Recent Developments, Defenses and Strategies in Brown Act Litigation

Wednesday, May 3, 2017 General Session; 3:15 – 4:45 p.m.

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League of California Cities
City Attorney's Department
Spring Conference
San Francisco, California
May 2017

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I. Introduction

One of a city attorney's most important responsibilities is to help his or her client navigate the Ralph M. Brown Act. (Govt. Code § 54950 et seq.) The Brown Act protects the public's right to address local government on issues of public importance and ensures that, with certain exceptions, local legislative bodies conduct their meetings in an open and public manner.

Given its central role in local government, the Brown Act undergoes significant legislative and judicial scrutiny on an ongoing basis. Staying on top of the Brown Act's legislative amendments and judicial interpretations is essential in order to adequately advise municipal clients and avoid Brown Act lawsuits. This paper will outline the key Brown Act amendments from 2016 and the most recent court decisions regarding the Brown Act.

This paper will also review defenses and strategies that city attorneys should consider when evaluating a Brown Act lawsuit. Prevention is always the best solution when it comes to the Brown Act, but there are times when, despite our best efforts, litigation ensues. While the Brown Act's application is broad and its exceptions are narrow, there are a number of effective defenses and strategies upon which cities can rely when faced with a Brown Act claim. The recent cases that will be discussed below provide valuable guidance on these defenses and strategies.

II. Brown Act Amendments

In 2016, the Legislature adopted three noteworthy Brown Act amendments:

A. AB 1787 (Chapter 507, Statutes of 2016) – Govt. Code §§ 54954.3(b)(2), (3).

AB 1787 addresses how local agencies regulate and control public comment during the meetings of local legislative bodies. The Brown Act allows local agencies to adopt reasonable regulations regarding the amount of time that members of the public may have to address the legislative body. Many cities limit public comment to three to five minutes per speaker. There were questions, however, as to whether such a time limit should include the time necessary for someone to translate for a non-English speaker. Prior to AB 1787, the Brown Act was silent on this issue.

Under AB 1787, if a legislative body limits the time for public comment, it must provide at least twice the allotted time to a member of the public who uses a translator, to ensure that non-English speakers receive the same opportunity to directly address the body. However, if the legislative body uses a simultaneous translation equipment system to allow the body to hear the translated public testimony simultaneously, this provision is inapplicable.

B. AB 2257 (Chapter 265, Statutes of 2016) – Govt. Code § 54954.2(a)(2).

Section 54954.2(a) requires that a local legislative body post its agenda at least 72 hours before a regular meeting in a "location that is freely accessible to members of the public and on the local agency's Internet Web site, if the local agency has one." AB 2257 adds several significant requirements for online agenda posting. After January 1, 2019, a legislative body of a city must post its meeting agendas on the local agency's primary website homepage accessible through a prominent, direct link. In addition, the online posting must be in an open format that is retrievable, downloadable, indexable, and electronically searchable by commonly used internet search applications. AB 2257 does not provide much guidance on how local agencies can comply with these requirements. However, the purpose of this legislation was to make sure that online agendas were not buried within a local agency's website or posted in a manner that was not "intuitively navigable by a site visitor." Cities should work with their IT specialists and err on the side of visibility and accessibility.

C. SB 1436 (Chapter 175, Statutes of 2016) – Govt. Code § 54953(c)(3).

SB 1436 is yet another byproduct of the scandal involving the City of Bell. Under this legislation, local legislative bodies must publicly announce any recommended pay and benefit increases for executives before taking final action on the compensation.

III. Judicial Decisions

A. *Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146

Key Holding: Compliance with the pre-litigation conditions in Government Code section 54960.2(a) was only required for lawsuits that seek to determine the Brown Act's applicability to past actions, not to lawsuit related to ongoing actions.

The City of San Diego's regular council meetings take place weekly over the span of Monday and Tuesday. Beginning in 2001, San Diego published one consolidated agenda for each weekly meeting and provided for public comment on non-agenda items on Tuesday morning. In 2014, the Center for Local Government Accountability filed a petition for writ of mandate and complaint for declaratory and injunctive relief, claiming that the ongoing practice of providing a single public comment period during the two-day regular meeting violated Government Code section 54954.3(a). The trial court sustained San Diego's demurrer without leave to amend on the grounds that the plaintiff failed to submit a pre-filing cease and desist letter to San Diego under Government Code section 54960.2(a)(1), and that the action became moot after San Diego adopted an ordinance allowing for non-agenda public comment on both days of the regular meeting.

It was undisputed that the plaintiff did not submit a cease and desist letter prior to initiating its action against San Diego. The primary issue to be decided on appeal, therefore, was whether a cease and desist letter was necessary under Government Code section 54960. Section 54960 allows challenges by writ of mandate, injunction, or declaratory relief to determine the

Brown Act's applicability "to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of [the Brown Act] to past actions," subject to the filing preconditions set forth in Government Code section 54960.2. San Diego argued that the preconditions, which include the cease and desist letter requirement, applied to *all* types of lawsuits under section 54960, while the plaintiff argued that the preconditions only applied to lawsuits challenging past actions.

The Court of Appeal agreed with the plaintiff that compliance with the preconditions in Government Code section 54960.2(a) was only required for lawsuits that seek to determine the Brown Act's applicability to past actions. The Court of Appeal also determined that the plaintiff's lawsuit related to ongoing actions. The Court rejected San Diego's argument that the lawsuit only challenged the past action of adopting an ordinance regarding non-agenda public comment because the 2001 ordinance was not limited to a one-time effect. Finally, the Court concluded that San Diego's post-litigation ordinance providing for non-agenda public comment on both days of the regular meeting did not moot the litigation because it "did not equate to a change in the City's legal position." The Court of Appeal, therefore, reversed the judgment and remanded the matter to the trial court.

B. *Cruz v. City of Culver City* (2016) 2 Cal.App.5th 239 ("*Cruz I*")

Key Holding: City Council members' discussion of whether to place item on a future agenda fell within the Brown Act's listed exceptions to rule prohibiting discussion or action upon non-agenda items.

Residential parking has long been a contentious issue in Culver City. In 1982, residents of Farragut Drive successfully petitioned Culver City to impose strict parking permit requirements on their street. The City Council subsequently adopted an ordinance that established a city-wide preferential parking program and preserved existing residential parking restrictions, including the Farragut Drive parking restrictions.

In 2014, members of a church located near Farragut Drive asked the city about relaxing the Farragut Drive parking restrictions, which were allegedly having a negative impact on church parishioners. After learning from city staff that there was no existing procedure for a non-resident to petition for a change in any residential parking restriction, a lawyer for the church wrote to a councilmember asking for assistance. At the next city council meeting, on August 11, 2014, during the portion of the meeting reserved for receiving and filing public correspondence, the councilmember announced that he had received the letter and asked for consensus to place the Farragut Drive parking restrictions on a future council agenda. A brief, six-minute discussion ensued regarding the nature of the item to be discussed; the council members discussed whether the issue to be agendized was an administrative appeal by the church or a complete review of the Farragut Drive parking restrictions. After receiving clarification from staff, the council agreed to place the Farragut Drive parking restrictions on a future agenda.

The Farragut Drive parking restrictions were placed on the city council meeting agenda for September 8, 2014. The September 8th discussion lasted approximately two and a half hours

and culminated in the city council asking city engineering staff to provide information at a future council meeting regarding the conduct of a parking impact study.

On October 20, 2014, several Farragut Drive residents submitted a "cease and desist letter" alleging that Culver City violated the Brown Act on August 11, 2014 by discussing the Farragut Drive parking restrictions. They characterized the September 8th city council discussion as the "fruit of a poisonous tree" and requested "that the Culver City Council [sic] cease and desist discussions and actions related to its meeting on August 11, 2014." After the City responded that no Brown Act violation occurred, the Farragut Drive residents filed a complaint seeking declaratory relief that the city and its council members violated the Brown Act on August 11, 2014 by discussing and taking action to agendize the Farragut Drive parking restrictions.

