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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MALIBU TOWNSHIP COUNCIL, INC., Plaintiff and Appellant, v. CITY COUNCIL OF THE CITY OF MALIBU et al., Defendants and Respondents.	B266893 (Los Angeles County Super. Ct. No. BS142420)

APPEAL from orders and a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed in part; reversed in part with directions.

Angel Law and Frank P. Angel for Plaintiff and Appellant.

Jenkins & Hogin, Christi Hogin and Gregg W. Kettles for Defendants and Respondents.

I. INTRODUCTION

The Malibu Township Council, Inc., plaintiff, appeals from orders and a judgment. In 2013 it filed a petition and complaint for three causes of action under the Ralph M. Brown Act (the Brown Act) (Gov. Code[1], § 54950 et seq.) against defendant City Council of the City of Malibu. The trial court granted defendant's motion for judgment on the pleadings as to causes of action for declaratory and injunctive relief under sections 54960 and 54960.1. The trial court permitted the action to proceed as to the writ of mandate cause of action under section 54960.1. Following discovery and a writ of mandate hearing, the trial court denied the writ of mandate.

Plaintiff disputes the order granting a motion for judgment on the pleadings as to the declaratory and injunctive relief. It also disputes the denial of its petition for writ of mandate and asserts the trial court erred as to certain evidentiary rulings.

We reverse the order on the motion for judgment on the pleadings as to the Brown Act cause of action under section 54960 for declaratory and injunctive relief in part, as we will explain below. Plaintiff sufficiently demonstrated prejudicial error regarding its Brown Act claim pertaining to a closed city council session. The orders and judgment are otherwise affirmed.

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[1] Further statutory references are to the Government Code unless otherwise noted.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Pleadings

The City of Malibu (Malibu) owned and operated the 535-acre Charmlee Wilderness Park (Charmlee). The Malibu Bluffs Park (Bluffs) is 93 acres. California owned 83 acres of the Bluffs, which the Santa Monica Mountains Conservancy (the conservancy), a state agency, operated through the Mountains Recreation and Conservation Authority (the authority). Malibu owned the 10 remaining acres of the Bluffs, which it acquired from California in 2006. At the time of this action, the City Council of Malibu was composed of five council members: Joan House, Lou La Monte, Skylar Peak, Laura Zahn Rosenthal, and John Sibert.

In the fall of 2012, Councilmember House approached former mayor and Councilmember La Monte with the idea of a land swap involving the above-mentioned parks. The land swap would transfer ownership and control of Charmlee to the conservancy in exchange for the remaining 83 acres of the Bluffs going to Malibu. Before mid-November, Councilmembers House and La Monte requested a meeting with Executive Director Joe T. Edmiston of the conservancy to discuss the land swap. That meeting was eventually scheduled for December 13, 2012.

On December 10, 2012, the council held a closed session which preceded defendant's regularly scheduled public meeting. Councilmembers House, La Monte, Rosenthal, Sibert, City Attorney Christi Hogin and City Manager Jim Thorsen were in attendance. The closed session discussed approval of a final settlement in a case filed by City of Malibu against the California

Coastal Commission, with the conservancy as the real party in interest, referred to as the "Public Works Project Lawsuit." (See *City of Malibu v. California Coastal Com.* (2012) 206 Cal.App.4th 549.) Under the settlement, the conservancy agreed to pay the City of Malibu $175,000 in fees and agreed to an additional $200,000 penalty if it sought an override.[2] Defendant failed to disclose the city council's intent to discuss the Public Works Project Lawsuit in the posted agenda for the December 10, 2012 closed session meeting. Defendant also failed to publicly report the final litigation settlement agreed upon in that closed session. Plaintiff also alleged defendant had discussed the land swap at this closed session.

On December 13, 2012, Councilmembers House and La Monte discussed the land swap with Executive Director Edmiston. Edmiston was interested in the land swap, but also demanded the parties resolve other disputed issues between Malibu and the conservancy. This included a separate lawsuit

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[2] "[T]he override provision in [Public Resources Code] section 30515 is meant to prevent a local government from standing in the way of the development of a public works project or an energy facility that would meet the public needs of an area greater than that encompassed in the local coastal program that were not anticipated when the [local coastal program] was certified." (*City of Malibu v. California Coastal Com., supra*, 206 Cal.App.4th at pp. 563-564.) The override provision "permits a person authorized to undertake a public works project or proposing an energy facility development to seek a Coastal Commission override to allow the person to do exactly that . . . ." (*Id.* at p. 562.)

between the conservancy and Malibu concerning the 22-acre park in Ramirez Canyon, which is the location of the conservancy's headquarters. By the end of the meeting, Edmiston, House, and La Monte had agreed on a framework for a comprehensive solution to many of the issues between the conservancy and Malibu.

Negotiators and lawyers from Malibu and the conservancy met on December 20, 2012, to hammer out the details of the land swap. On December 21, 2012, Edmiston e-mailed the conservancy's and the authority's governing boards, the conservancy's advisory committee, and senior conservancy staff to report that the meeting was successful. He recommended a concurrent meeting with the conservancy and the authority on January 7, 2013 to approve the land swap.

