SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 12/09/15 TIME: 8:30 A.M. DEPT: B CASE NO: CV1404718

PRESIDING: HON. ROY O. CHERNUS

REPORTER: CLERK: JACKIE LANGFORD

PETITIONER: COMMUNITY VENTURES PARTNERS, INC. and RESPONDENT: COUNTY OF MARIN	

NATURE OF PROCEEDINGS: NOTICE OF MOTION – AND MOTION TO ISSUE PEREMPTORY WRIT OF MANDATE AND FOR DECLARATORY RELIEF [PETR] COMMUNITY VENTURES PARTNERS, INC.

RULING

As permitted by Govt. Code § 59460, Community Ventures Partners, Inc. has filed a petition for traditional mandate (Code Civ. Proc. § 1085), and declaratory relief (Code Civ. Proc. § 1060) alleging Respondent County's Board of Supervisors violated the agenda rules of the Ralph M. Brown Act (hereafter the Brown Act), specifically Govt. Code § 54954.2, when it heard a report by the Director of the Community Development Agency concerning the status of the County's Draft 2015-2021 Housing Element and conducted a follow-up Q and A discussion at its regularly-scheduled Board of Supervisors meeting held on August 19, 2014, without first posting this item on its agenda.

Petitioner seeks a writ of mandate directing the Board of Supervisors to refrain from engaging in similar off-agenda discussions in the future, and a judicial declaration finding that the Board's conduct in doing so violated the Brown Act.

Respondent opposes the petition (Oppo. p. 3), arguing there was no Brown Act violation because the discussion of the current state of the Draft Housing Element amendment was informational only, the Board of Supervisors took no vote or "action" on the matters discussed, and the time spent on this matter falls within an exception to § 54954.2 which Respondent construes to permit a "brief report" on off-agenda items. (Oppo. p. 3)

Respondent also argues that mandate relief is not available because the Board of Supervisors has the discretionary power to determine whether a report is sufficiently "brief" to fall within the exception. (Opposition. p. 4-5)

Finally, Respondent contends the cause of action for declaratory relief fails because there is no "justiciable controversy." (Opposition. p. 4)

Respondent does not dispute the events as described by Petitioner and the only question is the legality of the Board of Supervisors' actions.

As discussed below, the court finds in favor of Petitioner and concludes that the Board of Supervisors violated the Brown Act by not listing this report as an agenda item, and that no statutory exceptions apply.

FACTS

On August 12, 2014 Petitioner sent a letter to the Board of Supervisors raising questions concerning the County's methodology and conclusions contained in the draft Housing Element, and requesting that County delay submitting the Draft Housing Element to the State Department of Housing and Community Development in order to give the public more time to review the draft document and comment on it, and to schedule a public hearing for further participation. (Ex. A)

The Agenda prepared for the next scheduled hearing of the Board of Supervisors set for August 19, 2014 did not contain notice of any item dealing with the Draft Housing Element. (Ex. B)

Ironically, in a few places of the posted Agenda it was noted: "While members of the public are welcome to address the Board, under the Brown Act, Board members may not deliberate or take action on items not on the agenda, and, generally, [Board members] may only listen." (Ex. B, pp. 1, 7.)

The minutes of the Board of Supervisors prepared after the August 19 meeting note that during Agenda Item No. 2 – "Board of Supervisors' Matters", the Draft Housing Element was discussed, and specifically: "Supervisors Rice and Arnold commented briefly regarding correspondence from community members related to the Draft Housing Element." (Ex. C)

During the time for Agenda Item No. 3 – the "Administrator's Report," the minutes noted that Community Development Agency Director Brian Crawford, "provided an update on the status of the Draft Housing Element" and both Director Crawford and Principal Planner Ms. Leelee Thomas "responded to questions from Board members regarding various components of the Draft Housing Element." (Ex. C)

As more fully demonstrated in the video-recording of the meeting, Supervisor Rice initiated the discussion over the Draft Housing Element by stating that during the past weeks the Board had been receiving emails on the Draft Housing Element, and she recognized many of the "redshirts" in the audience who have spoken out at past forums against the Draft Housing Element. Supervisor Rice remarked it was good for the decision-making process to see the public is involved and she briefly read from prepared notes touching on the nature and purpose of the state-mandated Housing Element that the County must prepare every 8 years.