The trial court granted Culver City's special motion to strike under Code of Civil Procedure section 425.16 ("anti-SLAPP") and the Court of Appeal affirmed. The Court concluded that the lawsuit arose from the city council's exercise of its First Amendment rights and that the plaintiffs' claim sought personal relief (preventing any change to the Farragut Drive parking restrictions) such that the anti-SLAPP statute's public interest exception set forth in Code of Civil Procedure section 425.17 did not apply. The Court also concluded that there was no likelihood that the plaintiffs would succeed on the merits. The council members' discussion of whether to place the Farragut Drive parking restrictions on a future agenda fell within the Brown Act's listed exceptions to rule prohibiting discussion or action upon non-agenda items.

C. *Cruz v. City of Culver City, et al*. (Los Angeles County Superior Court Case No. BC617228) ("*Cruz II*")

Key Ruling: Agenda description for an item relating to City's parking requirements satisfied the Brown Act because it described exactly what the city council actually did. Moreover, the plaintiffs failed to demonstrate prejudice in light of their active involvement at the City Council hearing on the matter.

On April 15, 2016, the residents of Farragut Drive filed a second Brown Act lawsuit against Culver City. In March 2016, while the appeal in *Cruz I* was pending, the City revisited the Farragut Drive parking restrictions issue. On March 1, 2016, the City issued an "Official Courtesy Notification" to the residents of Farragut Drive regarding a continued discussion of the Farragut Drive parking restrictions. The notification provided the time and place of the meeting, explained how and when to obtain a copy of the staff report, explained how to submit written comments, and invited members of the public to participate in the meeting.

On March 10, 2016, the city published the agenda for the March 14th meeting. The March 14th regular meeting agenda described the Farragut Drive parking restrictions issue as follows:

> FOUR FIFTHS VOTE REQUIREMENT: (1) CONTINUED DISCUSSION OF THE EXISTING PERMIT PARKING RESTRICTIONS ON THE 10700 BLOCK OF FARRAGUT DRIVE; (2) CONSIDERATION OF THE REQUEST FROM GRACE

EVANGELICAL LUTHERAN CHURCH, (4427 OVERLAND AVENUE), TO CHANGE THE EXISTING FARRAGUT PARKING RESTRICTIONS; (3) CONSIDERATION OF A PARKING STUDY TO EVALUATE THE NEED FOR EXISTING FARRAGUT PARKING RESTRICTIONS AND, IF SUCH PARKING STUDY IS DIRECTED, (A) ADOPTION OF A RELATED RESOLUTION DIRECTING A PARKING STUDY, TEMPORARILY SUSPENDING THE EXISTING FARRAGUT PARKING RESTRICTIONS, AUTHORIZING TEMPORARY REMOVAL OF EXISTING PERMIT-ONLY PARKING RESTRICTION SIGNS; AND AUTHORIZING THE PRO-RATA REIMBURSEMENT OF THE COSTS OF PERMITS PREVIOUSLY ISSUED FOR THE 10700 BLOCK OF FARRAGUT DRIVE; (B) APPROVAL OF A PROFESSIONAL SERVICES AGREEMENT WITH KOA CORPORATION TO CONDUCT THE PARKING STUDY IN AN AMOUNT NOT-TO-EXCEED $35,428; AND (C) APPROVAL OF A RELATED BUDGET AMENDMENT (REQUIRES FOUR-FIFTHS VOTE); AND (4) DIRECTION TO THE CITY MANAGER AS DEEMED APPROPRIATE.

During the meeting, 13 citizens spoke either in support of or opposition to the Farragut Drive parking restrictions, including four of the named plaintiffs in the lawsuit and their legal counsel and his wife. At the conclusion of the ensuing city council discussion, the council voted to temporarily suspend the Farragut Drive parking restrictions and authorize a parking study.

In their complaint, the plaintiffs contended that there was no existing authority in the city's parking regulations that would have allowed any modification to the Farragut Drive parking restrictions without a petition initiated by the residents themselves. The plaintiffs argued, therefore, that the March 14th agenda description for the Farragut parking restrictions discussion violated the Brown Act's agenda requirement because it did not describe such a purported amendment to the city's parking regulations. The trial court rejected this argument and sustained the city's demurrer without leave to amend. The trial court held that the agenda described exactly what the city council actually did; a temporary suspension of the Farragut Drive parking restrictions for purposes of conducting a parking study to evaluate the efficacy of the 34-year old restrictions. In taking this action, the city council did not amend the existing regulations or take some discrete, unspecified action. The trial court concluded that the agenda described the "whole scope" of the action to be taken and, accordingly, more than satisfied the substantial compliance standard. The trial court also concluded that the plaintiffs had failed to demonstrate prejudice in light of the plaintiffs' active involvement in the city council hearing on the Farragut Drive parking restrictions.

D. *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194

Key Holding: Town council violated the Brown Act "brief general description" agenda requirement by acting on an MOU and accepting a donation for a special election where that action was not listed in the meeting agenda.

The plaintiff alleged that the Town of Apple Valley violated the Brown Act by failing to properly describe in the agenda certain actions to be taken at the town council's August 13, 2013 meeting. Agenda Item No. 16 was titled "Wal-Mart Initiative Measure" and described the

recommended action as "Provide direction to staff." No other information appeared on the agenda for this item. The agenda packet for this item, however, included three resolutions regarding a special election for a local initiative to enact a specific plan that would allow development of a shopping center and large retail store. At the meeting, 14 members of the public expressed their opposition to the initiative. The town council approved each resolution and an MOU that authorized the town's acceptance of a donation from Walmart to pay for the special election. The MOU was not included in the agenda packet for that meeting.

The initiative passed in a special election on November 19, 2013. A town resident subsequently filed a lawsuit, alleging that the town council's approval of the resolutions and MOU violated the Brown Act's agenda requirements. He claimed that he would have appeared at the August 13, 2013 meeting had the agenda more fully described the actions to be taken and he would have expressed his opposition to the resolutions and MOU. The plaintiff sought an injunction against any development in the specific plan area because the Brown Act violations rendered the approval of the resolutions and MOU null and void. The plaintiff also argued that the initiative violated article II, section 12 of the California Constitution because it specifically identified Walmart.

On the plaintiff's motion for summary judgment, the trial court concluded that the town's approval of the three resolutions and MOU on August 13, 2013 violated the Brown Act because these actions were not described in the meeting agenda. As to the resolutions, the trial court concluded that there was no prejudice because several members of the public commented on them at the public hearing. However, there was prejudice as to the MOU because it did not appear in the agenda packet and there were no public comments on the MOU. The trial court, therefore, declared the approval of the MOU invalid, void, and unenforceable. The trial court also concluded that the initiative violated the California Constitution and was unenforceable.

The Court of Appeal reversed the trial court's ruling on the constitutional issue, but affirmed the Brown Act ruling. Citing *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1175, the Court of Appeal concluded that the town council violated the Brown Act by acting upon the proposed MOU and accepting Walmart's donation to pay for the special election even though that action was not listed in the meeting agenda. The Court observed that "[n]o one at the meeting discussed the matter or commented on the MOU" and that Walmart "offered the gift to the Town the day after the agenda was posted." The Court concluded that "[t]his was troublesome as it is conceivable this was a major factor in the decision to send the matter to the electorate."

E. *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637

Key Holding: City satisfied the Brown Act's "brief general description" agenda requirement because it gave notice it would consider a substantial development of a hotel; would share project TOTs; and referred to a report that the project would involve a subsidy by the city.

