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SUPERIOR COURT OF CALIFORNIA

COUNTY OF HUMBOLDT

JANELLE EGGER,

Petitioner/Plaintiff,

vs.

HUMBOLDT COUNTY BOARD OF SUPERVISORS,

Respondent/Defendant.

Case No.: CV140631

REPLY IN SUPPORT OF RESPONDENT HUMBOLDT COUNTY BOARD OF SUPERVISORS' DEMURRER TO THE PETITION FOR WRIT OF MANDATE, INJUNCTION, AND DECLARATORY RELIEF

Date: February 10, 2015
Time: 1:45 p.m.
Dept.: 8

I. INTRODUCTION

Pro Per Petitioner Janelle Egger's conclusory allegations, sweeping generalizations, and self-serving interpretations of law are insufficient to defeat Respondent Humboldt County Board of Supervisors' ("Respondent" or "Board") demurrer. As evident by both the Petition and Opposition, Petitioner cannot establish the essential elements necessary to state a cause of action for violations of the Ralph M. Brown Act (Government Code section 54950, *et seq.*)[1] (the "Brown Act" or "Act"). Furthermore, Petitioner has failed to carry her burden of demonstrating how the Petition may be amended to state viable causes of action for Brown Act violations. Respondent therefore respectfully requests that the demurrer be sustained without leave to amend.

II. LEGAL ARGUMENTS

A. The Court Should Reject Petitioner's Attempts To Assert Improper Contentions, Deductions, And Conclusions Of Law As "Facts" To Defeat The Demurrer.

Although the Court may assume the truth of properly pleaded allegations in the Petition for purposes of the demurrer, the Court may not admit conclusions of law, self-serving interpretations of documents, facts impossible in law, or allegations contrary to facts which a court may take judicial notice. *Young v. Gannon* (2002) 97 Cal.App.4th 209, 220 (affirming order sustaining demurrer of writ petition without leave to amend). Petitioner's Brown Act causes of action survive the demurrer only if the Court rejects this longstanding, well-settled principle of law.

For instance, both the Petition and Opposition are premised on the unsupported conclusion of law that committees were formally created by Respondent and that those committees are subject to the open meeting requirements of the Brown Act. However, whether or not a committee is subject to the Act is a question of law. (*See e.g.*, Section II.B.1. below.) Thus, Petitioner's conclusory assertions that committees were formally created and that they are "legislative bodies" within her subjective interpretation of the Brown Act are not "facts" which this Court may accept as true for purposes of the demurrer. If the Court were to accept these conclusory legal propositions as true, then the function of a demurrer would be rendered a nullity. No demurrer would ever be sustained because every petitioner

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[1] All further statutory references will be to the Government Code, unless otherwise indicated.

would argue in opposition that the Court must accept the petitioner's legal definitions as true and must accept speculation as fact. This is not the standard of law to be applied on a demurrer, and the Court should reject Petitioner's attempt to masquerade her conclusions of law as "facts."[2]

B. There Is No "CHIP Committee"[3] And Thus No Brown Act Violation.

1. Petitioner Has Failed To Allege Facts Sufficient To Show That Respondent Created A "CHIP Committee."

In her Opposition, Petitioner contends that Respondent knew or was informed that alleged CHIP meetings were being held in the County Courthouse with the assistance of County staff. (Oppo. at 6-7.) From this, Petitioner surmises that Respondent somehow made a "collective decision or commitment," at some unknown point in the past, to form a "CHIP Committee" that would be subject to the open meeting requirements of the Brown Act. (*Id.*) The argument fails.

It bears repeating that the Brown Act applies only to a "legislative body," which is defined, as relevant here, as "a commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, *created by charter, ordinance, resolution, or formal action of a legislative body* ...." *See* Gov. Code §54952 (emphasis added). Petitioner has not and cannot cite to any charter, ordinance, or resolution creating a so-called "CHIP Committee," nor can she point to any "formal action" by Respondent to create a purported "CHIP Committee." No such facts exist for the simple reason that Respondent has never created a "CHIP Committee."

