SUPERIOR COURT OF CALIFORNIA

COUNTY OF CONTRA COSTA

LORI FOWLER, ET AL., Petitioners, vs. CITY OF LAFAYETTE, ET AL., Respondents.	Case No.: MSN16-2322 STATEMENT OF DECISION

I. PROCEDURAL BACKGROUND

On December 20, 2016, Petitioners filed their Petition for Writ of Mandate. It asserted one cause of action, based on violations of the Brown Act. (Govt. Code § 54950, et seq.) On April 20, 2017, the Court heard Respondent's demurrer, and sustained it with leave to amend, on the grounds that the pleaded facts did not show a violation of the Brown Act, and that even if there were a violation alleged, Petitioners had not pleaded sufficient prejudice to warrant a writ. (The formal order was not entered until May 18, 2017.)

On May 11, 2017, Petitioners filed an Amended Petition for Writ of Mandate and Injunctive and Declaratory relief. It alleged a First Cause of Action for Writ of Mandate, Injunctive, and Declaratory Relief, based on violations of the Brown Act and a Second Cause of

Action for Writ of Mandate and Injunctive Relief based on Government Code section 54960.1(a) (the provision of the Brown Act that provides for enforcement actions), alleging that the City had engaged in a pattern and practice of violating the Brown Act. Respondent again demurred. On September 1, 2017, the Court sustained the demurrer in part and overruled it in part. As to the First Cause of Action, the Court continued to find that the facts as alleged did not show a violation of the Brown Act, but concluded that Petitioners were entitled to a declaratory judgment, even if the substance of the judgment were adverse to Petitioners. As to the Second Cause of Action, the Court found that Petitioners had failed to allege prejudice.

On October 2, 2017, Petitioners filed a Second Amended Petition. In this Petition, the First Cause of Action remained essentially the same. The Second Cause of Action sought a writ of mandate and injunctive relief arising from the same Brown Act violations, violations of law arising from the appearance of Planning Commissioner Sayles at the Design Review Board, and generally alleging that the City's practices with respect to the application were unfair and deprived Petitioners of Due Process. The Third Cause of Action sought a writ of mandate and injunctive relief pursuant to Government Code section 54960.1(a), again based largely on the Brown Act. Respondents demurred to the Second and Third Causes of Action. On January 18, the Court overruled the demurrer. It concluded that the Second Cause of Action sufficiently alleged that Petitioners were deprived of the right to a fair and unbiased tribunal. As to the Third Cause of Action, it found that Petitioners had sufficiently alleged prejudice, because they now had alleged that, absent the violations, they "would have persuaded a majority of the City

Councilmembers to vote differently and a different result would have been probable." (The order after hearing was not entered until April 23, 2018.)[1]

Shortly thereafter, the Judge assigned to the case, the Honorable Barry P. Goode, retired. The matter was assigned to this Court.

Respondent answered the Seconded Amended Petition, some discovery took place, and the matter proceeded to trial. The matter was tried to the Court, based largely on stipulated evidence, including portions of depositions, and the Administrative Record. It was taken under submission on October 9, 2018.

On October 22, 2018, the Court issued a Tentative Decision and Proposed Statement of Decision, pursuant to CRC 3.1590(c)(1). Pursuant to CRC 3.1590(g), any party was permitted to serve and file objections to the Proposed Statement of Decision within fifteen days of service of the Proposed Decision. Petitioners served extensive objections on November 6. Because of the extensive nature of the objections, on November 15, the Court issued an order granting Respondent the opportunity to file a response by November 30, which it did. On December 4, without leave of Court, Petitioners filed a reply.

The purpose of the objections is to correct errors and to assure that the principal controverted issues are addressed. Petitioners' objections go far beyond that, extensively revising the decision, rearguing legal issues, and lodging exhibits with the Court that were not

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[1] While at times mentioning various substantive objections to the size and location of the structure, landscaping concerns, and view impacts, Petitioners' claims have been procedural. They have not at any point articulated a cause of action simply arguing that the *substance* of the decision was arbitrary, capricious, or an abuse of discretion.

admitted at trial. Any changes in response to the objections are reflected in the new text. Otherwise, all objections are overruled.

