STATEMENT OF COMPLAINANT

Background Facts:

The July 9, 2020 meeting of the Recreation and Park Commission contained Item 6-A, entitled "Review and Recommend Whether to Rename Jackson Park". In her report attached to the item the Executive Director of the Commission, Amy Wooldridge, suggested several options for choosing a new name, one of which was to *"[e]stablish a subcommittee or request that city staff to facilitate a community committee that discusses naming options and makes a name recommendation to the Commission. This committee could include a Commissioner, residents living near the park, local historians representing all aspects of Alameda's history, and other interested community members."*

At the meeting, the following motions were unanimously adopted:

1. Motion to Change the name of Jackson Park.
2. *"Motion to establish a subcommittee of Chair Alexander and Commissioner Robbins with City Staff to facilitate a diverse community committee which can include, residents living near the park, local historians and other interested community members to rename Jackson Park."*
3. Motion that the Commission make a name recommendation on Jackson Park to the City Council by December 31, 2020.

The City Council then passed a motion on July 21, 2020, directing staff to remove the sign at Jackson Park immediately and to "approve a community-led process for renaming Jackson Park."

At the City Council meeting Jan. 19, 2021, at Item 6-A on the agenda, Ms. Wooldridge presented the recommendations of the community committee for the renaming of Jackson Park. In her report attached to the item she stated that Chair Alexander and Commissioner Robbins had acted pursuant to the Commission's July 2, 2020 motion and appointed 13 members to the committee.

During the "clarifying questions" portion of her presentation to Council, Ms. Wooldridge confirmed that the committee had met weekly from September thru January, with a short intervening holiday break, and that none of the meetings complied with the provisions of the Sunshine Ordinance regarding public notice, public comment, and other provisions applicable to "policy bodies". Her reason for not doing so was that the committee was an "ad hoc" body and thus exempt from the definition of a "policy body". The City Council accepted the recommendation to rename the park Chochenyo Park.

Effective March 18, 2020, the City Council amended Sec. 2-91.1 (d) of our Sunshine Ordinance to add a phrase to subsection (d)(6) to remove some "ad hoc" committees from the definition of a "policy body". This appears to be the basis for Ms. Wooldridge's conclusion.

Complaint: The Jackson Park Renaming Committee ("Renaming Committee") was created by the Recreation and Park Commission ("Commission"), thereby meeting the definition of a "legislative body" under the Brown Act and a "policy body" under the Sunshine Ordinance, but failed to adhere to the open meeting, public access, and other requirements of said bodies.

On Jan. 19 City Council continued this violation of the Sunshine Ordinance and Brown Act by presenting and accepting the report of the Renaming Committee which contained the fruits of meetings of said committee conducted in violation of said laws.

Also, the provision of the ad hoc exception to the definition of a policy body in Sec. 2-91.1(d)(6) is a continuing violation of the Brown Act to the extent that it exempts bodies covered by Govt. Code section 54952 (b), including temporary, advisory committees created by formal action of legislative bodies.

Complainant does not seek to undo or void the work of the Commission, the Renaming Committee, or the City Council's subsequent approvals thereof, but instead seeks a cure and correct recommendation from the Commission that would in the future require all City committees created by a policy body acting as a whole to be treated as "policy bodies" under the Ordinance. Specifics on how to achieve this result will be presented later in this Statement.

Argument in Support of Complaint:

A. The Sunshine Ordinance: Definition of "Policy Body"

Resolution of this complaint turns on whether the Renaming Committee was a "policy body" required to follow noticing and open meeting rules under the Sunshine Ordinance. AMC 2-91.3 ["All meetings of any policy body shall be open and public…"].

The Sunshine Ordinance begins its definition of the term "policy body" at AMC 2-91.1(d) as follows:

"*Policy body" shall mean the following and have the same meaning as "legislative body" is defined in Section 54952 of the* California Government Code *unless the definition in this subsection applies to a broader range of boards, commissions, committees or other bodies:"*

As discussed below, the Renaming Committee is a "legislative body" under the Brown Act ("Section 54952 of the California Government Code") and, therefore, is a "policy body" under the Sunshine Ordinance.

Section 54952 (b) of the Brown Act provides that the term "legislative body" includes:

"A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body."

Because the Renaming Committee can be a "legislative body" under section 54952(b) *even though it was both "temporary" and "advisory"* (or "ad hoc"), the critical inquiry is whether the Renaming Committee was "created" by "formal action" of another "legislative body". If it was, then it is a "legislative body" and thus a "policy body" under the Sunshine Ordinance.

B. The Renaming Committee Constitutes a "Legislative Body" Under the Brown Act and is, Therefore, a "Policy Body" Required to Hold Open Meetings Under the Sunshine Ordinance

By unanimous motion, the Commission directed a sub-committee thereof to appoint members of the Renaming Committee. The Commission itself is, without question, a "legislative body" as it was created by Ordinance. AMC. Sec. 2-12.1. Moreover, the steps the Commission took to "create" the Renaming Committee constitute "formal action" as those terms in the Brown Act have been interpreted by California courts.

The cases define "create" as *playing a role in* bringing a body into existence. International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 CA4th 287, 294-300, ["Here, the City Council, as well as the harbor commission, played a role in bringing LAXT into existence."]; Epstein v. Hollywood Entertainment Dist. II Business Improvement Dist. (2001) 87 CA4th 862, 870-874, ["City was "involved in bringing into existence"]; Californians Aware v. Joint Labor/Management Benefits Committee (App. 2 Dist. 2011) 200 Cal.App.4th 972,., modified on denial of rehearing. ["A … committee, … is "created by" …other formal action of a legislative body if the legislative body " 'played a role' in bringing ... 'into existence' " the …committee"]; Frazer vs. Dixon Unified School District (1993) 18 Cal.App.4th 781.[1]

[1] For the text of all of these decisions see:
1. International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.
→ https://law.justia.com/cases/california/court-of-appeal/4th/69/287.html
2 Epstein v. Hollywood Entertainment Dist. II Business Improvement Dist.
→ https://law.justia.com/cases/california/court-of-appeal/4th/87/862.html
3. Californians Aware v. Joint Labor/Management Benefits Committee
→ https://caselaw.findlaw.com/ca-court-of-appeal/1585243.html
4. Frazer vs. Dixon Unified School District
→ https://law.justia.com/cases/california/court-of-appeal/4th/18/781.html

Frazer vs. Dixon Unified School District, a copy of which is attached, dealt with a scenario analogous to the formation of the Renaming Committee.

In Frazer, parents disputed the District's approval of a new elementary reading curriculum. The District had a written Board policy for such disputes. The Board directed the superintendent to resolve the dispute. Although not directed by the Board or the written policy to form citizen committees, the Superintendent appointed two temporary committees to contain both staff and citizens, one to review the curriculum and one to hear arguments for and against it. Both committees met in secret.

The appellants claimed that these committees were "advisory committees" subject to the Brown Act and that their closed meetings violated the Act. The District argued that the creation of the committees was not "formal action" and that the committees were not "created" by the board because the Superintendent chose the members. The Court disagreed with the District and held as follows:

"Respondents also appear to argue that section 54952.3 requires appellants to allege (and prove) that the Board itself appointed the members of the committees to fall within section 54952.3. definition of "legislative body." We do not believe that section 54952.3 contains such a requirement."[2]

"We think the focus of our inquiry should first be on the authority under which the advisory committee was created. In this case, we believe that authority originates with the Board and not, as respondents imply, with the Superintendent."

With regard to the requirement of "formal action" the Frazer court ruled:

"The Brown Act applies to a wide variety of boards, councils, commissions, committees and other multimember "legislative" bodies that govern California's cities, counties, school districts, and other local public agencies. (See §§ 54951, 54951.1, 54952, 54952.2, 54952.5.) Section 54952.3 clearly contemplates that many of these bodies will establish "advisory committees" to assist with "examination of facts and data," and that the mechanisms by which such advisory bodies are created will be equally varied. We must give that section a broad construction to prevent evasion. (Joiner v. City of Sebastopol, supra, 125 Cal.App.3d at p. 805, fn. 5, 178 Cal.Rptr. 299.)

