

LAW OFFICES OF JASON A. BEZIS
California State Bar No. 225641
3661-B Mosswood Drive
Lafayette, CA 94549-3509
(925) 708-7073
Bezis4Law@gmail.com
Attorney for Petitioners/Plaintiffs

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
07/30/2019
Clerk of the Court
BY: RONNIE OTERO
Deputy Clerk

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

NEW LIVABLE CALIFORNIA (d/b/a
Livable California), a California public benefit
corporation, and COMMUNITY VENTURE
PARTNERS, INC., a California public benefit
corporation,

Petitioners/Plaintiffs,

vs.

ASSOCIATION OF BAY AREA
GOVERNMENTS, a California joint powers
authority, and DOES 1-20,

Respondent/Defendant.

Case No.: CPF-19-516690

**PETITIONERS' OPPOSITION TO
DEMURRER AND MOTION TO STRIKE
BY RESPONDENT TO VERIFIED
PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF FOR
VIOLATIONS OF RALPH M. BROWN
ACT**

Date: August 12, 2019 Time: 9:30 a.m.

Judge: Hon. Ethan P. Schulman Dept.: 302

Reservation No.: 07120812-19

Action Filed: May 31, 2019

Petitioners/Plaintiffs NEW LIVABLE CALIFORNIA and COMMUNITY VENTURE
PARTNERS, INC. oppose the Demurrer and Motion to Strike of Respondent/Defendant
ASSOCIATION OF BAY AREA GOVERNMENTS (hereinafter ABAG) as follows:

I. INTRODUCTION.

Respondent/Defendant ABAG has violated Government Code § 54953(c)(2), a Ralph M.
Brown Act provision enacted in 2013 specifically in response to ABAG's secretive and
anonymous voting practices. (SB 751, Chapter 257, Statutes of 2013, Petition, ¶¶ 10-13.) After

1 several hours of testimony and debate at its January 17-18, 2019 meeting concerning the
2 controversial CASA Compact regional housing initiative, the ABAG Executive Board reverted
3 to its past behavior, now explicitly illegal. A Main Motion sought an immediate vote favoring
4 the CASA Compact, subject to conditions. A Substitute Motion sought a vote to delay action on
5 the CASA Compact matter for two months until the March 2019 Executive Board meeting,
6 among other conditions. In clear violation of § 54953(c)(2), ABAG did not publicly report the
7 votes and abstentions of each member present for the action on the Substitute Motion, nor did it
8 ascertain the identities of voting members absent from the Substitute Motion vote. Respondent
9 has produced no evidence to demonstrate that the “yes” and “no” vote counts were accurate. A
10 few minutes later, the ABAG Executive Board approved by roll call vote an Amended Main
11 Motion, a vote that was held only because the Substitute Motion failed. Acting in an
12 unreasonable, arbitrary and capricious manner, ABAG conducted the Substitute and Main
13 Motion votes differently and unequally, in brazen violation of the Brown Act.
14

15 **II. STANDARD OF REVIEW OF DEMURRER AND MOTION TO STRIKE.**

16 The policy of the law is to construe pleadings “liberally ... with a view to substantial
17 justice.” Code of Civil Procedure § 452. A court cannot sustain a demurrer when the
18 petitioner/plaintiff has stated a cause of action under any possible legal theory. *Palestini v.*
19 *General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 86. Where allegations are subject to
20 different reasonable interpretations, the court must draw “inferences favorable to the plaintiff,
21 not the defendant.” *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238.

22 In ruling on a motion to strike, allegations in the petition/complaint are considered in
23 context and presumed to be true. “(J)udges read allegations of a pleading subject to a motion to
24 strike as a whole, all parts in their context, and assume their truth.” *Clauson v. Sup. Ct. (Pedus*
25 *Services, Inc.)* (1998) 67 Cal.App.4th 1253, 1255. Motions to strike are granted only after careful
26 deliberation. “We emphasize that such use of the motion to strike should be cautious and
27 sparing. We have no intention of creating a procedural ‘line item veto’ for the civil defendant.”
28 *PH II, Inc. v. Sup. Ct. (Ibershof)*(1995) 33 Cal.App.4th 1680, 1683.