In December 2012, Councilmember Rosenthal communicated with Councilmembers House and La Monte in an e-mail. Rosenthal wrote in her e-mail in pertinent part: "I wanted to give a special thanks to the both of you for your brilliant idea (Charmlee!) and talent for negotiation." Rosenthal used her private e-mail account to send the e-mail to House's and La Monte's private e-mail accounts. Rosenthal also had communications with Councilmember Sibert about the land swap prior to defendant's regular meeting scheduled for January 14, 2013.

On January 4, 2013[3], Malibu posted the agenda for its January 14, 2013 meeting. Item 7B on the agenda was the following: "Proposal to Swap Charmlee Wilderness Park for the ≈83 acres of Bluffs Park Owned by the State and Operated by the

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[3] The record indicates the agenda was posted on January 3, 2013.

[SMMC/MRCA] and Settle *SMMC/MRCA v. City of Malibu[,]* Los Angeles County Superior Court Case No. SC092212 (Mayor La Monte and Mayor Pro Tem House) [¶] Staff recommendation: Direct the [c]ity [a]ttorney to negotiate agreements and implementing documents to effect land swap resulting in complete city control over all 93 acres of Bluffs Park and reach resolution in the lawsuit over the uses in Ramirez Park [the Ramirez Canyon Lawsuit]."

On January 7, 2013, the conservancy's and the authority's governing boards met and voted to authorize the land swap. The boards authorized ground leases that would allow the conservancy to take possession of Charmlee and Malibu to take possession of the Bluffs before recordation of any land ownership occurred. The boards also authorized an application to the California Coastal Commission for a development permit for eight campsites and other improvements at Charmlee.

When the proposed land swap came up for discussion at the January 14, 2013 city council meeting, plaintiff objected to the land swap and claimed that it had been negotiated in a secretive manner.[4] During the meeting, Councilmember House stated she approached Councilmember La Monte about the land swap, but then she later stated she had not had a conversation with any of the council members about it. House and La Monte both stated they had discussed the land swap with City Attorney Hogin and City Manager Thorsen. Councilmember Rosenthal referred to

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[4] Plaintiff is a nonprofit corporation mainly composed of Malibu residents and taxpayers. Plaintiff's purpose is to defend public health, safety, general welfare, environmental, cultural, and community interests of the residents and visitors of Malibu.

the land swap as "this deal." Councilmember Sibert stated he had found out before Christmas that there was a meeting to discuss the land swap. However, he was hearing a lot of the details regarding the land swap for the first time because the council had not discussed it. After statements by all council members, the council on a motion by Councilmember House and seconded by Councilmember Rosenthal approved the following action:

"1) Direct the [c]ity [a]ttorney to negotiate agreements and implementing documents to effect land swap of Charmlee Wilderness Park for approximately 83 acres of Bluffs Park resulting in complete [c]ity control over all 93 acres of Bluffs Park, contingent on establishing that ballfields can be added to State-owned portion of Bluffs Park and confirming that the [c]ounty imposes fire safety measures on camping that would be applicable to Charmlee Wilderness Park; 2) Direct the [c]ity [a]ttorney to negotiate a resolution in the lawsuit over the uses in Ramirez Park; 3) Establish the Charmlee Wilderness Park/Bluff Park Land Swap Ad Hoc Committee of Mayor La Monte and Mayor Pro Te[m] House to work with the [c]ity [a]ttorney on the swap; and 4) Direct the [c]ity [a]ttorney to initiate discussion with Santa Monica Mountains Conservancy (SMMC) to resolve differences over the appropriate uses and development proposed at Corral and Escondido Canyons." Councilmember House's motion carried unanimously.

On March 8, 2013, plaintiff submitted a detailed cure-and-correct demand letter to defendant. Plaintiff asserted direct and indirect evidence that a majority of the city council had violated the Brown Act. Plaintiff made a written demand pursuant to section 54960.1, subdivisions (b) and (c)(1) for defendant to cure

and correct all actions violating the Brown Act concerning the land swap. Plaintiff's demands included that defendant rescind the January 14, 2013 action; suspend all land swap-related work, including all negotiations with the conservancy and the authority; make available all land swap-related public records, including e-mails and texts between Councilmembers La Monte, House, Sibert, or City Manager Thorsen; refrain from putting a renewed land swap proposal on any city council agenda until after the public records were made available; consider any land swap proposal de novo; and comply with city council policies at an open public meeting prior to any future land swap agenda.

On March 13, 2013, City Attorney Hogin recommended to the city council that they reject any cure or correction demand. Hogin stated that she had briefed the council members in writing just before Christmas 2012 and indicated to Councilmembers Peak, Rosenthal, and Sibert that the land swap proposal originated from Councilmember House and was put forth by House and Councilmember La Monte.

At a March 25, 2013 council meeting, during which Councilmember La Monte was absent, plaintiff's legal counsel argued the city council should accept plaintiff's cure-and-correct demand. Councilmember Sibert indicated City Attorney Hogin had notified the city council prior to Christmas that there had been a meeting and knew what was discussed. He again stated he spoke to no one else about it, including other city council members. The city council voted to reject the demand by a 4-0 vote.