Oceanside entered into an agreement with a developer to build a luxury hotel. Under the agreement, the city was initially obligated to pay the developer 100 percent of transient

occupancy tax (TOT) receipts generated by the hotel and, thereafter, smaller percentages of TOT receipts from the hotel, until the city's $11 million TOT obligation was satisfied. When the agreement was presented to the city council for approval, the council agenda stated that the council would consider:

- the developer's agreement to guarantee development of the subject property as "a full service resort;"

- an agreement "to provide a mechanism to share Transient Occupancy Tax (TOT) generated by the Project;" and

- a report, required by statute "documenting the amount of subsidy provided to the developer, the proposed start and end date of the subsidy, the public purpose of the subsidy."

A citizen's group filed a complaint for declaratory and injunctive relief and a petition for writ of mandate against the city. The complaint alleged, among other things, that the agenda did not comply with the Brown Act because it did not set forth the amount of the proposed subsidy. The trial court entered judgment in favor of the city and the Court of Appeal affirmed.

The Court of Appeal observed that a local agency can fulfill its agenda requirements under Government Code section 54954.2(a) by providing a "brief general description of each item of business to be transacted or discussed." The Court further observed "that an agency fulfills its agenda obligations under the Brown Act so long as it substantially complies with the statutory requirements." In this case, the city satisfied the Brown Act's agenda description requirement because it "expressly gave the public notice that it would be considering a fairly substantial development of publicly owned property as a luxury hotel; that the city would be sharing TOT's generated by the project; and, importantly, by express reference to the subsidy report, that the project, if approved, would involve a subsidy by the city." While the city could have included other details regarding the subsidy, the Brown Act did not require it to do so. The city complied with the Brown Act because it "gave the public fair notice of the essential nature of what the council would be considering."

F. *Beland v. County of Lake* (2016) 2016 WL 230665 (unpublished)

Key Holding: County Board did not violate Section 54957 by engaging in closed session fact-finding or a hearing upon charges at which employee had a right to be present. Even when "complaints or charges" against an employee are considered at a closed session, notice is not required unless the session is a hearing under the Brown Act.

This case involved a former county employee's petition for writ of administrative mandate, following his termination from his position with the Lake County Sheriff's Department. The petitioner asserted the board of supervisors conducted a "closed-door hearing held without notice to [him], and that doing so resulted in a void termination" and violated

Government Code section 54957. He claimed the board "engage[d] in its own fact-finding [and] ... its deliberations evolve[d] into a hearing upon charges" at which he had a right to be present.

The Court of Appeal disagreed. Citing *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876, 880, the Court concluded that there was no violation because the board did not hear charges against the employee in the closed session. Further, the Court reiterated that even when "complaints or charges" against an employee are considered at a closed-door session, notice is not required unless the session is a hearing under the Brown Act, citing *Bollinger v. San Diego Civil Service Com*. (1999) 71 Cal.App.4th 568. In sum, the board's closed-door session was regarding a personnel matter rather than "complaints or charges," and was a deliberation, not a hearing. Consequently, there was no Brown Act violation.

G. *Fillmore Senior Center v. City of Fillmore* (2016) 2016 WL 3723913 (Cal.Super.) (Trial Court Order)

Key Ruling: Brown Act lawsuit to declare an action null and void was time barred by Section 54960.1, and City was not estopped from invoking limitations period by its denial that any violation had occurred.

This case involved a claim of an unspecified Brown Act violation. The Superior Court granted Defendant City of Fillmore's motion for summary adjudication of the Brown Act cause of action. The allegations of the third cause of action established that any Brown Act violation occurred at the November 18, 2014 council meeting. Pursuant to Government Code section 54960.1, the plaintiff had no more than 135 days from the violation to file the action (i.e., 90 days to make a written demand to cure, 30 days for the city to take action or not, and 15 days after that for the plaintiff to file suit). The plaintiff did not file its Complaint until well after the lapse of that period. Accordingly, the Brown Act violation was time-barred.

The plaintiff argued that the city was estopped from relying on the limitations periods in section 54960.1 because the city's denial that a violation occurred was the equivalent of active concealment. The trial court rejected that argument: "[T]he mere fact that the City denies that it violated the Brown Act … does not mean it intentionally concealed a violation …."

H. *Mark D. Kaye et al. v. City of St. Helena, et al.* (Napa County Superior Court Case No. 65665) (Trial Court Order)

Key Ruling: The trial court denied attorney's fees under Section 54960.5 because: the City did not violate the Brown Act's teleconference local quorum requirement; the Brown Act imposes no requirement for "quality connectivity" in teleconferencing; and the City in any event consistently agreed to cure any violation.

This case involves the Brown Act's teleconference requirements, as well as its cure and correct and attorneys fee provisions.

A planning commission conducted a public hearing on a proposed land use development. Two of the five commissioners recused themselves from the hearing. One of the remaining three

commissioners participated by teleconference from her hotel in Alaska, although the telephone connection was poor, and the commissioner participating remotely expressed some difficulty hearing the proceedings. The hearing's conclusion, the commission voted three to zero to deny the use permit and design review for the project.

The applicant missed his deadline under the Municipal Code to appeal the matter to the city council. The applicant's attorney, however, submitted a letter claiming that the planning commission's action was null and void, because the commission violated the Brown Act in several respects, including:

- teleconferencing was improper because the Brown Act requires a majority of the entire Commission to be located inside St. Helena, and
- the City was required to provide adequate telephonic connectivity to allow the remote member to fully hear and understand the entire proceeding.

In a subsequent discussion with the city attorney, the applicant's attorney conceded that his sole interest was in being excused from mistakenly allowing the appeal deadline to lapse and that his client had no interest in pursuing his Brown Act claims if he could appeal the project's denial before the City Council. Following further discussions, the parties agreed in concept to a resolution under which the applicant would waive all Brown Act claims and the commission would vacate its decision, conduct another hearing, and render a new decision. During the discussions, the applicant changed attorneys. The new attorney reiterated a commitment to the same conceptual deal, but the parties are unable to agree on final terms.

Section 54960.1 specifies a 30-day period from the date of the demand for the legislative body to cure or correct the challenged action in asserted violation of the Brown Act, and a 15-day period from the lapse of the 30-day period for the challenger to file suit. During the time the attorneys were exchanging e-mails agreeing about the concept of the deal, the statutory time to cure and correct lapsed. The City agreed to extend the time to sue.

The applicant filed suit, seeking to have the commission's decision declared null and void, and seeking attorney's fees. The city then unilaterally undertook a "cure and correct," by vacating the previous decision and scheduling a new public hearing. The commission conducted the new hearing, at which the applicant appeared along with neighborhood opponents. The commission (with all three participating members local) again voted to deny the application. The applicant attempted to appeal the decision to the city council, but again missed one of the two applicable deadlines for appeal. The council denied the appeal. The applicant did not timely challenge the denial by writ of mandate.

Months passed, during which the applicant did nothing to prosecute his complaint. Thereafter, the applicant hires his third attorney, who filed a motion for attorney's fees in the Brown Act case. The City opposed the motion, which the Superior Court denied based on the following arguments:

There Was No Brown Act Violation. There was no Brown Act violation, as required for fees under section 54960.5. First, the Plaintiff moved for fees without first seeking by

motion or trial to secure an order or judgment establishing a Brown Act violation prior to filing a motion for fees. Even if he had done so, the Court agreed with the city that the plaintiff's fee motion failed to establish a violation, as follows:

- **A Quorum Of The Legislative Body Was Local Per Section 54953 (b) (3).**

The city argued, and the Court agreed, that because two members recused themselves, the "legislative body," as that term is used in section 54953(b)(3), was comprised solely of those three participating members. That being the case, two members constituted a majority of the legislative body, and those two members did participate from St. Helena.

