d at p. 388 ["Their failure to do so will be deemed tantamount to a concession that the evidence supports the findings"].)

B. The County complied with section 54957.5 in making the Schwab Memorandum available for public inspection.

Sierra Watch alleges in its second cause of action that the County violated Government Code section 54957.5. Subdivision (a) of that provision requires "writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records … and shall be made available upon request without delay."

Subdivision (b)(1) requires where a "writing" meets the requirements of subdivision (a), "relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency, [and] is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection *pursuant to paragraph (2)* at the time the writing is distributed to all, or a majority of all, of the members of the body." (Gov. Code, § 54957.5, subd. (b)(1), italics added.)

Subdivision (b)(2) requires an agency to "make any writing described in paragraph (1) *available for public inspection at a public office or location that the agency shall designate for this purpose*. Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency." (Gov. Code, § 54957.5, subd. (b)(2), italics added.) The County complied with these mandates.

Sierra Watch nonetheless alleges that the County violated Government Code section 54957.5 by "providing the November 14 memorandum to all or a majority of the members of the Board less than 72 hours prior to the meeting without making it available to the public at the same time." (JA:2:467; see OB, p. 27.) This claim is baseless. Section 54957.5, subdivision (b) explains that "writings" described in subdivision (a) are made "available for public inspection" when they are placed at the public office designated for that purpose. Here, the second page of the agenda for the November 15, 2016, meeting included all of the required information, and adequately notified the public that the office designated by the County is the Clerk of the Board of Supervisor's Office at 175 Fulweiler in Auburn, California. (JA:4:1617, 6:2815; see JA:5:2415 [Mooers Deposition, 88:12-23], 2418 [91:3-6] [admitting that he had read the agenda and, had he been aware of the Schwab Memorandum, he could have called the clerk's office and asked them to email him a copy].)

The County complied with Government Code section 54957.5 by making the Schwab Memorandum available for public inspection at the designated public office, at the same time it was distributed the Board, and

the agenda properly notified the public of that location, as section 54957.5 requires. (JA:5:2140-2141 [Wood Deposition, 43:4- 44:15], 2184 [75:8-13]; see JA:4:1618-1619.) Specifically, the memorandum was emailed to the Clerk of the Board of Supervisors, at 5:36 p.m. on November 14, 2016. (*Ibid*.) The Clerk received the memorandum at her office and placed it in the public file. (JA:5:2141 [Wood Deposition. 44:1-7, 12-15], 6:2815; see Gov. Code, § 54957.5.) At 5:42 p.m. on November 14, 2016, the Clerk distributed the memorandum to all of the members of the Board of Supervisors, and it was available for public inspection—as required in section 54957.5, subdivision (b)(2)—at the same time. (JA:5:2140 [Wood Deposition, 43:4-25], 2141 [44:1-7, 12-15], 2148 [51:8-25], 2184 [75:8-13]; see JA:4:1618-1619.) The memorandum has been available for public inspection at the designated public office since that time, including November 15, 2016. (JA:5:2150-2151 [Wood Deposition, 53:23-54:12].) Sierra Watch does not allege otherwise. (See JA:5:2383-2384 [Mooers Deposition, 56:16-57:24], 2387-2388 [60:6-61:4] [admitting that he had "no reason to believe" that the Schwab Memorandum was not made available for public inspection at the same time it was received, and that Sierra Watch has never made any effort to check], 2407 [80:20-80:25], 2414 [87:2-87:25], 2448-2449 [121:18-122:4], 2687-2688 [Silverman Deposition, 58:9-59:2] [admitting that he had no information that led him to believe the Schwab Memorandum was not placed in the public file at the time it was distributed to the Board].)

