City of Alameda

OPEN GOVERNMENT COMMISSION
2263 Santa Clara Avenue, Suite 380
Alameda, CA 94501
(510) 747-4800

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission: City Council and Recreation and Park Commission

Name of individual contacted at Department or Commission: City Council, City Manager Levitt & City Attorney Shen

☐ Alleged violation of public records access.
☒ Alleged violation of public meeting. Date of meeting: Council Meeting of Jan. 19, 2021, Recreation and Park Commission meeting of July 9, 2020 and all meetings of the Jackson Park Renaming Committee

Sunshine Ordinance Section: Sec. 2-91 et. sec. with specific reference 2-91.1, 2-91.3, 2-91.4, 2-91.5, 2-91.6, 2-91.9, 2-91.15, 2-91.16. Brown Act Sec. 54952(b) which is incorporated by reference into the Sunshine Ordinance in Sections. 2-90, 2-91.1(d) and 2-91.3

Please describe alleged violation.

The Jackson Park Renaming Committee ("Renaming Committee") was created by the Recreation and Park Commission ("Commission"), thereby meeting the definition of a "policy body" under the Sunshine Ordinance and a "legislative body" under the Brown Act, but failed to adhere to the open meeting, public access, and other requirements of said bodies. The Commission (Alameda Mun. Code 2-12) as a whole created the Committee by way of a motion (Alameda Mun. Code 2-12.3(b)) that directed a sub-committee of the Commission to appoint members of the Renaming Committee. That the sub-committee of the Commission was less than a quorum of the Commission does not avoid the conclusion that the Renaming Committee was created by the Commission and that it was a "policy body" under the Sunshine Ordinance or a "legislative body" under the Brown Act. 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 Sec. 54952 (b) of the Brown Act that specifically includes temporary committees as subject to the Act and Sec. 2-91.3 of the Sunshine Ordinance that provides that, “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.”

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 require all City policy bodies to in the future designate all committees created by a policy body acting as a whole, as a policy body, excepting those consisting solely of less than a quorum of the originating body. The recommendation should also include modification of the Sunshine Ordinance as follows:

1. Repealing the ad hoc committee exception in Sec. 2-91.1 (d) (6), or any other exception not contained in the Brown Act.
2. Amending Sec. 2-91.1 (d)(3) to add “formal action” to the list of originating policy body actions that create policy bodies
3. Adding to Sec. 2-91.1 a definition of the word “created” to mean “played a role in”
4. Adding to Sec. 2-91.1 a definition of the word “formal action” to include the passage of a motion
5. Such other cure and correction as the Commission deems appropriate

A complaint must be filed no more than fifteen (15) days after an alleged violation of the Sunshine Ordinance.

Name: Paul S Foreman

Address: 1437 Morton Street, Apt. H

Telephone No: 510-455-1315

E-mail Address: ps4man@comcast.net

Date: Feb. 2, 2021 _____

Signature

City of Alameda

Meeting Agenda

City Council

Tuesday, January 19, 2021 **7:00 PM** **City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda CA 94501**

The closed session agenda was revised January 11, 2021 at 3:00 p.m. to add Item 3-D; January 12, 2021 at 4:00 p.m. to withdraw Item 3-C and change the time to 6:00 p.m. and January 12, 2021 at 5:15 p.m. to add Item 3-E and change the time to 5:45 p.m.

Due to Governor Executive Order N-29-20, Councilmembers can attend the meeting via teleconference. The City allows public participation via Zoom.

For information to assist with Zoom participation, please click:
*************.alamedaca.gov/zoom***

For Zoom meeting registration, please click:
***********alamedaca-gov.zoom.us/webinar/register/WN_n1aqfPTxRbu5t67c6CXg0A***

For Telephone Participants:
Zoom Phone Number: 669-900-9128
Zoom Meeting ID: 850 5723 3488

Any requests for reasonable accommodations should be made by contacting the City Clerk's office: clerk@alamedaca.gov or 510-747-4800.

City Hall will be NOT be open to the public during the meeting.

The Council may take action on any item listed in the agenda.

REVISED SPECIAL CITY COUNCIL MEETING - CLOSED SESSION - 5:45 P.M.

1 **Roll Call - City Council**

2 **Public Comment on Closed Session Items - Anyone wishing to address the Council on closed session items may speak for 3 minutes per item**

3 **Adjournment to Closed Session to consider:**

3-A 2021-555 CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION
(Pursuant to Government Code § 54956.9)
CASE NAME: City of Alameda v. Union Pacific (Sweeney)
COURT: Superior Court of the State of California, County of Alameda

CASE NUMBERS: RG18921261

3-B 2021-561 CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION
(Pursuant to Government Code § 54956.9)
CASE NAME: Friends of Crab Cove v. Vella et al.
COURT: Superior Court of the State of California, County of Alameda
CASE NUMBERS: RG18933140
COURT: First District Court of Appeal
CASE NUMBERS: A159140 and A159608

3-C 2021-551 WITHDRAWN - CONFERENCE WITH REAL PROPERTY NEGOTIATORS (Pursuant to Government Code Section 54956.8)
PROPERTY: Encinal Terminals, Located at 1521 Buena Vista Avenue (APN 072-0382-001,-002, and 72-0383-03), Alameda, CA
CITY NEGOTIATORS: Gerry Beaudin, Assistant City Manager, Andrew Thomas, Planning and Building Director and Nanette Mocanu, Assistant Community Development Director
NEGOTIATING PARTIES: City of Alameda and North Waterfront Cove, LLC
UNDER NEGOTIATION: Price and terms - WILL NOT BE HEARD

3-D 2021-570 CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION
Requests for the City to participate as amicus in pending litigations:
(Pursuant to Government Code § 54956.9)
Case Name: Apartment Association of Los Angeles County, Inc. v. City of Los Angeles et al.
Court: The United States Court of Appeals for the Ninth Circuit
Case Number: 20-56251

3-E 2021-578 CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION
(Pursuant to Government Code § 54956.9)
CASE NAME: Abdul Nevarez and Priscilla Nevarez v. City of Alameda
COURT: United States District Court, Northern District of California
CASE NUMBER: 20-cv-8302

4 Announcement of Action Taken in Closed Session, if any

2021-611 January 19, 2021 Closed Session Announcement

Attachments: Announcement

5 Adjournment - City Council

REGULAR CITY COUNCIL MEETING - 7:00 P.M.

Pledge of Allegiance

1 Roll Call - City Council

2 Agenda Changes

3 Proclamations, Special Orders of the Day and Announcements - Limited to 15 minutes

3-A 2021-554 Proclamation in Recognition of Alameda Rotary's 100th Anniversary. (City Manager 2110)

Attachments: Proclamation

4 Oral Communications, Non-Agenda (Public Comment) - A limited number of speakers may address the Council regarding any matter not on the agenda; limited to 15 minutes; additional public comment addressed under Section 8

5 Consent Calendar - Items are routine and will be approved by one motion unless removal is requested by the Council or the public

5-A 2021-556 Minutes of the Special and Regular City Council Meetings Held on December 15, 2021. (City Clerk)

5-B 2021-557 Bills for Ratification. (Finance)

Attachments: Bills for Ratification

5-C 2021-8245 Recommendation to Authorize the City Manager to Negotiate and Execute a Purchase Agreement, or in the Alternative a Lease Agreement, for a New Security Camera System from ICU Technologies for the Police Administration Building and Off-Site Property Storage Facilities in an Amount Not to Exceed $274,075.97. (Police 3116)

Attachments: Exhibit 1 - Purchase/Lease Proposal
Exhibit 2 - Scope of Work
Exhibit 3 - ICU Technologies GSA Contract Information

5-D 2021-511 Recommendation to Authorize the City Manager to Execute a Fourth Amendment to the Agreement with Nute Engineering for Engineering Design Services for Cyclic Sewer Rehabilitation Project, Phase 18, in an Amount Not to Exceed $411,500 for an Aggregate Amount Not to Exceed $1,556,321. (Public Works 602)

Attachments: Exhibit 1 - Original Agreement
Exhibit 2 - First Amendment
Exhibit 3 - Second Amendment
Exhibit 4 - Third Amendment
Exhibit 5 - Fourth Amendment

5-E 2021-515 Recommendation to Authorize the City Manager to Execute a Third Amendment to the Agreement with NBS for Administrative Services for Special Financing Districts in an Amount Not to Exceed $80,319 for an Aggregate Amount Not to Exceed $146,158. (Public Works 279)

Attachments: Exhibit 1 - Original Contract
Exhibit 2 - First Amendment
Exhibit 3 - Second Amendment
Exhibit 4 - Third Amendment

5-F 2021-501 Recommendation to Expand the City's Sick Leave Benefit Authorizing Use of Parental Leave and Increasing the Sick Leave Cap for Protected Leave to Care for a Family Member to 480 Hours. (Human Resources 2510)

5-G 2021-502 Adoption of Resolution Amending the City of Alameda's Employer/Employee Relations Resolution and Superseding the Following Resolutions: 7476, 7477, 7684 and 14894. (Human Resources 2510)

Attachments: Exhibit 1 - Resolution No. 7476
Exhibit 2 - Resolution No. 7477
Exhibit 3 - Resolution No. 7684
Exhibit 4 - Resolution No. 14894
Resolution

5-H 2021-8562 Adoption of Resolution Amending the Alameda City Employees' Association (ACEA) Salary Schedule to Add the Classification of Police Records Specialist and Reclassifying the Four Intermediate Clerks in the Police Records Division to Police Records Specialist, Effective January 19, 2021. (Human Resources 2510)

Attachments: Exhibit 1 - ACEA Salary Schedule
Exhibit 2 - Police Records Specialist Specification
Exhibit 2 REVISED - Police Records Specialist Specification
Resolution

5-I 2021-8564 Adoption of Resolution Approving Tentative Map Tract 8534 and Density Bonus Application PLN19-0448 to Subdivide a 1.29-Acre Property into Twelve Lots Located at 2607 to 2619 Santa Clara Avenue and 1514 to 1518 Broadway. (Planning, Building and Transportation 481001)

Attachments: Exhibit 1 - Density Bonus Application
Exhibit 2 - Tentative Map Tract 8534
Resolution

5-J 2021-8565 Recommendation to Authorize the City Manager to Execute an Agreement with Landscape Structures Inc. in an Amount Not to Exceed $285,862 for Construction of the Bayport Park Playground Project; and
Adoption of Resolution Amending the Fiscal Year 2020-21 Capital Budget for the Playground Replacement Project (91621) by Appropriating an Additional $150,000: (1) a Donation from the Alameda Friends of the Parks Foundation in the Amount of $10,000, and (2) Fund Balance of the Bayport Park Municipal Services District 03-1 in the Amount of $140,000. (Recreation 278)

Attachments: Exhibit 1 - Agreement
Exhibit 2 - Bayport Park Playground Design
Resolution

5-K 2021-505 Adoption of Resolution Amending Resolution No. 15728 Setting the 2021 Regular City Council Meeting Dates. (City Clerk 2210)

Attachments: Resolution

5-L 2021-552 Final Passage of Ordinance Authorizing the City Manager to Execute Lease Amendments for Rent Relief Programs to Rock Wall Winery and St. George Spirits through the Loan Conversion Assistance Program for Rent Relief in Response to the Covid-19 Pandemic. (Community Development 858)

Attachments: Lease Amendment - Rock Wall Winery
Lease Amendment - St. George Spirits

5-M 2021-553 Final Passage of Ordinance Amending the Zoning Map Designation for the Property at 2350 Fifth Street (APN 74-1356-23) from M-X, Mixed Use to R-4, Neighborhood Residential District to Facilitate Residential Use of the Property, as Recommended by the City Planning Board. (Planning, Building and Transportation 481005)

6 Regular Agenda Items

6-A 2021-504 Recommendation to Rename Former Jackson Park to Chochenyo Park. (Recreation 280)

Attachments: Exhibit 1 - Top 10 Names for Renaming Jackson Park
Exhibit 2 - Data from Community Forum and Survey
Exhibit 3 - 2016 Policy for Naming City Facilities
Presentation
Presentation - REVISED
Correspondence - Updated 1/19

6-B 2021-8337 Introduction of Ordinance Amending the Alameda Municipal Code by

Amending Article XV (Rent Control, Limitations on Evictions and Relocation Payments to Certain Displaced Tenants) to Adopt and Incorporate Provisions Concerning Capital Improvement Plans (CIP) for Rental Units in the City of Alameda. (Community Development 265)

Attachments: Exhibit 1 - Existing CIP Policy
Exhibit 2 - CIP Table
Ordinance
Presentation
Correspondence - Updated 1-19

6-C 2021-8379 Adoption of Resolution Requiring a Project Stabilization Agreement for Certain Construction Projects. (City Manager) [Continued from January 19, 2021; Public Comment Closed]

Attachments: Resolution
Presentation
Correspondence
Correspondence from Mayor - Mission Bay PLA

7 City Manager Communications - Communications from City Manager

8 Oral Communications, Non-Agenda (Public Comment) - Speakers may address the Council regarding any matter not on the agenda

9 Council Referrals - Matters placed on the agenda by a Councilmember may be acted upon or scheduled as a future agenda item

9-A 2021-508 Consider Establishing a New Methodology by which the Number of Housing Units are Calculated for Parcels Zoned C-2-PD (Central Business District with Planned Development Overlay). (Councilmember Daysog) [Not heard on January 5 or 19, 2021]

Attachments: Presentation
Correspondence

9-B 2021-522 Consider Directing Staff to Provide a Police Department Staffing and Crime Update. (Councilmember Herrera Spencer) [Not heard on January 19, 2021]

Attachments: Correspondence - Updated 1/19

10 Council Communications - Councilmembers can address any matter not on the agenda, including reporting on conferences or meetings

11 Adjournment - City Council

• Please contact the City Clerk at 510-747-4800 or clerk@alamedaca.gov at least 48 hours prior to the meeting to any reasonable accommodation that may be necessary to participate in and enjoy the benefits of the meeting.
• Meeting Rules of Order are available at:
**********.alamedaca.gov/Departments/City-Clerk/Key-Documents#section-2
• Translators and sign language interpreters will be available on request. Please contact the City Clerk at 510-747-4800 at least 72 hours prior to the meeting to request a translator or interpreter.
• Equipment for the hearing impaired is available for public use. For assistance, please contact the City Clerk at 510-747-4800 either prior to, or at, the Council meeting.
• Accessible seating for persons with disabilities, including those using wheelchairs, is available.
• Minutes of the meeting available in enlarged print.
• The meeting will be broadcast live on the City's website:
**********.alamedaca.gov/GOVERNMENT/Agendas-Minutes-Announcements
• Documents related to this agenda are available for public inspection and copying at of the Office of the City Clerk, 2263 Santa Clara Avenue, Room 380, during normal business hours.
• Sign up to receive agendas here: https://alameda.legistar.com/Calendar.aspx
• KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE: Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City of Alameda exist to conduct the citizen of Alameda's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.
• FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE OPEN GOVERNMENT COMMISSION: the address is 2263 Santa Clara Avenue, Room 380, Alameda, CA, 94501; phone number is 510-747-4800; fax number is 510-865-4048, e-mail address is lweisiger@alamedaca.gov and contact is Lara Weisiger, City Clerk.
• In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

ALAMEDA RECREATION AND PARK COMMISSION
MINUTES FOR REGULAR MEETING

DATE: **Thursday, July 9, 2020**
TIME: **7:04 p.m. Called to Order**
PLACE: **City Hall Council Chambers**

A video recording of the meeting may be viewed at https://alameda.legistar.com/Calendar.aspx
The following are action minutes in keeping with the Sunshine Ordinance 2-91.17.