We believe that adoption of a formal, written policy calling for appointment of a committee to advise the Superintendent and, in turn, the Board (with whom rests the final decision),

[2] It is important to note that the definition of advisory committees as legislative bodies in sec. 54952.3 of the version of the Act reviewed by the Frazer court was substantially similar to the current Sec. 54952(b): *"As used in this chapter "legislative body" also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency."*

whenever there is a request for reconsideration of "controversial reading matter" is sufficiently similar to the types of "formal action" listed in section 54952.3. Accordingly, allegations that the Review and Hearing Committee were created pursuant to Board Policy 7138 were sufficient to bring those advisory bodies within the coverage of the Brown Act,"

The analogy of the facts present in the formation of the Renaming Committee and Frazer are clear. In both cases the originating legislative body appears to have evaded the Brown Act by having the committees formed by a third party, the Superintendent in Frazer and the Commission sub-committee in the instant case. In both cases there was a pre-existing written policy which the third party was to follow, Board Policy 7138 in Frazer and the City Policy for Naming City Property Facilities and Streets, and, moreover, a unanimous motion to create the Renaming Committee. A review of both policies (see foot note 5 of Frazer) indicates that neither policy mandated nor suggested the formation of a citizens committee.

There are also differences in the two cases wherein the formation of the Renaming Committee creates *even stronger facts* to support its designation as a "legislative body". The Dixon School Board never directed the Superintendent to form the committees. The Commission's two person sub-committee was directed by a formal, unanimously passed motion to form the Renaming Committee. Majority vote is the formal mechanism through which the Commission is authorized to act. AMC 2-12.3(b). ["The votes of a majority of the entire membership of the Commission shall be necessary to take any action thereof."]

Should there be any lingering doubt that adoption of a motion is a "formal action" see Joiner v. City of Sebastopol (1981) 125 CA3d 799, 803-805, 178 CR 299, 301-302 where the court ruled that formal action occurred, even in the absence of a motion.

"We conclude also on the basis of undisputed facts that the proposed committee was "created by ... formal action" of the city council. Respondent concedes that the city council, though it did not formally adopt a resolution, nevertheless took "formal action" when it designated two of its members to meet with two planning commission members. It follows (since that designation was pursuant to a unanimously approved plan) that the city council also took "formal action" when it adopted the proposed agenda for the meeting"

Joiner v. City of Sebastopol
→ https://caselaw.findlaw.com/ca-court-of-appeal/1838563.html

Based upon all the above caselaw it is clear that the Renaming Committee was "created" by "formal action" of another "legislative body", the Commission, and thus is a "legislative body" as defined by section 54952(b) of the Brown Act. The Renaming Committee, therefore, is *necessarily* a "policy body" under the Sunshine Ordinance. AMC 2-91.1(d). (""Policy body" shall mean the following and have the same meaning as "legislative body" is defined in Section 54952 of the California Government Code…").

As a “policy body”, the Renaming Committee should have followed the open meeting rules applicable to “policy bodies” under the Sunshine Ordinance. Similar committees should do the same in the future.

C. “Ad Hoc Committees”

Sec. 2-91.1 (d) (4) of the Ordinance broadens the definition of a “policy body” beyond what is covered by Section 54952 of the California Government Code by dropping Section 54952’s requirement of “formal action” altogether and including within the definition of a “policy body” all committees created “by the initiative of a policy body” as a whole. However, Sec. 2-91.1 (d) (6) modifies (d)(4) by excepting an ad hoc committee unless it has been formed by Charter, Ordinance or Resolution of the City Council.

The responding party may argue that the Renaming Committee is an “ad hoc committee” under Sec. 2-91.1(d)(6) and, therefore, excluded from the definition of a “policy body” – *even if* the Committee qualifies as a “legislative body” under Section 54952 the Brown Act. That would be mistaken.

Once a committee is determined to be a “legislative body” under the Brown Act, the inquiry under the Sunshine Ordinance *ends*. AMC 2-91.1(d) ["Policy body" shall mean the following and have the same meaning as "legislative body" is defined [in the Brown Act]”). Application of the additional definitions of “policy body” enumerated in paragraphs 1-6 of subsection (d) of AMC 2-91.1 – including the “ad hoc committee” exception in AMC 2-91.1(d)(6) – is permitted *only if* doing so would provide *broader* coverage than the Brown Act:

“d. "Policy body" shall mean the following and have the same meaning as "legislative body" is defined in Section 54952 of the California Government Code ***unless*** *the definition in this subsection applies to a* ***broader range*** *of boards, commissions, committees or other bodies…”*

Applying the “ad hoc committee” exception to a Brown Act body such as the Renaming Committee would do the *opposite* of what is required by the express language of the Sunshine Ordinance. It would impermissibly result in the Sunshine Ordinance applying to a ***narrower range*** of committees than the Brown Act.

Applying the “ad hoc” exception to a Brown Act legislative body also violates other provisions of both the Ordinance and the Brown Act.

As the Commission knows, California’s Brown Act sets standards for public access to meetings of local governmental bodies. Govt. Code Sec. 54950 et sec. However, Sec. 54953.7 of the Brown Act gives local governments the option to adopt ordinances to, *“impose requirements upon themselves which allow greater access to their meetings than prescribed by the minimal standards set forth in this chapter.”*

Consistent with the above limited authority, our Sunshine Ordinance provides in Sec, 2-91.3 that:

"All meetings of any policy body shall be open and public, and governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et seq.) and of this article. In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedited public access shall apply."

In sum, because the Renaming Committee is a "legislative body" under the Brown Act, it is necessarily also a "policy body" required to hold open meetings under the Sunshine Ordinance. Characterizing it as an "ad hoc committee" cannot -- under the terms of AMC 2-91.1(d), AMC 2-91.3, and Section 54953.7 of the Brown Act -- remove its status as a "policy body".

For more guidance on the inclusion of ad hoc or temporary committees in the Brown Act see the Los Angeles City attorney memorandum at:
https://empowerla.org/wp-content/uploads/2012/04/Brown-Act-Standing-and-Ad-Hoc-Committee.pdf

See also the manual produced by the California League of Cities at bullet point Appointed bodies, pp. 12-13:
https://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx

Cure and Correction: Sec. 2-93.8 (a) authorizes you to recommend to the Recreation and Park commission and to City Council, "steps necessary to cure or correct the violation". Complainant, however, does not seek to undo or void the work of the Commission, the Renaming Committee, the selection of Chochenyo Park as the new name, or the City Council's subsequent approvals thereof.

Complainant instead seeks a cure and correct recommendation from the Commission that would require all City policy bodies to in the future designate, consistent with the Brown Act, all committees created by a policy body acting as a whole, as a policy body. The recommendation should also include:

1. Repealing the ad hoc committee exception in Sec. 2-91.1 (d) (6),
2. Adding to Sec. 2-91.1 a definition of the word "created" to mean "played a role in bringing into existence"
3. Such other cure and correction as the Commission deems appropriate

Respectfully Submitted

Paul S Foreman

18 Cal.App.4th 781
Court of Appeal, First District, Division 2, California.

Richard FRAZER et al., Plaintiffs and Appellants,
v.
DIXON UNIFIED SCHOOL DISTRICT, et al., Defendants and Respondents.

No. A056012.
|
Sept. 2, 1993.
|
Rehearing Denied Oct. 1, 1993.
|
Review Denied Nov. 17, 1993.

Synopsis
Parents petitioned for writ of mandate and for declaratory relief against school district and its governing board and its superintendent with respect to their handling of review process for parents' complaints regarding reading series. The Superior Court, Solano County, No. 108873, Dennis Bunting, J., denied petition, and parents appealed. The Court of Appeal, Phelan, J., held that: (1) district did not violate Education Code or board policies regarding parental involvement in selection of instructional materials, and (2) gathering of quorum of board at joint curriculum council/board work session was "meeting" within meaning of Brown Act.

Affirmed in part; reversed in part and remanded.

Attorneys and Law Firms

****644 *783** Michael D. Imfeld, Newport Beach, for plaintiff and appellant.

Thomas H. Gordinier, County Counsel, Vicki Sieber–Benson, Asst. County Counsel, Harry B. Wyeth, Deputy County Counsel, Fairfield, for defendants and respondents.