II. FACTS

Mike and Diane Archer own a home in Lafayette, with a tennis court, on a lot of over two acres. On March 17, 2015, they applied for permission to build a cabana for the tennis court, near the front edge of the property. The proposed 1,199-square-foot-structure required a variance and various permits for a number of reasons, including that it would be closer to the lot line than the 20-foot limit ordinarily required in that area. Depending on the size, location, and configuration of the cabana, as well as the surrounding landscaping, the proposed cabana would be seen by neighbors or others going through the neighborhood.

The first point for the application was the Design Review Commission, which held three meetings at which the application was discussed, and ultimately approved it on October 13, 2015. In doing so, the Design Review Condition required a number of changes: a small change in location, limits on exterior lighting, and imposing fencing, drainage, and landscaping requirements. At the Design Review Commission meeting, the applicants were represented by their architect, Richard Sayles. Mr. Sayles was a member of the City Planning Commission, and the "liaison" to the Design Review Commission, which made him an ex officio, non-voting member of the Design Review Commission. He recused himself from participation as a commissioner.

Some of the neighbors appealed to the planning Commission, which reviews the matter de novo, but includes the information submitted before the Design Review Commission, in addition to any new information. After the fourth meeting at which the application was discussed, it was approved, on May 2, 2016. The vote was 3-2, with one commissioner absent,

and with Mr. Sayles abstaining. The Commission explored a number of issues, including an alternative location for the structure, and the applicants themselves proposed some changes to the size and location of the structure. The minutes in the Administrative Record do not show Mr. Sayles as participating in the discussion. He is sometimes recorded as absent. On the vote, he is listed as abstaining.

Some of the neighbors appealed to the City Council, which reviewed the matter de novo, but again includes the information submitted before the Planning Commission and the Design Review Commission, in addition to any new information. After the fourth meeting at which the application was discussed, it was approved, by a 4-1 vote.

At three City Council meetings at which the application was considered (July 25th, September 26th, and October 11th), in addition to the discussion of the application in the public meeting, the matter was discussed in closed session with counsel. The agenda for each of the meetings stated that, before the public meeting, a closed session to discuss threatened litigation would be held. It did not identify the specific matter that would be discussed.

The only written documentation concerning a threat of litigation is a note in the City's application file, which is maintained electronically. The note, written by the planner assigned to the matter, Megan Canales, stated that "on multiple occasions now, on the phone D. Bowie indicated he would take the matter to court if the City denied the project. M. Canales informed M. Subramanian [the City Attorney] of litigation threat." (D. Bowie is the attorney for the Archers.) This database is available for review by going to City Hall and asking a city staff member to provide access to it. It is not available on-line, nor was it otherwise published or distributed to the public.

Petitioners assert that the notation actually was not entered in July, 2016, but in November of 2016. The printed document showing the note states "Copied from Database on 11/3/16 by M. Canales for S. Sommer. Respondent claims this date is the date the note was printed out, not the date it was entered. Based on items in the notation, Respondent appears to be correct. (Moreover, Petitioners have not submitted any evidence about how the computer works and the meaning of the metadata from a witness competent to express an opinion as to the workings of the computer.)

Petitioners also dispute whether such a threat was made. In deposition, the City's Person Most Knowledgeable, Gregg Wolff, stated that he had spoken with the attorney, Mr. Bowie, many times, and recalled no specific statement that he would sue, but only that he would "ensure his client's rights are respected." But Mr. Wolff was not the city staffer who entered the litigation threat note in the record, Ms. Canales was. The preponderance of the evidence supports that the statement in the database was accurate.

In a Staff Report issued July 11, 2016, the City Attorney stated that Mr. Sayles and other commissioners "have not appeared before their own Commissions, voted on applications involving their clients, or attempted to improperly influence staff." The report also discussed the likely remedies if this had occurred, and recommended that the City Council consider adoption of new rules going forward.

Pursuant to the permits, the cabana has been substantially constructed as of the date of trial.

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III. ANALYSIS

A. Brown Act Closed Session Issue

In response to the initial demurrer, the Court previously ruled that the facts as pleaded did not show a violation of the Brown Act, because the closed sessions were justified by a threat of litigation. There is no reason for this Court to revisit that ruling. Moreover, this Court agrees with the prior decision.