1 **III. BROWN ACT VIOLATION ON SUBSTITUTE MOTION RENDERS ACTION**
2 **TAKEN ON MAIN MOTION NULL AND VOID.**

3 Petitioners challenged the validity of the Substitute Motion and Main Motion votes
4 concerning the CASA Compact at the January 17-18, 2019 ABAG Executive Board meeting in
5 demand letters dated April 17, 2019 (Exh. A to Petition), May 16, 2019 (Exh. B) and in their
6 petition to this court filed on May 31, 2019. Government Code § 54960.1(b)(3) says in part, “If
7 the legislative body takes no action within the 30-day period, the inaction shall be deemed a
8 decision not to cure or correct the challenged action.” On May 16, 2019, ABAG replied to
9 Petitioners, “[W]e have determined that no remedial action regarding the Board’s actions is
10 required.” (Exh. C, p. 1, ¶ 2).

11 Petitioners have met their burden in their petition alleging that the Substitute Motion vote
12 was not taken in substantial compliance with Government Code § 54953(c)(2) because neither
13 the presiding officer, nor the board clerk, nor the meeting minutes, publicly reported the vote or
14 abstention on that action of each member present for the action. Petitioners experienced
15 prejudice from this violation. (Petition, ¶¶ 36-37, 76-78.) Government Code § 54952.6 says that
16 “action taken means ... an actual vote by a majority of the members of a legislative body when
17 sitting as a body or entity, upon a motion.” The vote on the Substitute Motion should be deemed
18 null and void under Government Code § 54960.1(a).

19 The scope of the “null and void” remedy should include the Main Motion vote a few
20 minutes later that occurred only because the Substitute Motion vote failed. The preamble of the
21 Brown Act states in part, “In enacting this chapter, the Legislature finds and declares that the
22 public commissions, boards and councils and the other public agencies in this State exist to aid in
23 the conduct of the people’s business. It is the intent of the law that their *actions be taken openly*
24 and that their deliberations be conducted openly.” Government Code § 54950 (emphasis added).
25 “[T]he Brown Act is a remedial statute that must be construed liberally so as to accomplish its
26 purpose.” *Epstein v. Hollywood Entertainment Dist. II Business Improvement Dist.* (2001) 87
27 Cal.App.4th 862, 869.

28 Main and substitute motions are intertwined; consideration of a main motion depends
upon the failure of a substitute motion. *Robert’s Rules of Order, Newly Revised* (11th edition)

1 state, “[A] vote in favor of substituting an entire resolution or main motion is ordinarily a vote to
2 kill any provisions of the original version that are not included in the substitute.” (Petition, ¶
3 41). *Rosenberg’s Rules of Order* say, “If the substitute motion *passed*, it would be a substitute
4 for the basic motion and would eliminate it.” (Petition, ¶ 42).

5 Case law interpreting Government Code § 54960.1 supports Petitioners’ argument that
6 the “null and void” remedy is broad and expansive, with a single Brown Act violation cause of
7 action nullifying and voiding more than just the issue, item or action taken that is initially found
8 to violate § 54960.1. In *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216
9 Cal.App.4th 1167, a county planning commission posted an agenda with a single item of
10 business, approval of a project to subdivide 380.45 acres into nine parcels. However, at the
11 meeting the commission approved the subdivision and adopted a related CEQA mitigated
12 negative declaration (MND), which was not on the posted agenda. Plaintiffs filed a petition for
13 writ of mandate seeking to have the project approval and adoption of the MND set aside. The
14 county denied that the Brown Act had been violated, but the commission rescinded both the prior
15 approval of the project and the adoption of the MND, then reapproved and readopted same. *San*
16 *Joaquin*, 216 Cal.App.4th at 1172, fn. 8. The court of appeal found that the MND was “plainly a
17 distinct item of business, and not a mere component of project approval ... Because the
18 Commission discussed and adopted the MND at its October 14, 2009, meeting even though that
19 matter was not set forth on the meeting agenda, it violated the Brown Act.” 216 Cal.App.4th at
20 1177. Similarly in the case at bar, although the CASA Compact Substitute Motion was a distinct
21 motion, the Brown Act violation associated with it also invalidated the interrelated and
22 dependent CASA Compact Main Motion, which was amended after the Substitute Motion failed.