Sierra Watch's belief that it should have received e-mail notice of the existence of the memorandum has no basis in County policy or the law. (JA:5:2185-2186 [Wood Deposition, 76:23-77:21]; see Gov. Code, § 54957.5, subd. (a) & (b)(2).) In her deposition testimony, the Clerk of the Board explained that the County's standard practice is to comply with the Brown Act, and that the County posts agendas and agenda packets to the County website, but not all documents related to agenda items, including documents like the Schwab Memorandum. (JA:5:2116 [Wood Deposition, 19:6-13], 2127 [30:2-10], 2128 [31:4-7], 2137-2138 [40:21-41:5], 2185-2186 [76:23-77:9], see Gov. Code, §§ 54954.2, subd. (a)(1) [agendas shall be posted on the agency's website], 54957.5, subd. (a) [writings related to agenda items "shall be made available upon request without delay"] & (b)(2) [writings related to agenda items shall be made "available for public inspection at a public office or location that the agency shall designate for this purpose"].) Nor is it the County's standard practice to notify "the public of documents provided to the board less than 72 hours [prior to the hearing]." (JA:5:2185-2186 [Wood Deposition, 76:23-77:1]; see also JA:5:2186 [77:2-21] [it is not the County's general practice to "maintain email lists of people who are interested in … specific agenda items or specific projects"].) Thus, Sierra Watch's belief as to what it has an "expectation" to being notified of (JA:5:2414 [Mooers Deposition, 87:13-25]), has no basis in County policy or the law. (See JA:5:2185-2186 [Wood Deposition, 76:23-77:21].)

Sierra Watch argues that the Schwab Memorandum was not made available for public inspection as required by the Brown Act because it was made available at 175 Fulweiler Avenue in Auburn, after normal business hours on November 14, 2016, and because the public was not "notified" of its availability. (OB, pp. 27-28; see JA:7:3359.) Sierra Watch misstates the requirements of the Brown Act.

The Brown Act has two requirements for "writings" that relate to agenda items, when it comes to making them available to the public. First, they must be "made available upon request without delay." (Gov. Code, § 54957.5, subd. (a), italics added.) Sierra Watch admits that it has never made such a request. (JA:5:2387-2388 [Mooers Deposition, 60:6-61:4], 2684-2685 [Silverman Deposition, 55:21-56:20], 2689 [60:2-60:7].) Second, when distributed to the Board less than 72 hours prior to the hearing, they must be made "available for public inspection at a public office or location that the agency shall designate for this purpose." (Gov. Code, § 54957.5, subd. (b)(2).) As explained above, the County did so, and Sierra Watch cannot prove otherwise. (JA:5:2383-2384 [Mooers Deposition, 56:16-57:24], 2687-2688 [Silverman Deposition, 58:9-59:2].)

Sierra Watch's argument here is, essentially, that compliance with the explicit language of the statute is not enough. (OB, pp. 27-36.) Sierra Watch is full of suggestions on how the statute should be revised to make documents like the Schwab Memorandum more publicly available (*ibid.*); such suggestions should be directed at the legislature. (*Coalition of Labor, supra*, 129 Cal.App.4th at p. 210.) Section 54957.5 contains no temporal

restrictions on when "writings" related to agenda items may be distributed to the Board. (See Gov. Code, § 54957.5, subd. (c) [noting that such writings may be distributed during the meeting].) The only requirement is that when such writings are distributed between when the agenda is published and the date and time of the meeting, they must be made available for public inspection at the designated public office at the same time. (Gov. Code, § 54957.5, subd. (b).) Nor is there any requirement that the public be notified of all "writings" related to agenda items. Moreover, such a requirement would be practically impossible to implement. As Ms. Wood testified, "[t]his would entail telling everybody of every piece of correspondence on every particular item." (JA:5:2185-2186 [Wood Deposition, 76:25-77:1].)

Here, in addition to making the Schwab Memorandum available for inspection in compliance with the Brown Act, the Clerk of the Board of Supervisors, while not required to under the Act, took the extra step of making the memorandum available for public inspection at the hearing location on November 15, 2016. (JA:5:2155 [Wood Deposition, 58:25], 2168 [59:1-10].) The Brown Act only requires this procedural step when documents are distributed to all or the majority of the members of the Board for the first time at the hearing itself. (Gov. Code, § 54957.5, subd. (c).) But the County, in the spirit of making "a good faith effort to notify interested persons and the public" of the documents discussed and transacted by the Board (see *North Pacifica LLC v. California Coastal Com'n* (2008) 166 Cal.App.4th 1416, 1433(*North Pacifica*)), also made the

memorandum available for public inspection at the hearing. (JA:5:2155 [Wood Deposition, 58:25], 2168 [59:1-10].)[10]

Sierra Watch ignores the County's good faith efforts and claims that "it would have been physically impossible for the public to access the Schwab Memorandum in the Clerk's office prior to the hearing." (OB, pp. 30-31.) Nonsense. The "public" is not limited to Sierra Watch, or the individuals attending the hearing. The Brown Act requires that distributed writings be made available for public inspection at the designated public office so that *any* person may inspect them. (Gov. Code, § 54957.5, subd. (b); see, e.g., Gov. Code, § 54953, subd. (a) ["All meetings of the legislative body of a local agency shall be open and public, and *all persons* shall be permitted to attend any meeting…"] italics added, 54954.1 ["*Any person* may request…"] italics added.) Regardless, the Schwab Memorandum was not "completely unavailable" as Sierra Watch claims.