The court also agreed that because the issue was raised as a violation of the Planning Commission's own bylaws, the court was bound to defer to the Commission's interpretation of the meaning of its own bylaws unless it is "clearly erroneous" (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1091; *see Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193), and presume its regularity and correctness. (Evid. Code § 664.)[1]

- **The Brown Act Imposes No "Adequate Connection" Requirement.**

The "adequate connection" argument invited the Court to invent an additional standard found nowhere in the Brown Act namely, that the member participating by teleconference must also be "adequately connected." The text of section 54953(b)(4) imposes no such subjective, qualitative requirement for connectivity, nor has any case suggested such a thing. The argument offered no explanation for who would be the judge of whether a connection is "sufficient," or what standard that person or entity would apply. Courts are not at liberty to independently enlarge the scope of the express terms of the Brown Act beyond the language used, nor enlarge upon its operation so as to embrace matters not specifically included. (See, e.g., *Coalition of Labor, Agriculture and Business v. County of Santa Barbara Board of Supervisors* (2005) 129 Cal.App.4th 205, 209-210 (the court declined to fill a perceived Brown Act omission because doing so would constitute "an unwarranted intrusion of the judiciary on the legislative branch.").)[2]

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[1] See, however, the following authorities suggesting that members who are recused are not counted toward a quorum: Opinion No. 10-901, 94 Ops. Cal. Atty. Gen. 100 (2011), 2012 Daily Journal D.A.R. 50; 2 CCR section 1807; Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 ADMIN. L. REV. 1111, 1186-87 (2000); *Chamber of Commerce of the U.S. v. NLRB*, - F. Supp. 2d -, 2012 WL 1664028, at *7-8 (D. D.C. 2012); *In re Shapiro*, 392 F.2d 397, 400 (3d Cir. 1968).

[2] The City also submitted a declaration from the Commissioner who had participated remotely stating that she has heard and understood substantially all of the proceedings, and was able to make an informed vote. But consider whether, apart from the Brown Act issue, a poor telephone connection deprives stakeholders such as the applicant of the right to have all decision makers fully hear and understand the evidence under constitutional and statutory due process and fair hearing principles. (See generally CEB, California Municipal Law Handbook, section 10.416, p. 1119.) Consider in this regard the decision and rationale in the unpublished *Lacy Street Hospitality Service, Inc. v. City of Los Angeles* (2004) 125 Cal. App. 4th 526, decertified from publication June 15, 2005, and the cases it cites. The *Lacy* Court concluded that the inattentiveness of decision-makers during a public hearing prevented them from satisfying fair process principles and overturned the decision. (Citing *Haas v. County of San Bernardino* (2002) 27 Cal. 4th 1017, 1024 ("due process requires fair adjudicators in administrative tribunals"); *Henderling v. Carleson* (1974) 36 Cal.App.3d 561, 566 (takes as a given that administrative decision-maker listens at hearing); *Chalfin v. Chalfin* (1953) 121 Cal.App.2d 229, 233 (fact finder must listen to the evidence before making a decision).)

- **Substantial Compliance.**

If there had been a violation, the City substantially complied with the teleconference rules, precluding a determination that the action was null and void. (Govt. Code § 54960.1.) Under the *Castaic* decision, there could be no Brown Act liability because the City made a "reasonably effective" effort at satisfying the teleconference rules.[3]

The City made several other arguments why fees should be denied even if the Court found a Brown Act violation. Having found no violation, the Superior Court did not rule on these arguments.[4]

I. *The Alcove Unique Gifts v. Port San Luis Harbor District* (2016) 2016 WL 6270961 (Cal.Super.) (Trial Court Order)

Key Ruling: Trial court granted anti-SLAPP motion on Brown Act claim because plaintiff failed to satisfy Section 54960.1's pre-litigation requirement of a "cure and correct" demand.

The Port San Luis Harbor District denied an extension of the plaintiff's retail concessions agreement. The plaintiff responded by suing the District, three Harbor Commissioners, and a District employee on various theories, including an alleged Brown Act violation. The individual defendants filed an anti-SLAPP motion. The trial court granted the motion to strike without leave to amend. The trial court concluded that the causes of action against the individual defendants arose from their actions as commissioners and employees in considering and deciding on whether to extend the plaintiff's contract, which was an issue of great public interest. The plaintiff could not demonstrate a probability of prevailing on any of its claims. With regard to the Brown Act claim, the court observed that the plaintiff had failed to provide notice to the District to cure and correct the alleged Brown Act violation.

J. *City of Bell v. Avila* (2016) 2016 WL 8224341 (Cal.Super.) (Trial Court Order)

Key Ruling: Summary adjudication granted because City failed to satisfy Brown Act's "brief general description" agenda requirement for a resolution changing employee compensation.

The City of Bell sought summary adjudication of its cause of action seeking a declaration that a 2008 resolution was void and invalid because it was not described properly on a city council meeting agenda. The resolution at issue was listed on the agenda as "Approval of Resolution No. 2008-05 Identifying the Administrative Regulations and Operating Procedures and Rescinding Resolutions." The city argued that this did not constitute a brief, general description because the action involved employee compensation. The Defendants did not oppose this argument and the trial court granted summary adjudication as to this cause of action.

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[3] Section 54960.1 lists several Brown Act requirements, including teleconferencing under section 54953, that are subject to the substantial compliance standard.

[4] These arguments are addressed below.

IV. Attorney General Opinions

A. 99 Ops.Cal.Atty.Gen. 11 (2016)

Key Ruling: The Brown Act's website posting requirement is not violated if website is inaccessible due to technical problems.

The Brown Act requires that agendas be posted on a city's website (assuming it has one) 72 hours before the city council meeting (and meetings of certain other legislative bodies). (Govt. Code §§ 54954.2(a), (d).) This provision is not necessarily violated if the website experiences technical difficulties that cause the agenda to be inaccessible to the public for a portion of the 72 hours preceding the meeting.

V. Litigation Defenses and Strategies

The cases described above cover a wide range of potential Brown Act issues and provide guidance on several key recurring issues. These cases also provide guidance on potential strategies for defending against and litigating Brown Act claims.

A. The Pre-Litigation Requirements And Limitation Periods For Brown Act Lawsuits.

There are two types of Brown Act lawsuits that an interested person may bring against a local agency. Determining which type of lawsuit has been filed is critical to evaluating whether the plaintiff satisfied the applicable pre-litigation requirements and filed a timely complaint. A plaintiff's failure to comply with these requirements and limitations may provide you with an easy way out. The two categories of Brown Act lawsuits are as follows:

1. Government Code section 54960(a):

- Who may commence the action? District attorney or any interested person.
- What type of action? Mandamus, injunction, or declaratory relief.
- Purpose of action?
    - Stopping or preventing violations or threatened violations of the Brown Act by members of the legislative body of a local agency; or
    - to determine the applicability of the Brown Act to ongoing actions or threatened future actions of the legislative body; or
    - to determine the applicability of the Brown Act to past actions of the legislative body, subject to section 54960.2.
- Pre-litigation requirements. If the action seeks to determine the applicability of the Brown Act to *past actions*, the plaintiff must meet certain pre-litigation requirements set forth in section 54960.2:
    - the plaintiff must submit a cease and desist letter to the agency, clearly describing the past action and nature of the alleged violation, within nine months of the alleged violation.