Defendant's next scheduled regular meeting was set for April 8, 2013. On April 1, 2013, City Attorney Hogin issued a staff report recommending defendant reconsider its response to

plaintiff's cure-and-correct demand. Hogin recommended defendant rescind its action on January 14 but then reapprove it as part of the same agenda item.

At the April 8, 2013 meeting, plaintiff appeared to protest defendant's anticipated action. Plaintiff asserted City Attorney Hogin's recommendation was a sham cure that did not correct the alleged Brown Act violations. Defendant eventually voted to rescind its January 14 action and the March 25 rejection of plaintiff's demand to cure and correct. It then re-approved the language previously approved in its January 14 action, with the additional language that "'[t]he [c]ity [c]ouncil will consider proposals generated from this direction at future [c]ouncil meetings.'"

B. First and Second Amended Petition and Complaint

Plaintiff initiated its action against defendant on April 10, 2013. Plaintiff filed its first amended petition and complaint on April 22, 2013. On July 26, 2013, plaintiff filed its second amended petition and complaint, the operative pleading.

For its first cause of action, plaintiff petitioned for a writ of mandate under section 54960.1[5]. Plaintiff alleged defendant

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[5] Section 54960.1, subdivision (a) provides: "The district attorney or 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 Sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section."

violated section 54953, subdivision (a), which provides, "'All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.'" Plaintiff further alleged the following: (1) the city council engaged in deliberations and discussions as defined in section 54952.2; (2) the council members engaged in prohibited "hub-and-spoke" communications, with City Attorney Hogin as the "hub" and the council members as the "spokes"; (3) the council engaged in prohibited "daisy-chain" communications; (4) the city council engaged in a meeting via prohibited communications as defined under section 54952.2, subdivision (b); and (5) a majority of the council members concurred collectively on a positive position regarding the land swap, and on supporting Councilmembers House and La Monte's negotiations.

For the second cause of action, plaintiff alleged a violation of section 54960 and sought declaratory relief.[6] Specifically, it

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[6] Section 54960 was amended by the Legislature in 2012. (See Stats. 2012, ch. 732, § 1.) However, the amendment provided in pertinent part, "The provisions of this act shall not apply to past actions of a legislative body that occurred before January 1, 2013." (*Id.* at § 4.) Thus, for alleged acts prior to January 1, 2013, we apply former section 54960 in effect at the time.

Former section 54960, subdivision (a) provides: "The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body, or to

alleged a violation of section 54952.2, subdivision (b) regarding prohibitions on serial communications as mentioned above and violations of sections 54954.2, subdivision (a), 54957.1, subdivision (a)(3), and 54956.9, subdivision (a) concerning the closed session on December 10, 2012.

For the third cause of action, plaintiff alleged violations of sections 54960 and 54960.1 and requested injunctive relief, claiming defendant would continue to violate the Brown Act, including sections 54952.2, 54953, 54954.2, 54956.9, 54957.1, and 54957.7, unless they were enjoined. Plaintiff also asserted violations regarding the open meeting requirements and closed sessions.

C. Motion for Judgment on the Pleadings

Prior to plaintiff's second amended petition and complaint being filed, defendant filed a motion for judgment on the pleadings on May 23, 2013. Defendant's motion was directed at the first amended petition and complaint. On June 25, 2013, plaintiff requested leave to file a second amended petition and complaint. According to defendant's notice of ruling, the trial court granted plaintiff permission to file its second amended petition and complaint by July 25, 2013. The trial court also ordered defendant's motion for judgment on the pleadings to be deemed to attack the second petition and complaint.

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determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or to compel the legislative body to audio record its closed sessions as hereinafter provided."

Defendant's motion asserted plaintiff's Brown Act causes of action failed to state a claim. Namely, defendant contended any alleged violation was cured on April 8, 2013. Additionally, defendant asserted no "action taken" within the meaning of section 54960.1 occurred. It took the position that acquiring knowledge outside of a public meeting does not violate the Brown Act. Defendant argued failure to state a claim for the first cause of action should also result in judgment on the pleadings for the declaratory and injunctive relief causes of action.

Plaintiff filed its opposition on July 31, 2013. Plaintiff argued action was taken within the meaning of the Brown Act prior to and culminating in the January 14, 2013 meeting. Plaintiff disputed defendant's curative action on April 8, 2013.

The trial court denied the motion as to the first cause of action for writ of mandate on October 31, 2013. It found a cause of action existed indicating that "action taken" within the meaning of section 54960.1, subdivision (a) occurred prior to January 14, 2013. The court determined that whether the April 8, 2013 rescission, public discussion, and re-adoption was a meaningful cure was a factual inquiry not amenable to resolution by a motion for judgment on the pleadings.

As to the second and third causes of action, the court ruled defendant's alleged violation was a one-time violation of the Brown Act, not demonstrative of a pattern or practice, citing *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 915 (*Shapiro*). Additionally, the court found these causes of action duplicative of the first cause of action and granted the motion for judgment on the pleadings for the second and third causes of action.