Supervisor Rice indicated that later in the meeting Brian Crawford, the Director of the Community Development Agency, will speak on the progress and process of preparing the updated Housing Element for the upcoming 2015-2023 planning period. She ended these comments by stating she welcomed input from the public and that there is lots of time left for public discussion of the Housing Element. These remarks consumed about 3 minutes' time.

Supervisor Arnold followed and immediately remarked on the many letters in opposition to the Draft Housing Element received on this issue, including the letter from Petitioner Community Ventures Partners. She then read a letter from a constituent who disagreed with the Draft Housing Element opponents and who voiced support for the County's efforts to provide more housing as described in the Draft Housing Element. Her comments lasted about 2 ½ minutes.

Next, Director Crawford, whom Supervisor Rice asked to be present at the meeting, gave about a 10 minute prepared report describing: the current status of the Draft Housing Element; the benefits to the County of meeting certain statutory timelines; the procedures leading to initial review by the State and the ultimate adoption of the Housing Element by the Planning Commission and the Board of Supervisors; the Board's options in changing the housing sites lists after initial approval by the State; noting a discussion was held between himself and the County Counsel on a legal issue connected to the approval of the Housing Element by the statutory deadline; and the fact that several prior public meetings and information workshops about the Draft Housing Element have been held. Director Crawford's report also responded to some of the issues raised in Petitioner's August 12th letter.

This report was followed by four minutes of Q and A between members of the Board of Supervisors, Mr. Crawford and the County's Principal Planner Ms. LeeLee Thomas involving specific components of the Draft Housing Element which were currently under review by the Planning Commission, e.g., housing density ratios and buffers. The total time spent by Mr. Crawford and Ms. Thomas at the meeting, including the above report, was about 15 minutes.

During "Open Time" several "redshirt" residents asked the Board for more time to review and comment on the Draft Housing Element. These same people spoke out against the draft Housing Element, especially the proposed number of affordable housing units, their location and density ratios. In fact, one opponent also noted that prior to this meeting she sent a letter request to the Board asking to "agendize" the Housing Element for this meeting, which request was obviously ignored.

At the end of the public testimony, Supervisor Arnold made some very brief remarks clarifying some points made by the Housing Element opponents.

It is uncontroverted that had the County notified Petitioner that the Draft Housing Element was going to be discussed, it would have sent a representative to attend the hearing. (Ex. E)

On September 18, 2014 Petitioner sent the County a "cease and desist" letter requesting the County not to repeat the purported Brown Act violations, which letter is required by Govt. Code § 549460.2(a)(1) as pre-condition to filing this action,. (Ex. E) The County did not respond to Petitioner nor did it admit that it had erred or that it would not commit similar violations in the future. To the contrary, County Counsel refused to acknowledge that any illegality occurred. (Ex. F)

1.

The Brown Act

"The Brown Act (§ 54950 et seq.) provides for open meetings for local legislative bodies such as city councils, boards of supervisors and school boards. [Citation.]" (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1287.)

Adopted in 1953 and since amended, the Brown Act "is intended to ensure the public's right to attend the meetings of public agencies. [Citation.] To achieve this aim, the Act requires, inter alia, that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. (Gov. Code, § 54954.2, subd. (a).) The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation by public bodies. [Citation.]" (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1511, *internal citations omitted*; accord. *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1176.)

The agenda rule of the statute unambiguously requires that the Board of Supervisors "shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, . . ." (§ 54954.2(a)(1), *emphasis added.*)

However, § 54954.2 (a) provides several exceptions which permit the discussion of non-noticed items under limited circumstances:

> (2) No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members 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. In addition, on 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. (Emphasis added.)