    - The agency has 30 days to respond whether or not it will make an unconditional commitment to cease, desist from, and not repeat the past action.
- Limitations Period. If there is no unconditional commitment, the plaintiff must file the complaint within 60 days of receiving the agency's response or 60 days after the time period for the agency to respond expires, whichever is earlier.
- As noted above, the recent decision in *Center for Local Government Accountability v. City of San Diego, supra*, 247 Cal.App.4th 1146, held that the pre-litigation cease and desist demand requirement applies only to claims relating to past actions, and not "to ongoing actions or threatened future actions of the legislative body."
-

2. Government Code section 54960.1:

- Who may commence the action? District attorney or any interested person
- What type of action? Mandamus or injunction (no declaratory relief)
- Purpose of action?
    - obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section.
- Pre-litigation requirements. The plaintiff must meet the following requirements:
    - The plaintiff must submit a written demand to cure or correct the alleged violation
    - The demand must clearly describe the challenged action of the legislative body and nature of the alleged violation
    - The demand must be made within 90 days from the date the action was taken unless the action was taken in an open session but in violation of the agenda posting and brief description requirements of section 54954.2, in which case the written demand shall be made within 30 days from the date the action was taken.
    - Within 30 days of receipt of the demand, the legislative body shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct or inform the demanding party in writing of its decision not to cure or correct the challenged action.
- Limitations period:
    - If the legislative body takes no action within the 30-day period, the inaction shall be deemed a decision not to cure or correct the challenged action, and the 15-day period to commence the action described in subdivision (a) shall commence to run the day after the 30-day period to cure or correct expires.
    - Within 15 days of receipt of the written notice of the legislative body's decision to cure or correct, or not to cure or correct, or within 15 days

of the expiration of the 30-day period to cure or correct, whichever is earlier, the demanding party shall be required to commence the action pursuant to subdivision (a) or thereafter be barred from commencing the action.

- Pleading requirements: "To state a cause of action, a complaint based on [section] 54960.1 must allege: (1) that a legislative body of a local agency violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action, plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not cure or correct the challenged action." (*Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116–111.)

3. Determining Whether Section 54960 or 54960.1 Applies.

In many situations, it will be relatively easy to determine which of sections 54960 (past or threatened or ongoing violations) or 54960.1 (cure or correct one past action) applies. The party bringing the lawsuit typically does, and should be required to clearly identify the applicable section in both the demand letter (if applicable) and the complaint. These requirements, however, are a potential trap for unwary plaintiffs. The city attorney, therefore, should carefully scrutinize the demand letter and the complaint for potential discrepancies that may open the door to a defense that the action is time-barred.

For example, in *Cruz v. Culver City*, the plaintiffs' pre-litigation demand letter and complaint did not indicate whether the plaintiffs were proceeding under section 54960 or section 5490.1. The demand letter, however, clearly sought to invalidate the city council's initial decision to place the Farragut Drive parking restrictions on a future agenda. The plaintiffs argued in their demand letter that the city council could not take any action regarding the Farragut Drive parking restrictions and that a mere discussion of the restrictions was the "fruit of a poisonous tree." The plaintiffs did not submit this demand letter within the 30-day time period required under Government Code section 54960.1 for actions taken in open session.

The city argued that the plaintiffs were necessarily proceeding under Government Code section 54960.1 and that there action, therefore, was time-barred (in addition to lacking any substantive merit). In addition, the city argued that an action under section 54960.1 requires a plaintiff to allege and show prejudice. (See discussion below.) The plaintiffs responded that they were proceeding under Government Code section 54960 because they were only seeking a declaration that the Brown Act applied to a past action by the council (the decision on August 8, 2014 to place the Farragut Drive parking restrictions on a future agenda).

The city relied on two decisions, one by the California Supreme Court and another by the Court of Appeal, to establish that section 54960 may not be used where the Brown Act plaintiff challenges a single past action that is unrelated to ongoing or threatened violations.

In *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, the Supreme Court evaluated a former version of section 11130 (a), as found in the Bagley Keene

Open Meeting Act (Govt. Code §11120, et seq.), which contained almost identical language as here, i.e., "any interested person may commence an action ... for the purpose of stopping or preventing violations or threatened violations of" the act "by members of" a "[governmental] body," or "to determine" the act's "applicability ... to actions or threatened future action." The issue before the Supreme Court was whether the right of action granted by Government Code section 11130 (a) extended only to present and future actions and violations and not to past ones. The Court concluded, "the provision's right of action extends only to present and future actions and violations and not past ones." (*Regents, supra*, 20 Cal.4th at p. 524.) The facts before the court involved a request by the plaintiff for relief including a declaration that the Regents violated the act by making a collective commitment or promise to approve certain controversial resolutions, prior to a noticed, open, public meeting. The challenged violation was a one-time event, and plaintiff did not show any continuing course of conduct. (*Id*. at pp. 515–516, 536.)

In reaching its conclusions, the *Regents* Court examined previous case law arising under the Brown Act, Government Code section 54960(a). The Supreme Court stated that the section extends to past actions and violations as well as present and future ones—but "only as to past actions and violations that are related to present or future ones." (*Regents, supra*, 20 Cal.4th at p. 526, fn. 6.)

In *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, the court followed Regents in a matter involving Government Code section 54960. It held that a claim under section 54960 was viable only when there is a showing of a pattern of past conduct that provided an evidentiary basis to support the allegation that the legislative body would continue violating the Brown Act. (*Shapiro, supra*, 96 Cal.App.4th at p. 915 ["so long as the allegations and proof of the legislative body's practices extend to 'past actions and violations that are related to present or future ones,' the Brown Act provisions are brought into play to authorize and justify injunctive relief"].)

The City argued that *Regents* and *Shapiro* were dispositive, and that section 54960 did not apply to the claim of a single violation of section 54954.2 (taking action on a matter that was not listed on the agenda) at the August 11, 2014 meeting.

While Appellants argued that legislation from 2012, SB 1003, undid *Regents* and *Shapiro*, the City made the case that that argument fails under the doctrine of legislative acquiescence. That doctrine relies upon the fact that the Legislature is presumed to be aware of judicial decisions and to have enacted or amended statutes in light of such knowledge. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1008.) "When a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 196.) In such instances, the "construction becomes as much a part of the statute as if it had been written into it originally." (*People v. Hallner* (1954) 43 Cal.2d 715, 720.) Thus, the Legislature is presumed to have been aware of the *Shapiro* decision when it adopted SB 1003 without undertaking to overrule it in any manner and deemed to have acquiesced in *Shapiro's* ruling.

In addition, the City pointed out that in enacting SB 1003 and section 54960.2, the Legislature created a two-part process that allows a plaintiff to demand that an agency correct an ongoing Brown Act violation by sending a cease and desist letter and a legislative body to respond by issuing an "unconditional commitment to cease, desist from, and not repeat" the conduct in the future. (Govt. Code § 54960.2(a)(1), (c)(1); see also Black's Law Dictionary (8th ed. 2004), p. 237, col. 1 [defining a "cease and desist letter" as "[a] cautionary notice sent to an alleged wrongdoer, describing the offensive activity and the complainant's remedies and demanding that the activity stop."].) The City argued that this process would be pointless in the context of a one-time past violation. There would be nothing to "cease and desist" from and an "unconditional commitment to cease, desist from, and not repeat" the non-existent conduct would be futile. (Civ. Code § 3532 ["The law neither does nor requires idle acts."].)

The trial court agreed with the city that only section 54960.1 applied, and therefore found the complaint to be both time-barred and subject to the prejudice defense. In reaching this conclusion, the trial court relied on the plaintiffs' 10-page demand letter "which challenges the City Council's actions and gives every appearance of seeking to have them nullified."

B. Defenses Under Section 54960.1

1. Substantial Compliance

In *San Diegans for Open Government v. City of Oceanside*, *supra*, 4 Cal.App.5th 637, the Court of Appeal recognized "that an agency fulfills its agenda obligations under the Brown Act so long as it substantially complies with statutory requirements." (*Id*. at pp. 642-643.) The substantial compliance standard is set forth in Government Code section 54960.1(d)(1) and provides cities with a very useful defense against certain alleged Brown Act violations.