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[10] Sierra Watch has acknowledged that it never requested a copy of the Memorandum from the County. (See JA:5:2377-2378 [Mooers Deposition, 50:23-51:19] [admitting that he never looked for the Schwab Memorandum or asked County staff to see it], 2379 [52:1-5] [stating that Isaac Silverman looked, unsuccessfully, for the Schwab Memorandum, but did not ask County staff, and admitting that he knew of no one who asked County staff at the hearing for the Schwab Memorandum], 2457-2458 [130:25-131:7]; see also JA:5:2684-2685 [Silverman Deposition, 55:9-56:20] [stating that Mr. Silverman did not ask anyone for a copy of the Schwab Memorandum, he did not go to the County office, he did not send an email, he did not call anyone, nor did he direct anyone to obtain a copy of the Schwab Memorandum at any point].)

(JA:5:2155 [Wood Deposition, 58:25], 2168 [59:1-10]; see also JA:5:2684-2685 [Silverman Deposition, 55:9-56:20].)

Sierra Watch's argument that the Clerk's printing and placing of the Schwab Memorandum in the public file for inspection at the same time she transmitted to the Board did not comply with the Brown Act ignores the unambiguous language in Government Code section 54957.5. Instead, Sierra Watch pulls new terms out of the air and contorts dictionary definitions and an Attorney General Opinion construing a completely different statute, all in an attempt to rewrite section 54957.5 to include new requirements. These efforts are misplaced. "If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs."' (*Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 485 quoting *People v. Robles* (2000) 23 Cal.4th 1106, 1111.) It is unambiguous that section 54957.5 requires all "writings" related to agenda items that are distributed to the Board after the agenda is published "be made available upon request without delay" and to be made "available for public inspection at" a designated public office at the same time they are distributed to the Board. There is no need for interpretive aids, much less Sierra Watch's spin on dictionary definitions to add restrictions on when "writings" may be distributed to the Board. (See OB, pp. 31-32.)

Sierra Watch quotes the California Constitution's discussion of the public's "right of access" to "the writings of public officials and agencies." (OB, pp. 28-29, quoting Cal. Const. art. 1, § 3(b).) The Brown Act

recognizes this right of access in section 54957.5, subdivision (a), which acknowledges that all writings distributed to the Board are public records, and requires that they "shall be made available upon request without delay." There is no question that the County complied with this prime directive. Further, the Act requires that, when distribution occurs less than 72-hours before the meeting, such "writings" shall be made "available for public inspection at a public office or location that the agency shall designate for this purpose…" (Gov. Code, § 54957.5, subd. (b).) Sierra Watch would add restrictions on when distribution to the Board could occur, but the California Constitution includes no such restriction. Judicial construction, no matter how broad, cannot include the substantial rewrite requested by Sierra Watch. (See *Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 187 [a court may not "'in the exercise of its power to interpret, rewrite the statute'"].)

Sierra Watch argues that the requirement in Government Code section 54954.2—that agendas "shall be posted in a location that is freely accessible to members of the public"—somehow controls the meaning of section 54957.5, which addresses entirely different issues. In support of this argument, Sierra Watch cites an opinion by the Attorney General which opines on the posting requirement for agendas in section 54954.2, and does *not* address the requirements of section 54957.5. (See 78 Ops.Cal.Atty.Gen. 327 (1995).) As the trial court correctly found, section 54957.5 describes the requirements for "writings" that relate to agenda items which are distributed to the Board, not the agenda itself. (JA:7:3359 ["Government

Code section 54957.5 does not mandate that writings be 'freely accessible' to the public"]; see *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507 (*Committee of Seven Thousand*) [where legislature uses a different word or phrase in one part of a statute than it does in other sections, or in a similar statute concerning a related subject, it is presumed "a different intention existed"].)

