Fowler v. City of Lafayette

Court of Appeal of California, First Appellate District, Division Four

February 10, 2020, Opinion Filed

A156525

Reporter

46 Cal. App. 5th 360 | 258 Cal. Rptr. 3d 353 | 2020 Cal. App. LEXIS 215

LORI FOWLER et al., Plaintiffs and Appellants, v. CITY OF LAFAYETTE, Defendant and Respondent.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Subsequent History: Time for Granting or Denying Review Extended Fowler v. City of Lafayette, 2020 Cal. LEXIS 3971 (Cal., June 11, 2020)

Review denied by, Request denied by Fowler v. City of Lafayette, 2020 Cal. LEXIS 4971 (Cal., July 22, 2020)

Prior History: Superior Court of Contra Costa County, No. MSN162322, Edward G. Weil, Judge.

Fowler v. City of Lafayette, 45 Cal. App. 5th 68, 258 Cal. Rptr. 3d 353, 2020 Cal. App. LEXIS 100 (Feb. 10, 2020)

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(8) **(8) Administrative Law § 4—Municipalities—Open Meeting Requirement—Litigation Threat.**

A threat to sue if an agency does not approve a project being considered at an open session may reasonably be understood to relate to or be made in connection with the open session's agenda item. The express language of Gov. Code, § 54956.9, subd. (e)(5), requires a record of the threat to be made prior to the meeting where it will be discussed and then made available for public inspection pursuant to Gov. Code, § 54957.5. That the record is not otherwise subject to disclosure under § 54957.5 is immaterial. Read together, §§ 54956.9, subd. (e)(5), and 54957.5, require public agencies to include with the agenda materials litigation threats to be discussed in closed session.

CA(10) **(10) Administrative Law § 4—Municipalities—Open Meeting Requirements—Violation—Litigation Threat—Prejudice.**

Although the Court of Appeal agreed with plaintiffs that a city violated the Ralph M. Brown Act (Gov. Code, § 54950 et seq.), it concluded there was no prejudice. There was no reasonable argument that plaintiffs lacked a fair opportunity to present their case, that the city failed to consider it fully, or that plaintiffs would have achieved a more favorable result if they had known the city council was also considering a litigation threat in closed session. The action plaintiffs sought to nullify was the approval of a tennis cabaña project, which occurred not in closed session, but in an open session that was properly noticed and at which the city council considered the matter fully after hearing from all interested parties. Thus, this matter did not fall within the terms of Gov. Code, § 54960.1, which authorizes nullification only of an action taken in violation of the specified statutes.

[Cal. Forms of Pleading and Practice (2020) ch. 470B, Public Agency Meetings, § 470B.12.]

Counsel: Larson O'Brien, Scott A. Sommer and Gary S. Garfinkle for Plaintiffs and Appellants.

Keker, Van Nest & Peters, Benedict Y. Hur, Justina Sessions and Neha Mehta for Defendant and Respondent.

Judges: Opinion by Tucher, J., with Pollak, P. J., and Brown, J., concurring.

Opinion by: Tucher, J.

Opinion

TUCHER, J.—The City of Lafayette (the City) approved an application to build a tennis cabaña on a residential property. Lori Fowler, Scott and Jeanne Sommer, Val and Rob Davidson, and Avon and George Wilson (collectively, plaintiffs), all residents of the City, brought this action challenging the approval on the grounds that the City improperly considered the application in closed sessions in violation of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.; the Brown Act) 1 and violated their right to a fair hearing. They appeal after the trial court ruled against them. In the published portion of the opinion, we agree with plaintiffs that the City violated the Brown Act but conclude there was no prejudice. We also reject plaintiffs' other contentions, and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The owners of the property, Michael and Diane Archer (the applicants), sought to build what they called a tennis cabaña (the project) next to a tennis court on their 2.38-acre property. As initially proposed, the 1,199-square-foot cabaña would have included a pavilion with a kitchen for entertaining and a guest room with a full bathroom. In March 2015, they applied through their architect for approval of the project. Through the course of the design review, the applicants made changes that eliminated the need for a setback variance and removed the kitchen from the proposed building. The City's design review commission (DRC) approved the project, with conditions of approval requiring the applicants to record a landscape maintenance agreement and a deed restriction preventing the cabaña from being used as a secondary dwelling unit.