The substantial compliance standard applies in the following circumstances:

- There is a proceeding under section 54960.1 to deem an action null and void.
- The action that allegedly violated the Brown Act was taken in substantial compliance with:
    - Section 54953 (requirement that meetings be open and public; teleconferencing rules; prohibition against secret ballots; teleconferencing rules for health authorities)
    - Section 54954.2 (agenda posting and agenda item description requirements)
    - Section 54954.5 (closed session description requirements)
    - Section 54954.6 (notice and hearing requirements for new or increased taxes or assessments)
    - 54956 (requirements for special meetings)
    - 54956.5 (requirements for emergency meetings)

The courts have held that **"**substantial compliance" means actual compliance in respect to the substance essential to every reasonable objective of the statute. (*Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1205.) Under this standard,

strict compliance is not required, and reviewing courts are to reject "hypertechnical" arguments that "elevate form over substance." (*Id.* at p. 1207.) There is no Brown Act violation where the agency has made "reasonably effective efforts" to comply. (*Id*. at p. 1206.)

With regard to agenda descriptions, *San Diegans for Open Government* demonstrates that a city may substantially comply with the "brief general description" requirement by giving "the public fair notice of the essential nature of what the council would be considering." Under this standard, the agenda should describe each action to be taken, but it does not have to contain details that are more appropriate for a staff report.

2. Certain other actions are protected under Section 54960.1.

In addition to the substantial compliance rule, actions that are alleged to violate sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 shall not be determined to be null and void if any of the following conditions exist:

- The action taken was in connection with the sale or issuance of notes, bonds, or other evidences of indebtedness or any contract, instrument, or agreement thereto.

- The action taken gave rise to a contractual obligation, including a contract let by competitive bid other than compensation for services in the form of salary or fees for professional services, upon which a party has, in good faith and without notice of a challenge to the validity of the action, detrimentally relied.

- The action taken was in connection with the collection of any tax.

- Where person alleging noncompliance with section 54954.2(a), section 54956, or section 54956.5, because of any defect, error, irregularity, or omission in the notice given, had **actual notice** of the item at least 72 hours prior to regular meeting or 24 hours prior to special meeting.

- An action alleged to have been taken in violation of sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 **has been cured or corrected** by a subsequent action of the legislative body, the action filed pursuant to subdivision (a) shall be dismissed with prejudice.

Establishing these defenses, for example that the Plaintiff had actual notice, or that the violation was cured, will generally require the introduction of facts that are not set forth in the complaint. Because a city may not object to a Brown Act complaint by a demurrer that relies on or introduces facts beyond the four corners of the complaint itself, cities might consider simultaneously filing an anti-SLAPP motion, which may properly be supported by declarations providing such evidence, perhaps from the City Clerk, showing that the Plaintiff had actual

notice and appeared at the meeting. We discuss the use of such anti-SLAPP motions, and their applicability to Brown Act cases, below.

3. The Requirement of Prejudice As A Prerequisite For Brown Act Lawsuits Under Section 54960.1.

In proceedings under section 54960.1 (to deem an action null & void), merely alleging a Brown Act violation is insufficient by itself to state a valid cause of action. The plaintiff must also plead and prove prejudice. "Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's decision, Brown Act violations will not necessarily invalidate a decision. [Appellants] must show prejudice." (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1410; *Galbiso v. Orosi Public Utilities District* (2010) 182 Cal.App.4th 652, 670-671; *North Pacifica LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416, 1433-1434 (decided under "identical" Bagley-Keene Act).) In a case alleging a violation of the Brown Act's agenda requirements, a plaintiff cannot establish prejudice simply by alleging that he or she was unable to participate in a public meeting. (See *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555-556.) Rather, the plaintiff must demonstrate that his or her attendance would have affected the result of the meeting in some fashion.

In Cohan, as one example, the Court of Appeal found that a city council violated section 54954.2 by adding an administrative appeal of a development project to an agenda. (*Cohan v. City of Thousand Oaks, supra*, 30 Cal.App.4th at p. 556.) The matter was discussed and continued to a duly noticed public hearing, at which time the city council rejected the project. (*Id*. at pp. 552-553.) The Court of Appeal held that there was no prejudice to the developer because the city council considered the merits of the project at the subsequent, noticed public hearing. The Court of Appeal observed that "only a few persons showed support for the project [at the duly noticed hearing] in comparison to the large number of opponents." (*Id*. at p. 556.) The Court of Appeal observed that it was "highly unlikely more persons would have attended the [prior meeting] to dissuade the Council from considering whether to appeal the decision than appeared to support the project on the merits." (*Ibid*.)

In *Hernandez v. Town of Apple Valley*, *supra*, 7 Cal.App.5th 194, by contrast, the Court concluded that because of an inadequate agenda description as to one particular decision (the MOU) the City made, there had been no meaningful opposition mounted to the decision. The Court concluded that this was sufficient to establish prejudice.

D. Equitable and Other Principles Applicable To Brown Act Litigation.

- Courts adopt a flexible reading of the Brown Act where doing so is generally consistent with the purposes of the Brown Act. (*See Travis v. Board of Trustees* (2008) 161 Cal.App.4th 335, 346.)

- Courts will decline to engage in speculation about what might happen in other meetings were the City to push some imaginary Brown Act envelope. (*See, e.g., Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal.App.4th 109, 115 fn. 5.)

- Under principles of statutory construction, courts do not give the words of the Brown Act a literal meaning if to do so would result in an absurd result that was not intended. (*Chaffee v. San Francisco Public Library Com., supra*, 134 Cal.App.4th 109, 114.)

- Where the Brown Act creates a general rule without a limitation, courts are not at liberty to simply manufacture and insert one. (*Coalition of Labor, Agriculture and Business v. County of Santa Barbara Board of Supervisors, supra*, 129 Cal.App.4th 205, 209-210.)

E. The Application of the Brown Act to Councilmember and/or Public Comment

Those portions of public meetings reserved for comments by council members or the public present special challenges for city attorneys. A simple comment could elicit follow-up questions and quickly evolve into a substantive discussion, which could violate the Brown Act. Section 52954.2(a)(2) provides that "[n]o action or *discussion* shall be undertaken on any item not appearing on the posted agenda." (Emphasis added.) City attorneys, therefore, must always be on guard against actions and discussions that are not described in a meeting agenda.

Government Code section 54954.2(a)(2) sets forth three exceptions to this prohibition:

- [M]embers of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3;

- [O]n their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities;

- [A] member of a legislative body, or the body itself, subject to rules and procedures of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda.

The Court of Appeal decision in *Cruz I* provides an example of how these exceptions apply. As noted above, *Cruz I* involved the following statements regarding a non-agenda item:

- A statement by a council member that he had received a letter from the church that was affected by the Farragut Drive parking restrictions. The council member's comment regarding the letter was a permissible, brief response to a statement made by a person exercising his public testimony rights. Notably, the trial court and court of appeal rejected the plaintiffs' contention that this exception only applied to people exercising their public testimony rights in person at the meeting. Under this exception, a council member can respond to written correspondence as well as oral comments.

- The council member asked that the issue be placed on a future agenda for discussion. This request fell within the exception that allows members of a legislative body to request staff to report back at a subsequent meeting.
- The mayor and another council member asked whether the issue to be agendized was the process for appealing parking district decisions or the Farragut Drive parking restrictions. These questions constituted permissible requests for clarification.
- The city engineer provided clarification as to the issue to be discussed. The engineer's response was a permissible, brief response to a question from the council.
- The council decided by consensus to place the Farragut Drive parking restrictions on a future agenda for discussion. Government Code section 54954.2(a)(2) expressly allows a legislative body to "take action to direct staff to place a matter of business on a future agenda."

The Court of Appeal rejected the plaintiffs' Brown Act claim because the discussion at issue was not "substantive and substantial." The Court observed that the council member "did no more than ask for clarification as to the appropriate avenue of response to the church's letter." The city engineer "answered those questions and advised the council that the matter could be placed on a future agenda, with all parties given notice and an opportunity to comment." Under these facts, all three statutory exceptions applied.

