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April 12, 2019

San Francisco Bay Area Rapid Transit District Board of Directors
C/o District Secretary Patricia K. Williams
300 Lakeside Drive, P.O. Box 12688
Oakland, CA 94604-2688
VIA E-MAIL: boardofdirectors@bart.gov; bevan.dufty@bart.gov; records@bart.gov

**DEMAND LETTER TO CURE OR CORRECT BROWN ACT VIOLATIONS AT
MARCH 14, 2019 BOARD SPECIAL MEETING**

Dear President Dufty and Directors:

I represent Livable California, Inc. (LC) and Community Venture Partners, Inc. (CVP), in regard to matters related to the special meeting held by the San Francisco Bay Area Rapid Transit District Board of Directors, on March 14, 2019.

Complainant New Livable California, Inc. (d/b/a Livable California), a San Francisco-based California nonprofit corporation (#C4126310), is a statewide coalition of elected officials and community leaders who work together to educate, network and advocate for community interests around land use, zoning, transportation, and housing issues. Its mission is: (1) to empower communities to take action to support local community planning and decision making with the goal of an equitable and sustainable future for California; and (2) to grow and sustain communities that meet the needs of individuals and families, governed by locally elected City Councils and Boards of Supervisors, in collaboration with regional agencies, and free from undue influence of big business and Sacramento.

Complainant Community Venture Partners, Inc. is a Bay Area-based California nonprofit organization (#C3586411) that facilitates and assists community-based projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental sustainability. CVP is committed to the need for a transparent, "bottom up" public process that incorporates under-served community voices into government decision-making. The projects, events, programs and services offered by Community Venture Partners address a variety of community, local and regional issues related to city, county and regional planning, community involvement, affordable housing, sustainable development, and social and environmental impacts of development. CVP takes every opportunity to promote community voices on these issues.

This letter is to call your attention to substantial violations of central provisions of the Ralph M. Brown Act and Article I, Section 3 of the California Constitution, by the San Francisco Bay Area Rapid Transit District Board of Directors (hereinafter "BART Board"), which jeopardize the finality of actions taken by your Board on March 14, 2019. This letter demands that you cure or correct past violations and cease and desist from future violations.

The nature of the violation is as follows. In its special meeting of March 14, 2019, the BART Board took action to support Senate Bill 50. The action taken was not in compliance with the Brown Act and Article I, Section 3 of the California Constitution, because there was no adequate notice to the public and there was no finding of fact by the BART Board that urgent action was necessary on a matter unforeseen at the time the regular meeting agenda was posted.

Government Code § 54954.2(a)(3) states in part, "No action or discussion shall be undertaken on any item not appearing on the posted agenda." The action taken by the Board on the S.B. 50 legislation was not in compliance with § 54954.2(a)(3) because there was insufficient notice to the public. The posted agenda of the March 14th regular meeting did not include the S.B. 50 item and the CASA-related legislation was not an action item. The special meetings was improperly called. Further, the Brown Act creates specific agenda obligations for notifying the public with a "brief description" of each item to be discussed or acted upon. Government Code § 54954.2(a)(1). No adequate description was provided to the public and in fact the description provided was inaccurate. A major objective of the Brown Act is to facilitate public participation in all phases of local government decisionmaking and to curb misuse of democratic process by secret legislation by public bodies. *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal. App. 2d 41, 50.

Government Code §54954 requires BART to provide "the time and place for holding regular meetings." On this basis, a BART Board regular meeting was scheduled for March 14, 2019 at 9:00 a.m. In accordance with § 54954.2(a)(1), the BART District Secretary issued an agenda at least 72 hours before the regular meeting. The regular meeting agenda included an Item 6.B., which stated: "Metropolitan Transportation Commission Update. * a. CASA (Committee to House the Bay Area) b. Plan Bay Area 2050 For information." At the bottom of the page is the statement "* Attachment available", indicating that the agenda packet contained additional information. The regular meeting agenda packet was 32 pages long. The attachment that pertained to Item 6.B. was a one-page memorandum from General Manager Grace Crunican to the Board of Directors dated March 7, 2019 concerning "SUBJECT: MTC Presentation on the CASA Compact and Plan Bay Area 2050." It appeared on page 31 of the regular meeting agenda packet. The memo states in part,

At the March 14th, BART Board meeting, Ken Kirkey, MTC's Integrated Planning Department Director, will present two **information items. CASA. ...** As discussed at the February 28th BART Board meeting, **BART staff will return at a later date to seek the Board's position on the numerous CASA-related bills in this state legislative session. Plan Bay Area. ...** Staff will return to the Board later this spring to seek approval of a list of projects for submittal to MTC. [Bold typeface emphasis added.]