Having failed to meet the clear statutory definition of a "legislative body," Petitioner is forced to take extreme liberties in her interpretation of section 54952 to save her claim. Indeed, the only way that Petitioner is able to state a cause of action is if this Court rewrites the statute and adopts an interpretation of section 54952 that is in direct conflict with the plain language of the statute and the Legislature's express intent. In this case, Petitioner requests that the Court broadly interpret the phrase "formal

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[2] Petitioner has also improperly referenced facts and issues that are irrelevant, misleading, and/or not at issue. For instance, Petitioner implies that service of the Summons and Petition was completed as early as September 23 or October 14, 2014. (Oppo. at 1.) As Petitioner well knows, Respondent executed a Notice of Acknowledgement and Receipt of the Summons and Petition on November 10, 2014, at Petitioner's request, which is when service of the pleadings was completed.

[3] "CHIP" refers to the Community Homeless Improvement Project.

action" in section 54952 to mean "action taken" as defined in section 54952.6. (Oppo. at 4, 6-7.) The well-settled rules of statutory construction dictate that the Court reject Petitioner's request.

Had the Legislature intended to relax the requirements for creating a legislative body to include any "action taken" as defined in section 54952.6, it could have simply written the statute to reflect that a Brown Act committee could be "created by charter, ordinance, resolution, or any action taken by the legislative body." It did not do so. Moreover, Petitioner acknowledges in her Opposition that the statute was amended in 1994 (Oppo. at 4), at which time the Legislature could have modified the term "formal action" to "action taken." Again, the Legislature refused to do so. Finally, the Legislature included the word "formal" to describe the type of "action" that was necessary to create a committee that would be subject to the Brown Act. Had the Legislature intended for committees to be created by any action of a legislative body, there would be no need to include the adjective "formal." *See People v. Woodhead* (1987) 43 Cal.3d 1002, 1010 ("It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided."); *Freedom Newspapers, Inc. v. Orange Cnty. Employees Ret. Sys.* (1993) 6 Cal.4th 821, 826 (in determining the Legislature's intent, the court first turns to the statutory language "since the words the Legislature chose are the best indicators of its intent."); *City of Pasadena v. AT&T Communications of California, Inc.* (2002) 103 Cal.App.4th 981, 984 (courts should not "under the guise of statutory construction, 'rewrite the law or give the words an effect different from the plain and direct import of the terms used.'"); *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 804 ("It is bedrock law that if 'the law-maker gives us an express definition, we must take it as we find it ....'").

Petitioner's reliance on *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799 is also misplaced. (Oppo. at 7.) That case provides no support for any of Petitioner's arguments. *Joiner* involved two legislative bodies (a city council and a planning commission) wherein the city council took *formal action to create* a single advisory committee composed of two designated council members and two designated commissioners for the purpose of making a recommendation to the city council concerning a matter that was within the city council's sole responsibility. *Joiner*, 125 Cal.App.3d at

804. Here, there is no allegation or evidence that Respondent formally created a "CHIP Committee", no allegation or evidence that Respondent designated its members to participate in the CHIP, no allegation or evidence that the issue of homelessness is within Respondent's sole responsibility to address, and no allegation or evidence that the Board members were tasked by a majority of the Board to represent the interests of the Board at these alleged CHIP meetings.

Because Petitioner cannot show that Respondent created a committee by "charter, ordinance, resolution, or formal action," and because she cannot show that Respondent directed or ordered any of its members to represent its interests or to participate in the alleged CHIP meetings, Petitioner cannot state a cause of action for violation of the Brown Act. Gov. Code § 54952; *see also, Farron v. City and County of San Francisco* (1989) 216 Cal.App.3d 1071, 1076-77 (task force was not a "legislative body" because board members were not appointed to represent the board's interests, not required to serve on the task force, and the board did not exercise any control over the members' or the task force's actions).

2. Petitioner Admits That She Failed To Submit The Required Cease And Desist Letter To Respondent.

Even assuming there is a "CHIP Committee" that is subject to the Act (which there is not), Petitioner's claim nevertheless fails. Prior to initiating the litigation, Petitioner did not send a cease and desist letter to Respondent regarding her concerns that the purported "CHIP Committee" was violating the open meeting requirements of the Brown Act, as required by section 54960.2. In fact, Petitioner readily admits that she failed to do so. (*See* Oppo. at 1, 9.) Based on this admission alone, the Court may sustain Respondent's demurrer without leave to amend.