ROLL CALL

Present: (via teleconference) Chair Alexander, Vice Chair Robbins, Commissioner Limoges Commissioner Barnes and Commissioner Navarro
Staff: (via teleconference) Alameda Recreation and Park Department (ARPD) Director Amy Wooldridge

APPROVAL OF MINUTES

Chair Alexander moved to accept the minutes of June 11, 2020 Regular Meeting as presented.
M/S Commissioner Limoges / Commissioner Barnes. All present in favor with 5 ayes via roll call vote.

WRITTEN AND ORAL COMUNICATIONS

- Written Communication: None
- Oral Communication:
  Speaker Betsy Mathieson: Thanked ARPD Director Wooldridge and the Commission for deferred maintenance work at Jackson Park. Enjoying the re-paved walkways, new picnic table and benches.

REPORTS FROM THE RECREATION AND PARK DIRECTOR

ARPD Director Amy Wooldridge gave the report. (See Exhibit 1)

REPORTS FROM COMMISSIONERS

- Vice Chair Robbins: Has now visited all the City of Alameda Parks and commented on how clean and manicured the parks are. Suggested a computerized reservation program and rental signage at the tennis courts.
- Commissioner Limoges: Noticed a lot of trash along Shoreline at the beach. Response from Director Wooldridge: Working with East Bay Regional Park Department, (EBRPD), which oversees the beaches and shoreline, and potential volunteer groups to help with clean-up. Looking forward to seeing the Krusi Park Recreation Center completed.
- Chair Alexander: Commended the Alameda citizens as she is seeing lots of masks and social distancing. Had a lesson in Pickleball. Handball courts are consistently full. Krusi Recreation Center looks nice, was able to look inside and it looks beautiful. Complimented Franklin Camp Park staff for a job well done.
- Commissioner Navarro: ARPD Camps are doing a great job with masks and social distancing and the kids look like they are having fun. Diversity, Equity and Inclusion subcommittee met to discuss what can be done to put into practice with Parks and possibly citywide. Hopefully will have something concrete in 4 to 6 months.

- Commissioner Barnes: Have been to most City of Alameda Parks and commented that they all look great. Heard public feedback of relief and thanks for the ARPD Camps. Great Diversity, Equity and Inclusion meeting on starting the process for policy to create a policy and action plan to implement into practice with concrete plans and objectives. Plan to obtain data, demographic info and community input. Will work with a consultant to assist process, possibly from the Government Alliance on Race and Equity.

NEW BUSINESS

6-A Review and Recommend Whether to Rename Jackson Park
ARPD Director Amy Wooldridge gave presentation which included the history of the park and Andrew Jackson and the requirements and process options of renaming Jackson Park.

Public Comments

- Zac Bowling: In support of renaming of Jackson Park
- Rasheed Shabaaz: Two years ago came before the Commission to call for the renaming of Jackson Park. Spoke on the 2020 death of George Floyd and how it brought awareness to the public. In support of renaming Jackson Park, likes Justice Park, encouraged to add a memorial dedicated to those who were impacted by Andrew Jackson and were excluded from Alameda to explain why the park was renamed and that a new name should be selected by the end of the year. If there is no justice, there is no peace.
- Ezra Denney: Heartened to hear about the previous discussion on a diversity and inclusion policy for the parks. Supports renaming Jackson Park to show Alameda's community of Color how we welcome them and how everyone belongs here.
- Josh Geyer: Supports renaming Jackson Park to create a city where people feel truly welcome and to put up a monument that speaks to why the park was renamed and the impacts of Jacksons actions and belief systems while he was alive.
- Laura Gamble: Supports the renaming Jackson Park as it will signal that Alameda has the ability to move forward to a more just and fair future in a swift manner.
- Seth Marbin: Supports the renaming of Jackson Park and encouraged to remove the sign immediately.
- Lean Deleon, Alameda resident: Supports the renaming of Jackson Park as we are in a political movement to the right side of history.
- Rosemary Jordan: Supports the renaming of Jackson Park. Systemic racism is tearing our county apart and parks are places we can heal. It is urgent to remove any symbols and names that add trauma.
- Seraphi Allkind Sigma: Supports the renaming of Jackson Park, encourages a quick timeline and that Black voices, especially the youth, are listened to in the process of renaming the park.
- Betsy Mathieson: Jackson Park "Dumb Friends" bench is 100 years old this year and hoping for a celebration. Wants to discourage the Commission from naming the Park after Jim Morrison, a musician who was a student at Alameda High.

Motion to Change the name of Jackson Park
M/S Vice Chair Robbins / Chair Alexander. All in favor with 5 ayes via roll call vote.

Motion to Recommend to Council to Remove Jackson Park sign as soon as possible.
M/S Vice Chair Robbins / Commissioner Navarro. All in favor with 5 ayes via roll call vote.

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.
M/S Chair Alexander / Commissioner Barnes. All in favor with 5 ayes via roll call vote.

Motion that the Commission make a name recommendation on Jackson Park to the City Council by December 31, 2020.
M/S Commissioner Navarro / Vice Chair Robbins. All in favor with 5 ayes via roll call vote.

6-B Update on Active Transportation Plan Draft Recommendations
Rochelle Wheeler, City of Alameda Senior Transportation Planner, gave presentation and answered questions about the Transportation Plan, second phase which includes the plan's purpose and vision for bike, walk and roll, initial community input, pedestrian street map, bicycle network and draft goals for safety, community, connectivity and comfort, equity and mode shift.

ITEMS FOR NEXT AGENDA: City Aquatics Center Conceptual Design, name Alameda Marina Park and De-Pave Park Vision Plan

SET NEXT MEETING DATE: Commission agreed to have an additonal Regular meeting for Thursday, August 13, 2020 due to the numerous items.

ADJOURNMENT
M/S Commissioner Limoges / Commissioner Navarro
Motion carried by the following voice vote: All in favor with a 5 – 0.
Chair Alexander adjourned the meeting at 9:32 PM

EXHIBIT 1

7/09/2020 ARPD Director's Report – Presented by Recreation and Park Director Amy Wooldridge

Mastick Senior Center

- Mastick developed a partnership with the Kiwanis Club and they will provide a one-way Pen Pal program sending cards/notes to Leisure Club participants. Gift bags were delivered to participants before the July 4th holiday and greeting cards have been sent as well.
- New computers for the Mastick Computer lab are being installed.
- Renewal membership registration forms (approximately 3,300) are being mailed out.
- Monthly email blasts continue with updates and services. Zoom opportunities are being added and looking toward a curbside book pick-up, along with other opportunities.
- We continue to make wellness calls.
- The lunch program is growing and serving an average 30 - 35 people per day.
- Working on improving the front entry walkway for current ADA compliance.

Parks Maintenance

- Received $150,000 from the Community Development Block Grant program for improvements at Woodstock Park. Projects include converting remaining playground safety surfacing to poured in place, adding a shaded picnic area, painting the exterior of the recreation center and replacing all windows.
- Focused work on Bay Farm parks at Tillman and Leydecker as well as tree pruning along Shoreline Park
- Hired a new Gardener, Andrew Quintana who previously worked with the City of Berkeley. We're excited to have him join the team!

Recreation Services

- Working on options for fall after school programming. Waiting for additional guidelines from Alameda County Health Department and staff is participating in weekly discussions with the school district.
- Tiny Tots – We opened registration for our Tiny Tots programs but final configuration of those programs is pending guidance from the Health Department.
- Alameda Fourth of July Shines On decoration contest – There were 35 entries and staff decided to give participation awards to all registrants rather than doing a judging processes. We are offering $20 gift certificates to a variety of Alameda businesses.
- Park Ambassador Program – Staff are coordinating ways to implement a park ambassador program that serves as a positive educational outreach program in the parks during COVID-19. We will re-hire lifeguards and other part-time staff who will be easily identifiable in parks and will have extra masks to hand out as they let people know to wear masks, keep social distance and remain off the closed equipment. They will not be enforcing rules, simply educating the public in a friendly way.
- New youth camps – ARPD added several outdoor fitness and athletic camps per County guidelines began this week. These include both contract camps through ARPD and other organizations renting city park space for camps and following our guidelines.

- Kudos and deep appreciation to the many ARPD staff who are working so well under these trying times. Several compliments have been received about staff from the public.

ARPD Projects

- Krusi Park Recreation Center – the building is complete and site work (asphalt and other work) is continuing through July. Purchasing fixtures and installing the fire alarm. Anticipate completion before the school year starts.
- De-Pave Park – Vision Plan process is going well and a draft sketch plan was received well by the stakeholders this past week. Once completed, it will come to the Commission for review and comment.
- Starting work on a Diversity, Equity and Inclusion Policy and Action Plan.
- Bayport Park playground – The public input meeting for the Bayport Park playground design was cancelled due to the shelter in place. Staff will instead host an online survey and a Zoom neighborhood meeting for public input on the design. We will do our best to construct the playground so that it is completed close to when playgrounds may be opened. The design will come to the Commission for review and comment.

From:	ps4man@comcast.net
To:	Lara Weisiger
Subject:	[EXTERNAL] FW: Item 6A on Jan 19 Agenda
Date:	Tuesday, February 2, 2021 2:53:14 PM
Attachments:	We sent you safe versions of your files.msg Epstein v Hollywood Entertainment Dist II Business Improvement Dist.pdf Californians Aware v Joint LaborManagement Benefits Committee.pdf International Longshoremens and Warehousemens Union v Los Angeles Export Termina.pdf

Please file this to my Sunshine Ordinance Complaint v. City Council and the Recreation and Park Commission.

From: ps4man@comcast.net <ps4man@comcast.net>
Sent: Tuesday, January 19, 2021 4:46 PM
To: Marilyn Ashcraft <mezzyashcraft@alamedaca.gov>; Malia Vella <mvella@alamedaca.gov>; John Knox White <jknoxwhite@alamedaca.gov>; 'tony_daysog@alum.berkeley.edu' <tony_daysog@alum.berkeley.edu>; 'tspencer@alamedaca.gov' <tspencer@alamedaca.gov>
Cc: 'Eric Levitt' <elevitt@alamedaca.gov>; 'yshen@alamedacityattorney.org' <yshen@alamedacityattorney.org>
Subject: Item 6A on Jan 19 Agenda

Dear Mayor Ashcraft and Council Members:

It has been brought to my attention that there may be public comment on Item 6A that asserts that the park naming citizens committee has violated our Sunshine Ordinance and the Brown Act by failing to follow the transparency requirements of notice and public participation applicable to "policy bodies" as defined by the Ordinance. There are multiple definitions of the term in Sec. 2-91.1 (d) of the Ordinance, the pertinent one here being Sub-sec (d) (4) which defines it as "any committee or body, created by the initiative of a policy body as a whole;".

The Park and Recreation Commission is a policy body. On July 9, its action of appointing a sub-committee of two Commission Members to establish a citizen's committee renders that citizens committee a body "created" by the Commission, regardless of the fact that the committee members were appointed by the sub-committee.

A similar process was used by City Council in directing the City Manager to appoint a Citizens committee on police reform. In both instances these actions were designed to avoid the requirements of both our Sunshine Ordinance and the Brown Act requiring public notice and participation in meetings of these two citizens committees. I do not think that these laws were intended to allow local government bodies to avoid transparency requirements by the simple means of delegating the appointment of committee members to a third party.

As an aid to you and the City Attorney, I attach the cases which I think clearly support this view. Unless the City Attorney can convince me otherwise I will likely challenge these actions pursuant to the sunshine Ordinance and/or Brown Act.

Paul S Foreman

87 Cal.App.4th 862
Court of Appeal, Second District, Division 3, California.

Aaron EPSTEIN, Plaintiff and Appellant,
v.
HOLLYWOOD ENTERTAINMENT DISTRICT II BUSINESS IMPROVEMENT DISTRICT, et al., Defendants and Respondents.

No. B134256.
|
March 8, 2001.
|
Review Denied June 13, 2001.

Synopsis
Owner of property zoned for business purposes within business improvement district (BID) brought action to establish that non-profit corporation that administered funds raised through city's assessments on businesses within the district was subject to Brown Act's open meetings requirements. The Superior Court, Los Angeles County, Super. Ct. No. BC207337, Ricardo A. Torres, J., denied owner's motion for preliminary injunction, and he appealed. The Court of Appeal, Croskey, J., held that corporation was a "legislative body" subject to Brown Act's open meetings requirements.