Further, Sierra Watch's labored analogy has no basis in reality. The agenda in this case, like agendas generally, is a few pages long and could be posted in a "freely accessible" location without overburdening local agencies. (See JA:6:2814-2815 [agenda].) All "writings" related to agenda items distributed to the Board less that 72-hours before the meeting in this case includes thousands of pages of emails, comment letters, and attachments all of which relate to items on the agenda, as well as "writings" like the Schwab Memorandum. (See JA:5:2185-2186 [Wood Deposition, 76:23-77:21].) There is no "window" or "lighted display case" large enough to make the thousands of pages of "writings" related to agenda items "freely accessible" here, even if that were required.

Sierra Watch also argues that "[i]f 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…" (OB, p. 34.) But this is exactly what the legislature said, as established by the plain language of Government Code section 54957.5, subdivision (b). "A local agency shall make any writing described in paragraph (1) available for public inspection at a public office or location that the agency shall designate for this purpose." (See also

JA:7:3360 ["[S]ection 54957.5(b)(2) expressly proscribes the manner in which the agency must act by requiring the agency to make the writings available at the designated public office, which location is stated on the agenda"].)

Sierra Watch argues that, to comply with the Brown Act, the County should have posted the Schwab Memorandum on its website. (OB, pp. 34-35.) Sierra Watch is wrong. Section 54957.5, states that an agency "may also" post "writings" related to agenda items on its website, but does not require it. (Gov. Code, § 54957.5, subd. (b)(2).) The posting of agendas to an agency website is required by 54954.2, if possible; but again, the legislature chose not to include that requirement in section 54957.5. (*Committee of Seven Thousand*, *supra*, 45 Cal.3d at p. 507.) An agency is not required to post all "writings" relating to agenda items on its website under 54957.5. And for good reason, in cases like this, posting the tens of thousands of pages of comment letters, attachments, emails, etc. that the County received up to and including at the November 15, 2016, meeting would be very burdensome. (JA:5:2185-2186 [Wood Deposition, 76:23-77:21].)

The Brown Act does not require agendas or all "writings" related to agenda items be "emailed" to the public. (See Gov. Code, §§ 54954.2, 54957.5.) Nor would such a requirement be practical as it "would entail telling everybody of every piece of correspondence on every particular item." (See JA:5:2185-2186 [Wood Deposition, 76:23-77:1].) Neither County policy nor the Brown Act require such impracticality.

Sierra Watch's interpretation of section 54957.5 would lead to absurd results because, if the Brown Act prohibits the County from distributing writings to the Board outside of business hours, then writings —including the perpetual "document dumps" favored by project opponents—received the night before (or morning of) a meeting would not be distributed to the Board until during the meeting. (See Gov. Code, § 54957.5, subd. (c).) The practical effect of delaying distribution to the Board would be less informed decisionmaking, as the Board members would have little time to consider late submissions relating to items of business before the Board.

Lastly, Sierra Watch suggests that the County should have delayed the hearing to comply with Sierra Watch's interpretation of the Brown Act. (OB, p. 35.) Adding such a requirement would also lead to absurd results because it would allow opponents to perpetually delay project approval by submitting last minute comments outside of normal business hours. While such a procedural weapon would be advantageous to project opponents, neither the law, nor sound public policy allows it. (See *Cal. Optometric Assn. v. Lackner* (1976) 60 Cal.App.3d 500, 507 ["'There must be a limit to individual argument in such matters if government is to go on'"]; *Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal.App.4th 690, 703 [cautioning CEQA petitioners (in a statutory scheme with similar public participation and transparency goals) "'that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and

advancement"'] quoting *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.)

In sum, "[r]ewriting the Brown Act to add provisions the Legislature omitted would not advance the Legislature's purpose and would be an unwarranted intrusion of the judiciary on the legislative branch." (*Coalition of Labor*, *supra*, 129 Cal.App.4th at p. 210.) Yet, Sierra Watch asks this Court to do just that. (OB, pp. 27-36.) The Court should not do so.

C. At minimum, the County substantially complied with section 54954.2.

As this Court recently noted, the Brown Act only permits "nullification" of a local agency's act in violation of specific provisions. (Gov. Code, § 54960.1, subd, (a); see *Olson*, *supra*, 33 Cal.App.5th at p. 518.) This means that Sierra Watch cannot obtain its requested writ relief based on an alleged violation of section 54957.5, which Sierra Watch admits. (See OB, pp. 35-36 [requesting declaratory relief on its second cause of action].)