D. Discovery

Plaintiff conducted extensive discovery. This included a special interrogatory served on Councilmembers Rosenthal and Sibert, requesting that they "[f]ully describe all communications related to the parkland swap that you had with any [c]ity official, including but not limited to any member of the [c]ity [c]ouncil prior to the January 14, 2013 meeting." Plaintiff moved to compel further responses on July 22, 2013.

On August 13, 2013, the trial court denied plaintiff's motion as to special interrogatory No. 8 pertaining to Councilmembers Rosenthal and Sibert on grounds of the deliberative process privilege. The trial court also ruled that it would not permit any trial testimony at the hearing.

Plaintiff also served 10 requests for inspection of documents on April 24, 2014. Plaintiff found defendant's responses to be insufficient and moved to compel further responses on October 1, 2014. Defendant objected to certain inspection of documents requests under the attorney-client privilege and the deliberative process privilege. On November 20, 2014, the trial court upheld the attorney-client privilege and the deliberative process privilege insofar as the requested documents did not memorialize a Brown Act violation via serial meetings. The court ordered defendant to prepare a revised privilege log and ordered the parties to meet and confer concerning the log in light of the principles the court described.

E. Writ of Mandate Hearing

On April 20, 2015, defendant moved to dismiss the cause of action for writ of mandate, asserting it had effectively cured any Brown Act violation. The trial court held a hearing on the section 54960.1 cause of action for writ of mandate on May 28, 2015. The trial court again denied plaintiff's request for live testimony.

The trial court issued its order denying plaintiff's writ of mandate and granting defendant's motion to dismiss. It found there was no serial daisy-chain or hub-and-spoke communication that constituted a meeting under the Brown Act and that the city council did not discuss, deliberate, or take action on the land swap prior to the January 14, 2013 meeting. It also determined City Attorney Hogin's pre-Christmas 2012 briefing to the city council merely informed the city council of Councilmembers House and La Monte's negotiations and found no evidence the briefing was a concerted plan for the city attorney to act as intermediary for a majority of the city council to engage in collective deliberation.

Regarding Councilmember Rosenthal's December 24, 2012 e-mail to Councilmembers House and La Monte, the trial court found it did not demonstrate a discussion or commitment to a position in violation of the Brown Act. Alternatively, the trial court found no prejudice because the city council complied with the open meeting requirements at the January 14 meeting. The trial court entered judgment accordingly on July 14, 2015.[7] This appeal followed.

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[7] The trial court also ruled upon plaintiff's causes of action under the California Public Records Act. (§ 6250 et seq.) Plaintiff does not appeal the judgment as to those claims.

III. DISCUSSION

A. Evidentiary Rulings

1. Testimony at Writ of Mandate Hearing

Plaintiff asserts the trial court erred by denying it the opportunity to call witnesses to testify at the writ of mandate hearing. We review the trial court's evidentiary rulings for abuse of discretion. (See *California School Employees Assn. v. Del Norte County Unified Sch. Dist.* (1992) 2 Cal.App.4th 1396, 1405 [broad discretion for trial court to decide writ of mandate].)

The matter proceeded only as to a writ of mandamus. Subsequently, the trial court did not permit plaintiff to depose the council members, finding it to be an unnecessary burden given that plaintiff also propounded interrogatories and requests for admission. Plaintiff did not oppose the denial of the depositions, but requested it be permitted to call the council members as witnesses at the hearing. That request was denied at the writ hearing.

We find no abuse of discretion. Testimony is typically not permitted at writ of mandate proceedings. (See Cal. Rules of Court, rule 3.1103(a)(2) ["'[l]aw and motion'" includes writ of mandate proceedings], 3.1306(a) ["Evidence received at a law and motion hearing must be by declaration or request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown."]; *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 263 ["'In a law and motion, writ of mandate hearing, the trial court has broad discretion to decide a

case on the basis of declarations and other documents rather than live, oral testimony. [Citations.]' [Citations.]"].) Plaintiff never challenged the court's ruling denying depositions of the council members. Under the California Rules of Court, the trial court could not permit testimony at the hearing without a showing of good cause. There is no evidence in the record plaintiff demonstrated good cause or moved under rule 3.1306(b) of the California Rules of Court to present oral testimony at the hearing. Even if good cause was presented, the trial court has discretion to not permit such testimony.

Plaintiff's citation to *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*) is unpersuasive. In *Elkins*, a superior court had a local rule and trial scheduling order requiring parties in a marriage dissolution proceeding to present their case by written declaration. (*Id.* at pp. 1346-1347.) Our Supreme Court found that, for purposes of *trial*, declarations were considered hearsay and were not admissible, subject to specific statutory exceptions. (*Id.* at p. 1354.) Our Supreme Court specifically found, however, "Our conclusion does not affect hearings on motions." (*Id.* at p. 1345, fn. 1.) As noted, the California Rules of Court treat writ of mandate proceedings as law and motion proceedings. Plaintiff sought mandamus relief under section 54960.1 and categorized the relief requested as a peremptory or alternative writ under Code of Civil Procedure section 1085. Plaintiff thus sought relief that was subject to the procedural rules for a writ of mandate proceeding.[8] The trial court did not err by denying testimony at the writ of mandate hearing.