In an attempt to excuse this fatal procedural defect, Petitioner unconvincingly argues that section 54960.2's mandatory pre-litigation requirements do not apply to her because the "[t]he cease and desist letter is only required to address past actions of the legislative body." (Oppo. at 9.) Petitioner's position is nonsensical. The conduct which gives rise to Petitioner's allegations that Respondent violated the Brown Act occurred in the past and prior to Petitioner's filing of the Petition – *e.g.*, a January 22, 2014 Board memorandum, an August 19, 2014 Board meeting, an August 19, 2014 memorandum prepared by a Board member, an August 19, 2014 Eureka City Council Agenda Summary, and a presentation

occurring on August 19, 2014. (*See* Petition, ¶22.) Petitioner also alleges that Respondent "violated" (past tense) the Brown Act by "allowing the CHIP committee to engage in ongoing private meetings." (Petition, ¶31(2)(c).) Again, Respondent's alleged decision to allow a purported "CHIP committee" to meet in private in violation of the Brown Act is a past action. Thus, even under Petitioner's interpretation, she was required to submit a cease and desist letter to Respondent prior to initiating any lawsuit, as required by section 54960.2.[4] Because Petitioner has failed to satisfy the mandatory pre-litigation requirements, Petitioner's claim that the "CHIP committee" violated the Brown Act must be dismissed without leave to amend.[5]

C. The Agenda Review Meetings Are Not Subject To The Brown Act.

1. Petitioner Has Failed To Allege Facts Sufficient To Show That Respondent Created An "Agenda Committee."

In opposition to the demurrer, Petitioner speciously reasons that an "Agenda Committee" is created annually based on two factors: (1) Respondent's knowledge that County staff met in advance of regularly noticed Board meetings to organize the agenda for noticed meetings; and (2) Respondent's selection of a Chair and Vice-Chair each year. (Oppo. at 7-8.) According to Petitioner, because the Chair and Vice-Chair are aware that they may – but are not required – to attend the staff's meeting, a Brown Act committee therefore exists. (*Id.*) For the same reasons discussed above in Section II.B.1 regarding the "CHIP Committee," the argument is baseless.

To reiterate, the open meeting requirements of the Act only apply to a "legislative body" that is created by "charter, ordinance, resolution, or formal action." *See* Gov. Code § 54952. Noticeably absent from the Petition and the Opposition is any reference or allegation to the existence of any charter,

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[4] Petitioner's argument that she need not send a cease and desist letter is even more disingenuous when viewed in context of her prior actions. Petitioner is well aware of the applicability of section 54960.2, having previously sent the required letter in July 2014 to complain of similar Brown Act violations allegedly committed by Respondent. (Oppo. at 1; Petition, ¶15.)

[5] In an effort to provide support for her baseless claims, Petitioner also attempts to create a misleading narrative that adequate notice was provided regarding the "CHIP Committee", even if the required letter was not sent. She references her "diligent" efforts of sending "two demand letters, three other written communications, and five verbal objections or comments at open meetings." (Oppo. at 9.) However, none of these purported written and oral communications addressed the "CHIP Committee" and all occurred before Petitioner admittedly even learned of the alleged "CHIP Committee." (Petition, ¶22.)

ordinance, resolution, or formal action reflecting the creation of an "Agenda Committee." Moreover, there are no allegations that the Board issued any order directing or requiring any of its members to participate in the staff meetings. Petitioner cannot allege these necessary facts because there is no charter, no ordinance, no resolution, no formal action, and no directive or order creating an "Agenda Committee."[6] Consequently, because Respondent cannot state facts sufficient to state a cause of action for a Brown Act violation, the demurrer should be sustained without leave to amend.

2. Agenda Review Meetings Are Not "Meetings" As Defined By The Act.

In yet another fruitless attempt to oppose Respondent's demurrer, Petitioner asserts that "[w]hether or not the Board had a meeting is irrelevant." (Oppo. at 10.) This argument makes no sense in light of Petitioner's allegations. In Paragraph 31 of the Petition, Petitioner alleges that Respondent violated the Act by "allowing the Board Agenda committee to engage in ongoing private meetings and so denying Petitioner's and the public's the [sic] right to open meetings, posted agendas and public comment under §54953, §54954.2(a) and §54954.3." (Petition, ¶31(2)(b).) Thus, whether or not a meeting has occurred is critical to whether or not Respondent violated the open meeting requirements of the Brown Act.