Reversed and remanded.

Attorneys and Law Firms

****858 *863** Moskowitz, Brestoff, Winston & Blinderman, Dennis A. Winston and Barbara S. Blinderman, Los Angeles, for Plaintiff and Appellant.

***864** Sheppard, Mullin, Richter & Hampton, Costa Mesa, and Andre J. Cronthall, Los Angeles, for Defendants and Respondents Hollywood Entertainment District II Business Improvement District and Hollywood Entertainment District Property Owners Association.

James K. Hahn, City Attorney, Patricia V. Tubert, Senior Assistant City Attorney and Kenneth Cirlin, Assistant City Attorney ****859** for Defendant and Respondent City of Los Angeles.

Opinion

CROSKEY, J.

The Hollywood Entertainment District II Business Improvement District (BID II) is a special assessment district in the City of Los Angeles (City). The Hollywood Entertainment District Property Owners Association (the POA), a 26 United States Code section 501(c)(6) non-profit corporation, administers the funds City raises through assessments on businesses within BID II's boundaries.[1] The money is used to contract for such things as security patrols, maintenance, street and alley cleaning, and a newsletter.

Aaron Epstein (plaintiff), who owns property zoned for business purposes within BID II, sued defendants to establish that the POA was required to comply with the Ralph M. Brown Act (the Brown Act or the Act) (Gov.Code, § 54950 et seq.)[2] by holding noticed, open meetings and posting its agenda in advance. His motion for a preliminary injunction was denied after the superior court concluded that the Brown Act did not apply because (1) the POA had not been created by City, and (2) the POA had pre-existed the creation of BID II by at least two years.

Plaintiff filed timely notice of appeal. We reverse. The facts of this case come within the parameters of our holding in *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 81 Cal.Rptr.2d 456 (*International Longshoremen's*), because City "played a role in bringing" the POA "into existence." The POA was not simply a pre-existing corporation which just "happened" to be available to administer the funds for BID II. Instead, the record indicates that the POA was formed and structured in such a way as to take over administrative functions that normally would be handled by City.

***865 *FACTUAL AND PROCEDURAL BACKGROUND*[3]**

The Property and Business Improvement District Law of 1994 (Sts. & Hy.Code, §§ 36600 et seq.) authorizes cities to establish property and business improvement districts (BIDs) in order to levy assessments on real property for certain purposes. Those purposes include acquiring, constructing, installing, or maintaining improvements

(Sts. & Hy.Code, § 36606), which include such things as parks, street changes, ramps, sidewalks and pedestrian malls. (Sts. & Hy.Code, § 36610, subds. (f), (i), and (k).) A prerequisite to the creation of such a BID is a petition filed by property owners who will pay more than 50 percent of the total amount of assessments to be levied. (Sts. & Hy.Code, § 36621, subd. (a).)

On September 3, 1996, City adopted ordinance No. 171273 (the first Ordinance) to create the Hollywood Entertainment District Business Improvement District (BID I). The first Ordinance incorporated by reference a "Management District Plan" which contained information required by Streets and Highways Code section 36622.[4] The Management District Plan included a "Proposed Annual Program" which included security, maintenance, marketing, streetscape and administration components. It also included a section on "Governance," which provided, in relevant part, "The Property and Business Improvement District programs will be governed by a non-profit association. Following is a partial ****860** summary of the management and operation of the *proposed* association." (Italics added.) The section on Governance made it clear that the non-profit association, which would govern BID I, was not yet in existence.[5]

Articles of incorporation of the Hollywood Property Owners Association (the POA), the non-profit association that did take over governance of BID I, were filed with the California Secretary of State on September 25, 1996. These articles of incorporation were dated September 5, 1996. The POA was a nonprofit mutual benefit corporation, whose specific and primary purpose was "to develop and restore the public areas of the historic core of Hollywood, California, in order to make it a more attractive and popular destination for tourists, shoppers, businesspeople and persons interested in culture and the arts."

***866** On August 18, 1998, City adopted ordinance No. 172190 (the second Ordinance) to create Hollywood Entertainment District II Business Improvement District (BID II). The second Ordinance incorporated by reference a "Management District Plan" which contained information required by Streets and Highways Code section 36622. The Management District Plan for BID II, which was entitled "Hollywood Entertainment District Property Business Improvement District Phase II," included a copy of the petition used to form BID II, which referred to BID II as an "extension" of BID I. In fact, a comparison of the map of the proposed boundaries of BID II with the map of the proposed boundaries of BID I shows that BID II simply added approximately another 10 blocks down Hollywood Boulevard to the approximately five blocks down the length of the boulevard already covered by BID I.

The Management District Plan for BID II also included a "Program and Budget," which included security, maintenance, marketing and promotion, and administration components. It also included a section on "Governance," which provided, in relevant part, "The Property and Business Improvement District programs will be governed by the Hollywood Entertainment District Property Owners Association, a 501(c)(6) non-profit corporation *which was formed in 1996 to govern Phase I.* Following is a summary of the management and operation of the Association *as it relates to Phase II."* (Italics added.) In addition, unlike the Management District Plan for BID I, the Management District Plan for BID II included the "Amended and Restated Bylaws" of the POA which were quite detailed. And, although the POA was to manage and operate the BID, City, by law, retained the power to "modify the improvements and activities to be funded with the revenue derived from the levy of assessments by adopting a resolution determining to make the modifications after holding a public hearing on the proposed modifications." (Sts. & Hy.Code, § 36642.)

The POA's monthly meetings were not open to the public, much to the distress of plaintiff, who owns property subject to assessment in favor of BID II. Furthermore, according to plaintiff, the POA's by-laws allow it to do other things that would be prohibited by the Brown Act if it were applicable to the POA. For example, the by-laws allow meetings to take place anywhere, not solely within the POA's jurisdiction, and to take place without posting notice 72 hours in advance.

Accordingly, on March 18, 1999, plaintiff filed a complaint for declaratory and injunctive relief against defendants, seeking, among other things, a declaration that the Brown Act does apply to the POA and that, in fact, the POA's meetings are required to be open and noticed as required by the ***867** Brown Act, and that any contracts let by the POA must comply with ****861** the competitive bidding requirements of City's charter. He moved for a preliminary injunction, which the superior court denied on the ground that because the POA was not created by City, and because it pre-existed the creation of BID II by at least two years, the Brown Act did not apply. The order denying the motion was filed on June 11, 1999, and on August 4, 1999, plaintiff filed notice of appeal.

CONTENTIONS ON APPEAL

Plaintiff contends that the trial court erred by concluding that the POA was not a legislative body under the Brown Act. He further contends that because the POA is a legislative body within the meaning of the Act, and can only exercise the powers that City could delegate to it, it cannot enter into contracts without complying with the City Charter's requirement of competitive bidding. Finally, he contends the trial court erred by denying him injunctive relief against the POA. Defendants dispute these contentions.

DISCUSSION

1. *Public Policy Favors Conducting the Public's Business in Open Meetings*

It is clearly the public policy of this State that the proceedings of public agencies, and the conduct of the public's business, shall take place at open meetings, and that the deliberative process by which decisions related to the public's business are made shall be conducted in full view of the public. This policy is expressed in (1) the Bagley–Keene Open Meeting Act (§§ 11120 et seq.), which applies to certain enumerated "state bodies" (§§ 11121, 11121.2), (2) the Grunsky Burton Open Meeting Act (§§ 9027–9032), which applies to state agencies provided for in Article IV of the California Constitution, and (3) the Ralph M. Brown Act (§§ 54950 et seq.), which applies to districts or other local agencies, including cities. Under these various laws related to open meetings, a wide variety of even the most arcane entities must give notice of their meetings, and make such meetings open to the public.[6]

***868** 2. *The Purpose Behind the Brown Act*

The Brown Act, the open meeting law applicable here, is intended to ensure the public's right to attend the meetings of public agencies. (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 825, 25 Cal.Rptr.2d 148, 863 P.2d 218; *International Longshoremen's, supra,* 69 Cal.App.4th at p. 293, 81 Cal.Rptr.2d 456.)[7] To achieve this aim, the ****862** 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. (§ 54954.2, subd. (a); *International Longshoremen's, supra,* 69 Cal.App.4th at p. 293, 81 Cal.Rptr.2d 456.) 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 of public bodies. (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 293, 81 Cal.Rptr.2d 456.)

The Brown Act specifically dictates that "[a]ll meetings of the *legislative body* of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953, subd. (a), italics added.) The term "legislative body" has numerous definitions, grouped together in section 54952. The definition that arguably may apply to the POA is found in subdivision (c)(1)(A) of section 54952. This portion of the Brown Act states, in relevant part: "As used in this chapter, 'legislative body' means: [¶] ... [¶] (c)(1) A board, commission, committee, or other multimember body that governs a private corporation or entity that ...: [¶] (A) Is *created* by the elected legislative body in order to exercise authority which may lawfully be delegated by the elected governing body to a private corporation or entity." (§ 54952, subd. (c)(1)(A), italics added.) Thus, the question before us here, as a matter of law, is whether the POA's board of ***869** directors is a legislative body within the meaning of this subdivision because the POA was created by City in order to exercise delegated governmental authority.

In answering this question, we are mindful, as we noted in *International Longshoremen's,* that the Brown Act is a remedial statute that must be construed liberally so as to accomplish its purpose. (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 294, 81 Cal.Rptr.2d 456; see *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313, 58 Cal.Rptr.2d 855, 926 P.2d 1042 ["civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.]]")

3. *The POA's Board of Directors Is a Legislative Body Within The Meaning of the Brown Act*

a. *The City Can Be Said to Have "Created" the POA Within the Meaning of the Brown Act*

Here, just as in *International Longshoremen's,* the pivotal issue is whether City, an elected legislative body,

"created" the POA in order to exercise authority that City could lawfully delegate. Therefore, we discuss in some detail the facts of *International Longshoreman's.*

In the *International Longshoremen's* case, the Los Angeles Export Terminal, Inc. (LAXT) was a private, for-profit corporation organized to design, construct and operate a facility for the export of coal. The facility would be on land leased from the Harbor Department of the City of Los Angeles, and the Harbor Department was to be a fifteen-percent shareholder in LAXT. The shareholders' agreement by which LAXT was set up gave the Harbor Department the right to appoint three of LAXT's 19 board members, plus veto power over the coal facility project. The lease of the Harbor Department's land was also something that had to be, and was, approved by the City Council.

Thereafter, LAXT's board of directors authorized LAXT to enter into a terminal operating agreement with Pacific Carbon Services Corporation (PCS). This decision was made at a meeting that did not comply with the requirements of the Brown Act. The International Longshoremen's & ****863** Warehousemen's Union (ILWU) sued to nullify the agreement with PCS, and for an injunction, contending that LAXT was required to comply with the Brown Act.

The trial court agreed with the union, nullified the PCS agreement, and enjoined LAXT from making decisions without complying with the Brown ***870** Act. It reached this result because it concluded that LAXT's board of directors was a legislative body within the meaning of the Brown Act. LAXT appealed, and argued, among other things, that it had not been created by the City Council (a legislative body), but only by the Harbor Commission (an appointed body), and hence the Brown Act, by its terms, did not apply.

We disagreed. Although section 54952, subdivision (c)(1)(A), did not, and does not, define what is meant by the term "created by," we relied on the ordinary definition of "to create," which is "to bring into existence." (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 295, 81 Cal.Rptr.2d 456, quoting Webster's New Internat. Dict. (3d ed.1986) p. 532.) We concluded that the "City Council was involved in bringing LAXT into existence," because (1) it had the ultimate authority to overturn the Harbor Commission's actions, and (2) it could have disaffirmed any steps the Harbor Commission took to become part of LAXT. (69 Cal.App.4th at p. 296, 81 Cal.Rptr.2d 451.) We also concluded that LAXT had been created to exercise governmental authority, to wit, the development and improvement of a city harbor (§ 37386), and that the City Council had delegated its governmental authority as to this aspect of the City's harbor to LAXT. (69 Cal.App.4th at pp. 297–299, 81 Cal.Rptr.2d 451.) Therefore, the Brown Act applied to LAXT's meetings. (*Id.* at pp. 299–300, 81 Cal.Rptr.2d 451.)

Here, as discussed in more detail below, we conclude that City was "involved in bringing into existence" the POA to exercise delegated governmental authority, that City also retained the authority to overturn the POA's actions, and that it could have removed, and can still remove, the POA as the entity managing the BID.

1. *The City "Was Involved in Bringing the POA into Existence" to Exercise Some Governmental Authority Over BID I, and BID II Was Just an Extension of BID I*

In the case here, the issue is whether the POA is a private corporation or entity that was *created* by City, the elected legislative body, to exercise some authority that City could lawfully delegate to a private corporation or entity. We conclude that here, just as in *International Longshoremen's,* the private entity, the POA, was "created" by City to exercise governmental authority over BID I, authority that City otherwise could exercise.

The POA was, in fact, "created" by City, because City "played a role in bringing" the POA "into existence." (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 295, 81 Cal.Rptr.2d 456.) City specifically provided in the first Ordinance that BID I *would* be governed by a non-profit association, and even set forth a partial summary of the management and operation of such proposed ***871** association. Within days of the adoption of the first Ordinance, the POA's articles of incorporation were prepared, and less than a month later, were filed with the Secretary of State. The POA's sole purpose was to "develop and restore the *public* areas of the historic core of Hollywood." And it was the POA that did, in fact, take over governance of BID I. Obviously, when City adopted the first Ordinance creating BID I that called for the creation of a non-profit association to govern the BID I programs, the City "played a role in bringing the POA into existence."