The Brown Act allows a city council to meet in closed session where a public meeting would prejudice the agency in pending litigation. (Govt. Code § 54956.9(a).) Even if litigation is not yet filed, it is defined as "pending" under the statute, where "[a] point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency. (Govt. Code § 54956.9(d)(2).) "Facts and circumstances" are then defined for this purpose by subdivision (e) in five separate ways, two of which are debated by the parties. The City relies on subdivision (5), which provides for "[a] statement threatening litigation made by a person outside an open and public meeting on a specific matter within the responsibility of the legislative body so long as the official or employee of the local agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting, which record shall be available for public inspection pursuant to Section 54957.5." Petitioners rely on that language, but also on subdivision (2), which refers to [f]acts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the agency and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda or announced." Whether this closed session was justified under subdivision (2) or subdivision (5)

matters, because subdivision (2) requires a public announcement or agenda statement of the facts or circumstances, while subdivision (5) requires only a record that is "publicly available." There was a statement threatening litigation, bringing the matter under subdivision (5), and therefore requiring only a "publicly available" writing. Petitioners' effort to engraft the "announcement" requirement of subdivision (2) onto subdivision (5) is not consistent with the statutory language.

The issue remains whether the City complied with the "publicly available" requirement of subdivision (5). The Court must give meaning to the fact that the Legislature chose not to require an item on the agenda or a public announcement, as it did under the other provisions. The information was not broadcast or distributed, but it was available to any member of the public who goes to City Hall and asks to review the file. This is both technical compliance and substantial compliance with the law.

B. Due Process Violation

Petitioners' claim that they were denied a fair process is based on a confluence of matters: the closed meetings, the participation of Commissioner Sayles, and alleged bias of staff and the City Attorney.

1. Bias

As a threshold matter, the Court notes that "bias" implies that the person had a pre-judgment of the matter. It does not cover the understandable circumstance in which the officials may have developed views about the matter throughout the application process. With respect to the city staff, no evidence has been produced to indicate that any staff member ever expressed bias or prejudice, at the outset or at any point in the process. They thoroughly analyzed the project, and made recommendations about it. That is not bias, it is doing their job.

With respect to the City Attorney, Petitioners largely rely on the statement made that Mr. Sayles and other commissioners "have not appeared before their own Commissions, voted on applications involving their clients, or attempted to improperly influence staff." To some degree, the parties dispute the meaning of the statement. The City contends that since Mr. Sayles was a Planning Commission member, and only an ex officio member of the Design Review Commission, the statement was correct. Petitioners dispute this interpretation, and also argue that there have been many other instances of such appearances. The proper interpretation is not material to the bias issue. The statement falls well short of anything that would show a bias by the City Attorney that would render her advice to the City a form of bias, let alone one so substantial that it would fatally infect the process.

Moreover, the staff is not the decision maker: the appointed board or commission, or the elected city council is the decision maker. There is no competent evidence that the members of the city council themselves ever expressed any bias.

2. Participation by Mr. Sayles

Petitioners also assert that, in essence, the participation of Mr. Sayles fatally infected the entire process. They allege that his participation violated Government Code section 87100, et seq. Their concern with allowing members of a commission to represent an applicant before that commission is understandable. In response to the City's request, however, the Fair Political Practices Commission opined that, even if a commissioner's appearance at the Design Review or Planning Commission were improper, it would not preclude the City Council from considering the matter as part of their own review. This, of course, does not preclude this Court from considering the issue as part of inquiry into whether the process was unfair or biased.

At the Design Review Commission, advocacy by a member of the "higher" City Planning Commission could affect the Design Review Commission members. When the matter progressed to the City Planning Commission, the other commissioners may be less affected by the fact that Mr. Sayles participated at the "lower" Design Review Commission level, since disagreement with other commissioners may be common. Moreover, there is no evidence that he participated at the City Planning Commission.

Once the matter is elevated to the City Council, there is still less reason for concern: the City Council is aware of and accustomed to the fact that the Planning Commission members voted on the matter and expressed views, yet they often view a matter differently. Nothing offered by the parties, or in the Court's review of the Administrative Record indicates that any of the three bodies "went easy on" the applicants because they were represented by Mr. Sayles, or in any other way supported the contention that his participating affected their decisions.