23 In *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, a town council
24 approved three resolutions concerning an initiative measure and a related memorandum of
25 understanding (MOU) between the Town and Walmart. The posted agenda and agenda packet
26 “did not include any information regarding the MOU, which was adopted by Town.”
27 *Hernandez*, 7 Cal.App.5th at 208. The court held:

28 In none of the documents was the “item of business” that Town council was going
to accept a gift from Walmart in order to pay for a special election to pass the

1 Initiative. Hernandez was given no notice that this important “item of business”
2 was going to be voted on at the Town council meeting. Here, Town's action of
3 putting the Initiative on the ballot was properly found null and void by the trial
4 court as the Town council's decision to put the Initiative on the ballot was made in
5 violation of the Ralph M. Brown Act. 7 Cal.App.5th at 209.

6 The court did not limit the remedy to nullification and avoidance of the Walmart MOU, but
7 instead broadly declared null and void all related actions taken associated with putting the
8 initiative on the ballot. Similarly in the case at bar, the nullification and avoidance of the CASA
9 Compact Substitute Motion due to Brown Act violation should result in the nullification and
10 avoidance of the related and subsequent action taken on the CASA Compact Main Motion.

11 Although Petitioners characterized the broad scope of the Government Code § 54960.1
12 “null and void” remedy as “fruit of the poisonous tree” in their April 16, 2019 demand letter,
13 Petitioners did not make such an allusion in the petition. Petitioners used that analogy in their
14 demand letter merely to characterize the broad scope of the “null and void” remedy, not to
15 invoke directly that legal doctrine, which is most associated with criminal procedure.

16 Respondent contends, “[N]othing in the Brown Act requires compliance with the
17 procedures outlined in Robert’s or Rosenberg’s Rules of Order.” (Demurrer, p. 9, lines 20-21).
18 Respondent cites 75 Ops.Cal.Atty.Gen. 89 (1992), which states, “It has been held that
19 [Government Code] sections 25003 and 36813 vest a city council and county board of
20 supervisors with wide discretion in adopting rules concerning the conduct of their proceedings
21 [citations omitted] so long as such discretion is exercised reasonably and not in an arbitrary or
22 capricious manner,” citing *Nevens v. City of Chino* (1965) 233 Cal. App. 2d 775. “It is well
23 established that a court will not substitute its judgment for that of a board or commission which
24 has been authorized to do a particular act in its discretion absent ‘convincing evidence of fraud,
25 arbitrary action or an abuse of discretion,’” the Attorney General Opinion continued. 75
26 Ops.Cal.Atty.Gen. at 91. In *Nevens*, the court ruled, “The action of the city council is too
27 arbitrary and capricious, too restrictive and unreasonable.” 233 Cal. App. 2d at 788. Similarly,
28 the action of ABAG in not holding a roll call vote on the Substitute Motion, but holding a roll
call vote on the Main Motion, was arbitrary and capricious and unreasonable. ABAG had no

1 reason to conduct votes on these interrelated motions differently other than to discourage passage
2 of one and to favor passage of the other. Petitioners have alleged staff and institutional bias
3 against the Substitution Motion and in favor of the Main Motion (Petition, ¶ 52). Petitioners
4 have alleged that President David Rabbitt demonstrated bias against the Substitute Motion by
5 refusing to hold a roll call vote and by voting “no” on the Substitute Motion (Petition, ¶ 43, 47).
6 ABAG’s inconsistent actions are not entitled to judicial deference. ABAG’s disparate treatment
7 of the interrelated Substitute Motion and Main Motion votes invite the court’s scrutiny.

8 Furthermore, Respondent asserts, “Petitioners have not alleged that ABAG has adopted
9 Robert’s or Rosenberg’s Rules of Order” (demurrer, p. 9, fn. 4), but does not offer evidence of
10 any alternative rules of procedure adopted or used by ABAG. This omission suggests that
11 ABAG follows no rules of procedure, engages in *ad hoc* decision making at its meetings, and
12 increases the probability that its actions taken in the matter at bar were arbitrary and capricious
13 and unreasonable.

