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Association of Bay Area Governments Executive Board  
c/o Fred Castro, Clerk of the Board  
Bay Area Metro Center, 375 Beale Street  
San Francisco, CA 94105  
VIA U.S. MAIL and E-MAIL: fcastro@bayareametro.gov; David.Rabbitt@sonoma-county.org

**DEMAND LETTER TO CURE OR CORRECT BROWN ACT VIOLATIONS AT  
JANUARY 17, 2019 ABAG EXECUTIVE BOARD MEETING**

Dear President Rabbitt and ABAG Executive Board Members:

This office represents Livable California, Inc. (LC) and Community Venture Partners, Inc. (CVP), in regard to procedural matters related to the CASA Compact agenda item at the meeting held by the Association of Bay Area Governments Executive Board on January 17-18, 2019.

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 Association of Bay Area Governments Executive Board (hereinafter "ABAG"), which jeopardize the finality of actions taken by your Board on January 17-18, 2019. This letter demands that you cure or correct past violations and cease and desist from future violations.

The nature of the violations are as follows:

**I. ABAG's Secretive Vote on "CASA" Substitute Motion Violated Brown Act; Main Motion Vote Is Null & Void As "Fruit of Poisonous Tree" of Tainted Substitute Motion Vote; Legislature Condemned ABAG's Clandestine Practices.**

In its meeting of January 17-18, 2019 (during the early morning hours of January 18<sup>th</sup>), ABAG took action to reject a substitute motion concerning the CASA Compact and immediately thereafter accepted a main motion concerning the CASA Compact. The actions taken were not in compliance with the Brown Act and Article I, Section 3 of the California Constitution, because ABAG had a legal duty under the Brown Act [Government Code § 54953(c)(2)] to report publicly the individual votes of ABAG Executive Board members on the substitute motion. ABAG's failure to publicly report votes on the substitute motion in accordance with the Brown Act affected the vote on the main motion because that main motion vote was dependent upon the outcome of the substitute motion vote. The main motion vote would not have been held had the substitute motion won a majority vote. The main motion vote arguably was "fruit of the poisonous tree" of the illegally-conducted substitute motion vote and therefore the action taken is null and void.

Government Code § 54953(c)(2) states, "*The legislative body of a local agency shall publicly report any action taken and the vote or abstention on that action of each member present for the action.*" The Legislature and Governor "Jerry" Brown enacted this language in 2013 via SB

751, effective on January 1, 2014. The legislative history of SB 751 explains that critics raised concern that for local agencies with large legislative bodies, the absence of either a roll call vote or a specific tally and report of the votes of each member of a board made it difficult to determine who voted for or against a measure. The legislative history includes the example of the minutes of a May 17, 2012 ABAG meeting that reported that a motion received 27 ayes and 5 nays, without listing the votes of individual members. To address this concern, the Legislature passed SB 751. Therefore, it is both ironic and troubling that ABAG has willfully and intentionally violated this Brown Act provision, which ABAG's own conduct inspired.

## **II. Secretive Vote Captured on Video: Recording Proves Brown Act Violation.**

As demonstrated by ABAG's meeting video recording and in its adopted meeting minutes, the ABAG Executive Board violated Government Code § 54953(c)(2) by failing to publicly report the vote or abstention on that action of each member present for the action at the January 17-18 ABAG meeting on various CASA Compact motions, especially the substitute motion.

Brown Act text is very clear that "action taken" is broadly defined to include votes taken on motions. Government Code § 54952.6 defines "action taken" to include "an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion ..."

Most significant, ABAG failed to publicly report the vote or abstention of each member present for the action on the substitute motion concerning the CASA Compact. ABAG violated Government Code § 54953(c)(2) by conducting the substitute vote with a show of hands instead of a roll call, as the video recording of the meeting tends to demonstrate:

At 5:07:55, President Rabbitt said, "So, if there's no further comment, the – what we have on the table is a substitute motion to deal with first, that was moved and seconded. And I'll paraphrase unless the maker wants to correct it, which is to postpone or have no vote tonight, direct staff to collect and correlate financial impact data. Is that safe? And, uh, I will – Fred, do you want – shall we just do a raise of hands on the, uh – you're good with that or do we need a roll call?"

At 5:09:02, President Rabbitt said, "What we have on the floor, are just two motions to be clear, the substitute motion which we're dealing with first and then the motion that was made by Director Chavez. If anyone needs to do anything after that, we'll deal with it then." At 5:09:12, President Rabbitt turned to Clerk of the Board Fred Castro and asked, "Fred, do you want to do a roll call?" Mr. Castro replied, "It's your call, Mr. President. It's your call."