When an agency fails to comply with the Brown Act, Govt. Code § 59460(a) permits an interested person to sue to enforce its provisions. The statute provides in part:

> The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of this chapter to past actions of the legislative body, subject to Section 54960.2. (*Emphasis added.*)

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station...." (Code Civ. Proc., § 1085, subd. (a).) "[M]andamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. [Citation.] Generally, mandamus may only be employed to compel the performance of a duty that is *purely ministerial* in character." (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 62 italics added.) . . . . We examine the entire statutory scheme to determine whether the [entity] must exercise significant discretion to perform a duty." (*Sonoma Ag Art v. Department of Food and Agriculture* (2004) 125 Cal.App.4th 122, 127, 22 Cal.Rptr.3d 468.)" (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 232-33.)

" 'Whether [a statute] impose[s] a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation.' [Citation.]" (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 233.)
The Brown Act is a remedial statute and as such, "it should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed. [Citations.]" (*Golightly v. Molina, supra,* 229 Cal.App.4th at p. 1512.)

2.

Writ of Mandate

The undisputed evidence shows that the Board was well aware of the public's continuing interest in the status and content of the Draft Housing Element, based on numerous letters to the Board of Supervisors and the vocal opposition received at previously held public hearings and information sessions throughout the County. Also, Director Crawford's appearance at the meeting was specifically planned by Supervisor Rice in response to numerous letters the Board had received during the weeks before the meeting, including Petitioner's letter.

Construing the statute to give the fullest effect to its purpose – e.g., to ensure the public's right to be informed of the transactions and discussions undertaken by their elected officials, and to attend open meetings of the Board of Supervisors, the court concludes that notice of Director Crawford's planned report on the status of the Draft Housing Element should have been posted in a timely fashion on the meeting's agenda as required by § 54954.2(a)(1). The failure to do so violated the agenda rules of the Brown Act.

The court rejects the County's suggestion that the statute was not violated because the Board's purpose in having Director Crawford appear was to provide an informational update about the Draft Housing Element and that no vote or action on the Draft Housing Element took place. (Oppo. p. 2)

First, the Court has reviewed the video of this meeting and has found nothing to suggest that the Board's motive in requesting Director Crawford to give a status report reflected anything other than a genuine interest in keeping the public current on this very important and highly charged matter. Nevertheless, the Board's good-faith intentions do not excuse it from the clear mandate of the statute, since the failure to place that item on the agenda hinders the statute's stated purpose to keep the public informed and to provide public participation in all phases of the decision-making process. (See § 54950.)

Also, Respondent's assertion that no "action" or "vote" on the Draft Housing Element occurred, is irrelevant in determining if the statute was violated. (See *Page v. Mira Costa Comm. College District* (2009) 180 Cal.App.4th 471, 502 ["[W]e are cognizant that Brown Act open meeting requirements encompass not only actions taken, but also factfinding meetings and deliberations leading up to those actions. [Citations.]"].)

The statutory language clearly requires that an item be placed on the agenda concerning all business to be either "transacted" or "discussed" at the meeting. (§ 54954.2(a)(1).) Director Crawford's report, as well as the ensuing Q & A with Board members, qualify as a "discussion" under the statute.

The court also rejects the County's contention that these events fell into the exception under § 54945.2(a)(2) – "[O]n their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may . . . make a brief report on his or her own activities." (*Emphasis added.*) (Oppo. p. 3)

Typical of these "own activities" are a member's attendance at a ceremonial event, a report on interaction with constituants, noting her appearance at a hearing or conference in Sacramento, reference to a recent business trip, or a comment on a recent meeting with other officials. The Director's report did not fall into any of these categories.

Here, the report was prepared by the head of a distinct department within the County government who worked independently of the Board of Supervisors in preparing the Draft Housing Element for the Board's review and ultimate approval. The update by Director Crawford describing his and his staff's actions, cannot be construed to be a "brief report" by any member of the Board or by the Board's staff of their "own activities."

Nor can this report be construed as being "brief." The report consumed 10 mintues, with about five additional minutes of Q & A with members of the Board.

Given the planned nature of Director Crawford's report and its discussion of substantive information that is of continuing interest to the community, the court concludes the Board of Supervisors had a ministerial duty to post this report as an agenda item for this meeting as required by § 54954.2, and its failure to do so violated the Brown Act.