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[8] Plaintiff also cites to *Dare v. Bd. of Medical Examiners* (1943) 21 Cal.2d 790, 797-798, which held regarding mandamus proceedings: "When the matter is at issue on controverted

2. Discovery Rulings

We review rulings on motions to compel discovery for abuse of discretion. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) Plaintiff first contends the trial court erred regarding the denial of 10 requests for inspection of documents on April 24, 2014. We disagree. As noted, the trial court ordered defendant to produce a revised privilege log regarding these documents. The trial court then ordered the parties to meet and confer regarding the adequacy of defendant's privilege claims. Based on the record, plaintiff did not subsequently dispute these privilege claims. Thus, even if there was error as to any privilege claims for these documents, plaintiff waived it. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742-743 [acquiescence to error is waiver of claimed error].)

Plaintiff also contends the trial court erred by finding the deliberative process privilege applied as to the special interrogatory served on Councilmembers Rosenthal and Sibert. "Under the deliberative process privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or to be examined concerning not only the mental processes by which a given decision was reached, but the

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questions of fact, the cause may then be said to proceed as a civil action, that is, it is set down for trial and is tried as a civil action during the course of which any competent evidence may be introduced and received and the ordinary procedural rules apply." That case is also unpersuasive here because it is not mandatory for a trial court to treat a writ of mandate proceeding as a regular civil trial. (See *Sipper v. Urban* (1943) 22 Cal.2d 138, 141 [whether to allow trial de novo for mandamus proceeding is in discretion of court].)

substance of conversations, discussions, debates, deliberations and like materials reflecting advice, opinions, and recommendations by which government policy is processed and formulated." (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 540 (conc. opn. of Brown, J.); *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 305.) The burden is on the governmental body asserting the privilege to show the public's specific interest in nondisclosure clearly outweighs the public interest in disclosure. (*Citizens for Open Government v. City of Lodi, supra*, 205 Cal.App.4th at p. 306.)

Here, defendant claimed the deliberative process privilege applied because the need for confidentiality of the information was strong. Defendant noted council members can formulate policy positions in private with others, provided it does not violate the Brown Act. Defendant argued the Brown Act applies to deliberations of legislative bodies, which requires a majority of the members. (See § 54952.2, subd. (c)(1) ["Nothing in this section shall impose the requirements of this chapter upon any of the following: [¶] (1) Individual contacts or conversations between a member of a legislative body and any other person that do not violate subdivision (b)."].)

We find no abuse of discretion. As written, the special interrogatory served on Councilmembers Rosenthal and Sibert would require disclosure of *any* communication between the council member and any other person regarding the land swap. Such disclosure would encompass communications that do not fall within the scope of the Brown Act. The interrogatory thus conflicts with the deliberative process privilege.

B. Writ of Mandate

"'[W]e "conduct independent review of the trial court's determination of questions of law." [Citation.] Interpretation of a statute is a question of law. [Citations.] Further, application of the interpreted statute to undisputed facts is also subject to our independent determination. [Citation.]' [Citation.]" (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1511.)

Plaintiff contends the trial court erred by denying the writ of mandate under section 54960.1. Plaintiff's allegations under that section are that defendant took action within the meaning of section 54952.6 by 1) having a collective decision made by a majority of the city council and 2) a collective commitment by a majority of the city council to make a positive decision regarding the land swap. As evidence, plaintiff cites two communications: City Attorney Hogin's written briefing in December 2012 to the council members, which disclosed the existence of the land swap negotiations by Councilmembers House and La Monte; and Councilmember Rosenthal's December 24, 2012 e-mail to House and La Monte. Plaintiff also argued defendant had a discussion of the land swap during the December 10, 2012 closed session.

"To state a cause of action, a complaint based on [section] 54960.1 must allege: (1) that a legislative body of a local agency violated one or more enumerated Brown Act statutes; (2) that there was 'action taken' by the local legislative body in connection with the violation; and (3) that before commencing the action, plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not cure or correct the challenged action." (*Boyle v. City of Redondo Beach*

(1999) 70 Cal.App.4th 1109, 1116-1117.) Section 54952.6 provides: "As used in this chapter, 'action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."

As noted, plaintiff alleged defendant violated section 54953, subdivision (a), which provides: "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." Section 54952.2, subdivision (a) provides: "As used in this chapter, 'meeting' means any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body." Section 54952.2, subdivision (b)(1) provides in pertinent part: "A majority of the members of a legislative body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body."

The trial court found no collective decisionmaking took place. We agree. "[I]t is collective decisionmaking by a legislative body, not the solitary decisionmaking of an individual public official, which is subject to the Brown Act." (*Golightly v. Molina, supra*, 229 Cal.App.4th at p. 1514.) Regarding City

Attorney Hogin's pre-Christmas written briefing in 2012, there is nothing indicating it facilitated collective decisionmaking by a majority of the city council. City Attorney Hogin's written briefing informed the city council of the land swap negotiations promulgated by Councilmembers House and La Monte. This is not evidence of collective decisionmaking. There is no evidence in the record that the city attorney was acting as a hub for a majority of the city council to collectively decide anything regarding the land swap. (Cf. *Stockton Newspapers Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 102-103 [series of nonpublic phone calls by legislative body members for purpose of obtaining collective commitment regarding public business violated Brown Act].)