Opinion

***784** PHELAN, Associate Justice.

Appellants Richard and Debbie Frazer (appellants) timely appeal from the denial of their petition for a writ of mandate and for declaratory relief against respondents Dixon Unified School District and its Governing Board (Board) and Superintendent, J. Gerry Laird (Superintendent) (collectively, hereafter respondents or the District), which was originally filed in Solano Superior Court in May 1990. By their petition, appellants sought to compel respondents to establish a second task force to conduct an open, public review of the District's K–5 language arts curriculum—the so-called "Impressions" series. The Impressions materials had been approved by the District a year earlier, in May 1989, after a one-year pilot project and a six-week period for public viewing of the proposed materials, at the recommendation of a the District's Language Arts Task Force (LATF). The adoption of the Impressions curriculum was confirmed in May 1990 by a hearing committee which was appointed by the District Superintendent to review the LATF decision in light of parental complaints that the new curriculum was unwholesome, encouraged disobedience and anti-social behavior, contained satanic and morbid material, and introduced warped rituals.[1]

In their fourth amended petition, which was tried to the court on June 13, 1991, appellants alleged that the District failed to comply with its obligations under Education Code section 60262 and Board Policy 7135 regarding involvement of parents in the original selection of the Impressions materials. Appellants further alleged that, when a small group of parents complained in February 1990 about the use of the Impressions series in their children's classrooms, the District violated the Brown Act (Gov.Code, §§ 54950–54960)[2] and the Education Code by conducting secret meetings and excluding anti–Impressions parents from full participation in the process established for review of the complaints. Appellants also alleged that the District's actions violated the constitutional guarantees of due process and equal protection, and their right to petition the government to redress grievances.

We conclude that there is substantial evidence to support the trial court's decision that the District did not violate the Education Code or its own policies regarding parental involvement in the original selection of the Impressions series. The record also amply supports the trial court's ruling ***785** that appellants were not deprived of any constitutional right. Accordingly, we affirm the trial court judgment on the first and fourth causes of action in appellants' petition.

We further conclude, however, that a gathering of a

quorum of the Board at a joint "Curriculum Council/Board Work Session" on February 28, 1990, at which the Board members viewed a videotape, entitled "Holy Wars in Education," and at which discussion was held to bring the participants up to date on the review process for the parents' complaints, was a "meeting" within the meaning of section 54953, in that it consisted of "collective acquisition and exchange of facts preliminary to the ultimate decision" on a pending dispute within the Board's purview. We also hold that the Hearing and Review Committees appointed by the District pursuant to a written Board Policy were "advisory" committees within the meaning of ****645** section 54952.3, whose meetings and deliberations were subject to the Brown Act. Because both the February 28th meeting and the meetings of the Review and Hearing Committees were undisputedly closed to members of the public, we reverse the trial court judgment on the second and third causes of action in appellants' fourth amended petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 1988, the District's LATF undertook a search for a new set of elementary-level reading books.[3] Out of 17 contenders, the LATF narrowed the field to 6 reading book series, which were "piloted"[4] by several teachers in several different grades during the 1988–89 school year. The District presented evidence indicating that the six sets of finalist books were on display from late February through early June of 1989, and that a notice regarding the textbook selection process was published in the local newspaper, the Dixon Tribune, on March 17, 1989. The District also presented evidence that its Director of Instruction, Marilys Tognetti, spoke to the elementary school parents' association about the book selection process in February 1989, and that the elementary school teachers and administrators encouraged parental review of the pilot textbooks at parent-teacher conferences and open houses in April 1989.

In May 1989, the LATF met with the piloting teachers, publishers' representatives, and with representatives of each affected grade level to discuss the final selection of a textbook series. The Impressions series was ***786** the unanimous choice of the grade-level representatives. The Board approved the selection of the Impressions materials on May 18, 1989, and obtained necessary approvals from the State Board of Education for their purchase in July 1989.

There is no evidence of any complaint about the Impressions series at any time during the pilot period, or during the first half of the 1989–90 school year. In early February 1990, however, two sets of parents filed written complaints and requested review of the Impressions materials pursuant to Board Policy 7138.[5] The District immediately responded by establishing a review committee (consisting of teachers and parents who had first-hand experience with the Impressions curriculum) to investigate the merits of the complaints, and a hearing committee (consisting of District employees and community members with no working knowledge of Impressions) to hear testimony from the Review Committee and complainants, and to make a recommendation to the Board regarding the continued use of the Impressions series. Appellant Debbie Frazer asked to be appointed to the Review Committee, but was rejected because she was "unalterably opposed to use of the Impressions series of ****646** books." Of the 21 members of the Review Committee, 17 were District employees and 4 were parents (including one substitute teacher), none of whom objected to the Impressions series.

The issue of the Board's role in the establishment and conduct of the review procedures is hotly contested. There is evidence that the Board directly delegated to the Superintendent the responsibility to conduct a review of the parents' complaints in accordance with Board Policy 7138. The Superintendent does not deny that the Board made such a delegation and, in fact, confirms that he consulted with unspecified Board members beginning in early February about how to handle the complaints. The ***787** Superintendent also admits that he followed the basic approach of Board Policy 7138.[6] He testified only that the Board did not instruct him to establish the particular procedures that were followed in this case, or to appoint particular members of the Committees.

On a list of meetings to occur during the review process established by the Superintendent and his staff, the Board was scheduled for a "Possible Curriculum Council/Board Work Session" to be held on February 28, 1990, from 10 a.m. to 12 noon.[7] It is undisputed that the meeting was actually held, that it was not open to the public, that a quorum of three Board members were in attendance, that all three Board members viewed a videotape "Holy Wars in Education" (described in the meeting minutes as a "censorship film"), and that "Discussion was held regarding recent complaints received about our adopted language arts series" in connection with an agenda item denoted as an "Update on Language Arts Program."[8] It is also undisputed that the Curriculum Council was overseeing the work of the Review and Hearing

Committees.

There is conflicting evidence, however, whether the Board members who attended the February 28 meeting were present for, heard, or participated in the discussion of the parents' complaints. In "carbon-copy" declarations, the three Board members all testified that they were present for at least one hour of "discussion" and for the videotape viewing, but that there was no discussion about the Impressions series itself, and no discussion after the videotape was shown. At least one of those declarants, Board member Lisa Seifert, flatly contradicts her earlier deposition testimony, in which she admitted that she did hear some discussion about the Impressions curriculum. One other Board member's declaration testimony squarely contradicts her prior deposition testimony about the time she arrived and left the February 28 meeting, and the declarations of all three Board members conflict with the existing ***788** documentary evidence regarding the time the February 28 meeting began and ended.

Besides the February 28, 1990 meeting, the Board received a series of written communications from the Superintendent and his staff about the Impressions controversy. By memoranda dated February 8 and 13, 1990, the Board was advised of the appointments to the Review Committee and was provided copies of an education journal article entitled, "Holy Wars in Education." ****647** By memorandum dated February 23, Ms. Tognetti set forth the tentative schedule of meetings and activities for the Review and Hearing Committees and provided the Board and Committee members with certain materials, with the admonishment that the enclosed materials were for "Your Eyes Only." Included among those materials were (1) Ms. Tognetti's own analysis of the parents' complaints, (2) the "Holy Wars" article, (3) an article entitled "Experts Warn of Attempts to Censor Classic Texts," and (4) reports of two other school districts that had retained the Impressions curriculum despite protests by parents.

Apparently, the Review Committee met at least twice, on February 23 and 26, 1990, before making its formal presentation to the Hearing Committee at a meeting on March 29, 1990. Two pro-Impressions parents (members of an independent, ad hoc group called "Concerned Citizens of Dixon," which was organized in March 1990 to support the Impressions curriculum) were each allowed a few minutes to speak during the one and a half hours allotted to the Review Committee during the closed meeting on March 29, 1990. Although appellants and other complaining parents were excluded from the entire Review Committee presentation, they were given an hour and a half to present their own views about the Impressions series to the Hearing Committee—again in closed session.

After its March 29, 1990 meeting, the Hearing Committee recommended that the District retain the Impressions curriculum. That recommendation was relayed to the Board by the Superintendent. On April 5, 1990, the Board took up the Impressions controversy at an open, regular meeting before making the final decision about the parents' complaints. At that meeting, which was so well-attended by members of the press and the public that it had to be moved to a school gymnasium, the Board heard from both supporters and opponents of the Impressions curriculum and, thereafter, voted to retain the Impressions series in District schools.

After several rounds of demurrers, appellants' fourth amended petition was tried to the court on June 13, 1991, on the basis of documentary ***789** evidence and declaration and deposition testimony.[9] The trial court issued its statement of decision on September 19, 1991, denying all relief sought by appellants. After denial of their motion for new trial, appellants timely filed their notice of appeal on December 19, 1991.

II. DISCUSSION

A. *Whether the Trial Court Erred in Sustaining a Demurrer to Appellant's Second Amended Petition.*

Appellants first argue that the trial court erred in sustaining a demurrer to the fourth, fifth, sixth, and seventh causes of action in their second amended complaint. In reviewing the trial court's order to that effect, filed November 2, 1990, we accept as true all material facts pleaded in the petition. (See *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 99, 214 Cal.Rptr. 561.)