Moreover, even an alleged violation of Government Code section 54954.2 will not nullify the County's act here, unless Sierra Watch establishes that the County did not act in substantial compliance with the Act, and that the violation was prejudicial. (*Olson*, *supra*, 33 Cal.App.5th at p. 517, citing Gov. Code, § 54960.1 and *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1378. (*San Lorenzo*)) As a fallback, Sierra Watch also seeks declaratory relief that the County's actions violated the Brown Act. (OB, p. 59.) Such relief is permitted under section 54960,

and, as this Court stated in *Olson*, 54960 does not provide agencies with "safe harbor" based on substantial compliance. (at p. 525.) Regardless of the applied statutory standard, as the trial court correctly found, Sierra Watch "fails to establish a violation" of the Act. (JA:7:3360; see 7:3357.)

As stated by this Court in *Olson*, section 54960.1 prohibits finding a prior agency action "null and void" where "the action taken was in substantial compliance" with the Act. (33 Cal.App.5th at p. 518.) Substantial compliance is shown where the agenda provides "fair notice of the essential nature of what an agency will consider." (*San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637, 645; see *Olson*, at p. 520 ["the description leaves no confusion as to the essential nature of the District's action"].) The description of item 7 surpasses this measure.[11]

First and foremost, because the County did not approve any "deal" with the Attorney General to avoid litigation, there was no need to inform the public of such a nonexistent deal. (JA:7:3354, 4:1832-1834 [Rinke Deposition, 39:23-41:16], 1846 [53:2-53:18].) Thus, the situation is nothing like the "troublesome" gift from Walmart to the Town of Apple Valley in *Hernandez*. (7 Cal.App.5th at p. 208.) There, the Town entered into a Memorandum of Understanding (MOU) with the developer, Walmart,

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[11] As Sierra Watch notes, the trial court did not reach the issue of substantial compliance (OB, p. 53), because it found that "the County did not violate Government Code section 54954.2." (JA:7:3357.)

wherein Walmart would pay for the Town to hold a special election. (*Id*. at p. 208.) The MOU was not listed in the agenda, included in the agenda packet, and no one at the meeting commented on the MOU. (*Ibid*.) Here, the only agreement to which the County was a party was the Development Agreement. (JA:7:3159-3160, 3352.) That agreement was properly itemized and described in the agenda, and a draft of that agreement was included in the agenda packet. (JA:4:1616, 7:3156-3157.)

The publicly noticed agenda and supporting documents, including a draft of the Development Agreement, were posted and accessible to the public for more than 72 hours before the November 15, 2016, hearing. (JA:4:1617, 6:2814, 3050, 5:2120 [Wood Deposition, 23:11-14].) As stated above, the proposed amendment was made available for public inspection within minutes of Squaw finalizing its proposal and at the same time it was distributed to the Board, as required by section 54957.5. (JA:4:1617-1618, 6:3050; 5:2140-2141 [Wood Deposition, 43:4- 44:7, 12-15], 2148 [51:8-25], 2184 [75:8-13], 2383-2384 [Mooers Deposition, 56:16-57:24], 2387-2388 [60:6-61:4], 2407 [80:20-25], 2414 [87:2-25], 2448-2449 [121:18-122:4], 2687-2688 [Silverman Deposition, 58:9-59:2].)

County staff, although not obligated to do so, also brought a copy of the Schwab Memorandum along with the other relevant Project documents to the Board hearing on November 15, 2016, so that the information would be present at the meeting location. (JA:5:2133-2134 [36:16-37:18], 2155[58:25], 2168 [59:1-19], 2377-2379 [Mooers Deposition, 50:23-52:5], 2457-2458 [130:25-131:7] [admitting that Sierra Watch could not say with

100 percent accuracy that the Schwab Memorandum was not on the table], 2689-2690 [Silverman Deposition, 60:12-61:5] [admitting that he could not say with 100 percent accuracy that the Schwab Memorandum was not on the table].) These actions by the County "demonstrate a good faith effort to notify interested persons and the public" of the November 15, 2016, hearing and the items of business to be discussed and transacted at that hearing, including item 7. (See *North Pacifica*, *supra*, 166 Cal.App.4th at p. 1433 [discussing substantial compliance under the analogous Bagley-Keene Open Meeting Act].) Hence, the County, at the very least, substantially complied with Government Code section 54954.2.