3. Appearances by Other Commissioners on Other Matters

Separate from the participation by Mr. Sayles on this application, Petitioners have alleged that many Lafayette commissioners have appeared before the commission of which they are a member. They have never directly alleged a cause of action challenging city policy on that issue. Moreover, Government Code section 87100 et seq., while providing penalties for officials who violate its terms, does not provide that local government actions are rendered null and void by any violations committed by local government officials. Thus, the extent to which this practice has occurred, and whether it would be lawful, is not directly at issue in this case. It is, however, a relevant fact that may be considered in determining whether the process was biased or unfair. Considered in that light, it still seems to have had little or nothing to do with the way in which the project was considered or with the result.

At trial, Petitioners submitted an offer of proof, proposing introduction of evidence concerning the extent of the practice. The Court declines to admit this evidence, because, for the reasons stated above, it is not relevant. In addition, under Evidence Code section 352, the time it would consume through expansion of the issues is not sufficiently probative to justify the expansion of the case. Petitioners also claim that the evidence is relevant to the City Attorney's credibility, but for the same reasons, the Court declines to admit it for that purpose.

4. Overbroad Closed Discussions

In addition, Petitioners claim that the closed session discussions were overbroad, i.e., they extended beyond authorized discussion of the litigation threat, into the policy matters that should have been discussed publicly. Petitioners initially sought discovery of the contents of the closed session, but this was properly precluded by the Court based on clear case law. (*Kleitman v. Superor Ct.* (1999) 74 Cal. App. 4th 324, 335.)

Petitioners rely on the deposition testimony of Mr. Guy Atwood, a longtime participant in Lafayette civic matters, who says that he spoke with Mayor Mark Mitchell, who told him that the City Council had discussed the "land use project" in closed session, including that Councilmembers "asked questions about the project and were given answers by the City Attorney and Planning Staff." Discussing the "project" and answering questions about it are an inherent part of discussing the litigation, e.g., discussing the strengths and weaknesses of the threatened suit and the City's defenses. Assuming Mayor Mitchell's statements to Mr. Atwood to be true, they are not sufficient to support the inference that the City Council improperly used the closed session to debate and decide the merits of the project.

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5. Combined Effect

Having considered each claimed infirmity individually, the Court still must consider whether, even if not a material defect on their own, their combined effect tainted the overall process. Even considering their cumulative effect, they did not.

C. Prejudice

With respect to both the Brown Act violations and the Due Process violation, the parties dispute whether an action may be found invalid absent a showing of prejudice. This is another issue upon which Judge Goode ruled, and which the Court sees no reason to revisit. Nonetheless, a showing of prejudice is required. (*North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416, 1433 ["such a technical violation does not automatically nullify or invalidate the actions taken at that meeting[;]" plaintiff "must show prejudice."]) Prejudice does not mean simply that Petitioners were unable to make certain arguments, but that they might have obtained a different result.

As found by Judge Goode, Petitioners Second Amended Petition alleged prejudice sufficient to withstand demurrer by asserting that, absent the alleged violations, "they would have persuaded a majority of the City Councilmembers to vote differently and a different result would have been probable." (Second Amended Petition, Par. 63.)

Even if there were violations, Petitioners have not *proven* prejudice. While they allege that they could have changed the minds of the City Council members, the evidence in the record does not justify that inference. The matter was thoroughly considered and debated over multiple meetings. The vote to approve was 4-1, and the Council heard the views of the dissenting member. The approval, with its substantial conditions and modifications compared to the initial application, suggests a considered, fact-bound review.

D. Mootness

With respect to mootness, given that the Court has found no violation and no prejudice, it declines to address the issue of mootness.

IV. CONCLUSION

The Court finds and declares pursuant to Code of Civil Procedure section 1060 that the holding of closed sessions in the matter did not violate the Brown Act.

As to the other claims in the Petition, for the reasons set forth above, the Petition for Writ of Mandate is Denied.

Respondent is awarded its costs.

Respondent is directed to prepare a judgment.

Dated: December 6, 2018

Edward G. Weil

Judge of the Superior Court

SUPERIOR COURT – MARTINEZ
COUNTY OF CONTRA COSTA
MARTINEZ, CA 94553
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CLERK'S CERTIFICATE OF E-FILE & SERVE

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CASE NUMBER: N16-2322

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STATEMENT OF DECISION

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