Defendants, however, would prefer that we ignore the POA's history vis-à-vis BID I, and concentrate instead on the POA's relationship to BID II. This is because the POA's existence preceded the creation of BID II. Defendants would have us look at the POA as simply a "preexisting corporation" that just "happened" to be available to administer the funds for BID II, apparently in

reliance on footnote 5 of *International* ****864** *Longshoremen's.* In that footnote, we opined that if LAXT, the private corporation in question there, had been a "preexisting" entity "which simply entered into a contractual arrangement" to exercise authority that the government entity could have exercised, then the private entity "would not have been a creation of the City Council" and the private entity's board of directors would not be subject to the Brown Act. (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 300, fn. 5, 81 Cal.Rptr.2d 456.)

There is no reason to ignore the history behind the POA, and, in fact, because the issue is the "creation" of the entity whose governing board now wields governmental authority, we *must* look at the circumstances surrounding the POA's birth. The record shows that the POA was formed and structured for the sole purpose of taking over City's administrative functions as to BID I. Therefore, under the Brown Act, as interpreted by us in *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc., supra,* 69 Cal.App.4th 287, 81 Cal.Rptr.2d 456, the POA's board of directors, vis-à-vis BID I, was subject to the Brown Act, because the board was a legislative body within the meaning of section 54952 subdivision(c)(1)(A).

Thereafter, the boundaries of BID I were extended, the new BID was called BID II, and the POA simply continued to administer the assessments collected from property owners in the enlarged District. Obviously, the fact that the POA was already in existence and ready to take over City's legislative functions vis-à-vis BID II cannot change the result we would have reached if this case had been presented after BID I was created and before BID II had come into existence. And the connection between BID I and BID II rationally cannot be ignored in any determination of when and ***872** how the POA was "created." City itself, in the Management District Plan for BID II, explicitly recognized that the POA "was formed in 1996 to govern Phase I," that the POA also would govern "Phase II," and that BID II was just an "extension" of BID I.

Under these circumstances, we would improperly elevate form over substance if we were to treat the POA as a "pre-existing" private entity with which City just "happened" to decide to do business when it turned governance of BID II over to the POA. To turn a blind eye to such a subterfuge would allow City (and, potentially, other elected legislative bodies in the future) to circumvent the requirements of the Brown Act, a statutory scheme designed to protect the public's interest in open government. This we will not do. (*Plumbing, etc., Employers Council v. Quillin* (1976) 64 Cal.App.3d 215, 220, 134 Cal.Rptr. 332 [court will not place form above substance if doing so defeats the objective of a statute]; *People v. Jackson* (1937) 24 Cal.App.2d 182, 192, 74 P.2d 1085, *disapproved on another ground, People v. Ashley* (1954) 42 Cal.2d 246, 262, 267 P.2d 271 ["It should be and is an established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit. (Citations.)"]; see also Civ.Code, § 3528 ["The law respects form less than substance."]; *People v. Reese* (1934) 136 Cal.App. 657, 672, 29 P.2d 450, *disapproved on another ground, People v. Ashley* (1954) 42 Cal.2d 246, 262, 267 P.2d 271 ["The evidence tends to prove, and the jury had the right to find, that the real intention of the defendants was to place upon the market and sell shares of stock in a corporation, and that the form of the certificates issued by them was a subterfuge adopted in order to defeat the purposes of the Corporate Securities Act. The operation of the law may not thus be circumvented."].)

****865** In order to avoid the conclusion that the Brown Act applies, the defendants characterize our treatment of the POA as a legislative body within the meaning of the Brown Act as being "contrary to the evidence produced in the trial court and unfair to the businessmen trying to improve their local community." They contend that there is no evidence that City ever "handled" the administrative functions of any BID, and that, to the contrary, the BIDs and the POA were structured by the local property owners themselves from the outset to be administered by a nonprofit organization formed by the owners themselves.

This contention, however, misses the point. The fact that local property owners who wanted City to create a BID were involved in the structuring of ***873** the BID, and structuring of the POA to run the BID, does not mean that City did not "play a role in bringing" the POA "into existence." A BID cannot be created by private individuals. Private individuals do not have the power to authorize tax assessments, or to create tax liens. Thus, a public entity *must* be involved in the creation of any BID, no matter how, when, or by whom the idea and future structuring of the BID-to-be was initiated and pursued. Here, as already noted, the POA was formed for the purpose of administering the BID. Thus, by giving the BID the necessary legal standing as a BID, and by providing that the BID would, in fact, be administered by a POA yet to be formed, City clearly was involved in bringing into existence the POA. An operative BID was the *raison d'être* for the POA; by giving the BID the legal breath of life, the City breathed life into the POA as well.

2. *City Retained the Authority to Overturn the POA's Actions*

Furthermore, just as in *International Longshoremen's, supra,* 69 Cal.App.4th at page 296, 81 Cal.Rptr.2d 456, City, the elected legislative body with ultimate accountability to the voters, retained plenary decisionmaking authority over the BID's activities. (Sts. & Hy.Code § 36642.) Street and Highways Code section 36642 provides, in relevant part, that a city council "may modify the improvements and activities to be funded with the revenue derived from the levy of the assessments by adopting a resolution determining to make the modifications after holding a public hearing on the proposed modifications."

This retention of power over the POA is not only provided for by section 36642, but it is required by well-established law, which provides that a public body may only delegate the performance of its administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest. (*International Longshoremen's, supra,* 69 Cal.App.4th at pp. 297–298, 81 Cal.Rptr.2d 456 and cases cited there.) And a nonprofit corporation to which such administrative functions are delegated *must comply with the same laws and regulations as the public entity that is delegating its authority.* (*International Longshoremen's, supra,* 69 Cal.App.4th at p. 300, 81 Cal.Rptr.2d 456; 81 Op.Atty.Gen. 281 (1998) [when a community redevelopment agency used a nonprofit corporation to administer its housing activities, the nonprofit corporation was required to comply with the same laws applicable to the redevelopment agency itself, such as open meeting laws and public bidding and prevailing wage statutes].)

b. *There Is No Legal Reason to Exempt the POA from The Operation of the Brown Act*

1. *The "Unfairness" and "Interference with Business" Argument*

As noted above, City and the BID contend that our decision that the POA must comply with the same laws as would City, for example, the Brown Act, ***874** is somehow unfair to businesspeople, and interferes with private businesses' ability to improve their areas of operation. Needless to say, if local businesspeople want to form property ****866** owners' associations to try to improve their local community, they are free to do so. They may hold their meetings in secret, by invitation only, or may invite the general public, limited only by whatever laws, if any, are applicable to such groups. However, participation in such purely private, purely voluntary organizations differs dramatically from participation in a BID. For example, membership in a private business owners' organization is voluntary, and, presumably, membership can be terminated at will. In contrast, "membership" in a BID may be involuntary for a majority of the property owners within the BID. (Sts. & Hy.Code, § 36621, subd. (a) [the only prerequisite to the creation of such a BID is not a petition filed by a *majority* of the property owners in the proposed district, but a petition filed by property owners who will *pay* more than 50 percent of the total amount of assessments to be levied].) And, once the BID is created, "membership" lasts for at least five years, and cannot be voluntarily terminated by individual members. (Sts. & Hy.Code, §§ 36622, subd. (h), 36630.)

Given these differences, defendants' pleas that the result we reach here is somehow "unfair" to businesspeople are simply not persuasive. When an individual business owner's money can be taken without his or her individual consent, when it can be taken through use of the government's power to tax and assess, and when it can be used to benefit others' property through the provision of services (whether or not such services include such traditional municipal services as street and sidewalk improvements), it is clearly not "unfair" for such individual business owners to expect to have an opportunity to participate in the decision-making process by which one benefit or another is actually conferred. Nor is it unfair for us, given the language of the Brown Act and the rules of interpretation related to it, to validate that expectation.

2. *The "Supplemental Services" Argument*

Defendants also point to the "supplemental" nature of the services provided by this BID, as though this somehow obviates any need to comply with the Brown Act. Such an argument makes no sense. First, what is "supplemental" can become quite subjective. There is nothing to stop a city from proclaiming that *any* traditional municipal services, other than the most critical things such as fire and police protection, are "supplemental." Thus, street sweeping, the trimming of

street trees, and even the purchase of new library books could be characterized as "supplemental" services. Shall we ***875** interpret the Brown Act on a case-by-case basis, based on each public entity's own characterization of the topic as being one of "supplemental," versus basic, services? Shall the Brown Act apply if the legislative body is making decisions about the purchase of police cars, but not if it is deciding whether to buy new library books or to cut back the street tree maintenance program? To ask such questions is to answer them.

Second, focussing on the "supplemental" nature of the *services* is backwards it is not the *kinds of services,* so much as the *nature of the source of funding* to be used for them, which is relevant to the issue on appeal. Are traditional legislative bodies exempt from the Brown Act merely because they act to disperse "bonus" federal funding for special, supplemental programs and services? If a private benefactor donates $10 million to a city to spend on "supplemental" services and programs, may the city council meet informally and secretly to decide upon the proper allocation of such funds? The obvious answer to both these questions is "No." This is so because the funds involved constitute public money. The funds do not belong to the individual council members, they belong to the public, and the public has a right to participate in any decisions about how public funds should be expended. Very simply, the Brown Act contains no exemptions ****867** for decisions about expenditures of *public funds* for "supplemental services."

3. The "Advisory Committee" Argument

Defendants also argue that the existence of "advisory committees" somehow obviates the need for application of the Brown Act's rules to actions taken by the POA vis-à-vis the BID. Just as there is no exemption in the Brown Act for actions on "supplemental services" taken by statutorily-defined legislative bodies, so, too, there is no exemption for actions taken by bodies such as the POA which were "previewed" by an advisory committee.

True, Streets and Highways Code section 36631, subdivision (b) provides that advisory committees "*shall* " comply with the Brown Act. But, contrary to the arguments of the BBID and the POA, that section does *not* also specify that any other entities involved in a BID are *exempt* from the Brown Act. When section 36631 is read in context with the Property and Business Improvement District Law of 1994 as a whole, it is apparent that the Legislature assumed the advisory committee would be making reports and recommendations about the BID to a city council (Sts. & Hy.Code, §§ 36631, subd. (a); 36633, 36640), which *itself* would then be taking legislative action to carry out the assessments, levies, boundary changes and improvements and activities to be funded. (See, e.g., Sts. & Hy.Code, §§ 36632, 36634, 36635, 36641, 36642, 36651.)

***876** Thus, the Legislature specified that an advisory committee's meetings about its intended reports and recommendations vis-à-vis a BID are subject to the Brown Act, and did not so specifically state that the Brown Act applies to a city council's meetings to actually carry out, modify, or disapprove such recommendations. Is this persuasive evidence that the Legislature intended to exempt city councils from the Brown Act when they make decisions about BIDs? Of course not. Likewise, the Legislature's failure to *expressly* specify that a nonprofit corporation to whom a city has delegated its administrative functions vis-à-vis a BID must comply with the Brown Act is no evidence that the Legislature intended to *exempt* such a nonprofit corporation from open meeting requirements.

4. *The "We Said We Didn't 'Create' the POA, So You Can't Decide We Did" Argument*

Defendants urge that because City itself concluded that it did not "create" the POA, we are somehow bound by such a conclusion. Defendants characterize this determination as a finding of fact to which we must defer, citing *McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879, 890, 264 P.2d 932 and *Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1792, 8 Cal.Rptr.2d 762. Not so. The issue of whether City was involved in bringing the POA into existence, in other words, whether City "created" it within the meaning of section 54952, subdivision (c)(1)(A), is, ultimately, a question of law.

CONCLUSION

The POA's status as an entity originally "created" to take over City's legislative functions was not somehow negated, annulled, or dissipated simply because its role subsequently was expanded by the geographic expansion of the area over which it exercised such functions. Nor do any of the reasons advanced by defendants justify exempting the POA from the same application of the

Brown Act as would apply to City's legislative body. We therefore conclude that the POA is a legislative body within the meaning of the Brown Act, that its actions must be taken in compliance with that Act, and that the trial erred by denying plaintiff's motion for a preliminary injunction.

DISPOSITION

The order denying plaintiff's request for a preliminary injunction is reversed and ****868** remanded. The trial court is directed to enter a preliminary injunction in favor of plaintiff in accordance with the views expressed ***877** herein. In connection with any arguments that the POA is or is not bound to follow City's laws related to competitive bidding, the trial court should be guided by our conclusion that the POA is a legislative body within the meaning of the Brown Act, and that the Brown Act does apply to actions taken by the POA in its administration of the BID. Plaintiff shall recover his costs on appeal.

KLEIN, P.J., and ALDRICH, J., concur.

All Citations

87 Cal.App.4th 862, 104 Cal.Rptr.2d 857, 2001 Daily Journal D.A.R. 2513

Footnotes

1 BID II, City and POA may be referred to collectively as defendants in this opinion.

2 All further statutory references will be to the Government Code, except as otherwise noted.

3 We recite facts taken from the Clerk's Transcript.

4 For example, section 36622 requires a map showing each parcel of property within the district, the proposed district name, the improvements and activities proposed for each year of operation, the proposed amount to be spent to accomplish the activities and improvements each year, and the source of funding.

5 Section 36622 does *not* require the management district plan to contain information on governance or management. However, a city council may require the management district plan to contain other items not specifically required by the state law. (§ 36622, subd. (*l*).)

6 See, e.g., Business and Professions Code section 3325 [meetings of the Hearing Aid Dispensers Advisory Commission must be noticed and open]; Business and Professions Code section 7315 [meetings of the State Board of Barbering and Cosmetology must be noticed and open]; Government Code section 8790.7 [meetings of the California Collider Commission must be noticed and open]; Harbors and Navigation Code section 1153 [meetings of the Board of Pilot Commissioners must be noticed and open] Harbors and Navigation Code section 1202 [meetings for the purpose of investigating pilotage rates shall be noticed and open]; Health and Safety Code section 1179.3, subd. (b) [meetings of the Rural Health Policy Council for comments on projects in rural areas of California must be noticed and open]; Insurance Code section 10089.7, subd. (j) [meetings of the governing board and advisory panel of the California Earthquake Authority must be noticed and open]; Public Resources Code section 33509 [meetings of the governing board of the Coachella Valley Mountain Conservancy must be noticed and open]; Education Code section 51871.4, subd. (g) [meetings of the Commission on Technology in Learning must be noticed and open].