D. Sierra Watch has not and cannot establish prejudice resulting from any alleged violation of section 54954.2.

Because the County adequately described the "item of business" that it "took action" on regarding the Development Agreement, Sierra Watch's concern about the amendment's ability "to resolve the Project's impacts" is irrelevant to the Brown Act. (*Olson*, *supra*, 33 Cal.App.5th at p. 527 ["the significance of an action is irrelevant when it has been adequately described"]; see OB, at pp. 56-57.) But, even if Sierra Watch could establish a violation here, that would not be enough to grant their requested writ relief. As stated above, "a finding of prejudice is required before nullifying the Board's action." (see *Olson*, at p. 522; see also *Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 671 [to "'invalidate a decision[] [Plaintiff] must show prejudice.'"] quoting *San Lorenzo* , *supra*, 139 Cal.App.4th at p. 1410.)

Sierra Watch alleges that it was caught "entirely off guard" by Squaw's proposed amendment to the Development Agreement to voluntarily pay the TRPA Fee to address the concerns of the Attorney General. This is incorrect. The Attorney General's office advised Sierra Watch, through its counsel, that it was meeting with the County to address its concerns regarding the Project before the November 9, 2016, meeting took place. (JA:4:1791.) The Attorney General also informed Sierra Watch about Squaw's agreement to pay the TRPA fees before the Board received notice of Squaw's proposal. (JA:5:2093.)[12] Moreover, both Ms. Schwab and Mr. Manley testified about the substance of Squaw's Agreement with the Attorney General prior to the public comment period at Board's hearing. (JA:6:2902-2904, 2908-2914; see JA:5:2371 [Mooers Deposition, 44:12-18].) Sierra Watch could have asked to review the Schwab Memorandum at the hearing – it did not. (JA:5:2377-2378 [Mooers Deposition, 50:23-51:19].) Sierra Watch could have commented on the proposed amendment to the Development Agreement —as others did (JA:6:2921, 2932)—or requested the Board continue the public hearing so they could comment on the proposed amendment – it chose not to. (JA:5:2418-2419 [Mooers Deposition, 91:7-92:16], 2681-2682 [Silverman

[12] Sierra Watch claims these communications from the Attorney General "did not give Sierra Watch *any* notice of the Fee Agreement." (OB, p. 57.) This is beside the point because, as the trial court found, there was no "Fee Agreement." (JA:7:3354.)

Deposition, 52:10-53:12], 2683-2684 [54:24-55:4].) Thus, Sierra Watch's argument that it was caught off guard and somehow prejudiced ignores the facts.

Hernandez is on point. There, the petitioner did not attend the meeting (7 Cal.App.5th at p. 198), and the court held that only the unlisted actions which no members of the public at the meeting discussed or commented on were prejudicial to him. (*Id*. at pp. 205, 207-208 ["No one at the meeting discussed the matter or commented on the MOU"].) Here, several members of the public commented on Squaw's agreement with the Attorney General at the Board's hearing. (See e.g., JA:6:2921, 2932.) Under *Hernandez*, Sierra Watch cannot show prejudice.

Here, the lack of prejudice is striking for five reasons. One, Sierra Watch was notified by the Attorney General's Office of Squaw's agreement even before the Board was. (JA:5:2093.) Thus, its allegations of surprise ring hollow. Two, despite being aware of Squaw's Agreement with Attorney General and the proposed amendment to the Development Agreement, Sierra Watch made a conscious choice not to comment on it. (JA:6:2917-2919 [Tom Mooers], 2923-2925 [Chase Schweitzer], 2925-2930 [Isaac Silverman]; 5:2681-2682 [Silverman Deposition, 52:10-53:12] [testifying that he had the opportunity to speak about the Attorney General agreement several hours after learning of the agreement, but chose not to talk about it], 2683-2684 [54:24-55:4], 2418-2419 [Mooers Deposition, 91:7-92:16].) Three, the County did not adopt the TRPA fee as "mitigation" for the Project; so Sierra Watch's comments on its adequacy as such would

have been meaningless.[13] In fact, as the Attorney General's PMQ testified, the County consistently stated that it would not require payment of the TRPA fee. (JA:4:1832-1833 [Rinke Deposition, 39:23-40:3], 5:1985-1986, 6:2902-2904.) Fourth, there is no dispute that the sole effect of the amendment was to oblige Squaw to voluntarily pay $440,862 to TRPA to help reduce traffic and improve air quality. (JA:5:1986, 2158; see JA:7:3352.) While Sierra Watch might have wanted Squaw to pay more, it did not oppose the voluntary payment. (JA:5:2428 [Mooers Deposition, 101:6-11].) Fifth and finally, even if Project approvals were overturned, the agreement between Squaw and the Attorney General would not be affected. (See JA:5:2157-2167.)