Plaintiffs are neighbors of the applicants who objected that the tennis cabaña was inconsistent with the neighborhood and too close to an adjacent home, such that it would subject the occupants to noise and loss of privacy. They appealed the DRC's action to the City's planning commission (Planning Commission), asserting a number of objections to the project: that it was an illegal second unit; that it violated a landscape condition of approval imposed in 1990, when the tennis court was approved; that the building was too large, too close to neighboring residences, and inconsistent with the City's general plan and municipal code; and that the notices of DRC hearings were inadequate and violated the Brown Act. A supporting letter also raised the concern that the applicants had an unfair advantage in the review process because their architect was a member of the Planning Commission.

The City's Planning Commission considered the matter at four meetings between December 2015 and May 2016. During the course of those meetings, the applicants made additional changes to the project, shaving its size to 1,100 square feet and decreasing its height, while increasing the distance from the cabaña to a neighboring project, and improving landscaping. The Planning Commission approved the project subject to conditions of approval including the landscape agreement and the prohibition on use as a secondary dwelling unit.

Plaintiffs appealed the matter to the City Council. They argued that the project violated the 1990 landscape condition of approval; that it improperly expanded the use of the tennis court, which they asserted was a nonconforming use under the City's ordinances; that it was an illegal second unit; that the restrictions on use would not bind future owners of the property; and that consideration should be given to locating the cabaña on another portion of the applicants' property, farther from neighbors' homes.

The City Council considered the appeal at four meetings: July 11, July 25, September 26, and October 11, 2016. At the final meeting, the City Council denied the appeal and upheld the Planning Commission's approval of the application, subject to conditions, on a four-to-one vote.

While approval was pending, the applicants' attorney threatened to sue the City if it denied the project, and the City Council discussed the threat of litigation during closed sessions held before the July 25, September 26, and October 11, 2016 meetings. An entry in the “Notes” field in the City's “Application Database” for the project—between notations indicating that the appeal to the City Council had been received and that the appeal was scheduled for a July 11 hearing—states: “On multiple occasions now, on the phone D. Bowie [David Bowie, the applicant's counsel] indicated he would take the matter to court if the City denied the project. M. Canales [Megan Canales, an assistant planner who worked on the application] informed M. Subramanian [Mala Subramanian, City Attorney] of litigation threat.”

Subramanian notified the City Council of the litigation threat orally, rather than in written form, in the July 25, 2016 closed session. That a threat of litigation had been made with respect to this specific project was not noted in the agenda for any of the public meetings, and there was no mention of it in any of the packets of information—including staff reports and agenda attachments—that were made available to the public for inspection in City offices and online before the meetings. The agendas simply record that the City Council would confer with legal counsel in closed session about one case of anticipated litigation, without identifying the case. In order to see the notation regarding the threat of litigation in this matter, a member of the public would have to visit the City's “planning counter,” speak with a planner, and ask to see the project's “notes field.” The computer network that included that information was password protected, and there was no indication the Notes in the project's application database were printed out until after the City Council reached its decision.

Plaintiffs did not learn that Bowie had threatened litigation or that the City Council had discussed the matter in closed sessions until November 2016, after the project had been approved.

Plaintiffs brought a petition for writ of mandate (Code Civ. Proc., § 1085) and complaint for injunctive and declaratory relief challenging the City's decision. The operative second amended petition alleges the City violated the Brown Act by discussing the application in closed hearings, and that plaintiffs were deprived of their right to a fair hearing.

The trial court rejected all of plaintiffs' claims, denied the petition, and entered judgment for the City.