Councilmember Rosenthal's December 24, 2012 e-mail also fails to demonstrate that a majority of the city council collectively decided or committed to the land swap. Rosenthal communicated to Councilmembers House and La Monte an appreciation for their land swap idea and talent for negotiation. That does not demonstrate a collective decision or commitment to the land swap. As found by the trial court: "When a legislator conveys her opinion that she believes an idea is brilliant, a reasonable inference may be drawn that she will support it. But that inference is not the same thing as an express demonstration of her commitment to a position." Indeed, evidence exists indicating Rosenthal had not yet committed to the land swap. At the January 14, 2013 meeting, Rosenthal sought deed restrictions on camping regarding Charmlee because of the potential fire danger. City Attorney Hogin explained that the conservancy would not agree to a land swap if camping was deed restricted. Rosenthal nonetheless asked City Attorney Hogin to attempt to do so. This

does not demonstrate a collective decision regarding the land swap by a majority of the city council was made prior to the January 14, 2013 meeting.

An examination of the posted agenda on January 3, 2013, and the action taken on January 14, 2013, demonstrates actual deliberation occurred at the regular meeting. The agenda for the January 14, 2013 meeting indicated only that the city attorney would negotiate the land swap. Members of the public appeared to voice their support or opposition, including plaintiff. The action taken on January 14, 2013, indicated the land swap would be contingent on ballfields being built and fire safety measures taken for camping. Based on the record, any collective decision concerning the land swap occurred at the January 14, 2013 regular meeting, and not before. We find no action taken within the meaning of section 54952.6 occurred in violation of section 54960.1.

Plaintiff contends there was evidence that defendant violated the Brown Act during the December 10, 2012 closed session. It argues on appeal that defendant's proposed settlement of the Public Works Project Lawsuit on December 10, 2012, does not make sense unless the land swap was part of the settlement calculation. Plaintiff proffered as evidence the conservancy's January 7, 2013 staff report, in which Edmiston wrote: "As part of the Conservancy['s] and [the authority's] proposed . . . Plan, certain improvements, including overnight camping, were planned for the Bluffs. The Conservancy . . . and the City of Malibu failed to reach an agreement on these plans and several years of litigation effectively put any development of the Bluffs on hold. [¶] Recently, the City of Malibu approached staff with a proposed settlement that would resolve the pending

litigation." Plaintiff contends the referenced litigation referred to the Public Works Project Lawsuit. We note the trial court does not discuss plaintiff's assertion in its statement of decision. However, "[t]he doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment. [Citation.] The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error. [Citations.]" (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) We will affirm a trial court's implied factual finding if supported by substantial evidence. (*Ibid.*) Here, the implied findings against plaintiff's argument are supported by substantial evidence. City Attorney Hogin's pre-Christmas briefing and Councilmember Rosenthal's December 24, 2012 e-mail both support the inference that defendant did *not* discuss the land swap at the December 10, 2012 meeting. Councilmember Sibert stated at the January 14, 2013 meeting that he found out before Christmas there was a meeting to discuss the land swap but no details were discussed. Substantial evidence supports the implied finding that the city council as a whole did not become aware of the land swap until after Councilmembers House and La Monte had negotiations with Edmiston on December 13, 2012. An appellate court does not reweigh the evidence. (*Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 745.)

C. Motion for Judgment on the Pleadings

"'Because a motion for judgment on the pleadings is similar to a general demurrer, the standard of review is the same. [Citation.] We treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [¶] . . . We consider evidence outside the pleadings which the trial court considered without objection. [Citation.]' [Citation.]" (*Estate of Dayan* (2016) 5 Cal.App.5th 29, 39-40; *Stockton Newspapers, Inc. v. Redevelopment Agency, supra*, 171 Cal.App.3d at p. 99; see Code Civ. Proc., § 438, subd. (c)(1)(B).)

In the second amended petition and complaint, plaintiff labeled the various remedies of mandamus, declaratory relief, and injunctive relief as separate causes of action. However, plaintiff's complaint arises from only two causes of action, one under section 54960 and the other under section 54960.1. Section 54960 provides three forms of relief—mandamus, injunction, and declaratory relief. Section 54960.1 provides two forms of relief—mandamus and injunction. Based on the allegations, plaintiff seeks mandamus and injunctive relief under section 54960.1, and declaratory and injunctive relief under section 54960.

The trial court granted judgment on the pleadings as to the declaratory and injunctive relief on the theory that they are duplicative of the cause of action for mandamus. We disagree with this conclusion. The declaratory and injunctive relief under section 54960 and the mandamus relief under 54960.1 arise under separate causes of action. The purpose of an action under former section 54960 is to, inter alia, "stop[] or prevent[] violations or threatened violations of this chapter by members of

the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body . . . ." The purpose of a section 54960.1 action is to "obtain[] a judicial determination that an action taken by a legislative body of a local agency in violation of [specific sections of the Brown Act] . . . is null and void under this section." While alleged conduct may fall within both sections, they are not the same causes of action. (See *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1288 [time requirements and cure and correct provisions are contained only in section 54960.1, not section 54960].)