The term "meeting" has a very specific definition contained in the Brown Act, and refers to "any congregation of a majority of a legislative body at the same time and location ... to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body." Gov. Code §54952.2. The Act requires that "[a]ll *meetings* of the legislative body of a local agency shall be open and public" (*id.* §54953 (emphasis added)) and an agenda be posted "[a]t least 72 hours before a regular *meeting*," which contains a "brief general description of each item of business to be transacted or discussed at the *meeting*" (*id.* §54954.2 (emphasis added)). The Act also provides that that "[e]very agenda for regular *meetings* shall provide an opportunity for members of the public to directly address the legislative body ...." *Id.* §54954.3 (emphasis added.) Therefore, in order to violate

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[6] To the extent Petitioner relies on her broad interpretation of section 54952 as support for her claim that Respondent created an "Agenda Committee" by a "collective decision or commitment," the Court should reject the argument. As explained in detail in Section II.B.1, Petitioner's attempt to broaden the meaning of section 54952 is contrary to the rules of statutory construction and directly conflicts with the plain language of the statute.

the open meeting requirements of the Brown Act, Petitioner must first show that the Agenda Review Meetings had a "congregation of a majority" of the Board "at the same time and location" "to hear, discuss, deliberate, or take action on any item" that is within their subject matter jurisdiction. *Id.* §54952.2. She has not and cannot make this essential showing and, consequently, the demurrer should be sustained without leave to amend.

3. The Setting Of The Board's Agenda Is Not Subject To The Brown Act.

Petitioner further argues that the function of the alleged "Agenda Committee" is irrelevant to whether or not there has been a Brown Act violation. (Oppo. at 9-10.) Petitioner's logic is flawed.

Even assuming that there is an "Agenda Committee" (which there is not), any meeting held by County staff, public or private, where the agenda is organized (*e.g.*, where an item is placed on the agenda, placing an item for the morning or afternoon session, setting sufficient time for presentations and discussions, *etc.*) is not and cannot constitute a violation of the Brown Act. It is entirely permissible for a Board member to confer with appropriate staff outside of an open and noticed meeting to discuss issues that concern scheduling and organization. *See e.g.*, Gov. Code §54952.2, subd. (b)(2).[7] Respondent's position is further supported by *Coalition of Labor, Agriculture & Business, et al. v. County of Santa Barbara Board of Supervisors, et al.* (2005) 129 Cal.App.4th 205, in which the court determined that the Brown Act does not "require the Board to allow members of the public to address it on whether to place an item on the agenda." Because Respondent may set its agenda without public input, Petitioner has not been deprived of any right to participate in any meetings allegedly held.

D. The April 1, 2014 Board Order Did Not Violate The Brown Act.

1. A Temporary, Ad Hoc Committee Is Exempt From The Brown Act.

Petitioner argues that the April 1, 2014 Board Order created a "standing committee," as that term is defined in subdivision (b) of section 54952. (Oppo. at 3, 5-6, 8.) But the Board's decision to have two of its members consult with two staff members about the Human Rights Commission's Policy Statement and Recommendations related to Ordinances 2477 and 2488 (regulating County properties)

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[7] *See also*, Open & Public IV: A Guide to the Ralph M. Brown Act, League of California Cities, 2nd Ed. (Revised July 2010) at 17-18.

and to "bring it back to the Board for future consideration" neither created a standing committee nor conferred continuing subject matter jurisdiction. (*See* Request for Judicial Notice, Ex. 1.)

Petitioner's arguments are based on an interpretation of law that is both unreasonable and unsupported. (Oppo. at 5-6, 8.) As a matter of simple logic, merely because a certain "subject matter" is within the jurisdiction of the Board does not mean a group considering that "subject matter" has "*continuing* subject matter jurisdiction", so as to bring that group within the open meeting requirements of the Brown Act. Indeed, Petitioner's interpretation would effectively moot any exception to the Act and contravenes the Legislature's express definitions of what is and what is not a "legislative body." It ignores the term "continuing" and gives no legal significance as to how that word modifies the term "subject matter jurisdiction." *See Woodhead*, 43 Cal.3d at 1010; *Freedom Newspapers*, 6 Cal.4th at 826; *City of Pasadena*, 103 Cal.App.4th at 984. (*See also*, Section II.B.1 above.)

No reasonable construction of the law and of the Board Order can support Petitioner's position that the alleged April 1, 2014 Board Order committee was tasked with anything more than a very limited and very specific defined task: to review and consider the Human Rights Commission Policy Statement and Recommendations related to Ordinances 2477 and 2488 (regulating County properties) and return the matter to the Board for future consideration. The alleged committee, if one exists, is by definition a temporary committee that is exempt from the Act.