The BART Board regular meeting agenda for March 14, 2019 clearly stated that the CASA item was "[f]or information," not action. The accompanying agenda item memo from General Manager Crunican clearly stated, "two information items ... BART staff will return at a later date to seek the Board's position on the numerous CASA-related bills in this state legislative session." The regular meeting agenda placed the public on notice that there would be no action taken at the March 14th regular meeting concerning the Board's position on CASA-related bills in the 2019 state legislative session, implicitly including S.B. 50.

Despite the fact that an agenda had already been posted for the BART Board regular meeting on March 14, 2019 at 9:00 a.m., BART Board President Bevan Dufty called a special meeting for March 14, 2019 at 9:00 a.m., precisely the same day and time as the regular meeting.

Complainants contend that this special meeting was held in violation of the Brown Act. The special meeting notice is believed to have been issued sometime after 4:00 p.m. on March 11th. The special meeting notice was revised 4:00 p.m., March 12th, according to text on its face.

The BART Board's March 14, 2019 special meeting consisted of a single action item: "State Legislation for Consideration: Senate Bill 50 (Wiener) – Planning and zoning: housing development: equitable communities incentive.* Board requested to support." The Metropolitan Transportation Commission, which convened CASA, regards S.B. 50 as a CASA-related bill, as does BART. The call of the special meeting to take action to support S.B. 50 was an illegal effort to "amend" regular meeting agenda item no. 6.B., in which the BART Board was to consider "CASA" "[f]or information" only.

During the special meeting, Director Debora Allen asked BART staff and President Dufty to explain why the special meeting was called (meeting video at 31:45):

I want to ask staff: Why now? Why do we need to rush? And we are rushing to support this and that's really illustrated by the call of a special meeting on Monday to address this. Usually we do special meetings for things that are really urgent. So we called a special meeting. We've had over 300 comments from constituents, people, writers, that I know I haven't had ample time to read through. I've been presented with a number of things here at the dais that I haven't been able to read through. And in fact, the amendments were made – I got the amendments on mid-day Tuesday and I haven't been able to actually thoroughly analyze those amendments and talk to other stakeholders about the impacts of those amendments. So why are we addressing this today in such a hurry?

President Dufty replied to Director Allen (meeting video at 33:10):

... I knew that one of our colleagues had requested that it come before this meeting, that I requested that the District Secretary calendar this special meeting. So it really was out of a concern by me that if a colleague has requested something, if there's an extraordinary circumstance that would make you question whether to move it, at least I think the Board President should have been talked to and resolve it. And so I simply felt from a standpoint of this how we operate as a Board of Directors, and I want to respect any of us that would have made that request that I asked for this special meeting. So it really is something that I initiated.

President Dufty then asked BART administrators to offer an explanation for the call of the special meeting. An administrator simply replied, "The president has the right to schedule the meeting and the president scheduled the meeting." (Meeting video at 34:22.)

President Dufty issued the special meeting notice in circumvention (and therefore violation) of the provision of the Brown Act that allows a legislative body to take immediate action on an item not on the posted agenda. Government Code § 54954.2(b)(2) says in part, "Upon a determination by a two-thirds vote of the members of the legislative body present at the meeting,

or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted.”

Absent a properly agendized item, the legally proper way for the BART Board to take action on S.B. 50 at its March 14th meeting would have been a motion to that effect during the regular meeting, along with findings that there was a need to take immediate action that came to the attention of BART after the regular meeting agenda had been posted. However, the BART Board never articulated an immediate need for action that came to the attention after the agenda had been posted. Moreover, courts do not defer to legislative bodies’ findings of an “urgency” exemption. *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App. 4th 547, 556-57 (“[W]e agree with the trial court that no “urgency” exemption existed.”).