California Alliance for Utility etc. Education v. City of San Diego (1997) 56 Cal.App.4th 1024 (*CAUSE*) is illustrative of a sufficiently plead cause of action under section 54960 for declaratory relief. In *CAUSE*, the plaintiff, a citizen group, alleged the city was engaging in continuing violations of the Brown Act by conducting closed meetings in which it reduced an electric company's franchise obligation to place power lines underground. (*Id.* at p. 1028.) The trial court sustained a demurrer without leave to amend against the complaint. (*Ibid.*) The Court of Appeal reversed: "For their part the plaintiffs believe the city council did not properly give notice of the closed session it conducted on March 28, 1995, used the closed session to discuss issues other than receiving advice from its attorneys and failed to properly give notice of the public session in which the settlement agreement with SDG&E was formally approved and failed to conduct the public hearing they believe is required by the city charter. [¶] Notwithstanding its demurrer, for its part city does not believe any violation has occurred. City's belief as to the propriety of its action may be found not only in plaintiffs'

allegation that city will engage in similar practices in the future but also in city's failure to concede that the facts alleged by plaintiffs constitute a violation of the Brown Act or the city charter. (See *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 524 [courts may presume that municipality will continue similar practices in light of city attorney's refusal to admit violation].) Thus there can be no serious dispute that a controversy between the parties exists over city's past compliance with the Brown Act and the charter. On that basis alone plaintiffs are entitled to declaratory relief resolving the controversy. (*Alameda County Land Use Assn. v. City of Hayward* [(1995)] 38 Cal.App.4th [1716,] 1723.)" (*CAUSE, supra*, 56 Cal.App.4th at p. 1030.)

Here, plaintiff has alleged under section 54960 for declaratory relief not only that defendant did not believe it had violated the Brown Act regarding the land swap via the December 2012 communications but that defendant denied the December 10, 2012 closed session violated the Brown Act's open meeting requirements. Plaintiff alleged that declaratory relief would resolve the present controversy and likely prevent future disputes. Similarly, for injunctive relief under section 54960, plaintiff alleged an injunction was necessary otherwise defendant would continue to violate the Brown Act for open meetings and closed sessions, including: section 54952.2 (meeting and prohibited communications); 54953 (open and public meetings); 54954.2 (posting of agendas); 54956.9 (pending litigation and closed sessions); 54957.1 (closed sessions); and 54957.7 (disclosure of items discussed in closed sessions). These

allegations are sufficient to state a cause of action under section 54960.[9]

The trial court relied upon *Shapiro*, *supra*, to justify granting judgment on the pleadings regarding declaratory and injunctive relief. Unlike the *CAUSE* case, *Shapiro* involved a trial on whether Brown Act violations occurred and what relief was appropriate. During that trial, the court conducted an in camera review of confidential minutes of closed door city council sessions, which Shapiro alleged were not properly noticed. (*Shapiro, supra*, 96 Cal.App.4th at p. 908.) Based on that review, the court determined that the city had violated various provisions of the Brown Act and issued declaratory relief concerning what specifically the city had done wrong. (*Id.* at pp. 908-910.) It then issued an injunction prohibiting such conduct in the future. (*Id.* at pp. 910-911.) On appeal, the city acknowledged that at least some of the declaratory relief was appropriate and appealed only the injunctive relief portion of the judgment, including the order concerning the disclosure of agenda items and the extent to which other matters "reasonably related" to agenda items could be discussed. (*Id.* at p. 911.) The appellate court upheld the trial court's injunction order in full and in so doing made the following observation: "[S]o long as the allegations and proof of the legislative body's practices extend to *'past actions and violations that are related to present or future ones,'* the Brown Act provisions are brought into play to authorize and justify injunctive relief." (*Id.* at p. 915.) Significantly, there was no discussion regarding the sufficiency of the pleadings nor was the availability of declaratory relief an issue.

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[9] We will discuss the cause of action under section 54960.1 for injunctive relief below.

The trial court's order granting judgment on the pleadings contains the following statement: "The city's alleged violation is a one-time violation of the Brown Act, and not a circumstance in which a declaration of rights is appropriate because the city has a pattern and practice of holding closed sessions on parkland swamps" followed by a citation to *Shapiro*. The reference to "one-time" violation is mentioned in *Shapiro* but that term was used in the context of how the case was different from *Regents of University of California v. Superior Court, supra,* 20 Cal.4th at page 509, which concerned a violation of a different Government Code section.[10] Moreover, there is no discussion in *Shapiro* at all about the need to specifically allege a "pattern and practice."

Because the allegations under a motion for judgment on the pleadings are treated as true, and plaintiff did allege that alleged violations of the Brown Act would continue to occur, plaintiff stated a cause of action under section 54960 for declaratory and injunctive relief. (*Estate of Dayan*, *supra*, 5 Cal.App.5th at pp. 39-40.) The trial court erred by granting judgment on the pleadings as to the cause of action under section 54960 for declaratory and injunctive relief.