F. Using The Anti-SLAPP Statute To Address Brown Act Claims.

In responding to a Brown Act lawsuit, a city attorney is not limited to a demurrer. Under appropriate circumstances, a city attorney may file an anti-SLAPP motion under Code of Civil Procedure section 425.16. Section 425.16 (b)(1) provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

1. Two-Step Analysis: Arises From Protected Activity/Probability of Prevailing one the Merits

An anti-SLAPP motion requires a two-step analysis:

> (1) Has the moving defendant shown that that challenged cause of action arises from protected activity? (*Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315-316.) Section 425.16 (e) defines an act "in furtherance of a person's right of free petition or free speech in connection with a public issue" to include the following:[5]

[5] The scope and applicability of two of these four prongs are currently before the California Supreme Court in *Rand v. City of Carson*, Case No. S235735.

- any written or oral statement or writing made before a legislative proceeding or any other official proceeding authorized by law (Code Civ. Proc. § 425.16(e)(1));

- any written or oral statement or writing made in connection with an issue under review or consideration by a legislative body or in any other official proceeding (Code Civ. Proc. § 425.16(e)(2));

- any written or oral statement or writing made in a public forum in connection with an issue of public interest (Code Civ. Proc. § 425.16(e)(3)); or

- any other conduct taken to further the exercise of the constitutional right of petition or right of free speech in connection with a public issue (Code Civ. Proc. § 425.16(e)(4)).

(2) If the moving defendant makes the threshold showing, the court then decides whether plaintiff has demonstrated a "probability of prevailing" on the claim. (*Holbrook v. City of Santa Monica, supra,* 144 Cal.App.4th 1242, 1247.)

The anti-SLAPP statute protects cities and city officials. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19.) It applies to lawsuits seeking declaratory relief for alleged Brown Act violations. (*Cruz v. City of Culver City* (2016) 2 Cal.App.5th 239; *Holbrook v. City of Santa Monica* (2004) 144 Cal.App.4th 1242.) "Under the First Amendment, legislators are 'given the widest latitude to express their views' and there are no 'stricter "free speech" standards on [them] than on the general public.'" (*Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252, 1261 [holding that a citizen's act of contacting a council member and the council member's act of talking with city staff were "petitions for grievances against the government protected by the First Amendment"].) Responding to inquiries on matters of public interest is a quintessential duty of elected officials. (*Manistee Town Center v. City of Glendale* (9th Cir. 2000) 227 F.3d 1090, 1093.)

Holbrook addressed the application of the anti-SLAPP statute to a claim that certain conduct at city council meetings violated the Brown Act. That case involved two council members who sued the city on the grounds that the city's practice of conducting long city council meetings violated various constitutional provisions. The trial court granted the city's special motion to strike and the Court of Appeal affirmed. The Court of Appeal concluded that the underlying complaint related broadly to oral statements at a public meeting in furtherance of issues of public importance. The Court of Appeal stated:

> "All four criteria [under section 425.16] are satisfied here. The City Council's exercise of its right of free speech in meetings … is the basis for the petition and complaint. Council members make oral statements before the other members of their legislative body and in connection with issues under review by the City Council. They make statements in a place open to the public or a public forum, in connection with issues of public interest. The public meetings, at which council

> members discuss matters of public interest and legislate, are conduct in furtherance of the council members' constitutional right of free speech in connection with public issues and issues of public interest. Under the First Amendment, legislators are given the widest latitude to express their views and there are no stricter free speech standards on [them] than on the general public. …The action arises directly from and is based on the City's exercise of its speech and petition rights." (144 Cal.App.4th at pp. 1247-1248.)

In *Cruz v. City of Culver City*, the city argued that the protected activities under the anti-SLAPP statute include specific oral statements and responses, such as those made by council members and staff during meetings. Specifically, a council member's request to agendize parking restrictions for a future discussion was an oral statement during a duly-authorized City Council meeting, as were the follow-up questions by the mayor and vice mayor. (Code Civ. Proc. § 425.16(e)(1).)

- In requesting a future agenda item on the parking restrictions, a council member made an oral statement in connection with an issue (preferential parking restrictions) under consideration or review by the city council. (Code Civ. Proc. § 425.16(e)(2).)
- Brief oral statements regarding the nature and scope of the future agenda item were made in a regular, open, and public city council meeting. (Code Civ. Proc. § 425.16(e)(3).)
- Finally, a council member's disclosure that he received an inquiry from a constituent about the city's parking restrictions and his request to place the issue on a future agenda was "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16(e)(4).)

2. Public Interest Exception to Anti-SLAPP Statute (Code Civ. Proc. § 425.17(b)

The *Cruz I* plaintiffs argued that they were exempt from the anti-SLAPP statute under the "public interest" exception created by Code of Civil Procedure section 425.17(b). Section 425.17(b) provides, in relevant part:

> Section 425.16 does not apply to any action **brought solely in the public interest or on behalf of the general public** if all of the following conditions exist: (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public.... [¶] (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons. [¶] (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter. (Emphasis added.)

The *Cruz I* plaintiffs argued that the public interest exception applied because there was no direct prayer for personal relief. Rather, the plaintiffs argued, they were only seeking a declaration that the city violated the Brown Act in the past. As a result, their relief did not give them greater or different relief than it gave the public. The plaintiffs also argued that a judgment in their favor would provide a significant benefit to the public and private enforcement was necessary because no one else stepped up to challenge the city's action. The plaintiffs argued that the allegations of the complaint were irrelevant and the court should focus solely of the nature of the requested relief.

The Court of Appeal rejected the plaintiffs' argument and held that the plaintiffs had an individual stake in the outcome that defeats application of the public interest exception. In reaching this conclusion, the Court looked past the prayer for relief and considered the totality of the complaint to determine whether the allegations concerned the plaintiffs' personal, narrow interests. The allegations demonstrated that the lawsuit concerned the plaintiffs' personal interest in the preservation of a preferential parking district that excluded the general public and provided a private advantage to residents of a particular street. The Court stated:

> Distilled, plaintiffs alleged that the council had no authority to hear an appeal by the church regarding the Farragut Drive Parking restrictions, and asked the city to stop taking further actions in that regard. Keeping the parking restriction at status quo would directly benefit plaintiff Farragut Drive homeowners. In short, plaintiffs sought personal relief in the form of a halt to any attempts by the church to undo the long-standing parking restrictions. As a result, the public interest exception to the anti-SLAPP provisions does not apply.

The public interest exception analysis in *Cruz I* is significant because it supports the proposition that there does not have to be a direct link between the relief sought and a personal benefit in order to defeat the exception. Rather, a court can look at a party's motivation to evaluate whether the public interest exception applies. In *Cruz I*, the plaintiffs' personal interest in preserving the Farragut Drive parking restrictions was driving the lawsuit. A declaration that the city council violated the Brown Act by placing the Farragut Drive parking restrictions on a future agenda was consistent with the plaintiffs' theory that the city council should not have done anything that would impair the existing restrictions. The plaintiffs wanted to stop any council debate on the parking restrictions and keep the issue in the hands of the city engineer, who had previously refused to modify the restrictions. The public interest exception, therefore, did not apply.

3. *Cruz v. City of Culver City*: No Probability of Prevailing On the Merits Of The Brown Act Claim.

Once a defendant demonstrates that the complaint's claims fall within the purview of section 425.16, the complaint must be stricken unless the plaintiff establishes a reasonable probability of prevailing on the merits. (*Holbrook, supra,* 144 Cal.App.4th at p. 1247.) A plaintiff must produce "sufficient admissible evidence to establish the probability of prevailing on the merits of every cause of action asserted." (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721.) In addition to considering the substantive merits of

the plaintiff's claims, the court "must also consider all available defenses to the claims. (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1026.)