1. Whether Appellants Sufficiently Alleged a Violation of Education Code Section 35145.5 By Asserting that the Board Rejected Ms. Frazer's Timely Demand to Address the March 15, 1990 Meeting of the Board.

In the fourth and fifth causes of action, appellants alleged that the District violated both the Brown Act and Education Code section 35145.5 by refusing to allow

them to place an item on the agenda of and to address the March 15, 1990 "special meeting" of the Board, and sought mandamus and declaratory relief to correct the past, and prevent any future, violations of these provisions. The superior court sustained respondents' demurrer to these ****648** causes of action on the ground that 1986 amendments to the Brown Act and to Education Code section 35145 (Stats. 1986, ch. 641, §§ 2, 5, pp. 2156–2158), preempted and superseded section 35145.5, eliminating the right of members of the public to place matters directly related to school district business on the agenda of school district governing board meetings, and to address the board regarding items on the agenda as such items are taken up. We disagree, in part, with the trial court's statutory interpretation, but agree with its conclusion.[10]

" '... [T]here is a presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility ***790** of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together....' " (*Hays v. Wood* (1979) 25 Cal.3d 772, 774, 160 Cal.Rptr. 102, 603 P.2d 19, citations omitted, quoting from *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 54, 69 Cal.Rptr. 480.)

We believe that the 1986 amendments to the Education and Government Codes can be harmonized with the pre-existing provisions of Education Code section 35145.5. In reality, what the Legislature accomplished by those amendments (Stats.1986, ch. 641, §§ 5–6, pp. 2157–2158) was to codify certain judicially and locally created requirements relating to the posting of and adherence to an agenda—requirements that had been applicable to school boards since 1978—to make those requirements more uniform and generally applicable to all regular meetings of the "legislative body" of all local agencies governed by the Brown Act. (See *County of El Dorado v. Reed* (1858) 11 Cal. 130, 132; and see generally, 1 Ogden, Cal.Pub. Agency Prac., § 13.04(2)(b).)

At the same time, however, the Legislature amended Education Code section 35145 (Stats.1986, ch. 641, § 2), and thereby eliminated any suggestion that there must be an "agenda" for a special meeting of a school board.[11] Rather, by simultaneously amending Education Code section 35144 and section 54956 (Stats.1986, ch. 641, §§ 1, 7), the Legislature declared that both school boards and any other "legislative body" of a local agency may proceed in a "special meeting" after posting a "call and notice" at least 24 hours prior to the special meeting. (Ed.Code, § 35144; § 54956) Of course, special meetings must be open and public, and the school board/legislative body may not consider any business other than that which is specified in the posted "notice." (Ed.Code, § 35145; § 54953, subd. (a).)[12] The 1986 ****649** amendments do not expressly provide for public input into either the "notice" for a special meeting, or the meeting itself.

***791** It appears, therefore, that the Legislature has eliminated any right members of the public may have had before the 1986 amendments to place items on the agenda of, and to address, special meetings of a school board. There remains, however, the requirement that members of the public have a right to place items on the agenda for all *regular* meetings of school boards that may well be broader than for regular meetings of other local legislative bodies. (See Ed.Code, § 35145.5.) Indeed, school boards are required to "adopt reasonable regulations *to insure* " that this right is protected, subject only to the limitation that the regulations may "specify reasonable procedures to insure the proper functioning of governing board meetings." (*Ibid.,* emphasis added.) It also appears that, at regular meetings, school boards must allow members of the public to directly address "any item of interest to the public ... that is within the subject matter jurisdiction" of the school board, whether or not that item has previously been placed on the agenda.[13]

In this case, appellants clearly alleged in their second amended complaint that the March 15 meeting was a "special meeting." Given the 1986 amendments to the open meeting laws, appellants' fourth and fifth causes of action for violation of Education Code section 35145.5 were appropriately dismissed.

2. Whether Appellants Sufficiently Alleged that the Hearing and Review Committees Were Subject to, and Violated, the Brown Act.

In their sixth and seventh causes of action, appellants alleged that the Review and Hearing Committees were "advisory committees" which are subject to the Brown Act pursuant to section 54952.3. Appellants further alleged that these Committees violated the Brown Act by secretly reviewing, investigating, and deliberating about parental complaints regarding the Impressions series and, again, sought declaratory and mandamus relief against respondents. The superior court sustained the demurrer to these causes of action, citing the general discussion of "legislative bodies" under section 54952 found in *Yoffie v. Marin Hospital Dist.* (1987) 193 Cal.App.3d 743, 238 Cal.Rptr. 502. While we disagree with the trial court's

conclusion on this issue, we recognize that it is a close question of statutory interpretation.

***792** Appellants specifically alleged that the Review and Hearing Committees were "created by the GOVERNING BOARD under BOARD Policy 7138 and exercised authority delegated by the BOARD under that policy" and were, thus, "advisory committees" within the meaning of section 54952.3. Appellants argue that establishment of the Committees pursuant to the Board Policy was sufficient to meet the requirement of section 54952.3 that an advisory committee be "created by charter, ordinance, resolution, or by any *similar formal action* of a legislative body ... of a local agency." (Emphasis added.)

Respondents do not deny that the Committees were formed under the general authority of Board Policy 7138 but, rather, argue that creation pursuant to the Policy was not sufficient "formal action" within the meaning of section 54952.3. Respondents also appear to argue that section 54952.3 requires appellants to allege (and prove) that the Board itself *appointed* the members of the Committees to fall within section 54952.3. definition of "legislative body." We do not believe that section 54952.3 contains such a requirement.

The issue under section 54952.3 is whether the Board "created" the advisory committee by some type of "formal action." We think the focus of our inquiry should first be on the *authority* under which the advisory committee was created. In this case, we believe that authority originates with the Board and not, as respondents ****650** imply, with the Superintendent.[14] The next question is whether creation of the Committee pursuant to a standing policy is sufficient to constitute "formal action" within the meaning of section 54952.3. We believe that it is. The Brown Act applies to a wide variety of boards, councils, commissions, committees and other multimember "legislative" bodies that govern California's cities, counties, school districts, and other local public agencies. (See §§ 54951, 54951.1, 54952, 54952.2, 54952.5.) Section 54952.3 clearly contemplates that many of these bodies will establish "advisory committees" to assist with "examination of facts and data," and that the mechanisms by which such advisory bodies are created will be equally varied. We must give that section a broad construction to prevent evasion. (*Joiner v. City of Sebastopol, supra,* 125 Cal.App.3d at p. 805, fn. 5, 178 Cal.Rptr. 299.)

***793** We believe that adoption of a formal, written policy calling for appointment of a committee to advise the Superintendent and, in turn, the Board (with whom rests the final decision), whenever there is a request for reconsideration of "controversial reading matter" is sufficiently similar to the types of "formal action" listed in section 54952.3. Accordingly, allegations that the Review and Hearing Committee were created pursuant to Board Policy 7138 were sufficient to bring those advisory bodies within the coverage of the Brown Act, and allegations that members of the public (appellants) were excluded from the meetings of these bodies were sufficient to state a cause of action for violation of section 54953.[15]

B. *Whether Substantial Evidence Supports the Trial Court's Ruling That The Board Did Not Violate Education Code Section 60262, or its own Policy 7135 in Selecting the "Impressions" Materials in 1989.*

Appellants raise several claims of error in the superior court's determination of the issues presented for decision during the June 13, 1991, "trial" of the four causes of action remaining in their fourth amended petition.[16] The first set of such issues arises out of the process by which the District originally selected the Impressions materials in 1988 and 1989. In their first cause of action, appellants asserted that the District violated Education Code section 60262, which directs the Board to "promote the involvement of parents and other members of the community in the selection of instructional materials," and Board Policy 7135, which requires the Superintendent to "insure adequate opportunity for teachers, parents and other community members to be involved in the process of recommending instructional materials for purchase by the District." We believe the record amply supports the trial court's findings and conclusions on this cause of action.

As described in Section I, above, District parents had notice and ample time to comment ****651** on, endorse, or object to the six sets of textbooks that were in ***794** use in pilot classrooms during the 1988–89 school year and on display in District offices for several weeks in the spring of 1989. There was also admissible, uncontradicted evidence that the District took affirmative steps to encourage parental involvement in the LATF and the selection process.[17] The fact that no non-staff parents availed themselves of the opportunities to provide input for the textbook selection process—or to voice any objections to the series that was ultimately adopted—cannot be blamed on the District. Accordingly, we affirm the trial court judgment on the first cause of action in appellants' fourth amended petition.