At 5:09:22, President Rabbitt said, "On the substitute motion, then, I'll ask all those in favor of the substitute motion to raise your, raise your right hand so Fred can see you and count the votes. Ha ha, you gotta pledge." The meeting video captures some, but not all, of the legislative body, during the vote, making it impossible to determine who voted in favor of the substitute motion.

At 5:09:45, President Rabbitt said, "All those in – all those opposed to the substitute motion." The meeting video again depicts some, but not all, of the legislative body, during the vote, making it impossible to determine who voted against the substitute motion.

At 5:10:01, Clerk of the Board Fred Castro stated, "Eighteen no, yes nine." A voice asks, "What was it?" Mr. Castro replied, "Nine yes, eighteen no." President Rabbitt announced, "So the substitute motion fails. And now we'll come back to the motion that's on the floor."

### **III. Names Missing: ABAG Admits Brown Act Vote Violation in Meeting Minutes.**

At its March 21, 2019 meeting, the ABAG Executive Board adopted the minutes of the January 17, 2019 meeting. A snippet of the section concerning the substitute motion is pasted below.

ABAG Executive Board

January 17, 2019

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#### ***Substitute Motion***

**Upon the motion by Gibbons and second by Halliday, postponing authorizing the President to sign the CASA Compact until the next Executive Board meeting and directing MTC/ABAG staff to collect and correlate the responses from cities on the financial and economic impact of the CASA Compact on cities and counties and to present documents, findings, and recommendations to the Legislation Committee and the Executive Board were not approved. The motion failed by the following voice vote:**

**Aye: 9  
Nay: 18  
Abstain: 4  
Absent: 2**

These minutes constitute an adoptive admission of violation of Government Code § 54953(c)(2) as they do not indicate the votes or abstentions of individual members. The names of individual members are not listed next to their vote positions. At no point during the substitute motion vote did the presiding officer or clerk call for those abstaining, yet the minutes show that four members abstained. At no point during the substitute motion vote did the presiding officer or clerk announce who was absent, yet the minutes for the substitute motion vote show two unnamed members absent. When the body voted on the main motion a few minutes later, three absences were recorded, two members who were not present at the beginning of the meeting (Canepa and Yee) plus Director Dave Hudson of Contra Costa County.

A snippet of the January 17, 2019 minutes section concerning the main motion vote is immediately below. Note that in faithful accordance with § 54953(c)(2), individual names are associated with each voting position. The unknown voting members who abstained on the substitute motion (identities illegally concealed) took positions on the main motion vote.

ABAG Executive Board

January 17, 2019

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**encourage housing development without encouraging the inappropriate disposition of public property. This is to be included in the legislative advocacy process. (12) Direct MTC/ABAG staff to compile comments on CASA Compact from Executive Board members to be included in the legislative advocacy process. The motion was approved. The motion passed by the following vote:**

**Aye:** 21 - Arreguin, Arenas, Chavez, Cheng, Clark, Cortese, Diep, Garcia, Gibbons, Gibson, McElhaney, Haggerty, Halliday, Kalb, Mackenzie, Mitchoff, Peralez, Pierce, Rabbitt, Rahaim, Ramos, and Romero

**Nay:** 9 - Andersen, Bogue, Brown, Eklund, Lee, Mandelman, Miley, Pine, and Rodoni

**Absent:** 3 - Canepa, Hudson, and Yee

[18-1138](#)

CASA Compact Authorization to Sign

A request for the Executive Board to authorize the President to sign the CASA Compact.

Director Hudson possibly voted or abstained on the substitute motion and then exited the building in the minutes before the main motion vote, but it is also possible that he actually was absent for the substitute motion vote and that abstain vote total is one too high. This is a good example of why the Legislature amended the Brown Act to require roll call votes on motions and other actions taken – a statutory amendment inspired by the lack of transparency in past ABAG votes – so that individual public officials can be held accountable for their actions and so that collective vote totals reflect actual votes and actual abstentions.