VI. CONCLUSION

For all of these reasons, the County and Squaw respectfully request that the Court uphold the trial court's decision to deny the First Amended Petition, and dismiss the appeal, because Sierra Watch cannot show that the County violated the Brown Act.

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[13] Notably, had the County adopted the TRPA fee as mitigation, nothing in the Brown Act or CEQA would have prohibited that either. (See *Treasure Island*, *supra*, 227 Cal.App.4th 1036, 1062; *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 905.) As with the Development Agreement, the Agenda described item 1 as "[a]doption of a resolution to certify the Village at Squaw Valley Specific Plan Final Environmental Impact Report … and the Mitigation Monitoring and Reporting Program" (JA:6:2815.) It did not include "a specific list" of mitigation measures. (Cf. *Olson*, *supra*, 33 Cal.App.5th at p. 521.)

Respectfully submitted,

Dated: September 27, 2019

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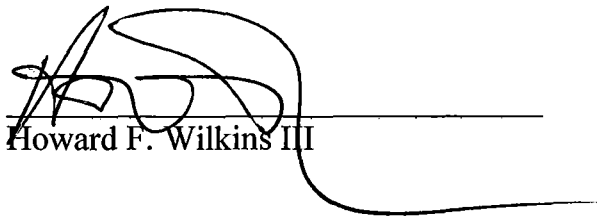
CERTIFICATE OF WORD COUNT
[Cal. Rules of Court, Rule 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this **OPPOSITION BRIEF OF REAL PARTIES IN INTEREST** contains 13,994 words, according to the word counting function of the word processing software used to prepare this brief.

Executed on September 27, 2019, at Sacramento, California.



Howard F. Wilkins III

Sierra Watch v. Placer County, et al.
Third District Court of Appeal Case No. C087892
(Placer County Superior Court Case No. SCV0038917)

PROOF OF SERVICE

I, Kathryn A. Ramirez, am a citizen of the United States and I am employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California, 95814. My email address is kramirez@rmmenvirolaw.com. I am over the age of 18 years and I am not a party to the above-titled action.

On September 27, 2019, I served the following:

RESPONDENTS AND REAL PARTIES IN INTEREST'S OPPOSITION BRIEF

☒ **VIA TRUEFILING** by causing a true copy thereof to be electronically delivered to the following person(s) or representative(s) at the email address(es) listed below. I did not receive any electronic message or other indication that the transmission was unsuccessful.

SERVICE LIST

Amy J. Bricker Shute Mihaly & Weinberger LLP 396 Hayes Street San Francisco, CA 94102-4421 Tel.: (415) 552-7272 Email: bricker@smwlaw.com	Attorneys for Appellant SIERRA WATCH **VIA E-Service**
Clayton T Cook Placer County Counsel's Office 175 Fulweiler Avenue Auburn, CA 95603 Tel.: (530) 889-4044 Email: ccook@placer.ca.gov	Attorneys for Respondents PLACER COUNTY and PLACER COUNTY BOARD OF SUPERVISORS **VIA E-Service**
Supreme Court of California 350 McAllister Street San Francisco, CA 94102 Tel.: (415) 865-7000	Pursuant to CRC 8.212(c) **VIA 3DCA E-Filing**

Sierra Watch v. Placer County, et al.
Third District Court of Appeal Case No. C087892
(Placer County Superior Court Case No. SCV0038917)

☒ **VIA FIRST CLASS MAIL** by causing a true copy thereof to be placed in a sealed envelope, with postage fully prepaid, addressed to the following person(s) or representative(s) as listed below, and placed for collection and mailing following ordinary business practices.

SERVICE LIST

Clerk of Court for Judge Michael W. Jones PLACER COUNTY SUPERIOR COURT PO Box 619072 Roseville, CA 95661	**VIA USPS**
Appellate Coordinator OFFICE OF THE ATTORNEY GENERAL 1300 I Street Sacramento, CA 95814	**VIA USPS**

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 27th day of September 2019, at Sacramento, California.

Kathryn A. Ramirez