C. *Whether the Trial Court Erred in Ruling That The Governing Board Did Not Violate the Brown Act or the Education Code in its Handling of the 1990 "Impressions" Controversy.*

Appellants next assert that there was not substantial evidence to support the trial court's determination that there were no violations of the Brown Act in the District's handling of the 1990 Impressions controversy. Appellants first argue that the trial court erred in concluding that the Board did not violate the open meeting laws by reviewing secret memoranda and informational materials that were presented to its members by the Superintendent and his staff during the investigation of the parents' complaints. Appellants further argue that the trial court erred in concluding that the joint meeting of the Board and the Curriculum Council to view the "Holy Wars" videotape on February 28, 1990, did not violate the Brown Act. Both of these issues turn on whether there occurred a "meeting" within the meaning of the Brown Act, under which members of the public must be given notice, allowed to attend and (depending on the type of meeting) allowed to participate, unless a specific statutory exception to the open meeting laws is available. (§§ 54950, 54953, 54954.1–54954.3, 54956.)

It is now well settled that the term "meeting," as used in the Brown Act (§§ 54950, 54953), is not limited to gatherings at which action is taken by the relevant legislative body; "deliberative gatherings" are included as well. (*Sacramento Newspaper Guild, supra,* 263 Cal.App.2d at p. 48, 69 Cal.Rptr. 480.) Deliberation in this context connotes not only collective decisionmaking, but also "the collective acquisition and exchange of facts preliminary to the ultimate decision." (*Id.,* at pp. 47–48, 69 Cal.Rptr. 480; *Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234, 175 Cal.Rptr. 292.)

***795** As the court in *Sacramento Newspaper Guild, supra,* explained, "Section 54950 is a deliberate and palpable expression of the act's intended impact. It declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either." (263 Cal.App.2d at p. 47, 69 Cal.Rptr. 480.) The court further explained that the term "meeting" must be construed expansively to prevent local legislative bodies from evading the requirements of the Brown Act: "In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, ****652** as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices." (*Id.,* at pp. 49–50, 69 Cal.Rptr. 480, fn. omitted.)

Thus, an informal luncheon, at which a quorum of the legislative body is present and the public's business is discussed, is a "meeting" within the meaning of the Brown Act. (*Sacramento Newspaper Guild, supra,* 263 Cal.App.2d at pp. 46–48, 69 Cal.Rptr. 480.) Similarly, a session in which a school board gathers information from prospective contractors about their qualifications to perform services for the school district is a "meeting" subject to Brown Act requirements, even though no commitment is made to retain the persons interviewed. (*Rowen, supra,* 121 Cal.App.3d at pp. 233–234, 175 Cal.Rptr. 292.) To prevent subterfuge, moreover, a series of telephone calls by which the members of a legislative body commit themselves to a decision concerning public business, has also been held to be a "meeting" for purposes of the Brown Act. (*Stockton Newspapers, Inc., supra,* 171 Cal.App.3d at pp. 102–103, 214 Cal.Rptr. 561.)

The February 28, 1990 gathering of a quorum of the Board and various members of the Curriculum Council falls well within the definition of "meeting" as developed by the foregoing case law. In their declarations, the three Board members who attended that meeting admitted that they were all present for approximately one hour of discussion about "district goals and objectives" that plainly occurred between and among the declarants and the members of the Curriculum Council. The three Board members also admitted that they jointly viewed the "Holy Wars" video, which was described in the minutes as a "censorship film." It is irrelevant that the declarants deny, in ***796** unison, that they participated in or heard any discussion about the videotape or the Impressions series.[18]

What is relevant to the "meeting" issue is that the Board members who were present constituted a quorum, that they participated in discussions relating to District business, and that they were undeniably engaged in "collective acquisition and exchange of facts" relating to decisions they were charged with making in the course of their official duties, including the decision they were to make about the pending curriculum controversy. Even if there was no mention of the Impressions series per se, and no discussion after the videotape was shown, the viewing of the "censorship film" by the three Board members was itself an act of collective acquisition of information

relating to the pending dispute.

Respondents' analogy to a situation in which Board members attend a District football game or school play is not apt. There is no evidence that the purpose of the February 28 gathering was purely social, or that the Board members attended as mere spectators to the event. Indeed, ****653** there is uncontradicted evidence that, at a minimum, the Board members actively participated in discussion of "district goals and objectives."

Respondents also argue that some sort of "collective agreement or commitment" must occur at a deliberative gathering to bring it within the "meeting" concept. This cannot be, and is not, the law. (*Sacramento Newspaper Guild, supra,* 263 Cal.App.2d at p. 48, 69 Cal.Rptr. 480 ["deliberative gatherings are ***797** 'meetings,' however confined to investigation and discussion"]; *Rowen, supra,* 121 Cal.App.3d at pp. 233–234, 175 Cal.Rptr. 292 [gathering to discuss qualifications of prospective consultants was a Brown Act "meeting" notwithstanding the fact that no commitment was made about retaining them]; 42 Ops.Cal.Atty.Gen., 61 [Brown Act applies to "briefing sessions" by which employees of local agency simply provide information to a gathering of members of the legislative body].) It is true, as described above, that "the Brown Act comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning public business." (*Stockton Newspapers, Inc., supra,* 171 Cal.App.3d at p. 102, 214 Cal.Rptr. 561.) That language does not, however, describe the entire universe of gatherings subject to the Brown Act. If it did, a legislative body would be able to conduct most—if not all—of its deliberative functions behind closed doors, so long as it never reached agreement, or agreed *not* to agree. We reject Respondents' narrow interpretation of the term "meeting" as applied to the February 28, 1990 meeting. (*Sacramento Newspaper Guild, supra,* 263 Cal.App.2d at pp. 49–50, 69 Cal.Rptr. 480.)

On the other hand, we do not believe that the one-way transmission to and solitary review by Board members of background materials relating to the Impressions controversy is within the ambit of the open meeting laws. Unlike the "serial" meetings at issue in *Stockton Newspapers, Inc., supra,* the transmission of informational materials in this case undisputedly involved no interaction or communication between or among individual Board members, either directly or through the agency of District staff. (171 Cal.App.3d at p. 102, 214 Cal.Rptr. 561.)

The California Supreme Court has recently addressed a similar issue. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373–377, 20 Cal.Rptr.2d 330, 853 P.2d 496.) In that case, a resident and taxpayer of the City of Palmdale alleged that distribution of a confidential legal opinion of the city attorney to individual members of the city council, in preparation for a public hearing on a real estate development, was a "closed-session meeting" of the city council which violated the Brown Act. (§ 54956.9.) The Court of Appeal agreed with the taxpayer that the city council had violated section 54956.9 in that the "meeting" was commenced without an appropriate public announcement. However, after reviewing the history of the Brown Act, its interpretation in the courts, and the plain meaning of the language of the statute, the Supreme Court reversed, holding that "section 54956.9 was intended to apply to *collective* action of local governing boards and not to the passive receipt by individuals of their mail." (5 Cal.4th at p. 376, 20 Cal.Rptr.2d 330, 853 P.2d 496, emphasis added.) Because the record did not disclose any serial communications among members of the city council, or any other type of "collective ***798** deliberation" about the city attorney's letter, the court concluded that there had been no "meeting" within the meaning of the Brown Act. (*Id.,* at pp. 376–377, 20 Cal.Rptr.2d 330, 853 P.2d 496.)

The same is true here. Appellants presented no evidence of any type of "collective deliberation" by Board members regarding the memoranda about the Impressions controversy. Rather, appellants alleged nothing more than "passive receipt by individuals of their mail." (*Roberts, supra,* 5 Cal.4th at p. 376, 20 Cal.Rptr.2d 330, 853 P.2d 496.) Thus, the trial court was correct in ruling that distribution of memoranda from District staff to individual members of the Board was not subject to ****654** the open meeting requirements of the Brown Act.[19]

Nevertheless, we agree with appellants that the trial court committed reversible error when it ruled that the closed meeting of the Board on February 28, 1990, did not violate the Brown Act. We also agree that the District's persistent denials that such a gathering was a "meeting" subject to the Brown Act warrants declaratory relief in favor of appellants. (See *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 523–524, 195 Cal.Rptr. 163.) Accordingly, we reverse the trial court's judgment on the second and third causes of action in the Fourth Amended Petition, and remand for entry of an appropriate declaratory judgment consistent with this opinion.