Complainants believe that President Rabbitt and other ABAG Executive Board members intentionally and deliberately violated the Brown Act's public vote requirement in order to discourage "yes" votes on the CASA Compact substitute motion and to encourage "no" votes and abstentions. By failing to engage in a roll call vote, President Rabbitt and other CASA Compact supporters signaled to the body that their votes effectively would be anonymous because individual names would not be associated with their votes on the CASA Compact substitute motion. Powerful special interests support the CASA Compact and opposed the side of the substitute motion. President Rabbitt and other CASA Compact supporters knew that if the substitute motion passed, then the body would not proceed onto a vote on the main motion. President Rabbitt raised his hand to vote "no" on the substitute motion, so he is known to have been hostile to the substitute motion. This hostility likely affected his ability to serve as a neutral and objective presiding officer over the meeting and especially this vote. ABAG staff, especially ABAG legal counsel, should have intervened and advised a roll call vote on the substitute motion because the Brown Act expressly requires that every individual vote or abstention be recorded. The engagement of ABAG staff in knowing and intentional violations of the Brown Act (especially of a Brown Act provision specifically enacted to combat opaque voting practices at ABAG) suggests that they were under political pressure by ABAG administrators, ABAG Executive Board members, and/or outside special interests to do so. Complainants ask District Attorney Gascon and his staff to thoroughly investigate such issues resulting in this illegality.

#### **IV. Substitute and Main Motion Votes on CASA Compact Are Null and Void: Analysis Under Robert's Rules of Order and Rosenberg's Rules of Order.**

The Brown Act violation, especially the lack of individual names supporting, opposing and abstaining on the substitute motion vote, is obvious. On the CASA Compact item at the January 17, 2019 ABAG meeting, the motion to substitute was validly made and seconded. Complainants argue that not only is the "substitute motion" vote null and void, but also is the "main motion" vote null and void because consideration of the main motion depended upon the substitute motion vote. The main motion arguably was "fruit of a poisonous tree." Robert's Rules of Order and Rosenberg's Rules of Order tend to support complainants' contentions.

According to *Robert's Rules of Order, Newly Revised* (11<sup>th</sup> edition), a "substitute" is a form of the motion to amend, one which seeks to replace an entire paragraph, section, article, or the entire motion with new language. Such a motion takes precedence over the main motion. The motion to substitute is considered first. After the motion to substitute is considered, the main motion (either as originally made or as now amended, depending on whether the substitute is adopted) is then considered (see pp. 153-62). "The motion to substitute often provides a convenient and timesaving method for handling a poorly framed resolution, or for introducing a different or better approach to the real question raised by a main motion ... An amendment in the form of a substitute can also be used to defeat or work against the purpose of the measure originally introduced ... It should be noted that **a vote in favor of substituting an entire**

**resolution or main motion is ordinarily a vote to kill any provisions of the original version that are not included in the substitute.”** (p. 157, lines 3-6, 14-16 and 19-22)(emphasis added).

Many California public entities use *Rosenberg’s Rules of Order* to govern their meeting procedures. Under Rosenberg’s Rules of Order, had the substitute motion vote on the CASA Compact item prevailed at the January 17-18, 2019 ABAG meeting, then no vote would have been held on the main motion. Page 3 of Rosenberg’s Rules of Order says, “If the substitute motion *passed*, it would be a substitute for the basic motion and would eliminate it.”

Therefore, under Robert’s Rules of Order and Rosenberg’s Rules of Order, nullification of a substitute motion vote also arguably nullifies any main motion vote that followed it and therefore was dependent upon its outcome. For this reason, the main motion, ABAG’s action taken to permit its President to sign the CASA Compact, is null and void under Rosenberg’s Rules of Order. ABAG President David Rabbitt’s signature is effectively removed from the CASA Compact retroactive back to January 2019.

**V. Chavez’s Midnight Main Motion Mysteriously Materialized: Staff Collusion?**

Complainants also question how the body handled the main motion after the illegal consideration of the substitute motion. Just after the substitute motion vote, Director Chavez presented a revised main motion. She referred to “the sheet that’s in front of all of you that we typed up” (video at 5:10:50). ABAG had contended and still contends that ABAG never endorsed the CASA Compact. Presumably ABAG staff were not and are not empowered to advocate for or against the CASA Compact (before, during and after the January 17, 2019 ABAG vote). Complainants do not understand how Director Chavez’s revised main motion, especially the sheet of paper that Director Chavez referred to, was typed up, printed and distributed, absent assistance from ABAG staff. Just about every public photocopy shop was closed at that hour. Complainants assert that if ABAG staff generated, printed and distributed the Chavez revised main motion, then this is additional evidence of staff and institutional bias against the substitute motion and for the main motion. Staff is supposed to operate at the direction of the legislative body; it is not supposed to direct the legislative body or to favor or disfavor a Board faction.

**VI. Another Brown Act Violation: No Roll Call Vote on Motion to Call Question.**

ABAG also failed to publicly report the vote or abstention of each member present for the action on the motion to call the question on the CASA Compact main motion. This occurred around 5:15:00 in the meeting video. ABAG violated Government Code § 54953(c)(2) by conducting this vote with a show of hands instead of a roll call. Clerk of the Board Fred Castro at 5:15:32 said, “Mr. President, if we could take a roll call vote, please.” Then at 5:15:48, Mr. Castro said, “On the motion to call the question, we don’t need a roll call. I’ll appreciate a roll call for the actual motion.” A show of hands was made, but no vote count taken or announced. At 5:16:01, President Rabbitt announced, “Fred, I think we’re good.” The vote on this motion is entirely missing from the January 17, 2019 meeting minutes adopted by the ABAG Executive Board in March 2019.