7 The Brown Act's statement of intent provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950.)

104 Cal.Rptr.2d 857, 2001 Daily Journal D.A.R. 2513

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200 Cal.App.4th 972
Court of Appeal, Second District, Division 5, California.

CALIFORNIANS AWARE et al., Plaintiffs and Appellants,
v.
JOINT LABOR/MANAGEMENT BENEFITS COMMITTEE et al., Defendants and Respondents.

No. B227558.
|
Nov. 10, 2011.
|
As Modified on Denial of Rehearing Nov. 28, 2011.

Synopsis
Background: Political advocacy group brought action against joint labor/management benefits committee (JLMBC) of community college district for declaratory, injunctive, and writ relief challenging committee's failure to follow Ralph M. Brown Act open meeting procedures. The Superior Court, Los Angeles County, No. BS124856, David P. Yaffe, J., denied petition. Advocacy group appealed.

Holdings: The Court of Appeal, Mosk, J., held that:

Brown Act did not apply to JLMBC, and

JLMBC's meetings with unions were within exemption from Brown Act.

Affirmed.

Attorneys and Law Firms

****767** Law Offices of Kelly A. Aviles, La Verne, Kelly A. Aviles; Dennis A. Winston, Los Angeles; Joseph T. Francke, Carmichael, for Plaintiffs and Appellants Californians Aware and Richard P. McKee.

Atkinson, Andelson, Loya, Ruud & Romo, Cerritos, Warren S. Kinsler and Joshua E. Morrison for Defendants and Respondents Joint Labor/Management Benefits Committee and Los Angeles Community College District.

MOSK, J.

***974 INTRODUCTION**

Plaintiffs, petitioners, and appellants Californians Aware and Richard P. McKee (McKee) filed a verified petition for writ of mandate, an injunction, and declaratory relief against defendants, respondents, and respondents in this appeal the Los Angeles Community College District (District) and the Joint Labor/Management Benefits Committee (JLMBC) alleging that the JLMBC failed to comply with the public notice and open meeting requirements of the Ralph M. Brown Act (Brown Act). (Gov.Code, § 54950 et seq.[1]) The trial court in denying the petition found that the JLMBC was not subject to the Brown Act because the JLMBC was formed to further the District's collective bargaining with the unions representing the District's employees and thus was exempt from the Brown Act under section 3549.1, subdivision (a), which is part of the Educational Employment Relations Act (EERA) (§ 3540 et seq.[2]). Petitioners appeal. We affirm.

BACKGROUND[3]

In or about 2002, the District entered into a "Master Benefits Agreement" (Agreement) with unions representing its employees[4] concerning hospital-medical, ****768** dental, vision group coverage, group life insurance coverage, and the District's employee assistance program. The unions are referred to in the Agreement as the "Exclusive Representatives" of the employees. Pursuant to the Agreement, the District was to convene, and the Exclusive Representatives were to participate in, the JLMBC. The JLMBC's purpose was to "contain the costs of the District's Health Benefits Program while maintaining and, when feasible, improving the quality of the benefits available to employees."

***975** Prior to adoption of the Agreement, the District's six bargaining units each had a separate article in their collective bargaining agreements that addressed health benefits. Those articles were inconsistent, resulting in

coverage disparities. One of the Agreement's purposes was to ensure common benefits throughout the District. Under the Agreement, the District's health benefits program consisted of "group benefit plans recommended by the Joint Labor/Management Benefits Committee and approved by the Board under which eligible District employees (and their eligible dependents) receive hospital, medical, dental, and vision care coverage. The purpose of the Health Benefits Program is to provide quality health care to the District's employees, retirees, and their eligible dependents and survivors."

The JLMBC was composed of "one voting and one non-voting District Member" (District Members); six "Employee Members," one from each of the Exclusive Representatives; and the "Chair" who was to be nominated by the president of the Los Angeles College Faculty Guild and confirmed by a simple majority of the regular voting members. Each Exclusive Representative could appoint nonvoting members in proportion to the size of each bargaining unit. The JLMBC had authority to:

"1. review the District's Health Benefits Program and effect any changes to the program it deems necessary to contain costs while maintaining the quality of the benefits available to employees (this includes, but is not limited to, the authority to substitute other plans for the District's existing health benefits plans);

"2. recommend the selection, replacement, and evaluation of benefits consultants;

"3. recommend the selection, replacement, and evaluation of benefit plan providers;

"4. review and make recommendations regarding communications to faculty and staff regarding the health benefits program and their use of health care services under it;

"5. review and make recommendations regarding benefit booklets, descriptive literature, and enrollment forms;

"6. study recurring enrollee concerns and complaints and make recommendations for their resolution;

"7. participate in an annual review of the District's administration of the Health Benefits Program;

***976** "8. review and make recommendations about the District's health benefits budget; and

"9. if health care legislation that necessitates modification of the District's Health Benefits Program is enacted before the termination of this agreement, assess the effects of such legislation and make recommendations to the District and the Exclusive ****769** Representatives about appropriate action to take."

Any action taken by the JLMBC required approval by the affirmative vote of the voting District Member and all but one of the voting Employee Members at a meeting at which a quorum was present. The Agreement provided that a quorum consisted of the voting District Member and any five voting Employee Members. The JLMBC had to submit any proposed changes to the board of trustees (presumably the District's board of trustees) (Board) for its consideration. In order to continue to provide quality health care to the District's employees, retirees, and eligible dependents at a reasonable and sustainable cost, the JLMBC annually had to report to the Board on its actions and activities to mitigate increases to the cost of the health benefits program.

In 2002, the District adopted board rule 101702.10, which provided, "The District shall convene a Joint Labor/Management Benefits Committee (JLMBC) as prescribed by the Master Agreement between the District and the exclusive representatives of its employees. The role, composition, and authority of the Committee are specified in Section IV of the Master Agreement. Section IV of that Agreement (as it now reads or as it may be revised by the parties from time to time) is, by this reference, incorporated herein as if set forth in full."

McKee, on behalf of himself and Californians Aware, submitted a letter to the Board and the JLMBC asserting that the JLMBC was a "legislative body" of the District, which had been holding meetings that did not conform to the public notice and open meeting requirements of the Brown Act. McKee demanded that the District publicly acknowledge in a letter to him that the JLMBC was a "legislative body" under the Brown Act and that all future JLMBC meetings would comply with the Brown Act. Dr. Susan Aminoff, the Chair of the JLMBC, responded that the JLMBC was not a "Brown Act committee."

Petitioners filed their verified petition for writ of mandate, an injunction, and declaratory relief for the JLMBC's alleged violations of the Brown Act. In their petition, petitioners alleged, among other things, that a controversy existed between petitioners and the JLMBC concerning "(1) the legal rights of members of the public to proper and timely notice of the business to be ***977** transacted by the JLMBC and to an opportunity to provide input to the JLMBC prior to or during the JLMBC's discussion of that business; and (2) the ministerial duties imposed upon the JLMBC by the Brown Act." The petition sought a declaration that the JLMBC is a "legislative body" under

the Brown Act and a peremptory writ of mandate ordering the JLMBC to comply with the Brown Act's requirements. Petitioners filed a motion for "Peremptory Writ of Mandate and for Declaratory Relief."

The trial court denied petitioners' petition for writ of mandate. In its order denying the petition, the trial court referred to the California Attorney General's publicly issued opinion that the JLMBC is not required to comply with the Brown Act. The trial court stated that the petition implicated two statutory schemes—the Brown Act and the EERA. According to the trial court, the purpose of the Brown Act, an open meeting law, is to require local entities to conduct their business in public, and the purpose of the EERA is to require public school districts, including community college districts, to recognize and bargain collectively with labor unions representing school district employees. The trial court noted that there is a "tension" between the open meeting ****770** requirements of the Brown Act and the closed-door collective bargaining provided by the EERA. The trial court opined that the Legislature resolved that tension with section 3549.1, subdivision (a), which provides that meetings and negotiations between management and labor are not subject to the Brown Act.

The trial court rejected petitioners' attempt to distinguish meetings conducted by the JLMBC from labor-management negotiations and observed that the District and its employees' unions had agreed to divide their negotiations into subgroups, one of which was the "particularly complex" subject of health benefits. The trial court said that the parties created the JLMBC, "to filter out the changes that are to be brought to the negotiating table by requiring some degree of consensus by both labor and management members of the JLMBC in order to submit a change to the board of trustees for its consideration." The trial court concluded, "The activities of the JLMBC are part of the collective bargaining process and the intent of the legislature is that those activities are not to be done in public."

DISCUSSION

Petitioners contend that the trial court erred in denying their petition for writ of mandate. The trial court properly ruled that the JLMBC is not subject to the provisions of the Brown Act.

***978** *A. Standard of Review*

" ' "In reviewing the trial court's ruling on a writ of mandate (Code Civ. Proc., § 1085), the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]" [Citation.]' (*Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1217 [85 Cal.Rptr.2d 660].)" (*Zubarau v. City of Palmdale* (2011) 192 Cal.App.4th 289, 301, 121 Cal.Rptr.3d 172; *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 293, 81 Cal.Rptr.2d 456 (*International Longshoremen's*) [applicability of Brown Act to undisputed facts is subject to de novo review].) Here, because the facts are undisputed, we make our own determination as to the interpretation and application of the Brown Act and the EERA.

B. Relevant Statutes

1. The Brown Act

Section 54953, subdivision (a) sets forth the Brown Act's general requirement that local agencies must hold their meetings open to the public. Section 54953, subdivision (a) provides, "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."[5] As relevant here, section 54952, subdivision (b) of the Brown Act defines a "legislative body" as "[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." A commission, committee, board, or other body of a local agency is "created by" charter, ordinance, resolution or other formal action of a legislative body if the legislative body " 'played a role' in bringing ... 'into existence' " the ****771** commission, committee, board, or other body. (*Epstein v. Hollywood Entertainment District II Bus. Improvement Dist.* (2001) 87 Cal.App.4th 862, 864, 104 Cal.Rptr.2d 857 (*Epstein*), quoting *International Longshoremen's, supra,* 69

Cal.App.4th at p. 295, 81 Cal.Rptr.2d 456; see also *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal.App.4th 354, 358–363, 36 Cal.Rptr.3d 47.)

***979** 2. The EERA

Section 3549.1 of the EERA provides in relevant part, "All the proceedings set forth in subdivisions (a) to (d), inclusive, are exempt from the provisions of ... the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5), unless the parties mutually agree otherwise: [¶] (a) Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization."

Section 3540.1, subdivision (h) provides in pertinent part, " 'Meeting and negotiating' means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation...." Section 3540.1, subdivision (k) provides as applicable here, " 'Public school employer' or 'employer' means the governing board of a school district, a school district...."

C. Application of Statutes

Petitioners contend that the JLMBC is a "legislative body" subject to the public notice and open meeting requirements of the Brown Act because the District played a role in bringing it "into existence" by entering into the Agreement and by adopting board rule 101702.10. The Brown Act exemption in section 3549.1 of the EERA does not apply to the JLMBC, petitioners contend, because the JLMBC is not a "public school employer" that may engage in "meeting and negotiating," as it is neither the District itself nor a governing board of the District.

The Attorney General issued a formal opinion that the JLMBC is not required to comply with the Brown Act. (92 Ops.Cal.Atty.Gen. 102, 107 (2009).) Citing section 3549.1 and its prior opinion at 61 Ops.Cal.Atty.Gen. 1, 8, 9 (1978) ["that the Legislature ... did not intend to require bargaining committees to negotiate in public is clearly exemplified in section 3549.1...."], the Attorney General stated that it is well-settled that labor-management negotiations conducted pursuant to the EERA between a public school employer and a recognized or certified employee organization are not subject to the Brown Act. (92 Ops.Cal.Atty.Gen., *supra,* at p. 105.) The Attorney General added, "Health benefits are matters of employee health, safety, and training, which fall squarely within the recognized scope of collective bargaining. [Fn. omitted.] The JLMBC formation springs directly from collective bargaining between an employer and the exclusive bargaining representatives of the employer's workforce. With its ongoing responsibility to monitor the employees' health benefits, the JLMBC plays a continuing role in the collective bargaining process with respect to a mandatory subject of bargaining." (*Id.* at p. 106.)

***980** The Attorney General further stated, "To 'create' means, among other things, 'to bring into existence,' or 'to produce or bring about by a course of action or behavior.' [Fn. omitted.] The JLMBC was brought into existence through the process of collective bargaining memorialized in the Master Agreement. Having established the JLMBC, the Master Agreement ****772** conferred upon the District the complementary obligation to cause the JLMBC to assemble, which the District discharged through the adoption of Rule 101702.10. [¶] Because the JLMBC was created through the process of collective bargaining as memorialized in the Master Agreement, it does not come within the definition of a legislative body under section 54952. [Fn. omitted.]" (92 Ops.Cal.Atty.Gen., *supra,* at pp. 106–107.)