Statements by the County Counsel and Supervisor Rice[1] demonstrate they believe that the Board's past conduct was consistent with the Brown Act, from which the court concludes the County is not likely to change its practices if not directed to do so by this court.

Accordingly, the court finds Petitioner is entitled to a writ of mandate enjoining the Board of Supervisors from engaging in such action in the future.

Contrary to Respondent's contention, the court interprets §54960(a) as not requiring Petitioner to show it has suffered prejudice because of this past violation in order to qualify for mandamus relief. (Oppo. p. 5.)

Respondent's reliance on the decision in *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356 is misplaced.

[1] Supervisor Rice's declaration was filed in support of Respondent's earlier motion for judgment on the pleadings.

First, Plaintiffs in that case sought to set aside a decision of the local agency to close two elementary schools as being made in violation of the Brown Act, § 54960.1, which statute allows courts to declare null and void actions taken in violation of the Brown Act. The appellate court held in those instances, a violation of the Brown Act does not necessarily invalidate the agency's action unless the party challenging the agency action shows prejudice. (*Id.* at pp. 1409-1410.)

In contrast, here Petitioner is not seeking to overturn a prior vote or decision taken against it by the Board of Supervisors under § 54960.1 (a), but seeks a determination under the express language of § 54960(a) that the Board of Supervisors's past conduct violated the agenda rule under the Brown Act.

Also, the *San Lorenzo* decision was decided prior to the 2012 amendment to § 54960 which added the language Petitioner is relying on, i.e., "to determine the application of this chapter to past actions of the legislative body, . . ." Reading a prejudice requirement into this language would effectively nullify the remedial purpose of this provision and allow the County to continue to make this same error under the mistaken belief it is in compliance with the Brown Act.

In any event, the evidence establishes Petitioner was prejudiced because the record shows that his letter to the Board of Supervisors was discussed and Petitioner would have sent a representative to the meeting had it been notified that this issues was going to be part of the agenda.

3.

Declaratory Relief

Section 54960(a) authorizes an action for declaratory relief "to determine the applicability of this chapter to past actions of the legislative body."

To be awarded declaratory relief a party must allege an "actual controversy relating to the legal rights and duties of the respective parties" (Code Civ. Proc. § 1060), i.e., "one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts." (*BKHN, Inc. v. Dept. of Health Services* (1992) 3 Cal.App.4th 301, 308.)

Here the evidence establishes that the parties disagree over whether the Board's past action violated the Brown Act, with Respondent continuing to insist that the Brown Act allowed the Board to schedule an interim status report for informational purposes without placing the matter on the agenda.

In light of County Counsel's refusal to admit a violation occurred, the court is justified in presuming Respondent will continue similar practices. (See *California Alliance for Utility, supra,* 56 Cal.App.4th at p. 1030, quoting *Common Cause v. Stirling* (1983) 147 Cal.App. 3d 518, 524.)

On this record the court finds that Petitioner has demonstrated that an "actual controversy" exists over the Board of Supervisors' "past compliance with the Brown Act." (See *California Alliance for Utility etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 2014, 1029-1030 [an actual controversy was found to exist where the parties disagreed over whether the city council's past action violated the city charter and the Brown Act]; also *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 886.)

Of particular relevance is the language in *California Alliance for Utility, supra,* finding Petitioner's claim of a past statutory violation was ripe for a judicial declaration:

> **Contrary to City's argument, the ripeness doctrine does not require that to obtain declaratory relief CAUSE allege and prove a pattern or practice of past violations. Rather, it is sufficient to allege there is a controversy over whether a past violation of law has occurred. . . . "An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, *or they dispute whether a public entity has engaged in conduct* or established policies *in violation of applicable law.* [Citations.]"**

(*Id.*, 56 Cal.App.4th at p. 1029, *internal citations omitted.*)

On this basis, Petitioner is entitled to a judicial declaration finding that Respondent's decision not to post Director Crawford's report on the Draft Housing Element or the Board's discussion of that matter as an agenda item for this meeting, violated § 54954.2(a)(1) of the Brown Act.

Parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. In the event that no party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.