DISCUSSION

I. *Brown Act Violation*

A. *General Standards*

Plaintiffs contend the City violated the Brown Act by failing to announce or make available for public inspection Bowie's statement threatening litigation and by conducting unauthorized and overbroad discussions in closed sessions. Where the facts are undisputed, our review of this challenge is de novo. (*San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637, 642 [209 Cal. Rptr. 3d 305]; *Castaic Lake Water Agency v. Newhall County Water Dist.* (2015) 238 Cal.App.4th 1196, 1204 [190 Cal. Rptr. 3d 151].) However, to the extent the trial court drew factual inferences, we defer to those inferences if they are supported by substantial evidence. (*Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, 178–179 [35 Cal. Rptr. 3d 826].)

The Brown Act requires most meetings of a local agency's legislative body to be open and public. (§ 54953, subd. (a); *Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1321 [5 Cal. Rptr. 3d 776].) It "is intended to ensure the public's right to attend the meetings of public agencies. [Citation.] To achieve this aim, the Act requires, inter alia, that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. [Citations.] The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation by public bodies." (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1511 [178 Cal. Rptr. 3d 168].) The Brown Act is "'construed liberally so as to accomplish its purpose.'" (*Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 525 [245 Cal. Rptr. 3d 236] (*Olson*).)

B. *Closed Sessions Concerning Pending Litigation*

One of the exceptions to the Brown Act's open meeting requirements allows closed sessions for an agency to "confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." (§ 54956.9, subd. (a).) Resolution of the question of whether the City Council gave adequate notice that it was discussing the project in closed session requires a close examination of the statutory provisions regarding pending litigation.

Litigation is considered pending when, inter alia, "[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." (§ 54956.9, subd. (d)(2).) Subdivision (e) of the same statute limits "existing facts and circumstances" in this context to five scenarios, two of which are pertinent to our inquiry: "(2) Facts 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*," and "(5) 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*. ..." (§ 54956.9, subd. (e)(2) & (5), italics added.)

The first question we must decide is whether subdivision (e)(2) or (e)(5) of section 54956.9 applies to this case. This question is significant because of the different requirements for notifying the public of a litigation threat: there is no dispute that the threat was not publicly stated on the record, as would be required if subdivision (e)(2) governed; but the parties dispute vigorously whether the City's actions in including the threat in the project's Notes field satisfied subdivision (e)(5)'s requirement that a record of a litigation threat be made available for public inspection pursuant to section 54957.5. Plaintiffs contend that the threat of litigation fell not only within subdivision (e)(5) of section 54956.9, but *also* within subdivision (e)(2)'s broad enumeration of "[f]acts and circumstances, including, *but not limited to*, ... [a] transactional occurrence that might result in litigation ... ," and that the City was therefore obligated to publicize when it would be

discussing potential litigation over the project.

On this point, the City has the better of the argument. On its face, section 54956.9, subdivision (e)(2) appears to apply to events that might themselves give rise to litigation, such as "an accident" or "disaster," or a "transactional occurrence that might result in litigation." But even assuming this language could be stretched to include a threat of litigation based on a pending application, we must bear in mind the well-established rule of statutory construction that "'"[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates."'" (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 895 [89 Cal. Rptr. 2d 834, 986 P.2d 170]; accord, *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 365 [105 Cal. Rptr. 3d 760].) Subdivision (e)(5) of section 54956.9 specifically addresses a public agency's obligations when a person has threatened litigation outside a public meeting. Like the trial court, we conclude this provision, and not subdivision (e)(2), applies here.

We next ask whether the City complied with its obligation under section 54956.9, subdivision (e)(5) to "make[] 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." Plaintiffs contend the record of the threat was not created until November 2016—after the project was approved—pointing out that the printed copy of the Notes field from the "Application Database" for the project (referred to by the parties as the "Bowie Statement") states at the bottom, "Copied from Database on 11/3/16 by M. Canales for S. Sommer," and the metadata for the entry does not reflect an earlier date. The trial court concluded, however, that the November 3, 2016 date merely reflects the date the Notes field was printed in response to a request by one of the plaintiffs, not the time each item in the Notes field was entered. This conclusion is reasonable, and the location of the Bowie statement in the database—*between* notes of the appeal to the City Council and of the scheduled July 11, 2016 date for the appeal to be heard—suggests the note was most likely entered before July 11, 2016.