We agree with the Attorney General and respondents that the JLMBC was created as part of, and for the purpose of furthering, the collective bargaining process under the EERA and, as such, is not subject to the provisions of the Brown Act. (92 Ops.Cal.Atty.Gen., *supra,* at pp. 105–107.) In this matter, we view the Attorney General's opinion as a significant authority. As the court in *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829, 25 Cal.Rptr.2d 148, 863 P.2d 218 said, "While the Attorney General's views do not bind us (*Unger v. Superior Court* (1980) 102 Cal.App.3d 681, 688 [162 Cal.Rptr. 611]), they are entitled to considerable weight (*Meyer v. Board of Trustees* (1961) 195 Cal.App.2d 420, 431 [15 Cal.Rptr. 717]). This is especially true here since the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements. (See, e.g., Open Meeting Laws (Cal.Atty.Gen., 1989).)" (See also *Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, 183, fn. 17, 35 Cal.Rptr.3d 826 [quoting *Freedom Newspapers, Inc. v. Orange County Employees Retirement System, supra,* 6 Cal.4th at p. 829, 25 Cal.Rptr.2d 148, 863 P.2d 218 and

stating, " '[a]n opinion of the Attorney General "is not a mere 'advisory' opinion, but a statement which, although not binding on the judiciary, must be 'regarded as having a quasi judicial character and [is] entitled to great respect,' and given great weight by the courts. [Citations.]" ' [Citation.]"].)

Petitioners' contention that the Brown Act exemption in section 3549.1 does not apply to the JLMBC because the JLMBC is not a "public school employer" that may engage in "meeting and negotiating" as it is neither the District itself nor a governing board of the District is incorrect. The JLMBC is a means for the District and its employees' exclusive representatives to meet and negotiate. Under the Agreement, the JLMBC includes one voting District Member and one nonvoting District Member. Section 3543.3 plainly permits the District, a "public school employer," such representation when "meeting and negotiating" with its employees' exclusive representatives. Section 3543.3 provides, "A public school employer *or such representatives* ***981** *as it may designate* who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, *shall meet and negotiate* with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation." (Italics added.) The District Members on the JLMBC clearly are such representatives—school districts act through agents or representatives.

Petitioners rely on *International Longshoremen's, supra,* 69 Cal.App.4th 287, 81 Cal.Rptr.2d 456, *Epstein, supra,* 87 Cal.App.4th 862, 104 Cal.Rptr.2d 857, and *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 22 Cal.Rptr.2d 641 (*Frazer*) for the proposition that the JLMBC is a "legislative body" because the District participated in its creation. ****773** *International Longshoremen's, supra,* 69 Cal.App.4th at pages 290 through 291, 81 Cal.Rptr.2d 456 concerned the Los Angeles City Council's approval of an agreement between its harbor department and 34 foreign and domestic companies to form a private, for-profit corporation that would design, construct, and operate a facility for the export of coal. *Epstein, supra,* 87 Cal.App.4th at page 864, 104 Cal.Rptr.2d 857 dealt with the City of Los Angeles's formation of a nonprofit corporation to administer funds that the city raised through assessments on businesses in a special assessment district within the city—that is, to take over administrative functions that the city normally would handle. *Frazer, supra,* 18 Cal.App.4th at pages 785 through 786, and 792, 22 Cal.Rptr.2d 641 involved the formation, pursuant to a school board policy, of hearing and review committees to advise the school superintendant and school district on a challenged change in school curriculum. None of these cases involved a mechanism, such as the one here, which was established as part of the collective bargaining process and therefore subject to a statutory Brown Act exemption.

Finally, petitioners contend that even if the JLMBC is deemed a "public school employer" within the meaning of section 3549.1, the JLMBC is subject to the open meeting and public participation requirements in section 3547.[6] Petitioners' argument fails. Section 3547 is part of the EERA and not the Brown Act. Petitioners' writ petition concerned the JLMBC's alleged lack of ***982** compliance with the Brown Act and not the JLMBC's alleged lack of compliance with section 3547 of the EERA. Accordingly, petitioners have forfeited this issue.[7] (*Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 740, 128 Cal.Rptr.3d 551.)

DISPOSITION

The judgment is affirmed. No costs are awarded.

We concur: ARMSTRONG, Acting P.J., and KRIEGLER, J.

All Citations

200 Cal.App.4th 972, 133 Cal.Rptr.3d 766, 192 L.R.R.M. (BNA) 2436, 274 Ed. Law Rep. 247, 11 Cal. Daily Op. Serv. 13,783

Footnotes

1 All statutory citations are to the Government Code unless otherwise noted.

2 The EERA sometimes used to be referred to as the Rodda Act. (*Sonoma County Bd. Of Education v. Public Employment Relations Bd.* (1980) 102 Cal.App.3d 689, 692, 163 Cal.Rptr. 464; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and

Employment, § 587, p. 700.)

3 The factual background is taken from the pleadings before the trial court.

4 The Los Angeles College Faculty Guild, AFT Local 1521; the AFT College Staff Guild, Los Angeles, AFT Local 1512A; the Los Angeles City and County School Employees Union, SEIU (Service Employees International Union) Local 99; the Los Angeles/Orange Counties Building and Construction Trades Council; the Supervisory Employees Union, SEIU Local 347; and the Public, Professional and Medical Employees Union of the California Teamsters, Local 911.

5 Section 54954.2 provides for notice.

6 Section 3547 provides:
"(a) All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.
"(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.
"(c) After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.
"(d) New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.
"(e) The board may adopt regulations for the purpose of implementing this section, which are consistent with the intent of the section; namely that the public be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives."

7 Citing California Code of Regulations, title 8, section 32602, respondents argue that any claimed violation of section 3547 is within the exclusive jurisdiction of the Public Employment Relations Board and that therefore petitioners have not exhausted their administrative remedies. Because petitioners forfeited their claim that respondents violated section 3547, we do not reach this issue.

69 Cal.App.4th 287
Court of Appeal, Second District, Division 3, California.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION et al., Plaintiffs and Respondents, v. LOS ANGELES EXPORT TERMINAL, INC., Defendant and Appellant.

No. B112263.
|
Jan. 14, 1999.
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As Modified on Denial of Rehearing Feb. 10, 1999.
|
Review Denied April 14, 1999.

Synopsis
After board of directors of private corporation that developed and operated coal export facility entered into terminal operating agreement with proposed operator, union filed petition for writ of mandate, seeking to nullify agreement as well as injunctive relief requiring board to conduct its meetings publicly in accordance with the Ralph M. Brown Act. The Superior Court, Los Angeles County, No. BC145559, Robert H. O'Brien, J., ruled that board was subject to the Brown Act, denied corporation's posttrial motions to vacate judgment and for new trial, and awarded attorney fees to union as the prevailing party. Corporation appealed. The Court of Appeal, Klein, P.J., held that: (1) corporation's board of directors was a "legislative body" within meaning of the Brown Act; (2) trial court properly denied corporation's posttrial motions; (3) award of attorney fees to union in the amount of $60,660, based on reasonable market value rather than on fees actually incurred, was proper; and (4) union was entitled to reasonable attorney fees on appeal.

Affirmed.

Attorneys and Law Firms

****458 *289** Jones, Day, Reavis & Pogue, Gerald W. Palmer, Erich R. Luschei and Erin E. Nolan, Los Angeles, for Defendant and Appellant.

***290** Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar, Robert Remar, Beth A. Ross, and Arthur A. Krantz, San Francisco, for Plaintiffs and Respondents.

Opinion

KLEIN, P.J.

Defendant and appellant Los Angeles Export Terminal, Inc. (LAXT) appeals a judgment and postjudgment order in favor of plaintiffs and respondents International Longshoremen's and Warehousemen's Union (ILWU), three of its affiliated locals, ILWU Local 13, ILWU Local 63 and ILWU Local 94, and three individuals, James Spinosa, John Vlaic and Mike Freese, each of whom is an officer or agent of one of the local affiliates (collectively, ILWU).

The essential issue presented is whether LAXT's board of directors is subject to the open meeting requirements of the Ralph M. Brown Act (the Brown Act or the Act) (Gov.Code, § 54950 et seq.).[1]

For the reasons discussed below, we conclude LAXT, a private corporation in which the Harbor Department of the City of Los Angeles (the Harbor Department) is a shareholder, is subject to the Brown Act. The judgment and postjudgment order are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1981, the Board of Harbor Commissioners, which is entrusted by sections 138 and 139 of the Los Angeles City Charter (City Charter) with power and authority over the Harbor Department and the Port of Los Angeles, adopted Resolution 4531. Said resolution approved in concept the development of a major coal terminal on Terminal Island and set forth a series of steps to expedite related environmental studies and review. The Port commissioned a feasibility study which was to determine the viability of the project.

Thereafter, 28 private companies based in Japan, six domestic companies and the Harbor Department negotiated and reached agreement on a complex contractual arrangement known as the Shareholders' Agreement. Under the agreement, LAXT would be formed as a private, for profit corporation to design,

construct and operate a dry bulk handling facility for the export of coal on land leased from the Harbor Department. LAXT was to be capitalized with $120 million. The Harbor Department, as a 15 percent shareholder, ***291** would contribute $18 million and would be entitled to nominate three of the 19 LAXT board members.

Pursuant to a Charter provision requiring the Los Angeles City Council (City Council) to approve contracts with a payment commitment ****459** extending beyond three years, the Shareholders' Agreement was submitted to the City Council for its consideration.

On February 23, 1993, the City Council adopted Ordinance No. 168614, stating: "The Shareholders' Agreement is hereby approved and the Mayor of Los Angeles, or the President of the Board of Harbor Commissioners or the Executive Director of the Harbor Department is hereby authorized to execute said agreement."

On March 31, 1993, articles of incorporation were filed with the Secretary of State by a Los Angeles deputy city attorney.

The corporate entities and the Harbor Department entered into the Shareholders' Agreement on April 12, 1993.

The Shareholders' Agreement contained, inter alia, a condition that the project would not go forward unless the parties unanimously approved the terms of the lease between LAXT and the Harbor Department. The Board of Harbor Commissioners approved the lease on June 14, 1993.

The lease specified a term of 35 years, including a 10–year option. Under the City Charter, leases having a duration exceeding five years require City Council approval. Because of the lease's duration, it was submitted to the City Council, which approved it on July 27, 1993.

The lease then was executed by LAXT and "THE CITY OF LOS ANGELES, by its Board of Harbor Commissioners," effective August 30, 1993.

LAXT's organization, shareholder funding, election of directors, project design and construction then proceeded. On November 16, 1995, LAXT's board of directors authorized LAXT to enter into a Terminal Operating Agreement with Pacific Carbon Services Corporation (PCS).

1. *Proceedings.*

Following LAXT's approval of the Terminal Operating Agreement with PCS, ILWU initiated this action on March 4, 1996 by filing a petition for writ of mandate which sought to nullify said agreement as well as injunctive ***292** relief. ILWU alleged PCS was a "non-union" or "anti-union" employer which would employ workers at LAXT and its facilities "at substandard wages and under substandard terms and conditions of employment that will severely harm the prevailing standards in the Port of Los Angeles." ILWU alleged LAXT's board of directors was a legislative body within the meaning of the Brown Act and therefore was required to conduct its meetings publicly.

ILWU sought an injunction requiring LAXT's board of directors to conduct its future affairs in accordance with the Brown Act, and a judicial determination that the PCS agreement was null and void because LAXT's board of directors had approved the PCS agreement without complying with the procedural requirements of the Brown Act calling for open public meetings. ILWU also sought an award of attorney fees pursuant to section 54960.5 of the Act.

2. *Trial court's ruling.*

The matter was tried on briefs, declarations and exhibits. After hearing arguments by counsel, the trial court ruled LAXT's board of directors is a "legislative body" subject to the Brown Act.

The statement of decision provides in relevant part: The construction and operation of the port facility herein would be a pure governmental function, but for the City's arrangement with LAXT. The construction and operation of a port facility is a properly and lawfully delegable activity of the City in that such activity constitutes the performance of administrative functions. (*County of Los Angeles v. Nesvig* (1965) 231 Cal.App.2d 603, 616, 41 Cal.Rptr. 918.) The City's actions in forming LAXT "amount to the creation of LAXT by the City's elected legislative body, the Los Angeles City Council." LAXT is a private entity created by the elected legislative body of a local agency in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity, within the meaning of section 54952, subdivision (c)(1).) Therefore, the Brown Act applies to the LAXT board of directors. On February

2, 1996, ILWU made a proper demand that LAXT comply with the Brown Act. "All actions taken by the **460 LAXT [b]oard of [d]irectors within the 90 days preceding [ILWU's] demand, November 4, 1995 through February 2, 1996, are null and void, ..." (§ 54960.1, subd. (a).)

Judgment was entered on March 7, 1997.

3. *Postjudgment proceedings.*

On April 25, 1997, the trial court denied LAXT's motion to vacate the judgment and enter a judgment of dismissal, as well as LAXT's motion for *293 a new trial. In addition, pursuant to section 54960.5, the trial court awarded attorney fees to ILWU, as the prevailing party, in the sum of $60,660.

This appeal followed.

CONTENTIONS

LAXT contends the trial court erred: in determining the LAXT board of directors is a legislative body subject to the Brown Act; in denying LAXT's posttrial motions to vacate the judgment and for a new trial; in awarding attorney fees to ILWU and in the amount awarded.

DISCUSSION

1. *Standard of review.*

The central issue is the applicability of the Brown Act, specifically, whether LAXT's board of directors is a legislative body within the meaning of section 54952, subdivision (c)(1)(A), so as to be subject to the Act. As an appellate court, "we 'conduct independent review of the trial court's determination of questions of law.' [Citation.] Interpretation of a statute is a question of law. [Citations.] Further, application of the interpreted statute to undisputed facts is also subject to our independent determination. [Citation.]" (*Harbor Fumigation, Inc. v. County of San Diego Air Pollution Control Dist.* (1996) 43 Cal.App.4th 854, 859, 50 Cal.Rptr.2d 874.)

2. *The Brown Act's purpose, scope and broad construction.*

The Brown Act (§ 54950 et seq.), adopted in 1953, is intended to ensure the public's right to attend the meetings of public agencies. (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 825, 25 Cal.Rptr.2d 148, 863 P.2d 218.) 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. (§ 54954.2, subd. (a); *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555, 35 Cal.Rptr.2d 782.) 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 of public bodies. (*Cohan, supra,* 30 Cal.App.4th at p. 555, 35 Cal.Rptr.2d 782.)

The Act's statement of intent provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and *294 councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950; Stats.1953, ch. 1588, p. 3270, § 1.)

