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Brown Act Violation Did Not Require Nullification of Project Approval Where No Prejudice Was Shown

The City of Lafayette violated the Brown Act by not including a litigation threat discussed in closed session in the agenda packet made publicly available before the meeting, but plaintiffs failed to show any prejudice resulting from the violation. *Fowler v. City of Lafayette*, 46 Cal. App. 5th 360 (2020). Homeowners sought approval from the City to build a cabaña near a tennis court on their property. Plaintiff neighbors appealed the Planning Commission's approval to the City Council. During consideration of the appeal, the homeowner's

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Plaintiffs

sued, contending that the City violated the Brown Act by discussing the application in closed hearings, and that plaintiffs were deprived of their right to a fair hearing. **Brown Act Violation** Plaintiffs claimed the City violated the Brown Act by failing to announce or make available for public inspection the litigation threat that served as the basis for closed session discussions. The City argued it was not required to include the litigation threat in the pre-meeting agenda packet because the threat was not distributed in written form to the City Council. The court of appeal rejected this argument, stating that under the Act, the record of a litigation threat to be discussed in closed session must be reduced to writing and included in the agenda packet made available upon request before a meeting. Therefore, the City violated the Brown Act. **Nullification of Agency Action** Plaintiffs urged the court to nullify the project approval under provisions of the Brown Act authorizing a court to declare null and void an

action taken in violation of specified portions of the Act. The court was unpersuaded for two reasons. First, plaintiffs' complaint was that they were not informed of the litigation threat before the City Council discussed the threat in closed session. But the action they sought to nullify was the approval of the cabaña, which occurred in an open session that was properly noticed. Second, plaintiffs failed to make the showing of prejudice necessary to support nullification under the Act. The application was thoroughly considered at four open City Council meetings, and there was no reasonable argument that plaintiffs lacked a fair opportunity to present their case, that the City failed to consider it fully, or that plaintiffs would have achieved a more favorable result had they known the City Council had discussed the litigation threat in closed session. **Fair Hearing Claim** Plaintiffs argued they were deprived of their right to due process and a fair hearing because the architect for the project was a member of the City's Planning Commission and a member of the Design Review Commission, which had initially reviewed and approved the project. The court rejected this argument, noting that the architect had recused himself from both the Design Review Commission's and the Planning Commission's consideration of the project. The court also rejected the contention that City staff and the City Attorney exhibited bias in favor of the project, observing that the City Council, not staff members or the City Attorney, was the decision-maker, and nothing showed that the City Council was infected by bias.