**VII. Major Midnight Votes Held Under Duress: Public Transit Closures Loomed.**

Complainants also note that some ABAG Executive Board members appeared to participate and vote at the meeting under duress. The January 17, 2019 meeting extended more than five hours, past midnight, into January 18<sup>th</sup>. At 4:08:00 in the meeting video, just after the substitute motion

was made, a Board member noted that many Board members took public transit to the meeting. A concern was voiced that they would miss the last public transit trips of the night out of the city before the meeting ended. Some took car pools to public transit stations and therefore were dependent upon the departure decisions of other attendees. This issue also might have affected negatively the debate and vote on the substitute motion, especially because some of the ABAG Executive Board members who traveled the longest to San Francisco by public transit also tended to favor the substitute motion and oppose the main motion concerning the CASA Compact. Perhaps the body illegally bypassed required roll call votes in order to save time.

#### **VIII. Complainants Prejudiced: Interests Injured by ABAG's Illegal Conduct.**

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.

Complainants were prejudiced by the action taken by ABAG on the CASA Compact at the January 17-18, 2019 meeting. Complainants contend that CASA Compact issues, especially the actions taken by ABAG on the CASA Compact, affect their core missions as nonprofit organizations. Complainant organizations and their members participated in the January 17-18, 2019 ABAG meeting through verbal and written comments. Complainant organizations and their members are injured by the Brown Act violations that resulted in the actions taken concerning the CASA Compact at the January 17-18 ABAG meeting.

#### **IX. Remedies: Cease Pro-CASA Lobbying, Rescind Illegal Votes, Etc.**

Complainants believe that the actions taken on the CASA Compact at the ABAG January 17-18, 2019 meeting are null and void because the root cause is a violation of Government Code § 54953, which is among the Brown Act statute sections listed in Government Code § 54960.1, which says in part, "any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953 ... is null and void."

In the event it appears to you that the conduct of the ABAG 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 ABAG’s action taken at the January 17-18, 2019 meeting is null and void and therefore has no validity. Pursuant to Government Code §§ 54960.1 and 54960.2, we demand that the ABAG Executive Board and/or General Assembly cure or correct the illegally taken action and cease and desist from future violations as follows:

- (1) your general counsel immediately direct all ABAG personnel, contractors and other agents to cease all advocacy activities concerning the CASA Compact, including but not limited to the cessation of all legislative lobbying activities concerning the CASA Compact, SB 50, SB 330, AB 1487, ACA 1 and other CASA Compact-related bills;
- (2) the members of the ABAG Housing Legislative Working Group immediately be informed of these allegations of illegal conduct as that body is “fruit of a poisonous tree” – that body exists only because of illegal actions concerning the CASA Compact taken at the miscondacted January 17-18, 2019 ABAG Executive Board meeting;
- (3) your Board/Assembly formally rescind and/or otherwise declare null and void the actions taken concerning the CASA Compact at your January 17-18, 2019 meeting;
- (4) your Board/Assembly re-agendize votes on the CASA Compact, if the Board/Assembly so chooses, including the substitute motion, and faithfully follow the Brown Act’s public notice, agenda, deliberative process and public comment requirements in so doing; and
- (5) your Board/Assembly unconditionally commit that it will cease, desist from, and not repeat the challenged violations of the Brown Act, especially the public reporting requirement of the individual vote of every board member.

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.

Elected representatives who serve on the ABAG Executive Board are among the region’s most experienced with the Brown Act. ABAG Executive Board members, administrators, legal counsel and staff should know better than to hold a secretive, off-the-record vote on a controversial dispositive motion in the wee hours of the morning in brazen defiance of a Brown Act provision recently adopted by the Legislature, specifically because of ABAG’s own pattern or practice of clandestine voting behavior. ABAG ought to set a positive example for its members. Therefore, we are directing a copy of this letter to San Francisco District Attorney George Gascón for all appropriate investigatory and prosecutorial action under §§ 54960, 54960.1 and 54960.2.

Sincerely,



JASON A. BEZIS

State Bar No. 225641

Attorney for Complainants Livable California and Community Venture Partners

cc: District Attorney George Gascón (via e-mail: [districtattorney@sfgov.org](mailto:districtattorney@sfgov.org))