The Brown Act dictates that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953, subd. (a).)

The term "legislative body" has numerous definitions, grouped together in section 54952. The question before us *de novo* is whether LAXT's board of directors is a legislative body within the meaning of subdivision (c)(1)(A) of section 54952. This provision states in relevant part: "As used in this chapter, 'legislative body' means: [¶] ... [¶] (c)(1) A board, commission, committee, or other multimember body that governs a private

corporation or entity that ...: [¶] (A) Is created by the elected legislative body in **461 order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity." (§ 54952, subd. (c)(1)(A).)

In determining whether LAXT's board of directors is a legislative body within the meaning of the Brown Act, we are mindful that as a remedial statute, the Brown Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed. (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955, 196 Cal.Rptr. 45 [construing open-meeting requirements].) This is consistent with the rule that "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.]" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313, 58 Cal.Rptr.2d 855, 926 P.2d 1042.)

3. *LAXT's board of directors is a legislative body within the meaning of the Brown Act.*

As indicated, section 54952, subdivision (c)(1)(A), defines a legislative body as "A board, commission, committee, or other multimember body that governs a private corporation or entity that ...:[¶] (A) Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity."

*295 There is no question that LAXT's board of directors is a multimember body that governs a private corporation or entity. The dispute concerns the remaining elements of section 54952, subdivision (c)(1)(A). LAXT contends the trial court erred in concluding LAXT's board of directors is a legislative body within the meaning of the statute because: (1) LAXT was not created by an *elected legislative body,* the City Council, but rather, by an appointed body, the Board of Harbor Commissioners; (2) LAXT was not created to exercise any governmental authority; and (3) LAXT was not granted any authority which could be delegated by the City Council. The arguments are unpersuasive.

a. *LAXT was created by an elected legislative body, namely, the Los Angeles City Council.*

To be subject to the Brown Act, the private corporation must be "created by the elected legislative body." (§ 54952, subd. (c)(1)(A).)

The City Charter vests the Harbor Commission, an *appointed* body, with power and authority over the operation and development of the Port of Los Angeles. (L.A. Charter §§ 138, 139.) LAXT asserts it was the Harbor Commission, not the City Council, which created LAXT, and the acts of the Harbor Commission in creating LAXT cannot be attributed to the City Council without disregarding the explicit allocations of power under the Charter.

Section 54952, subdivision (c)(1)(A), does not define what is meant by the term "created by." The ordinary definition of " to create" is "to bring into existence." (Webster's New Internat. Dict. (3d ed.1986) p. 532.) Here, the City Council, as well as the Harbor Commission, played a role in bringing LAXT into existence.

Specifically, on February 23, 1993, the City Council adopted Ordinance No. 168614, stating: "The Shareholders' Agreement is hereby approved and the Mayor of Los Angeles, or the President of the Board of Harbor Commissioners or the Executive Director of the Harbor Department is hereby authorized to execute said agreement."[2]

Following this formal action by the City Council, on March 31, 1993, articles of incorporation were filed by a deputy city attorney with the *296 Secretary of State, and the corporate entities and the Harbor Department entered into the Shareholders' Agreement on April 12, 1993.

Thus, the City Council was involved in bringing LAXT into existence. The contention LAXT was entirely a creature of the Board of Harbor Commissioners is without merit.

Of particular significance is a provision of the City Charter expressly authorizing the City Council to review any matter originally considered by the Board of Harbor Commissioners, effectively usurping the Commission's **462 role. Section 32.3 of the Charter provides in relevant part: "Notwithstanding any other provisions of this Charter, actions of commissions and boards shall become final at the expiration of the next five (5) meeting days of the City Council during which the Council has convened in regular session, unless City Council acts within that time by two-thirds vote to bring such commission or board action before it for consideration and for whatever action, if any, it deems appropriate, ... If the Council asserts such jurisdiction, said commission or board will immediately transmit such action to the City

Clerk for review by the Council and the particular action of the board or commission shall not be deemed final and approved.... *If the Council asserts such jurisdiction over the action, it shall have the same authority to act on the matter as that originally held by the board or commission,* but it must then act and make a final decision on the matter before the expiration of the next twenty-one (21) calendar days from voting to bring the matter before it, or the action of the commission or board shall become final." (Italics added.)

Thus, the City Council, an elected legislative body with ultimate accountability to the voters, retains plenary decision-making authority over Harbor Department affairs and has jurisdiction to overturn any decision of the appointed Board of Harbor Commissioners. Here, by adopting an ordinance which approved the Shareholders' Agreement to form LAXT, as well as by acquiescing in the Board of Harbor Commissioners' activity in establishing LAXT, the City Council was involved in bringing LAXT into existence. Without the express or implied approval of the City Council, LAXT could not have been created. Accordingly, LAXT was created by an elected legislative body within the meaning of the statute, and the trial court properly so found.

Nonetheless, in an attempt to characterize LAXT as entirely a creature of the Board of Harbor Commissioners, LAXT emphasizes the Shareholders' Agreement was submitted to the City Council for its approval *only because* ***297** section 390 of the City Charter required that contracts with a payment commitment extending for a period longer than three years be approved and authorized by ordinance of the City of Los Angeles. LAXT also stresses the 35–year lease between LAXT and the Harbor Department was submitted to the City Council for its approval *only because* section 140(e) of the City Charter required City Council approval for leases having a duration exceeding five years. These arguments are unpersuasive. Irrespective of the length of the payment commitment or the duration of the lease, the City's elected legislative body, namely, the City Council, inherently was involved in the creation of LAXT. Even assuming the payment commitment would have extended for less than three years, or the lease extended for less than five years, the City Council would have been involved in LAXT's creation.

As explained, under section 32.3 of the Charter the City Council is vested with the power to assert jurisdiction over any matter before the Board of Harbor Commissioners and the Council then has the same authority to act on the matter as was originally held by that board. Obviously, if the City Council is in agreement with the action taken by the Board of Harbor Commissioners, there is no need for the Council to usurp that board's role. In such a situation, the City Council, with full knowledge of the Harbor Commissioners' action and with the power to disaffirm the action, simply can acquiesce and thereby ratify the action taken by the Board of Harbor Commissioners. It is only when the City Council disagrees with the action taken by the Board of Harbor Commissioners that there is a need for the City Council to intervene.

Therefore, LAXT's attempt to depict itself as purely a creature of the appointed Board of Harbor Commissioners is unavailing. Irrespective of the level of the City Council's active involvement in the creation of LAXT, in view of the City Council's ultimate authority to overturn an action of the Harbor Commission, the trial court properly found LAXT was created by the City's *elected legislative body.* (§ 54952, subd. (c)(1)(A).)

****463** b. *LAXT was created to exercise governmental authority.*

Section 54952, subdivision (c)(1)(A) requires the private entity be created by the elected legislative body "in order to exercise authority" which may be delegated. LAXT contends it was not created to exercise any governmental authority. The argument is not persuasive.

By way of background, a public body may delegate the performance of administrative functions to a private entity if it retains ultimate control over ***298** administration so that it may safeguard the public interest. (*County of Los Angeles v. Nesvig, supra,* 231 Cal.App.2d at p. 616, 41 Cal.Rptr. 918.) Case law delineates the permissible scope of delegation of governmental authority. For example, *Irwin v. City of Manhattan Beach* (1966) 65 Cal.2d 13, 23, 51 Cal.Rptr. 881, 415 P.2d 769, upheld a city's grant of authority to private parties to build and operate an overpass as a lawful delegation. *County of Los Angeles v. Nesvig, supra,* 231 Cal.App.2d at page 617, 41 Cal.Rptr. 918, upheld the County of Los Angeles's contract with a private company to operate the Music Center as a lawful delegation of governmental authority. *Haggerty v. City of Oakland* (1958) 161 Cal.App.2d 407, 415–417, 326 P.2d 957, upheld the Oakland Board of Port Commissioners' lease of a port facility to a private company as a lawful delegation. In contrast, *Egan v. San Francisco* (1913) 165 Cal. 576, 583–584, 133 P. 294, invalidated a contract between San Francisco and a private corporation formed to build an opera house on public land, where the city had not retained sufficient control over operation of the opera house for the delegation to be valid.[3]

Here, Tay Yoshitani, who served as LAXT's president and as an LAXT director representing the Harbor Department, acknowledged in a letter to a taxpayers' organization: "*All major facilities at the Port of Los Angeles are totally built and paid for by the port and subsequently leased to a tenant with the exception of LAXT.* In other words, the port typically assumes 'all of the risk' of building a major marine facility. In the case of LAXT, the port structured the project so that other parties besides the City [of Los Angeles] assumed the bulk of the risk." (Italics added.)

Thus, LAXT's own president recognized the Board of Harbor Commissioners had delegated to LAXT its own authority to construct and operate a port facility. This is consistent with Government Code section 37386, which provides: "A city may lease such tide and submerged lands and uplands for: [¶] (a) Industrial uses. [¶] (b) Improvement and development of city harbors. [¶] (c) Construction and maintenance of wharves, docks, piers, or bulkhead piers. [¶] (d) *Other public uses* consistent with the requirements of commerce or navigation in city harbors." (Italics added; see also Gov.Code § 37385; Civ.Code, § 718.) Here, the City created LAXT to develop a coal facility on land leased from the Harbor Department, instead of developing the facility directly.

Accordingly, LAXT's contention it was not created to exercise any governmental authority must be rejected.

***299** c. *The delegation to LAXT was effected by the City Council.*

To be subject to the Brown Act, the private corporation must be created to exercise governmental authority "that may lawfully be delegated by the elected governing body to a private corporation or entity." (§ 54952, subd. (c)(1)(A).) LAXT asserts the authority which was delegated to it was delegated by the Board of Harbor Commissioners, not by the City Council. LAXT contends only the Board of Harbor Commissioners had the authority to delegate the authority at issue herein, i.e., to construct and operate a port facility.

The contention fails. LAXT is correct insofar as sections 138 and 139 of the City Charter vest the Board of Harbor Commissioners with power and authority over the Port of Los Angeles. However, the Board of Harbor Commissioners was powerless to delegate any authority to LAXT without the express or implied approval of the City Council. As indicated, the City Council retains ****464** the power to assert jurisdiction over any action and has the same authority to act as that originally held by the Board of Harbor Commissioners, including the power to disapprove any decision of that board. (L.A. Charter § 32.3.) Thus, the delegation of authority to LAXT could not have occurred without, at a minimum, the implied approval of the City Council.

Therefore, the trial court properly found the delegation of authority to LAXT was effected by the City Council as the duly elected legislative body, so as to bring LAXT within the Brown Act.[4]

***300** d. *Conclusion re applicability of Brown Act to LAXT's board of directors.*

The trial court properly held LAXT's board of directors is subject to the Brown Act because it is a legislative body within the meaning of section 54952(c)(1)(A). This interpretation is informed by the broad purpose of the Brown Act to ensure the people's business is conducted openly. Under LAXT's constrained reading of the Brown Act, the statute's mandate may be avoided by delegating municipal authority to construct and operate a port facility to a private corporation. While there is no indication LAXT was structured in an attempt to avoid the Brown Act, LAXT's narrow reading of the statute would permit that to occur. Surely that is not what the Legislature intended.[5]

4. *Trial court properly denied LAXT's posttrial motions.*

Based on the above contentions, LAXT argues the trial court should have granted its motion to vacate the judgment and enter a judgment of dismissal, as well as its motion for new trial. This contention necessarily fails in view of our rejection of LAXT's underlying contentions.

In addition, LAXT asserts the trial court abused its discretion in denying the motion for new trial based on newly discovered evidence after trial. The newly discovered evidence showed that one of the three directors who had been nominated by the City Council in accordance with the Shareholders' Agreement had resigned, leaving only two city nominees sitting among 17 directors. Further, due to the subsequent issuance of new shares, the Harbor Department's stake in LAXT has decreased to 13.6 percent, and because the Shareholders'

Agreement allocates one nomination for each five percent share, the City Council would not be able to nominate a third director. LAXT argues this new evidence demonstrates LAXT is a ****465** private corporation engaged in commerce, not an instrumentality of government.

The argument is unavailing. The issue here is whether LAXT's board of directors amounts to a "legislative body" within the meaning of ***301** section 54952, subdivision (c)(1)(A). The dilution of the Harbor Department's stake in LAXT does not alter the conclusion that LAXT's board is a legislative body within the meaning of the statute.

Therefore, we reject LAXT's contention the trial court abused its discretion in denying the motion for new trial.

5. *Award of attorney fees to ILWU was proper.*

LAXT contends the trial court erred in making an award of attorney fees to ILWU and in the amount awarded. Its arguments are unpersuasive.

a. *LAXT's board of directors is a "legislative body" within the meaning of section 54960.5.*

Section 54960.5, which was the basis for the trial court's award of attorney fees and costs, states in relevant part: "A court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to Section 54960 or 54960.1 where it is found that a *legislative body* of the local agency has violated this chapter." (Italics added.)

The Brown Act violation herein was committed by the board of directors of LAXT, not by the City Council. Obviously, LAXT's board of directors is *not* a "legislative body" within the ordinary definition of the term. Therefore, the question arises whether LAXT's board is subject to the attorney fees provision of section 54960.5.

Admittedly, the statutory scheme is not a model of drafting. Nonetheless, it would appear the extensive definition of "legislative body" set forth in section 54952 applies to the use of that term in section 54960.5. It is a fundamental principle of statutory interpretation that statutes are not construed in isolation, but rather, with reference to the entire scheme of law of which they are part so that the whole may be harmonized and retain effectiveness. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 484, 208 Cal.Rptr. 724, 691 P.2d 272; *People v. Ledesma* (1997) 16 Cal.4th 90, 95, 65 Cal.Rptr.2d 610, 939 P.2d 1310.) Further, it is internally inconsistent to suggest that a governing board subject to the open meeting requirements of the Brown Act pursuant to the definition of "legislative body" contained in section 54952 is exempt from the Act's attorney fees provision on the ground it is not a "legislative body" within section 54960.5.