Given these limitations, perhaps President Dufty did not believe that he could muster the necessary six votes, so he called the special meeting to circumvent this hurdle. President Dufty and the unnamed colleague whom he alleged had requested the special meeting were just two votes. If a Board minority could persuade a Board President to call a special meeting as a backdoor way of amending a regular meeting agenda, then the urgency clause under §54954.2(b)(2) and its majority vote requirement would be a dead letter, along with the 72-hour agenda posting requirement. As this would essentially eviscerate the Brown Act agenda requirement, courts take a skeptical view of special meetings called on regular meeting dates.

In *South Central Farmers Action Fund, et al. v. City of Los Angeles, et al.* (2010), the court ruled against the Los Angeles City Council for its practice of calling special meetings on the days of regular meetings (Los Angeles County Superior Court Case No. BS117561). David Zahniser of the *Los Angeles Times* wrote about this decision on January 12, 2010 (“L.A. City Council violated open meeting law, judge tentatively rules.”) According to the *Times* article, “[T]he council violated state law by convening its special session in the middle of its regular Aug. 15 meeting.” On April 21, 2011, Los Angeles Mayor Antonio Villaraigosa approved payment of \$481,279.50 in attorneys’ fees and \$8,942.43 in costs to the prevailing plaintiffs. See Council File No. 10-0640. A City of Los Angeles webpage about the Brown Act now says, “**Special meetings are not a safety net for regular meetings that did not get posted on time.** For example, if you missed the 72-hour agenda deadline for a regular meeting, you cannot simply re-label it as a “special meeting” in order to shorten the posting deadline to 24 hours. You must reschedule the meeting for a day and time different from when the regular meeting would have been held.” (Emphasis in original.) See: <http://empowerla.org/all-about-meetings-how-to-run-one-regular-vs-special-meetings-agenda-posting-public-comment/>

Many California local legislative bodies are subject to Sunshine Ordinances. The March 14, 2019 BART Board special meeting would have been indisputably illegal under the City of Oakland’s Sunshine Ordinance. Oakland Municipal Code § 2.20.070(F) says, “Special meetings may not be noticed on the same day as a previously scheduled regular meeting that was not noticed in compliance with this chapter if the special meeting is called to consider any of the items that were included in the notice for such regular meeting.” Unlike many other legislative bodies in California, the BART Board apparently has not adopted its own rules of procedures.

Complainants assert that they were prejudiced by the action taken by the BART Board to support S.B. 50 at the March 14, 2019 special meeting. Complainant organizations and their members regularly provide written and verbal comments to legislative bodies. As stated *supra*, the regular meeting agenda stated that the CASA legislation item was “For information.” The BART

General Manager's memorandum in the regular meeting agenda packet referred to the business as "information items" and further said, "BART staff will return at a later date to seek the Board's position on the numerous CASA-related bills in this state legislative session." Complainants assert that since the regular agenda and regular agenda packet said that no action would be taken on CASA legislation, there was no need to submit written comments before the regular meeting or to send representatives to speak on the regular agenda item. The regular practice of Complainants Livable California and Community Venture Partners, concerning "information" items, is to view the meeting video after the meeting. Complainants LC and CVP learned about the special meeting on the night of March 13th, but it was too late for it to organize any written or verbal comments from most organizations under its umbrella before 9 a.m. the following morning. Complainants were deprived of access to the information acquisition, deliberative process and opportunity to comment on the S.B. 50 action taken at the special meeting.

Complainants note that the first amended version S.B. 50 since its introduction last December was published on March 11th, the same day that President Dufty issued the BART Board special meeting call. On March 11th, BART records show that even before he informed his own Board of the special meeting, President Dufty arranged for the office of S.B. 50 author Senator Scott Wiener be informed about the special meeting. BART records also show that on March 11th, the staff of Senator Wiener gave to BART advance copies of the amended S.B. 50 and memoranda before their public release. Complainants also note that BART is a beneficiary of S.B. 50 in that it "upzones" BART real property, giving BART an incentive to endorse S.B. 50 as rapidly as possible before other BART stakeholders are able to identify any negative effects of intensified real estate development on BART transit operations, such as impaired station access, loss of commuter parking or passenger capacity constraints, and organize any opposition. As discussed *supra*, BART Director Debora Allen asserted that she lacked time to discuss S.B. 50 effects with stakeholders.