C. *Availability of Agendas and Other Writings*

So far, we have agreed with the trial court. We depart from it, however, on whether the City met its duty to make the record of the statement threatening litigation "available for public inspection *pursuant to Section 54957.5*." (§ 54956.9, subd. (e)(5), italics added.) Section 54957.5 directs public agencies to disclose agendas of public meetings and other writings that are distributed to members of a local agency in connection with open meetings. Specifically, section 54957.5, subdivision (a) dictates that such agendas and writings are disclosable public records that must be made available on request without delay. And section 54957.5, subdivision (b) requires that, if the writing is distributed less than 72 hours before the meeting, it must be made available at a location specified in the agenda or be posted on the agency's Web site. 2

The City argues it complied with these provisions by making the Bowie statement available for public inspection when it entered it in the Notes section of the Application Database, which any member of the public could inspect by going to the Planning Commission and asking to see the project notes. The City contends its obligation was limited to making the Bowie statement available for public inspection at city offices, not to *distributing* it in the agenda packet where, as here, it was not distributed in written form to the City Council.

This argument is unconvincing. Where litigation has been threatened outside a public meeting, it may be discussed in closed session under section 54956.9, subdivision (e)(5) *only* if a record of the threat is made before the meeting, which record must be made available for public inspection *pursuant to section 54957.5*. (§ 54956.9, subd. (e)(5).) The clear import of section 54957.5 is that agendas and other writings that the legislative body receives in connection with a meeting should be available to the public upon request. Mostly, these are documents relating to agenda items for the open session of the meeting (e.g., § 54957.5, subd. (b)(1)), but section 54956.9, subdivision (e)(5) requires the same for documented threats associated with an agenda item for the closed session as well. The only reasonable inference is that a record of a litigation threat to be discussed in closed session must be included in the agenda packet made available upon request before a meeting. (See *Citizens for a Green San Mateo v. San Mateo County Community College Dist.* (2014) 226 Cal.App.4th 1572, 1596 & fn. 5 [173 Cal. Rptr. 3d 47] [§ 54957.5 requires agenda packet to be made available to the public].)

Section 54957.5 does not explicitly address the situation we face here, in which an electronic record of the litigation threat was made but *not* distributed in written form to the legislative body. The City appears to take the position it can avoid its responsibility to include a record of the threat in the agenda packet by the simple expedient of conveying the threat to the legislative body orally, rather than in writing. But the statutory scheme does not allow an agency to thwart its duty of public disclosure in this manner. Read

together, sections 54956.9 and 54957.5 contemplate that a litigation threat will be reduced to writing and included in the agenda materials available to the public upon request. The threat here was entered in the City's computer system, and it was conveyed to the City Council as the basis for a closed session. Under sections 54956.9, subdivision (e)(5) and 54957.5, a record of the threat should have been included in the agenda packet made available at City offices.

The City disputes this conclusion, contending the notation regarding the threat was available for inspection in City offices upon request. But this availability is illusory if an interested person would not know the question to ask. We reiterate that the Brown Act is intended to "facilitate public participation in all phases of local government decisionmaking" (*Golightly v. Molina, supra*, 229 Cal.App.4th at p. 1511), and that we must construe it *liberally* to accomplish its purpose (*Olson, supra*, 33 Cal.App.5th at p. 525). Members of the public are entitled to rely on the agenda and packet made available upon request (see § 54957.5, subd. (a)), and the City has drawn our attention to no authority suggesting an interested citizen must, in addition, go to the planning counter, speak to a planner, and ask the planner to pull up the Notes field of an application file in a password-protected computer system to determine whether the legislative body has received a litigation threat that might properly be the basis of a closed session.