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[10] In *Regents*, the Supreme Court noted that a Bagley–Keene Open Meeting Act violation was a "one-time event" and held that the applicable statute (§ 11130) did not permit a right of action to nullify and void the Regents' past approval of a controversial resolution where there was no showing of a "present" violation. (*Id*. at pp. 515-516, 536.) *Regents* contained a lengthy footnote that discussed whether the Brown Act applied to past actions and violations as well as present and future ones but concluded that none of the cases cited therein, which included *CAUSE* and others mentioned in this case, actually considered the question. (*Id*. at p. 526, fn. 6.)

This does not end our inquiry however. An appellant must also demonstrate prejudice. "Article VI, section 13, of the California Constitution provides that a judgment cannot be set aside '. . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' This fundamental restriction on the power of appellate courts is amplified by Code of Civil Procedure section 475, which states that trial court error is reversible only where it affects '. . . the substantial rights of the parties. . . ,' and the appellant 'sustained and suffered substantial injury, and that a different result would have been probable if such error . . . had not occurred or existed.' Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred." (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833; accord, *Kim v. True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1444; *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 799.) "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 692, citing *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.)

We find no reversible error as to the trial court's order granting judgment on the pleadings regarding the section 54960.1 cause of action for injunctive relief. As indicated above, plaintiff did not demonstrate a violation of section 54953 (open and public meeting requirement) for purposes of a cause of action under section 54960.1. Thus, plaintiff has failed to demonstrate it is entitled to relief under section 54960.1, including mandamus and injunctive relief. Though the trial court erred initially by denying the section 54960.1 cause of action for injunctive relief, plaintiff has not demonstrated a result more favorable to it was reasonably probable to justify reversal.

We also find no reversible error as to the trial court's order granting judgment on the pleadings for declaratory relief pertaining to the land swap. Under section 54952.2, subdivision (b)(1) a majority of the members of a legislative body, outside of an authorized meeting, shall not "discuss, deliberate, or take action" regarding any item of business within the legislative body's subject matter. Section 54952.2 thus encompasses discussions and deliberations. However, the trial court specifically found no deliberation, discussion, or action was taken by defendant regarding the land swap prior to the January 14, 2013 regular meeting.

On this record, we do not find City Attorney Hogin's December 2012 written briefing or Councilmember Rosenthal's December 24, 2012 e-mail to be a discussion or deliberation. Hogin's written briefing as we explained above does not rise to the level of a hub-and-spoke style communication, so a majority of the legislative body was not involved. Rosenthal's December 24, 2012 e-mail was one-sided and did not solicit information regarding the land swap. There is no evidence in the

record demonstrating Councilmembers House or La Monte even responded to Rosenthal's e-mail. Indeed, as indicated above, Rosenthal did not appear informed on the details of the land swap at the January 14, 2013 regular meeting. (Cf. *Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 794 [deliberation connotes *collective* acquisition and exchange of facts preliminary to ultimate decision]; *Stockton Newspapers, Inc. v. Redevelopment Agency, supra*, 171 Cal.App.3d at p. 102 [same].) Plaintiff would not have achieved a more favorable result for its section 54960 cause of action pertaining to Hogin's December 2012 written briefing and Rosenthal's December 24, 2012 e-mail.

As for plaintiff's arguments concerning defendant's alleged discussion of the land swap during the December 10, 2012 closed session, we do not find prejudicial error. Substantial evidence supported the implied finding that the land swap was not discussed at the December 10, 2012 closed session, as discussed above. Based on the evidence, it is not reasonably probable plaintiff would have achieved a different result in the absence of the error.

Thus, the only issue remaining for remand is plaintiff's section 54960 cause of action for declaratory and injunctive relief related to the December 10, 2012 closed session and the application of the closed session requirements under the Brown Act. Here, there is prejudicial error. Based on the record, the trial court never fully considered plaintiff's allegations.[11] There

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[11] As indicated in defendant's answer to these allegations, defendant does not deny the agendas posted for the December 10, 2012 meeting did not list a conference with legal counsel regarding the Public Works Project Lawsuit. However, defendant asserted it was not a Brown Act violation because defendant's

is a footnote in the trial court's October 31, 2013 order which mentioned plaintiff was informed and believed that defendant discussed the land swap at the December 10, 2012 closed session. However, the trial court did not consider plaintiff's allegations that defendant failed to properly notice or report the closed session. The court also failed to consider plaintiff's allegations as to whether the Public Works Project Lawsuit matter was properly a closed session subject matter. Because we must assume for a motion for judgment on the pleadings that the non-moving party's pleadings are true, and based on the record, plaintiff has a reasonable chance of obtaining a more favorable result on this issue. We will remand for further proceedings. This remand regarding the December 10, 2012 closed session does not include plaintiff's arguments concerning defendant's alleged discussion of the land swap.

Because we have resolved all the issues on appeal above, we need not decide the parties' remaining arguments. (*Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259.)

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acts fell within an exception. Clearly there is a dispute between the parties on this matter.

IV. DISPOSITION

The trial court's October 31, 2013 order on the motion for judgment on the pleadings is reversed as to plaintiff's cause of action under Government Code section 54960 for declaratory and injunctive relief pertaining to the December 10, 2012 closed session as discussed above. Upon remittitur issuance, the matter is remanded for further proceedings consistent with this opinion. The orders and judgment are otherwise affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.