14 Therefore, both the actions taken concerning the CASA Compact on the Substitute
15 Motion and the Main Motion at the January 17-18, 2019 ABAG Executive Board meeting should
16 be declared null and void under Government Code § 54960.1. Petitioners request that the
17 demurrer be overruled and the motion to strike be denied insofar as they contend that allegations
18 related to the Amended CASA Motion are defective and fail to state a claim.

20 **IV. PETITIONERS ARE NOT REQUIRED TO ALLEGE PREJUDICE.**

21 Respondent erroneously, without legal basis, claims in its demurrer, “Any attempt to
22 invalidate the Substitute Motion fails as a matter of law because Petitioners have not alleged
23 facts demonstrating cognizable prejudice” (p. 10, line 13), and says of Petitioners, “[T]hey have
24 not pled and cannot plead cognizable prejudice.” (p. 12, lines 9-10). Respondent erroneously
25 claims in its motion to strike, “Petitioners’ claims regarding the Substitute Motion also fail to
26 support a cognizable, justiciable cause of action and should be stricken. Any attempt to
27 invalidate the Substitute Motion fails as a matter of law because Petitioners have not alleged
28 facts demonstrating cognizable prejudice” (p. 11, lines 9-12), and says of Petitioners, “[T]hey
have not pled and cannot plead cognizable prejudice.” (p. 13, lines 7-9).

1 First, a petitioner is not required to allege prejudice to state a cause of action under
2 Government Code § 54960.1, as affirmed by a recent decision, *Olson v. Hornbrook Community*
3 *Services Dist.* (2019) 33 Cal. App. 5th 502. “While a finding of prejudice is required before
4 nullifying the Board's action ..., its allegation is not necessary to state a cause of action under
5 section 54960.1 ... Plaintiffs' complaint satisfies the purposes of our inquiry on appeal following
6 a demurrer. The prejudice determination is better left for a later proceeding after the facts can be
7 ascertained.” *Olson*, 33 Cal.App.5th at 522. As *Olson* clearly states, Petitioners do not need to
8 allege facts demonstrating cognizable prejudice at the demurrer and motion to strike stage. The
9 prejudice determination is better left for a later proceeding after the facts can be ascertained
10 through discovery, declarations and/or writ hearing testimony. Therefore, the demurrer and the
11 motion to strike on prejudice grounds should be overruled on this basis alone.

12 Second, even if Petitioners were required to allege prejudice to state a cause of action
13 under § 54960.1, they would have met this burden because they specifically alleged prejudice in
14 both their “cure or correct” demand letter (Exh. A to Petition, p. 6) and in their petition (§§ 76-
15 78). For the purpose of testing the sufficiency of the cause of action, the demurrer admits the
16 truth of all material facts properly pleaded. *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962,
17 966-67.

18 Third, Respondent misstates the definition of prejudice. Respondent claims,
19 “[Petitioners] do not allege facts supporting the conclusion that the Substitute Motion would
20 have passed if the Directors votes had been recorded” (Demurrer, p. 11, lines 23-24 and p. 12,
21 line 1) and “Petitioners have not pled and cannot plead that ABAG’s Board would have taken a
22 different course of action but for the allegedly improper Substitute Motion. Therefore they have
23 not pled and cannot plead cognizable prejudice.” (p. 12, lines 8-10). Respondent provides no
24 legal authority for its contention that the Petitioners must demonstrate prejudice by alleging that
25 the Substitute Motion would have passed if ABAG directors’ votes had been recorded.
26 Respondent makes a ridiculous, unsubstantiated claim, “New Livable California attended the
27 meeting, and so could observe the votes of each member ... they actually had the opportunity to
28 monitor the votes, even in the absence of reporting and cannot claim prejudice” (Demurrer, p.
12, lines 11-14). Respondent assumes, without evidentiary basis, that members of the audience

1 could see all thirty or so voting members, identify them by name, record their votes and figure
2 out who abstained during the brief durations of the show of hands votes. The votes were taken in
3 violation of § 54953(c)(2); the vote outcome is inconsequential to proving a violation. The
4 definition of “action taken” includes “a positive or a negative decision.” § 54952.6.