Accordingly, we conclude LAXT's board of directors is a legislative body subject to the attorney fees provision of section 54960.5 of the Act.

***302** b. *Award of attorney fees was within trial court's discretion.*

LAXT argues the trial court abused its discretion in awarding any attorney fees to ILWU due to the lack of any benefit to the general public. (*Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 524, 195 Cal.Rptr. 163.) LAXT argues ILWU's purpose in bringing this litigation was to advance the union's parochial goal of preserving the level of the prevailing wage and voiding the approval by LAXT of a contract with a nonunion employer.

By way of background, a trial court is not required to award attorney fees "to a prevailing plaintiff in every Brown Act violation. A court must still thoughtfully exercise its power under section 54960.5 examining all the circumstances of a given case to determine whether awarding fees under the statute would be unjust with the burden of showing such inequity resting on the defendant." (*Common Cause v. Stirling* (1981) 119 Cal.App.3d 658, 665, 174 Cal.Rptr. 200.) Considerations which the trial court should weigh in exercising its discretion include "the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit." (*Ibid.*)

****466** The public benefit from ILWU's action was sufficient to support an award of attorney fees. As discussed, LAXT asserted it was a private entity beyond the reach of the Brown Act, and it continues to adhere to that position. Therefore, had ILWU not brought this action, LAXT would have engaged in recurring violations of the Brown Act, to the detriment of the public generally.

Clearly, the outcome of the lawsuit was not exclusively for the benefit of ILWU.

Accordingly, we reject LAXT's contention an award of attorney fees to ILWU is unjust.

c. *Trial court did not err in basing the attorney fees award on market rates.*

LAXT contends the $60,660 attorney fees award to ILWU is excessive. The record reflects ILWU paid its attorneys an hourly rate of $125 per hour and later, $140 per hour. However, in moving for attorney fees, ILWU requested reasonable attorney fees based on market rates, which ranged from $125 per hour to $275 per hour for the attorneys who worked on this matter. LAXT contends the trial court erred in awarding fees in excess of those actually charged by ILWU's counsel. The argument fails.

***303** In *Serrano v. Unruh* (1982) 32 Cal.3d 621, 642, 186 Cal.Rptr. 754, 652 P.2d 985, which involved a claim for attorney fees under Code of Civil Procedure 1021.5, the private attorney general statute, our Supreme Court cited with approval the view of the First Circuit, which earlier held: " 'We do not think ... that compensating a public interest organization ... on the same basis as a private practitioner results in ... a windfall.... Indeed, we are concerned that compensation at a lesser rate would result in a windfall to the defendants.' (*Palmigiano v. Garrahy* (1st Cir.1980) 616 F.2d 598, 602, cert. den....)" *Serrano* concluded "[s]ervices compensable under section 1021.5 are computed from their reasonable market value. The trial court was entitled to use the prevailing billing rates of comparable private attorneys as the 'touchstone' for determination of that value. Cost figures bore no reasonable relevance to calculation of the 'touchstone' figure. [Fn. omitted.]" (*Id.,* at p. 643, 186 Cal.Rptr. 754, 652 P.2d 985.)

The private attorney general statute is analogous to the Brown Act's attorney fees provision in that both authorize compensation for private actions which serve to vindicate important rights affecting the public interest. (*Serrano, supra,* 32 Cal.3d at p. 632, 186 Cal.Rptr. 754, 652 P.2d 985; *Common Cause, supra,* 147 Cal.App.3d at p. 524, 195 Cal.Rptr. 163.) In *Common Cause,* a case involving attorney fees under the Brown Act, the court was guided, inter alia, by decisions involving fees under the private attorney general theory. (*Common Cause, supra,* 147 Cal.App.3d at p. 522, 195 Cal.Rptr. 163, citing *Marini v. Municipal Court* (1979) 99 Cal.App.3d 829, 160 Cal.Rptr. 465 and *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 154 Cal.Rptr. 503, 593 P.2d 200.) Therefore, the rationale for basing an award of attorney fees on reasonable market value is equally applicable to section 54960.5. Accordingly, the trial court was not required to base the attorney fees award on the fees actually incurred by ILWU.

6. *ILWU is entitled to reasonable attorney fees on appeal.*

In the respondent brief, ILWU requests reasonable attorney fees incurred in the defense of this appeal.

The issue presented is whether section 54960.5 authorizes an award of attorney fees at the appellate level. The statute provides a court may award attorney fees and costs "to the plaintiff" or "to a defendant." (§ 54960.5.) The statute does not use the terms "appellant" or "respondent." Nonetheless, we conclude section 54960.5 authorizes compensation for all hours reasonably spent, including those necessary to defend the judgment on appeal.

In *Serrano,* defendants contended no fees were recoverable for defending the fee award on appeal because the appeal did not independently meet the ***304** requirements of Code of Civil Procedure section 1021.5. (*Serrano, supra,* 32 Cal.3d at p. 637, 186 Cal.Rptr. 754, 652 P.2d 985.) *Serrano* disagreed, reasoning a contrary rule "would permit the fee to vary ****467** with the nature of the opposition." (*Id.,* at p. 638, 186 Cal.Rptr. 754, 652 P.2d 985.) A defendant " 'cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.' [Citation.]" (*Ibid.*) Therefore, *Serrano* held that "absent circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." (*Id.,* at p. 639, 186 Cal.Rptr. 754, 652 P.2d 985.)

By a parity of reasoning, we conclude ILWU is entitled under section 54960.5 to recover reasonable attorney fees incurred in defending this appeal.[6]

DISPOSITION

The judgment and postjudgment order are affirmed. ILWU shall recover costs and reasonable attorney fees on appeal.

CROSKEY and ALDRICH, JJ., concur.

All Citations

69 Cal.App.4th 287, 81 Cal.Rptr.2d 456, 99 Daily Journal D.A.R. 537, 1999 Daily Journal D.A.R. 1389

Footnotes

1 All further statutory references are to the Government Code, unless otherwise indicated.

2 Although LAXT contends it was created by the collective action of all of its shareholders rather than by any governmental entity, absent this approval by the City Council authorizing the Harbor Department to enter into the Shareholders' Agreement, LAXT could not have been created.

3 There is no contention here there was an excessive delegation of public authority to LAXT.

4 In support of LAXT's contention the City Council lacked power to delegate authority held by the Board of Harbor Commissioners, LAXT invokes section 32.1(a) of the City Charter, which states in relevant part: "Notwithstanding the powers, duties and functions of the several departments, boards or bureaus of the City government as set forth in this Charter, the Mayor, subject to the approval of the Council by ordinance, adopted by a two-thirds vote of the whole of the Council, may transfer any such powers, duties or functions from one department, board or bureau to another, or consolidate the same in one or more of the departments, boards or bureaus created by this Charter or in a new department, board or bureau created by ordinance.... *The power of the Mayor and Council so to act as provided in this section shall not extend to the Harbor Department,* Department of Airport, the Department of Water and Power, the City Employees' Retirement System or the Department of Pensions." (Italics added.)
LAXT's reliance on City Charter section 32.1(a) is misplaced. Section 32.1(a) empowers the Mayor and City Council to transfer powers, duties and functions from one department to another and specifies the power of the Mayor and Council so to act does not extend to the Harbor Department, among others. However, there is no issue here as to a transfer by the Mayor or Council of the powers of the Harbor Department to another municipal department. Further, nothing in section 32.1(a) negates the power of the City Council under section 32.3 to revisit any action taken by the Board of Harbor Commissioners. Thus, in allowing the delegation by the Harbor Department to LAXT to proceed, the City Council acted within its power by effectively ratifying the delegation.

5 We emphasize our holding is a narrow one. LAXT's board of directors is subject to the Brown Act pursuant to section 54952, subdivision (c)(1)(A), because, inter alia, LAXT was created b*y* an *elected legislative body,* i.e., the Los Angeles City Council. Had LAXT been a *preexisting* corporation which simply entered into a contractual arrangement with the Harbor Department to develop the coal facility, LAXT would not have been a creation of the City Council and LAXT's board of directors would not be subject to the Brown Act pursuant to section 54952, subdivision (c)(1)(A).

6 If our interpretation of various aspects of the Brown Act is not what the Legislature intended, the statutory scheme could use clarification. (See *Malibu Committee for Incorporation v. Board of Supervisors* (1990) 222 Cal.App.3d 397, 410, 271 Cal.Rptr. 505, review den.; *Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1487, fn. 7, 33 Cal.Rptr.2d 243, review den.; *Las Tunas Beach Geologic Hazard Abatement Dist. v. Superior Court* (1995) 38 Cal.App.4th 1002, 1016, fn. 10, 45 Cal.Rptr.2d 529, review den.; *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, 321, 48 Cal.Rptr.2d 696, review den.; *Denny's, Inc. v. City of Agoura Hills* (1997) 56 Cal.App.4th 1312, 1329, fn. 9, 66 Cal.Rptr.2d 382.)

From: ps4man@comcast.net
To: Lara Weisiger
Subject: [EXTERNAL] FW: Item 6-A Jan 19 Council Agenda
Date: Tuesday, February 2, 2021 2:54:09 PM

Please file this to my Sunshine Ordinance Complaint v. City Council and the Recreation and Park Commission.

From: ps4man@comcast.net <ps4man@comcast.net>
Sent: Friday, January 22, 2021 9:44 AM
To: 'Eric Levitt' <elevitt@alamedaca.gov>; 'Yibin Shen' <yshen@alamedacityattorney.org>
Subject: Item 6-A Jan 19 Council Agenda

Eric and Yben,

I want to further clarify my position on the proper definition of policy body. I am aware that Sec. 2-91.1 (d) (6) exempts an ad hoc committee from the definition of a policy body and probably forms the basis of your determination that the Jackson Park Renaming Committee is not a policy body. It is my position that the ad hoc exemption is in violation of Section 94952 (b) of the Brown Act which expressly includes temporary committees within the definition of a legislative body. This makes it internally inconsistent with Sec. 2-91.1 (d) which states that "policy body" has the same meaning as "legislative body" as defined in Section 94952 and with Sec. 2-91.3 which states that "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."

Again, I am very open to dialogue with both of you to attempt to avoid a complaint if it can be accomplished within the next week.

Paul

From: ps4man@comcast.net
To: Lara Weisiger
Subject: [EXTERNAL] FW: Item 6-A Jan 19 Council Agenda
Date: Tuesday, February 2, 2021 2:54:58 PM

Please file this to my Sunshine Ordinance Complaint v. City Council and the Recreation and Park Commission.

From: ps4man@comcast.net <ps4man@comcast.net>
Sent: Friday, January 22, 2021 9:46 AM
To: 'Eric Levitt' <elevitt@alamedaca.gov>; 'Yibin Shen' <yshen@alamedacityattorney.org>
Subject: FW: Item 6-A Jan 19 Council Agenda

Correction of typo. The Brown act Section is 54952.

From: ps4man@comcast.net <ps4man@comcast.net>
Sent: Friday, January 22, 2021 9:44 AM
To: 'Eric Levitt' <elevitt@alamedaca.gov>; 'Yibin Shen' <yshen@alamedacityattorney.org>
Subject: Item 6-A Jan 19 Council Agenda

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Paul

From: ps4man@comcast.net
To: Lara Weisiger
Subject: [EXTERNAL] FW: Item 6-A Jan 19 Council Agenda
Date: Tuesday, February 2, 2021 2:55:38 PM

Please file this to my Sunshine Ordinance Complaint v. City Council and the Recreation and Park Commission.

From: ps4man@comcast.net <ps4man@comcast.net>
Sent: Tuesday, January 26, 2021 4:38 PM
To: 'Eric Levitt' <elevitt@alamedaca.gov>; 'Yibin Shen' <yshen@alamedacityattorney.org>
Subject: Item 6-A Jan 19 Council Agenda

Dear Eric and Yibin,

I have located yet another case which I think is very analogous to the present dispute. It is Frazer vs. Dixon Unified School District, 18 Cal.App.4th 781 (1993). In that case parents disputed the District's approval of a new elementary reading curriculum. The District had a written Board policy for such disputes that did not include a citizen committee. The Board directed the superintendent to conduct a review of the parent's complaints pursuant to said policy. The Superintendent determined to establish and appoint members to 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 held as follows:

"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 imply, with the Superintendent. 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.)

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."

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 Dixon court was:

"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."

The current definition of advisory committees as legislative bodies is found in sec. 54952 (b) and states that "legislative bodies" includes:

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

Thus, the current definition of "legislative body" is even more expansive than the definition addressed by the Dixon court by explicitly including temporary bodies.

The facts concerning the establishment of the Jackson Park Renaming Committee present an even stronger case that it is a legislative body than those presented in Dixon. As in Dixon, the City has a written policy for renaming City property which does not require the creation of a temporary committee. However in Dixon there was no specific direction in the District policy or by the Board that the superintendent form temporary committees. In the instant case, on July 9, 2020, there was a formal motion adopted by the Recreation and Parks Commission directing a sub-committee "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."

I hasten to advise you that I see the same analogy to Dixon in the action of City Council in creating the Police Reform and Racial Justice Committees which will soon be presented to Council. I also repeat my previous advice that I am not seeking a redo of the efforts of these volunteer citizens committees, but I am seeking appropriate documentation from the City that it will cease and desist from the above described process of attempting to shield temporary committees from the Brown Act.

The documentation needs to include the amendment of the Sunshine Ordinance Section 2-91.1 (d) (3) & (4) to define the word "created" to cover the formal action of any policy body that plays a part in bringing another committee or body into existence. Also needed is the amendment of Sec. 2-91.1 (d) (6) to delete the exclusion of an ad hoc committee from the definition of a "policy body"(just added in February of 2020), as such exclusion conflicts with Sec. 54952 (b) of the Brown Act which includes temporary committees within the definition of legislative bodies.

Paul