California voters in 2016 passed Proposition 54, a constitutional amendment that generally requires the Legislature to publish on the internet the text of every bill at least 72 hours before passage. See California Constitution, Article IV, Section 8(b)(2). The People of California found, "The opportunity for an orderly and detailed review of bills by the public, the press, and legislators will result in better bills while thwarting political favoritism and power grabs." The amended S.B. 50 was published on March 11th, less than 72 hours before the BART Board supported S.B. 50 at its March 14th special meeting. The BART Board voted in favor of legislation that would have been illegal for the Legislature itself to vote upon at that very instant. Complainants did not have the opportunity for an orderly and detailed review of S.B. 50, as amended on March 11th, and therefore were prejudiced by the action taken by the BART Board at its special meeting.

Complainants also allege that BART directors may have conducted an illegal serial meeting or other attempt to develop a collective concurrence of the Board on S.B. 50 outside of an official meeting. Director Rebecca Saltzman stated during the special meeting, "When I and other directors chatted earlier this week about that it wasn't on the agenda, I wasn't happy about it." (Video at 35:10.) Her comment suggests that three or more directors discussed an item of BART Board business outside of an official meeting. President Dufty also stated during the meeting that he had discussed this item of business with one or two other BART directors in making his decision to call the special meeting. While we acknowledge the authority of BART directors to discuss the need for a special meeting under § 54956, we are concerned that during this extra-meeting discussions the directors developed a collective concurrence not to support the § 54954.2(b)(2) urgency exemption and/or to take a position supporting S.B. 50.

In the event it appears to you that the conduct of the BART Board specified herein did not amount to the taking of action, we call your attention to Government Code § 54952.6, which defines “action taken” for purposes of the Act very expansively. There was “an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion.”

As you are aware, the Brown Act allows the legal remedy of judicial invalidation of illegally taken action. We contend that the BART Board’s action taken at the March 14, 2019 special meeting is null and void and therefore has no validity. Pursuant to Government Code §§ 54960.1 and 54960.2, we demand that the BART Board cure or correct the illegally taken action and cease and desist from future violations as follows:

- (1) your general counsel immediately direct all BART personnel, contractors and other agents to cease all advocacy activities concerning S.B. 50, including but not limited to the cessation of all legislative lobbying activities concerning S.B. 50;
- (2) your Board formally rescind and/or otherwise declare null and void the action taken concerning S.B. 50 at your March 14, 2019 special meeting;
- (3) your Board re-agendize a vote on the S.B. 50 legislation, if the Board so chooses, and faithfully follow the Brown Act’s public notice, agenda, deliberative process and public comment requirements in so doing;
- (4) your Board unconditionally commit that it will cease, desist from, and not repeat the challenged violations of the Brown Act’s special meeting and serial meeting requirements;
- (5) your Board follow the City of Oakland and other Bay Area jurisdictions in adopting a Sunshine Ordinance that includes a provision that expressly forbids BART board special meetings on the same days as regular meetings; and
- (6) your Board adopt formal Rules of Procedure and designate a counsel or parliamentarian to assist your Board and its committees and their members, individually and collectively, in complying with Brown Act and other meeting procedures and related legal requirements.

As provided by §54960.1, you have 30 days from the receipt of this demand to either cure or correct the challenged action, or inform us of your decision not to do so. If you fail to cure or correct as demanded, we are entitled to seek judicial invalidation of the action pursuant to §54960.1, in which case we would seek the award of court costs and reasonable attorney fees pursuant to §54960.5.

We are directing a copy of this letter to Alameda County District Attorney Nancy O’Malley for all appropriate investigatory and prosecutorial action under §§ 54960, 54960.1 and 54960.2.

Sincerely,



JASON A. BEZIS

State Bar No. 225641

Attorney for Complaints Livable California and Community Venture Partners

cc: District Attorney Nancy O’Malley (via e-mail: info@alcoda.org)