D. *Whether the Decision Confirming the Adoption of the "Impressions" Series Must be Set Aside Because of the*

Brown Act Violations in This Case.

Having decided that the District committed certain violations of the Brown Act, which we believe are appropriately the subject of declaratory relief in this case, we turn to the further question of whether the decision of the Board confirming the decision to adopt the Impressions series must be set aside because of those violations. We believe that this issue is best entrusted to the superior court for determination following a new hearing. ***799** The trial court will have to consider the effect of our reinstatement of the sixth and seventh causes of action from the second amended complaint. Before deciding whether to issue a writ of mandamus pursuant to section 54960.1, moreover, the trial court will need to make additional findings as to appellants' compliance with the demand procedures provided in that section. (*Id.,* at subd. (b).) The court should also consider, in the first instance, whether any "action taken" in violation of the Brown Act in this case was "cured or corrected" by subsequent action of the Board, including the holding of public meetings on March 1 and April 5, 1990, at which both sides of the Impressions controversy were allowed to air their views for consideration by the Board. (*Id.,* at subd. (d).)

E. *Whether the Trial Court Erred in Ruling that There Was No Violation of Respondents' Constitutional Rights in the Proceedings Below.*

Appellants' constitutional claims appear to be of two types. First, they appear to assert that the District's conduct in violation of the Brown Act also constituted a denial of due process. There is no legal basis for appellants' due process claim absent proof that they were deprived of some protected property interest. (See *Public Utilities Comm. v. U.S.* (9th Cir.1966) 356 F.2d 236, 240–242.)

Appellants' second theory of viewpoint discrimination, in violation of their equal protection, free speech, and petition rights, fares no better. Clearly, there is substantial evidence to support the trial court's conclusions that appellants had ample opportunity to present their views on the Impressions materials, and that appellants and the pro-Impressions parents were treated in a substantially equal manner by the District. It is only by distorting the record evidence beyond recognition that appellants can argue that the pro-Impressions parents "worked with" and were supported ****655** by the Review Committee. The mere fact that the two pro-Impressions parents made their presentation to the Hearing Committee during the time allotted to the Review Committee does not establish that they received more favorable treatment at the hands of the District because of the content of their expression. Indeed, the pro-Impressions parents were allowed only a few minutes to speak to the Hearing Committee, whereas appellants were given an hour and a half to present their case.[20] We affirm the trial court ruling on appellants' fourth cause of action.

***800** F. *Whether the Trial Court Erred in Awarding Costs to Respondents.*

Appellants' final contention is that the trial court erred in entering a cost award in favor of respondents. A defendant local agency may recover court costs (and reasonable attorney fees) in a Brown Act case when (1) the agency has prevailed in a final determination of the action, and (2) the court finds that the action was "clearly frivolous and totally lacking in merit." (Section 54960.5.) The trial court made no finding on the issue of frivolousness of appellants' action before entering a cost award in favor of respondents. In light of our conclusions on the Brown Act issues presented in this appeal, we do not believe that appellants' action was "frivolous" so as to warrant an award of costs to respondent. Indeed, we have concluded that there were violations of the Brown Act in the District's handling of the 1990 "Impressions" controversy. Accordingly, we vacate the award of costs to respondents.

Appellants take this issue one step further, however, and ask this Court to award *them* costs and attorney's fees in this action if the Court finds any violations of the Brown Act. An award of costs and fees to the plaintiff in an action pursuant to sections 54960 or 54960.1 is not mandatory, but rather a matter entrusted to the sound discretion of the trial court. (§ 54960.5; *Common Cause v. Stirling, supra,* 147 Cal.App.3d at pp. 520–521, 195 Cal.Rptr. 163.) Unlike the court in *Common Cause,* we do not have the benefit of a stipulated set of facts, or the trial court's wisdom on the issue whether appellant should recover its fees and costs and, if so, in what amount(s). Accordingly, we decline appellants' invitation to decide this issue in the first instance, and remand for an exercise of the trial court's discretion in light of our discussion of the Brown Act.

III. CONCLUSION

The judgment of the trial court as to the first and fourth causes of action in appellants' fourth amended petition is affirmed. As to the third cause of action, we reverse and remand for entry of an appropriate declaratory judgment as to the Brown Act violations we have identified. As to the second cause of action, by which appellants apparently seek a writ of mandamus pursuant to section 54960.1, we reverse and remand for a new hearing including a determination whether (1) appellants sought relief within ***801** the time limits stated in subdivision (b) of that section; and (2) whether the public meetings of the Board in March and April 1990 "cured and corrected" the previous violations of the Brown Act, eliminating any resulting prejudice to appellants, as provided in subdivision (d).

KLINE, P.J., and SMITH, J., concur.

All Citations

18 Cal.App.4th 781, 22 Cal.Rptr.2d 641, 85 Ed. Law Rep. 127

Footnotes

1 The District received two formal complaints, one from John and Diane Ford on February 2, 1990, and one from Cynthia Lee on February 7, 1990. Although the Fords joined in the petitions below, they are not parties to this appeal.

2 Unless otherwise indicated, all further statutory references are to the Government Code.

3 The LATF consisted of only District employees, some of whom were also parents of children who attended District schools; it did not include any non-employee parents.

4 Among professional educators, the term "pilot" is used as a verb to describe a process by which competing sets of proposed instructional materials are used, on a trial basis, before a final selection and decision to purchase is made.

5 Board Policy 7138 is entitled "COMPLAINTS ABOUT INSTRUCTIONAL MATERIALS." It provides, in relevant part, that:

> 2. Recognizing that the final decision for controversial reading matter shall rest with the Board, ... the Board has adopted the following policy for dealing with censorship of books or other materials.
>
> .....
>
> 2.3 Any parent who wishes to request reconsideration of the use of any book in the school must make such a request in writing on forms available from site principals. The statement must be signed and identified so that a reply may be given.
> 2.4 A committee of the principal and two teachers, appointed by the principal, shall review the material and judge whether it conforms to the above-stated principles, and submit its report in writing to the parent with a copy to the Superintendent.
> 2.5 If the matter cannot be resolved at the site level, then the written criticism along with the principal's evaluation will be forw[a]rded to Superintendent for presentation to the Curriculum Council. The Curriculum Council will forward its recommendation to the Superintendent, who will make the final decision. The concerned parties will be notified of the final disposition in writing.

6 According to the Superintendent, Board Policy 7138 was originally designed to address individual parental complaints about the use of a particular book in their child's classroom. The procedure was to have the principal and two teachers from the child's school study the complaint and issue its recommendation as to the disposition of the matter. In this case, the Board Policy had to be adapted to provide a mechanism for resolving Appellants' across-the-board challenge to an entire textbook series that was in use at multiple grade levels. Thus, the Review Committee had representatives from the affected elementary and middle schools, and a more broad-based Hearing Committee was established to study the complaints and hear from the complainants and other members of the public regarding the Impressions curriculum.

7 The Curriculum Council consists of "[a]ll the managers in the District," including the Superintendent, the Director of Instruction, principals and vice principals from various District schools, and other District employees. There was some overlap between the Curriculum Council and the Review and Hearing Committees.

8 The two Board members who did not attend the February 28 meeting later viewed the videotape in their own homes.

9 Contrary to the statement of decision, the trial court did not allow any live testimony by witnesses for either side. Appellants did not present any declarations, but were allowed to present some deposition testimony to impeach certain of the 10 declarations respondents presented. Although respondents apparently did not serve their declarations until the time of the hearing, appellants agreed to proceed and declined the court's offer of a continuance.

10 Respondents argued below—and in a previous writ proceeding in this Court—that Government Code section 54954.3 "preempts" or "supersedes" Education Code section 35145.5. The trial court adopted Respondents' reasoning on this point. On appeal, Respondents have softened their position somewhat, arguing that the 1986 amendments "qualify and clarify" Education Code section 35145.5.

11 Before it was amended in 1986 (Stats. 1986, ch. 641, § 2), Education Code section 35145, subdivision (b) provided, inter alia, that "A list of items on which action may be taken that will constitute the agenda" had to be posted in a place where parents and teachers may view same, "in the case of special meetings, at least 24 hours prior to said special meeting."