The City also suggests that it was not required to make the litigation threat available as part of the agenda materials because the threat related only to the closed session, not to an item discussed in open session. (§ 54957.5, subds. (a) & (b).) This point fails. First, a threat to sue if an agency does not approve a project being considered at an open session may reasonably be understood to relate to or be made in connection with the open session's agenda item. Second, the express language of section 54956.9, subdivision (e)(5) requires a record of the threat to be made "prior to the meeting" where it will be discussed and then made "available for public inspection pursuant to Section 54957.5." That the record is not *otherwise* subject to disclosure under section 54957.5 is immaterial. Read together, sections 54956.9, subdivision (e)(5) and 54957.5 require public agencies to include with the agenda materials litigation threats to be discussed in closed session.

D. *Other Brown Act Challenges* * [NOT CERTIFIED FOR PUBLICATION]

E. *Nullification of Agency Action*

Our conclusion that the City violated the Brown Act does not end the matter. Section 54960.1 authorizes a court to find null and void an action taken in violation of specified portions of the Brown Act—sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 3—and plaintiffs urge that the project approval is null and void under this provision.

We are not persuaded. Plaintiffs' complaint is that they were not informed that Bowie had threatened litigation before the City Council discussed the threat in closed session. But the action they seek to nullify is the approval of the cabaña, which occurred not in closed session, but in an open session that was properly noticed and at which the City Council considered the matter fully after hearing from all interested parties. Thus, this matter does not fall within the terms of section 54960.1, which authorizes nullification only of "an action taken ... in violation of [the specified statutes.]" (§ 54960.1, subd. (a).)

Relatedly, plaintiffs' claim for nullification fails because they have not shown prejudice from the Brown Act violation here. We do not set aside an agency's action unless the appellants show the violation caused prejudice. (*Olson, supra*, 33 Cal.App.5th at p. 522; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1410 [44 Cal. Rptr. 3d 128].) This rule has been consistently stated in cases construing the Brown Act and analogous law. (See *Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 671 [107 Cal. Rptr. 3d 36] (*Galbiso*) ["in light of the long history of this assessment dispute and litigation in which both parties were well aware of the other side's position and arguments, no prejudice is apparent"]; *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556 [35 Cal. Rptr. 2d 782] (*Cohan*) ["highly unlikely" more people would have attended hearing to support appellant's position if matter had been properly placed on agenda]; see also *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416, 1433–1434 [83 Cal. Rptr. 3d 636] [considering failure to comply with 10-day advance notice requirement of analogous Bagley-Keene Open Meeting Act, § 11120 et seq.].)

Plaintiffs argue that the language in these cases is mere dictum and should be disregarded. Not so. The court in *Cohan* found a Brown Act violation, noted the requirement of prejudice to invalidate a decision, and explained the reasons that there was no showing of prejudice. (*Cohan, supra*, 30 Cal.App.4th at p. 556.) In *Galbiso*, the lack of prejudice was an alternate basis for the court's decision. (*Galbiso, supra*, 182 Cal.App.4th

at p. 670; see *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1996) 50 Cal.App.4th 1542, 1549 [58 Cal. Rptr. 2d 371] [where two independent reasons are given for decision, neither is considered mere dictum].)

Plaintiffs also argue that the language of section 54960.1 forecloses a prejudice requirement, but we disagree. The statute sets forth five circumstances in which a challenged action "shall not be determined to be null and void" (§ 54960.1, subd. (d)), but this language does not imply the converse—that a challenged action *must* be set aside, even without a showing of prejudice, unless one of these enumerated circumstances prevails. Had the Legislature intended that result, we assume it would have chosen different language. (See, e.g., § 54957 [action taken in violation of statute "shall be null and void"]; *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 682 [98 Cal.Rptr.2d 263].) Plaintiffs thus give us no reason to repudiate the rule that an action will not be invalidated for violation of the Brown Act absent a showing of prejudice.