5 Fourth, courts have required a finding of prejudice only in a Government Code § 54960.1
6 challenge. Even if Petitioners were to fail to demonstrate prejudice to gain relief under §
7 54960.1, their Brown Act challenges under §§ 54960 and 54960.2 would still survive demurrer
8 and motion to strike as they do not require findings of prejudice.

9 10 **V. LIVE CONTROVERSY EXISTS FOR COURT TO RESOLVE.**

11 Respondent incorrectly asserts, “[T]here is no disagreement between the parties, no threat
12 of future violations, and no basis for the Court to order equitable relief.” (Demurrer, p. 13, lines
13 12-13). Petitioners believe that ABAG’s well-documented history of anonymous voting
14 practices, ostensibly made illegal by the § 54953(c)(2) amendment in 2013, suggests otherwise.

15 Petitioners on April 17, 2019 submitted to the ABAG Executive Board a demand letter
16 pursuant to Government Code §§ 54960 and 54960.2 that called, *inter alia*, for “your
17 Board/Assembly [to] unconditionally commit that it will cease, desist from, and not repeat the
18 challenged violations of the Brown Act, especially the public reporting requirement of the
19 individual vote of every board member.” (Exh. A to Petition, p. 7). The Brown Act,
20 Government Code § 54960.2(c)(1), permits a legislative body “to respond to a cease and desist
21 letter with an unconditional commitment to cease, desist from, and not repeat the past action that
22 is alleged to violate this chapter” and provides a form response. Section § 54960.2(c)(2) says
23 that such “unconditional commitment ... shall be approved by the legislative body in open
24 session at a regular or special meeting as a separate item of business, and not on its consent
25 agenda.” Section § 54960.2(c)(3) says in part, “An action shall not be commenced to determine
26 the applicability of this chapter to any past action of the legislative body for which the legislative
27 body has provided an unconditional commitment pursuant to this subdivision.”

28 Respondent provides no evidence that ABAG as a legislative body has replied at any time
to Petitioners’ cease and desist letter with an unconditional commitment to cease, desist from,

1 and not repeat its Brown Act § 54953(c)(2) violation. As discussed *supra*, on May 16, 2019,
2 ABAG replied to Petitioners' demand letters, "[W]e have determined that no remedial action
3 regarding the Board's actions is required." (Petition, Exh. C, p. 1, ¶ 2). Now Respondent argues,
4 "[W]hile ABAG was unwilling to accede to Petitioners' demand that it rescind its approval of
5 the CASA Compact, its Board did publicly commit to ensuring that all future votes are
6 conducted by roll call where support for or against a given action is less than unanimous."
7 (Demurrer, p. 13, lines 7-10). According to Respondent's Request for Judicial Notice, which
8 Respondents oppose *infra*, ABAG Executive Board Vice President Jesse Arreguin made a
9 verbal statement at the May 16, 2019 Executive Board meeting:

10 First I want to reiterate the process for voting on actions at our Executive Board
11 meetings where support for, or against, a given action is less than unanimous.

12 Under those circumstances, the Clerk will conduct a roll-call vote to report the
13 vote or abstention of each member present, and to determine whether there are a
14 sufficient number of votes to approve an action. So, I just want to let everyone
15 know, I will ask to see if there is unanimous consent to a particular item; if not,
16 we will proceed to a roll-call vote on those items.

17 The Arreguin verbal statement appears to admit that Respondent violated the Government Code
18 § 54953(c)(2) on-the-record voting requirement.

19 Petitioners contend that these are inadequate responses to their Brown Act demand letters
20 and petition. First, Vice President Arreguin's verbal statement was not an "unconditional
21 commitment" by ABAG to cease, desist from, and not repeat" its § 54953(c)(2) violation. It
22 merely was a verbal announcement by the Executive Board vice president, accompanied by no
23 action taken by the legislative body. If Respondent claims that the Arreguin verbal statement is
24 an "action of the legislative body" or a "legislative enactment," then Respondent engaged in yet
25 another Brown Act violation because a verbal statement by one member of a legislative body
26 usually would not constitute "action taken." Government Code § 54952.6. Second, Respondent
27 fails to provide any agenda, agenda packet, meeting minutes or resolution demonstrating that "its
28 Board did publicly commit," despite its claim in its demurrer (p. 13, lines 7-10). Third, the
"process" articulated in Vice President Arreguin's verbal statement is legally inadequate. It