12 Although the Education and Government Codes have consistently provided that the presiding officer, or a majority of the members of local "legislative body," may call a special meeting, neither before nor after the 1986 amendments to the Education and Government Codes has there been any legislative guidance as to the *purposes* for which a special meeting may be called. The most obvious reason for such meetings might be that time-sensitive issues arise that must be addressed before the next regularly scheduled meeting, which may be held either monthly or quarterly. (Ed.Code, § 35141.) However, use of "special meetings" to evade the agenda and public participation requirements that apply to "regular meetings" (Ed.Code, §§ 35145, 35145.5; §§ 54954.2, 54954.3) may well violate state open meeting laws. (See *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 805, fn. 5, 178 Cal.Rptr. 299; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra,* 263 Cal.App.2d 41, 50, 69 Cal.Rptr. 480 [open meeting statutes may "push beyond debatable limits in order to block evasive techniques"]; see also § 54954.4, subd. (c) ["complete, faithful, and uninterrupted compliance with the Ralph M. Brown Act ... is a matter of overriding public importance"].)

13 Since 1991, moreover, the Legislature has decreed that local legislative bodies, including school boards, must allow the public to address the body "before or during the legislative body's consideration of the item." (Stats. 1991, ch. 66, § 1.)

14 Respondents encourage this court to look outside the pleadings to evidence that the Superintendent appointed the members of the Review and Hearing Committees. We decline to do so for purposes of our review of the trial court's rulings on the demurrer. However, we note, in passing, that it is irrelevant whether it was the Board or the Superintendent who made the actual appointments. The Superintendent operates at all times under the control of the governing board, and does not exercise independent powers of the type contemplated by section 54952.3. (See *Main v. Claremont Unified School Dist.* (1958) 161 Cal.App.2d 189, 204, 326 P.2d 573, disapproved in part on other grounds, *Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717, 722, 139 Cal.Rptr. 627, 566 P.2d 261.)

15 Although appellants expressly disclaim reliance on section 54952.2, we believe that section provides an alternate basis for our conclusion that the Review and Hearing Committees were subject to the Brown Act. Allegations and exhibits to the second amended petition were sufficient to bring the Committees within the section 54952.2 definition of "legislative body," which includes a committee that exercises authority delegated to it by the legislative body of the local agency.

16 We agree with respondents that appellants waived their objections to any irregularities in the trial procedures by agreeing to go forward on June 13, 1991, and rejecting the court's offers to continue the proceedings to allow appellants to prepare a response to respondents' declarations. This waiver does not extend to proper evidentiary objections made by appellants during trial.

17 Whereas appellants assert that the Superintendent's appointment of the Review and Hearing Committees pursuant to Board Policy 7138 was sufficient to constitute "formal action" by the Board for purposes of section 54952.3, they argue here that the Superintendent's and District staff's efforts to encourage parental involvement in the LATF was *in* sufficient to satisfy *the Board's* duty to "promote the involvement of parents ... in selecting instructional materials" for purposes of Education Code section 60262. They cannot have it both ways.

18 The attendees included both a quorum of the Board and several members of the recently-appointed Review and Hearing Committees, and the *only* agenda item for which the minutes of the February 28 meeting reflect any discussion was "recent complaints received about our adopted language arts series." Given these facts, it is, frankly, incredible that the District asserts that there was no discussion about the Impressions controversy. Indeed, Board member Lisa Seifert admitted in her deposition that she *did* hear some discussion about the Impressions controversy. The Superintendent also admitted that the February 28 meeting of the Curriculum Council and Board members was intended to "bring them up to date" about the review process for the parents' complaints. There are additional reasons to doubt the Board members' declaration testimony on this point: The uniform times of arrival ("about 8:30 AM, after the meeting had begun") and departure ("immediately" after the videotape ended) flatly contradict all other documentary evidence about the meeting times. Also, Board member Patty DeTar's deposition testimony about her time of arrival (10:00 a.m.) and departure (11:30 a.m.) is consistent with the documentary evidence about the meeting, but squarely contradicted by her later declaration. Because of these discrepancies between the declarations and other more reliable evidence, including deposition testimony, the trial court would have been fully justified in rejecting the Seifert, DeTar, and O'Neill declarations. (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22, 112 Cal.Rptr. 786, 520 P.2d 10) In light of our ruling that the precise topics of discussion at the February 28 meeting were irrelevant to the determination of the "meeting" issue,

however, we need not decide whether the trial court erred in admitting these declarations.

19 This is not to say that we condone what appear to have been attempts by District staff to conceal the fact of these communications from members of the public, other than those who were invited to serve on the Review and Hearing Committees, by labelling the materials for "Your Eyes Only." The challenged materials were undisputedly writings that were distributed to a majority of Board members, and related to matters to be discussed and/or considered at meetings that were—or should have been—public meetings. Unlike the city attorney's letter in *Roberts, supra,* there was no claim of privilege as to the materials distributed by the Superintendent and his staff. (5 Cal.4th at pp. 369–373, 20 Cal.Rptr.2d 330, 853 P.2d 496.) Thus, it appears that these documents were subject to public disclosure *upon request,* in advance of any meeting to which they pertained (§ 54957.5), notwithstanding the District's attempts to keep them secret. However, there is no indication that appellants made a request for the challenged materials in advance of any of the meetings about the Impressions series, nor that they were denied copies when they were ultimately requested.

20 Appellants make much of the fact that Ms. Frazer was rejected in attempts to win appointment to the Review Committee. Beyond the fact that she was, thus, unable to attend the closed meetings of the Committee, we do not find any indication in the record that this statutory violation in any way impaired Ms. Frazer's ability to communicate her views about the Impressions series to the District. It is apparent from the record that she had multiple opportunities to and, in fact, did address the Board, the Hearing Committee, and District staff at public and private meetings, by letter, and by telephone.

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Court of Appeal, First District, Division 1, California.

Ernest J. JOINER and George Klineman, Plaintiffs and Appellants,
v.
CITY OF SEBASTOPOL, Defendant and Respondent.

Civ. 46515.
|
Nov. 18, 1981.

Synopsis
Newspaper publisher and newspaper correspondent filed complaint for injunctive relief claiming that proposed nonpublic meeting of joint group of city council and city planning commission members would violate the Ralph M. Brown Act, and city cross-complained for declaratory relief. The Superior Court, Sonoma County, Joseph P. Murphy, Jr., J., found in favor of city, and plaintiffs appealed. The Court of Appeal, Grodin, J., held that group consisting of two members of city council and two members of city planning commission, which was in both instances less than quorum of their respective bodies, created at the initiative of city council for purposes of making recommendations to city council concerning filling of vacancy on planning commission, constituted a "legislative body" within meaning of Brown Act requiring all meetings of legislative body of local agencies be open and public where representatives of council and commission were not to report back with information to their respective boards, but were to review applicants and report, with recommendations, to city council, which had sole legal responsibility for filling the vacancy and group was appointed by formal action of city council.

Reversed and remanded.

Attorneys and Law Firms

***800 **300** A. J. Di Mauro, Rohnert Park, for plaintiffs and appellants.

Edward Dermott, City Atty., Dermott & Cutler, Law Corp., Santa Rosa, for defendant and respondent.

Frederick W. Clough, City Atty., Santa Barbara, for amici curiae.

Opinion

***801** GRODIN, Associate Justice.

The Ralph M. Brown Act (Gov.Code, s 54950 et seq.) requires that "(a)ll meetings of the legislative body of a local agency shall be open and public" (s 54953). The term "legislative body" is defined in section 54952.3 to include "any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal actions of a governing body or member of such governing body of a local agency ... (but) as defined in this section does not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." The question presented by this appeal is whether a group consisting of two members of a city council and two members of a city planning commission (in both instances less than a quorum of their respective bodies), created at the initiative of the city council for the purpose of making recommendations to the city council concerning the filling of a vacancy on the planning commission, constitutes a "legislative body" within the meaning of that section.[1] Contrary to the ruling of the trial court, we hold that it does.

Factual and Procedural Background

The relevant facts are not in dispute. The City of Sebastopol has a city council and a planning commission. The members of the commission are appointed by, and serve at the pleasure of, the council. On February 16, 1976, the mayor announced at a regular city council meeting that a member of the planning commission had resigned, and the council then discussed various procedures for interviewing applicants for the vacant position. The city attorney advised that a group consisting of less than a quorum of the council and less than a quorum of the planning commission could interview applicants and make a joint recommendation to the council concerning the appointment of a commissioner to fill the vacancy. The council agreed to commend that approach to the planning commission, and designated two council members to meet for that purpose in the event that the commission similarly ***802** designated two of its

members. On February 24, 1976, the planning commission discussed the council's proposal at its regular meeting, but took no action. At the next regular meeting of the city council, on March 1, 1976, the city council again discussed the procedure; and the mayor asked the chairman of the planning commission, who was present, "to poll the Commission members and see if two will serve with two council members and participate in private interviews and return with the information to the City Council." The chairman did that at the next regular meeting of the planning commission about a week later, and two commissioners volunteered to serve.