Furthermore, even if the April 1, 2014 Board Order could liberally be construed as creating a four-person committee that is subject to the Brown Act as Petitioner alleges (which it is not), Petitioner does not explain how this purported four-person committee violated the Brown Act. Petitioner has not identified any meetings that have been held by this alleged four-person committee or how this four-person committee violated the open meeting requirements of the Act. In other words, there can be no violation of the open meeting requirements of the Act if there has been no meeting. *See* Gov. Code §§54952.2, 54953, 54954.2, subd. (a), 54954.3. (*See also*, Section II.C.3 above.)

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2. Failure To Follow The Rules Of The Board Of Supervisors Is Not A Brown Act Violation.

There simply is no provision in the Brown Act that provides for a cause of action where a legislative body fails to follow its own self-imposed rules or guidelines. Petitioner concedes as much in her Opposition, failing to cite to any section of the Government Code, case law, or secondary sources that stands for the proposition that a Brown Act violation occurs under these circumstances. (Oppo. at 10-11.) The only legal support that Petitioner does offer is a citation to *Glendale City Employees Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, which Petitioner admits does not even address the Brown Act. (Oppo. at 10-11.) To be clear, *Glendale* has no application to the issues before the Court – it provides no interpretation of any section of the Brown Act nor does it provide any guidance as to whether a cause of action exists based on Petitioner's allegations. Having failed to provide any bases from which Petitioner can state a claim for a Brown Act violation, the demurrer should be sustained without leave to amend.

E. The Claims Regarding The Human Rights Commission Must Be Dismissed For Failure To Include The Proper Defendant/Respondent In The Litigation.

The parties do not dispute that the Human Rights Commission ("HRC") is a distinct legislative body under section 54952 for which the Brown Act applies. Petitioner, however, erroneously assumes that she may omit the HRC as a defendant/respondent in the litigation, despite that it is the very entity which has allegedly violated the Act. (Oppo. at 12-13.) Like Petitioner's other arguments in opposition, the Court should reject these arguments as well.

Petitioner relies on *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167 and *Laidlaw Environmental Services, Inc. v. Local Assessment Committee* (1996) 44 Cal.App.4th 346 to argue that the litigation may proceed in the HRC's absence, but those cases offer no support for her claim. (Oppo. at 12-13.) Contrary to Petitioner's argument, *San Joaquin Raptor Rescue Center* actually supports Respondent's contention that the HRC is a necessary party to the litigation. In *San Joaquin Raptor Rescue Center*, the petitioners filed suit against *both* Merced County *and* the Merced County Planning Commission. *San Joaquin Raptor Rescue Center*, 216 Cal.App.4th at 1170. *Laidlaw Environmental Services* has no application whatsoever. That case did not address the Brown

Act, did not discuss which legislative bodies were proper defendants/respondents, and did not resolve any questions as to what constitutes an indispensable party.

Furthermore, Petitioner provides no reasonable explanation for her blanket refusal to name the HRC as a defendant/respondent in the case. She has repeatedly alleged that the HRC violated the Brown Act (*see e.g.*, Petition, ¶¶11-14, 21), and thus basic principles of law and due process dictate that the defendant in an action for relief under the Brown Act must be the entity that has allegedly violated the Act. *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1289. Moreover, because Respondent is not the legislative body that committed the alleged violations of the Brown Act, it cannot be held liable for the actions of the HRC. Petitioner has cited to no legal authority that would permit imputation of Brown Act violations committed by one separate legislative body to another.[8] The demurrer as to this cause of action against Respondent should therefore be sustained without leave to amend.

IV. CONCLUSION

Petitioner carries the burden of proving that there is a reasonable possibility that the pleading defects can be cured by amendment, and must show how the Petition can be amended and how that amendment will change the pleading's legal effect. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. She has failed to meet her burden and cannot set forth the essential facts necessary to establish a viable cause of action for Brown Act violations against Respondent. Respondent therefore respectfully requests that the Court sustain the demurrer without leave to amend.

Dated: February 2, 2014

Respectfully Submitted,

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[8] Even if it could be said that Respondent may be held liable for the alleged Brown Act violations committed by the HRC's Homeless Committee (which it cannot), that subcommittee was disbanded by action of the HRC four months ago. (Request for Judicial Notice, Ex. 2.) It no longer exists, and there is no current or future threat of a potential or actual violation of the Brown Act by this dissolved subcommittee.