1 violates Government Code § 54953(c)(2), which states, “The legislative body of a local agency
2 shall publicly report any action taken and the vote or abstention on that action of each member
3 present for the action.” “Unanimous” actions taken are not expressly exempted and
4 “unanimous” is not defined in the Brown Act. If one or more voting members were present but
5 failed to reply to a “unanimous consent” request, then § 54953(c)(2) requires that the ABAG
6 Executive Board “publicly report ... abstention on that action of each member present for the
7 action.” The Brown Act requires ABAG to identify the voting members present who did not
8 vote on the “unanimous consent” request and therefore abstained. Furthermore, if Vice President
9 Arreguin’s verbal statement were an accurate statement of ABAG policy or procedure, then
10 ABAG would be placing considerable pressure upon dissenting directors to conform to the
11 majority position. Directors who oppose “unanimous consent” requests could be subjected to
12 considerable pressure to change their votes or to leave the room in order to obviate a roll call
13 vote. As ABAG meetings extend into the wee hours of the morning, dissenting directors could
14 be blamed for extending the meeting duration due to time consumed to conduct non-unanimous
15 votes.

16 Finally, Petitioners/Plaintiffs seek declaratory relief (Petition, Prayer, ¶ 3). A general
17 demurrer to a cause of action for declaratory relief must be overruled as long as an actual
18 controversy is alleged; the pleader need not establish it is also entitled to a favorable judgement.
19 See *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 606. A general
20 demurrer is usually not an appropriate method for testing the merits of a declaratory relief action
21 “because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff’s
22 interest.” *Qualified Patients Ass’n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 751. A
23 plaintiff does not necessary to allege a pattern and practice of violations to seek a declaration of a
24 Brown Act violation; the allegation of a single violation can be sufficient to sustain such an
25 action. *California Alliance for Utility etc. Education v. City of San Diego* (1997) 56 Cal.App.4th
26 1024, 1029. Therefore, the demurrer should be overruled.

27 //

28 //

1 **VI. OPPOSITION TO REQUEST FOR JUDICIAL NOTICE.**

2 Respondent requests that the Court take judicial notice of its transcription of ABAG’s
3 Executive Board President David Rabbitt’s May 16, 2019 purported public announcement
4 (“President’s Report”), delivered by ABAG Executive Board Vice President Jesse Arreguin, as
5 found on ABAG’s public website. Petitioners oppose this request for judicial notice because it is
6 improper under Evidence Code § 452 and related case law.

7 Since the taking of judicial notice of official acts of a governmental entity does not
8 necessarily require acceptance of the truth of factual matters deducible therefrom, and since a
9 demurrer is not the appropriate procedure for determining the truth of disputed facts, judicial
10 notice of matters on demurrer will be dispositive only in those instances when there is not or
11 cannot be a factual dispute concerning that which is sought to be judicially noticed. *Cruz v.*
12 *County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134. “A demurrer is simply not the
13 appropriate procedure for determining the truth of disputed facts,” *Cruz*, 173 Cal.App.3d at 1134
14 [quoting *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879].

15 Evidence Code § 452(b) cannot justify this request for judicial notice because
16 Respondent has not demonstrated that Vice President Arreguin’s verbal statement is a
17 “regulation” or “legislative enactment” of ABAG. It appears to be a mere verbal statement made
18 by a temporary presiding officer, not a “regulation” or “legislative enactment” of ABAG.
19 Respondent provides no evidence that the ABAG Executive Board or ABAG General Assembly
20 adopted any such regulation or enactment on May 16, 2019 or at any other time. Therefore,
21 Respondent’s citation to *Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 602, fn. 4, is inapposite.
22 In *Geraghty*, the court accepted judicial notice of a written city report that provided
23 “supplemental context for the city’s legislative action” that was central to a lawsuit between two
24 private parties, a landlord and a former tenant.