At this point appellants, who are a newspaper publisher and a newspaper correspondent, interceded by filing a complaint for injunctive relief, claiming that the proposed non-public meeting of the joint group would violate the Brown Act. In fact, the meeting never took place. The city cross-complained for declaratory relief, however, and the action proceeded.

After a two-day trial, the trial court made "findings" to the effect that, "No 'Advisory Commission or Advisory Committee' ever came into being, nor was it contemplated that such Commission or Committee ****301** would be 'created' by the City Council"; that "The City Council's proposal was that a sub-committee of the City Council, consisting of less than a quorum, and a sub-committee of the Planning Commission, consisting of less than a quorum, meet together for purposes of discussion, evaluation and recommendation, but that such group not possess any power or any decision making authority"; and that "Whatever recommendations may have resulted from the meeting of the proposed group would not be binding upon the City Council." It entered judgment declaring: "The use of sub-committees of two public agencies constituting less than a quorum of each public agency or legislative body for the purposes herein contemplated, does not constitute a violation of the Brown Act," and directed that each party bear its own costs and attorney's fees.[2] This appeal followed. A number of cities have filed an amicus curiae brief in support of respondent's position.

Discussion

The critical question is whether the group contemplated by the city council's action would constitute an "advisory committee ... created ***803** by ... formal action" of the city council. If so, then it would constitute a "legislative body" within the meaning of section 54952.3, since its composition was not limited to members of the city council as required by the exception to that section. The question is one of law applicable to undisputed facts, so that this court is not bound by the trial court's negative "finding" on that ultimate issue. (Cf. Mantonya v. Bratlie (1948) 33 Cal.2d 120, 128, 199 P.2d 677; 6 Witkin, Cal.Procedure (2d ed. 1971) Appeal, s 256.)

In support of the trial court's reasoning, respondent and amici rely upon Henderson v. Board of Education (1978) 78 Cal.App.3d 875, 144 Cal.Rptr. 568, which held that the open meeting requirement of the Brown Act did not apply to meetings of three "ad hoc advisory committees" created by the Board of Education to interview candidates for appointment to the board, because each committee was composed solely of members of the governing body, and each comprised less than a quorum of that body, thus meeting the requirements of the exception to section 54952.3. Henderson, however, does not address the issue presented here. The group contemplated by the city council's action in this case was not to be limited to members of the governing body, so that if that group constituted an "advisory committee" the exception does not apply.[3]

Respondent and amici rely also upon an unpublished "indexed letter" from Attorney General Younger to State Senator Behr (Cal.Atty.Gen. I.L. 76-174 (Aug. 27, 1976)) in response to the Senator's inquiry: "Are the open meeting requirements of the Ralph M. Brown Act applicable to the meetings which have been or are being held between representatives of Lake County and Yolo County to discuss mutual water problems of the two counties?" The meetings were of two subcommittees of the boards of supervisors of the two counties, each consisting of less than a quorum of each board. The Attorney General expressed the opinion as regards section 54952.3 that "the two subcommittees ***804** would be removed from the definition of a 'legislative body' by the terms of the section itself, which exempts 'a committee composed solely of members of the governing body of a ****302** local agency which are less than a quorum of such governing body.' "[4]

That opinion, however, concerned a meeting between representatives of two legislative bodies, both of which had responsibility for the subject matter under discussion, in order to discuss their "mutual" problems and, presumably, to report back to their respective bodies. To characterize such a meeting as being between two subcommittees, rather than as the meeting of a single "advisory committee," seems entirely appropriate. A different question is presented here, where the proposed meeting was for the purpose of making a recommendation

to the city council concerning a matter within its sole responsibility.

This distinction is reflected in a recent formal opinion of the Attorney General (—- Ops.Cal.Atty.Gen. —- (1981) No. 81-218) concerning proposed meetings of a "Coordinating Committee," consisting of less than a quorum of the governing boards of the El Dorado County Water Agency and the El Dorado Irrigation District, to discuss mutual problems concerning development of the South Fork of the American River for energy and other purposes. The facts as presented to the Attorney General were in dispute: government officials characterized the coordinating committee as "in reality two subcommittees of the respective governing bodies which are sent to meet with each other and do nothing but report back with information to their respective boards to avoid the necessity of the full boards jointly meeting all the time," whereas a local newspaper asserted that the committee "is a single committee which has generally acted like a 'unitary body.' " Declining to resolve the factual dispute, the Attorney General opined that the answer depended upon which characterization was correct: if the committee were "an independent, separate committee which has been established by the two governing boards," then the open meeting requirement of the Brown Act would apply; but "if the 'committee' is in fact two subcommittees of the governing boards of the water agency and the irrigation district," then the requirement would not be applicable.

We are, of course, not bound by opinions of the Attorney General, but in matters of this sort it has been held that they are entitled to ***805** "great weight" (Henderson v. Board of Education, supra, 78 Cal.App.3d 875, 883, 144 Cal.Rptr. 568; Lucas v. Board of Trustees (1971) 18 Cal.App.3d 988, 991-992, 96 Cal.Rptr. 431), and we find ourselves moreover, in this matter, persuaded by his reasoning. The representatives of the city council and the planning commission were not to "report back with information to their respective boards." Rather, they were as a "unitary body" to interview applicants and report, with recommendations, to the city council, which had sole legal responsibility for filling the vacancy. We conclude that the proposed meeting was to be of an "advisory committee" within the meaning of section 54952.3.

We conclude also on the basis of undisputed facts that the proposed committee was "created by ... formal action" of the city council. Respondent concedes that the city council, though it did not formally adopt a resolution, nevertheless took "formal action" when it designated two of its members to meet with two planning commission members. It follows (since that designation was pursuant to a unanimously approved plan) that the city council also took "formal action" when it adopted the proposed agenda for the meeting, i. e., that the group which was to meet would interview applicants and report back to the city council with recommendations. And, since the city council instigated that procedure as a means of fulfilling its responsibility to fill a vacancy on the planning commission, the "creation" of the committee must be attributed to the council's action. The fact that the procedure was contingent upon the planning commission's compliance does not detract from that conclusion. A contrary view would lead to the unacceptable conclusion ****303** that a legislative body which desired to evade the strictures of section 54952.3 could do so simply by declaring that the existence of an advisory committee including non-members of the governing body was contingent upon the non-members being willing to serve.[5]

Government Code section 54960.5 provides for recovery of attorney's fees and costs by a successful plaintiff. Upon remand, the trial court will determine appellants' entitlement under that section.

***806** Reversed and remanded. Appellants will recover their costs on appeal.

ELKINGTON, Acting P. J., and RAGAN, J.*, concur.

All Citations

125 Cal.App.3d 799, 178 Cal.Rptr. 299

Footnotes

1 Appellants contend in the alternative that such a group constitutes a "legislative body" within the meaning of section 54952, which defines the term as including "any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency ...." In view of our disposition, it is unnecessary to consider that contention.

2 The trial court also concluded that the request for injunctive relief was moot. Appellants have not challenged that conclusion on appeal.

3 Respondent appears to attach significance to the fact that the Henderson court quoted with approval from a publication of the Attorney General's office entitled "Secret Meeting Laws Applicable to Public Agencies" (1972), which characterizes the exception to section 54952.3 as codifying, as regards advisory bodies, the "less than a quorum" exception which the Attorney General has long deemed applicable by implication to the Brown Act as a whole. Since section 54952.3 expressly provides for a less-than-a-quorum exception, whether such an exception is implicit in other statutory definitions of the term "legislative body" is not relevant for our purposes.

4 The indexed letter also discusses the applicability of the definitions of "legislative body" contained in sections 54952 and 54952.5, matters not relevant here.

5 Section 54952.3 was amended in 1975 to extend the definition of the term "legislative body" to include advisory bodies created by any "member" of the governing body. (Stats. 1975, ch. 959, s 7.) This amendment, as well as the broad language used in the section to encompass the various modes by which such a body may be "created," evidences a legislative intent that the section be construed broadly to preclude evasion.

* Assigned by the Chairperson of the Judicial Council.

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