Because "meritless" SLAPP lawsuits seek to deplete "the defendant's energy" and drain "his or her resources," the Legislature sought "to prevent SLAPPs by ending them early and without great cost to the SLAPP target." Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 589.) In assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 614.) In attempting to establish the existence of a factual dispute, the opposing party may not rely upon the mere allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, or admissible discovery material, in support of its contention that the dispute exists. (*Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 77.)

The Culver City City Council's brief six-minute discussion directing staff to agendize the matter focused on what to place on the future agenda, not the merits of the future item. The City's conduct complied with the requirements of section 54954.2. The *Cruz* Court thus ruled that the plaintiffs had not met their burden of showing a probability that they would succeed on the merits.

4. Pros and Cons of Using Anti-SLAPP For Brown Act Claims:

Anti-SLAPP motions are commonly joined with other motions, especially demurrers. (See, e.g., *Roberts v. Los Angeles County Bar Assoc.* (2003) 105 Cal.App.4th 604, 612.) Trial courts obviously have wide ranging discretion in determining how to manage such companion motions. One of the primary advantages to filing an anti-SLAPP motion is that the moving defendant is not limited to the allegations of the complaint and matters subject to judicial notice, as is the case with demurrers. Rather, a moving defendant can submit declarations and exhibits to support the anti-SLAPP motion. In many situations, this may increase your odds of defeating the case on the merits at an early stage. Keep in mind, however, that, unlike other successful moving defendants in anti-SLAPP cases, a defendant who succeeds on an anti-SLAPP motion in a Brown Act case is not entitled to attorney's fees, except for a "frivolous case"[6] as authorized by Section 54960.5. (Code Civ. Proc. § 425.16(c)(2) ["A defendant who prevails on a special motion to strike in an action … shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section …54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to … 54960.5, of the Government Code."].)

G. Who can recover attorney's fees in a Brown Act case?

Under section 54960.5, a court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to sections 54960, 54960.1, or 54960.2 where it is found

[6] This is an exacting standard, as discussed below.

that a legislative body of the local agency has violated this chapter. Additionally, when an action brought pursuant to section 54960.2 is dismissed with prejudice because a legislative body has provided an unconditional commitment pursuant to paragraph (1) of subdivision (c) of that section at any time after the 30-day period for making such a commitment has expired, the court shall award court costs and reasonable attorney fees to the plaintiff if the filing of that action caused the legislative body to issue the unconditional commitment. The costs and fees shall be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency. Notably, section 54960.5 does not explicitly provide for a fee award when an agency agrees to cure and correct under section 54960.1.

A court may award court costs and reasonable attorney fees to a *defendant* in any action brought pursuant to section 54960 or 54960.1 where the defendant has prevailed in a final determination of such action and the court finds that the action was **clearly frivolous and totally lacking in merit**. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [an action is objectively frivolous "when any reasonable attorney would agree that the appeal is totally and completely without merit."].) In *Flaherty*, the California Supreme Court articulated two standards to determine whether an appeal was frivolous. The objective standard looks at the appeal from a reasonable attorney's perspective. Fees are appropriate under this standard "when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Flaherty, supra*, 31 Cal.3d at p. 650.) The subjective standard considers the motives of the party or attorney. If the purpose of an appeal is "to harass the respondent or delay the effect of an adverse judgment," it is frivolous. (*Ibid*.) The objective and subjective standards are interrelated and "the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Id*. at p. 649.)

This is a very difficult (exacting) standard to meet. In *Cruz I*, the trial court denied the city's request for attorney's fees even though there was little dispute that the exceptions in section 54954.2(a) to the Brown Act's agenda requirement applied to the city council's action to agendize the Farragut Drive parking restrictions for a future meeting. Indeed, the Court felt compelled to deny the City's fee motion under the *Flaherty* line of cases, after having ruled that the Plaintiff's case was "**flawed at just about every level**" and the City's anti-SLAPP motion was "**meritorious at every level**."

H. Limitations On The Recovery Of Attorney's Fees In Brown Act Cases.

- **Certain Fees Are Not Authorized By Section 54960.5**.

The Brown Act's fee statute, section 54960.5, on its face only allows fees in a claim under section 54960.2 for a failure to make an unconditional commitment to cease and desists. It does not similarly allow for fees for a failure to timely cure and correct under section 54960.1.

Where, as in section 54960.5, the Legislature has carefully employed a provision in one place and has excluded it in another, it should not be implied where excluded. The omission of such provision from a statute concerning a related subject shows that a different intention existed. (See, e.g., *In re Michael G.* (1998) 63 Cal.App.4th 700, 710; *Suman v. BMW of North*

America, Inc. (1994) 23 Cal.App.4th 1, 10–11; *City of Port Hueneme v. City of Oxnard* (1959) 52 Cal.2d 385, 395.)

- **No Fees May Be Awarded Where The Brown Act Lawsuit Was Pointless.**

Government Code section 54960.5 authorizes an award of attorney fees, in the trial court's discretion, to a successful Brown Act plaintiff. In considering whether to award attorney fees under section 54960.5, a trial court should consider among other matters the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686; *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1083.)

Trial courts are not obliged to award fees in every Brown Act case. Rather, courts must "thoughtfully exercise" their discretion by examining all the circumstances to determine whether an award of fees would be unjust. (*Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1324.) Courts have the discretion to deny successful Brown Act plaintiffs their attorneys' fees, where the defendant shows that special circumstances exist that would make such an award unjust. (*Los Angeles Times Communications, supra*, 112 Cal.App.4th at p. 1327; *Galbiso v. Orosi Public Utility Dist., supra*, 167 Cal.App.4th at p. 1083.) Such circumstances include, among other matters: (1) the lack of necessity for the lawsuit; (2) the lack of injury to the public; (3) the likelihood the problem would have been solved by other means; and (4) the likelihood of recurrence of the unlawful act in the absence of the lawsuit. (*Bell v. Vista Unified School Dist., supra*, 82 Cal.App.4th at p. 686; *Galbiso v. Orosi Public Utility Dist., supra*, 167 Cal.App.4th at p. 1083.)

- **Fees Are Not Appropriate Where Purely Personal Interests Are At Stake**.

Where a Brown Act case is so motivated by personal, financial interests, fees are not appropriate under section 54960.5. (*Bell v. Vista Unified School Dist., supra*, 82 Cal.App.4th 672, 691.)

- **A Plaintiff Can Be Estopped From Recovering Fees**

Plaintiffs can also be estopped from recovering fees, if, for example, they make representations and assurances that leads the city to defer action to commence a cure within the 30-day period. (See, e.g., *Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 917-918; *Doheny Park Terrace Homeowners Ass'n v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1090.)

In *Kaye v. St. Helena*, above, the plaintiff objected to and sought to exclude the city attorney's declaration describing his predecessors' representations and assurances. The trial court overruled the objection for three reasons:

First, Evidence Code section 1152(a) only precludes settlement discussions from being admissible to prove liability. Where the Ccity uses settlement communications as evidence of

the City's ongoing willingness to cure the claimed violation, and reasonableness of the plaintiff's fees request, not to establish the plaintiff's liability, they are admissible. (See, e.g., *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1023-24; *White v. W. Title Ins. Co.* (1985) 40 Cal.3d 870, 887.)

Second, because the plaintiffs referred to the communications in its moving papers and supporting declarations in arguing that the city overreached in seeking a broad waiver of the plaintiff's claims, the plaintiff waived any objection to the use and admission of the communications. (See, e.g., *Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946 ["[A] witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony."]; *People v. Robinson* (1997) 53 Cal.App.4th 270, 282–283.)

Third, such communications were relevant and admissible to prove that the plaintiff was estopped, by virtue of their repeated assurances of settlement, from asserting that the City's ultimate unilateral cure was untimely. (See e.g. *Flintkote Co. v. Presley of Northern California* (1984) 154 Cal.App.3d 458, 465.)