25 Similarly, Respondent’s citation to *Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001)
26 25 Cal.4th 508, 519, fn. 5 is inapposite. In *Hoechst Celanese*, the Supreme Court stated, “Where
27 the Legislature adopts a uniform act, the history surrounding the creation and adoption of that act
28 is also relevant,” and took judicial notice of a California Assembly committee hearing transcript
concerning adoption of a statute central to that lawsuit. Here ABAG cites to a verbal “report”

1 that it issued on May 16, 2019, the very day that it executed a letter rejecting Petitioners' written
2 demand to cure or correct and cease and desist from Brown Act violations concerning its voting
3 practices (Exh. C to Petition).

4 The Arreguin verbal statement presumably was made in response to Petitioners' demand
5 letter and in anticipation of this litigation; it does not inform the legislative history of a regulation
6 or enactment and therefore appears to be an improper attempt to introduce extrinsic evidence at
7 the demurrer and motion to strike stage of these proceedings. Respondent provides no meeting
8 agendas or minutes, so its citation to *Bravo Vending v. City of Rancho Mirage* (1993) 16
9 Cal.App.4th 383, 405-406 is not appropriate.

10 Furthermore, the Arreguin verbal statement is "reasonably subject to dispute" and not
11 "capable of immediate and accurate determination by resort to sources of reasonably indisputable
12 accuracy" under Evidence Code § 452(h). One could reasonably dispute whether or not Vice
13 President Arreguin had the authority to make his assertion and whether or not it is an accurate
14 statement of an actual regulation or legislative enactment or otherwise is an accurate statement of
15 ABAG policy. Vice President Arreguin "reiterate[s] the process for voting," yet he does not
16 state the ultimate source of "the process for voting." Use of the word "reiterate" indicates that
17 this assertion had been stated previously or was officially adopted policy, yet no previous
18 "source[] of reasonably indisputable accuracy" is provided. In addition, Respondent's attorney
19 states in his declaration that he prepared the transcription, not an objective third party, so its
20 accuracy is "reasonably subject to dispute." None of the other provisions of Evidence Code §
21 452 appears to support Respondent's request, so judicial notice of the Arreguin verbal statement
22 would be improper.

23 24 **VII. PETITION IS NOT VAGUE.**

25 Respondent claims that the petition is subject to a demurrer for vagueness because
26 Petitioners include the Substitute and Main Motions in a single cause of action. Petitioners deny
27 that their petition is "uncertain," "ambiguous" or "unintelligible" under Code of Civil Procedure
28 430.10(f). Respondent asserts, "Petitioners should be required to amend their Petition to separate
their claims related to each motion." (Demurrer, p. 13, lines 23-24). Respondent's citation to

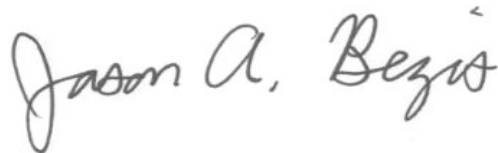
1 *Nevada County & Sacramento Canal Co. v. Kidd* (1869) 37 Cal. 282, 308 is inapposite. In *Kidd*,
2 a 150 year-old decision that antedates the 1872 Code of Civil Procedure that generally is in effect
3 today, the court sustained a demurrer because the plaintiff combined in a single cause of action
4 the right of possession of dam/canal sites and water rights, implicating two separate areas of law.
5 Petitioners' case is entirely different; it concerns the scope of a remedy of Brown Act violations
6 affecting two interrelated and dependent motions on the same agenda item at the same public
7 meeting.

8
9 **VIII. CONCLUSION.**

10 For the reasons stated herein, Petitioners/Plaintiffs respectfully request that the demurrer
11 and motion to strike the petition for writ of mandate and complaint be denied in full. If the court
12 were to grant relief to Respondent/Defendant, then Petitioners/Plaintiffs request leave to amend.

13
14 Dated this July 30th, 2019

15 Respectfully submitted,

16
17 
18

19 JASON A. BEZIS
20 Attorney for Petitioners/Plaintiffs

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

At the time of service, I was over 18 years of age and not a party to this action. My business address is 3661-B Mosswood Drive, Lafayette, CA 94549-3509. On July 30, 2019, I served true copies of the following document(s) described as:

on the interested parties in this action as follows:

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

Executed on July 30, 2019, at Lafayette, California.

Jason A. Bezis

JASON A. BEZIS