There has been no showing of prejudice here. The application was thoroughly considered at four open meetings at which the City Council considered plaintiffs' appeal. The minutes of the discussion at the July 11, 2016 meeting devote more than 20 pages, representing more than an hour and a half of meeting time, to this issue. The minutes record there was a staff summary of the project; questions by the mayor and council members and responses by staff and the City Attorney; comments by applicant Michael Archer and attorney Bowie in support of the project; extensive comments in opposition to the project by Lori Fowler and Scott Sommer, two of the plaintiffs; public comments by other neighbors opposed to the project; and discussion among the mayor and members of the City Council. The discussion at the July 25, 2016 hearing covered more than 25 pages of the meeting's minutes and was again exhaustive, as were the discussions at the September 26 and October 11, 2016 hearings. There is no reasonable argument that plaintiffs lacked a fair opportunity to present their case, that the City failed to consider it fully, or that plaintiffs would have achieved a more favorable result if they had known the City Council was also considering the litigation threat in closed session.

In an effort to show prejudice, plaintiffs argue that had they known the litigation threat was being discussed in closed session, they could have distinguished the issues in this matter from those in another matter the City Council was considering in the closed session, in which Bowie also represented the applicant. But there is nothing to suggest that the City Council did not understand or differentiate the issues before it in the two matters, and we will not indulge in such speculation. And even if appellants had known that the City Council was discussing Bowie's litigation threats, they would not have been privy to, or in a position to rebut, comments made in closed session.

Plaintiffs also argue that they might have achieved a more favorable result from newly elected City Council members who took office a few weeks *after* the project was approved. But speculation about what future council members might have done if the matter had been delayed is irrelevant to whether plaintiffs were prejudiced by the Brown Act violation that actually occurred.

Plaintiffs argue that the rule that we reverse only for prejudicial Brown Act violations is strictly limited to minor technical violations, such as, for instance, a city council's action in "'amending'" an agenda at a meeting to consider a new item. (*Cohan, supra*, 30 Cal.App.4th at p. 555.) But the surest way to distinguish what might be called minor or technical violations from violations that require us to nullify an official act is to examine whether a party has been prejudiced. (Compare *Cohan, supra*, 30 Cal.App.4th at p. 556 with *Sounhein v. City of San Dimas* (1992) 11 Cal.App.4th 1255, 1260–1261 [14 Cal. Rptr. 2d 656] [failure to provide notice and public hearing when considering adoption of zoning ordinance not harmless as "mere minor technical defect," but deprived residents affected by ordinance of opportunity to have concerns and welfare considered].) Thus, *Horn v. County of Ventura* (1979) 24 Cal.3d 605 [156 Cal. Rptr. 718, 596 P.2d 1134], on which plaintiffs rely, requires notice and a hearing to neighboring landowners only where a city's land use decisions "result[] in 'significant' or 'substantial' deprivations of property." (*Id.* at p. 616.)

Here, where the challenged action was taken in open session after the merits and demerits of the project had been exhaustively debated in multiple City Council meetings, and where there is no basis to assume the closed sessions were themselves improper or that the City Council failed to understand the issues raised in them, we see no basis for inferring prejudice from the City's failure to disclose in the meeting packet the applicant's litigation threat.

II., III. * [NOT CERTIFIED FOR PUBLICATION]

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

Pollak, P. J., and Brown, J., concurred.

A petition for a rehearing was denied March 11, 2020, and the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied July 22, 2020, S261744.

Footnotes

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I.D., II., and III. of the Discussion.

---

1 All undesignated statutory references are to the Government Code.

2 Section 54957.5, subdivision (a), provides that "agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records ... and shall be made available upon request without delay."

Subdivision (b)(1) of section 54957.5 provides: "If a writing that is a public record under subdivision (a), and that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency, is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection pursuant to paragraph (2) at the time the writing is distributed to all, or a majority of all, of the members of the body."

Under subdivision (b)(2) of section 54957.5, "A local agency shall make any writing described in paragraph (1) available for public inspection at a public office or location that the agency shall designate for this purpose. Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency. The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting."

* See footnote, *ante*, page 360.

3 These statutes involve the Brown Act's requirements for open meetings (§ 54953), posting agendas (§ 54954.2), closed session item descriptions (§ 54954.5), meetings regarding new or increased taxes or assessments (§ 54954.6), special meetings (§ 54956), and emergency meetings (§ 54956.5).