COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

CALIFORNIANS AWARE, and
RICHARD P. McKEE,

Plaintiffs and Appellants,

v.

JOINT LABOR/MANAGEMENT
BENEFITS COMMITTEE, and
LOS ANGELES COMMUNITY
COLLEGE DISTRICT

Defendants and Respondents.

B227558

L.A. Sup. Ct. No. BS 124856
Hon. David P. Yaffe

Appeal Filed: September 17, 2010

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS PURSUANT TO *CALIFORNIA RULES OF COURT RULE 8.208*

Appellant Californians Aware ("CalAware") is a 501(c)(3) not for profit public benefit corporation organized under the laws of the state of California, governed by a board comprised of public officials, public minded citizens and journalists, whose mission includes the promotion and defense of the principles of open government. CalAware is not aware of any other entity or person that has a financial or other interest in the outcome of the proceedings that CalAware reasonably believes the justices should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

DATE: February 25, 2011

DENNIS A. WINSTON,
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By_____
Dennis A. Winston
Attorney for Appellants Californians Aware and Richard P. McKee

1. ISSUES PRESENTED ON APPEAL

1. Whether Defendant and Respondent Joint Labor/Management Benefits Committee ("JLMBC") which was created by Defendant and Respondent Los Angeles Community College District ("District") as an advisory committee is subject to requirements of the Ralph M. Brown Open Meeting Act (the "Brown Act", *Government Code § 54950, et seq*.);

2. Whether the JLMBC is completely exempt from following the requirements of the Brown Act by *Government Code § 3549.1*, which exempts "meeting and negotiating" (a statutorily defined term[1]) between the "governing board" of the District or the "District" and the "exclusive [employee] representative."

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[1] *Government Code § 3540.1(k)*.

2. INTRODUCTION AND SUMMARY OF ARGUMENT

> The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. [] (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.

Cal. Constitution, Art. I, sec. 3(b); ***Epstein v. Hollywood Entertainment District II Business Improvement District*** (2001) 87 Cal.App.4th 862, 868, 869.

Appellants and Petitioners Californians Aware ("CalAware") and Richard P. McKee ("McKee", collectively, "CalAware") appeal the denial of their Petition for a writ of mandate to remedy Appellees and Respondents Joint Labor/Management Benefits Committee's ("JLMBC") and Los Angeles Community College District's ("District") refusal to comply with the open meeting requirements of the Brown Act in conducting the business of the JLMBC.

The trial court denied the Petition (without first ruling on whether the Brown Act applied to JLMBC) based upon the contention that *Government Code § 3549.1* [2] exempted JLMBC from complying with the Brown Act. The trial court erred as a matter of law.

First, JLMBC is a "legislative body" subject to the Brown Act because it was created by the District Board as an advisory committee. (*Section 54952(b)*.[3])

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[2] Hereinafter, all references to "sections" shall be to the *Government Code*.

[3] A "'legislative body' means: [¶] (b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body."

Second, *Section 3549.1*'s exemption of "meeting and negotiating" from coverage by the Brown Act is defined by statute to mean "meeting and negotiating" between an exclusive employee representative and the "public school employer" defined as "the governing board" of the District or the "District", not an advisory committee. (*Section 3549.1(a); Section 3540.1(h), (k)*.)

Further, as provided in the same *Chapter 10.7* of the *Government Code,* before any "meeting and negotiating" may take place, *all* proposals must be disclosed at a public meeting of the public school employer and the pubic must be afforded the opportunity to discuss and comment on the proposal:

> (a) All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.
>
> **(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer**.
>
> (c) After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.

(*Section 3547*.[4])

The ineluctable dilemma facing JLMBC is this: either JLMBC is *not* a "public school employer" because it is an advisory committee created by the District Board (making it a "legislative body" subject to the Brown Act but not

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[4] Unless otherwise indicated, all emphasis supplied all internal quotation marks omitted.

exempt by *Section 3549.1*), or JLMBC *is* a "public school employer" in which case it must conduct public meetings for all initial proposals before any "meeting and negotiating" takes place. Either way, JLMBC must comply with the applicable strictures of the Brown Act to ensure open government.

The trial court's denial of the writ should be reversed and the court ordered to grant the writ as requested.

2. STATEMENT OF FACTS

Beginning in 2002, collective bargaining contracts approved by the Board of Trustees (the "Board") of the District and by its represented employees have included a Master Benefits Agreement ("Master Agreement"). (Clerk's Transcript ("CT") at 000012, 000004, 000040.) The Master Agreement called for the creation of the JLMBC. (CT at 000027, 000004, 000040.)

Accordingly, in 2002, the District's Board adopted Rule 101702.10 to Chapter X, Article XVII of the Board's Rules ("Rule 101702.10"), which states that: "The District shall convene [JLMBC] as prescribed by the Master Agreement between the District and the [exclusive employee representatives]. The role, composition and authority of [JLMBC] are specified in Section IV of the Master Agreement." (CT at 000029.)

As detailed in Section IV of the Master Agreement:

> B. The [JLMBC] shall be composed of one voting and one non-voting District Member appointed by the Chancellor; six Employee Members, one appointed by each of the Exclusive Representatives; and an additional voting member who shall serve as Chair….
> Although each Exclusive Representative will appoint one regular voting member on the [JLMBC], the [JLMBC] shall adopt rules

under which each Exclusive Representative may appoint additional non-voting members in proportion to the size of each unit.

C. The [JLMBC] shall have the authority to:

1. review the District's Health Benefits Program and effect any changes to the program it deems necessary to contain costs while maintaining the quality of benefits available to employees (this includes, but is not limited to, the authority to substitute other plans for the District's existing health benefits plans);
2. recommend the selection, replacement, and evaluation of benefits consultants;
3. recommend the selection, replacement, and evaluation of benefit plan providers;
4. review and make recommendations regarding communications to faculty and staff regarding the health benefits program and their use of health care services under it;
5. review and make recommendations regarding booklets, descriptive literature, and enrollment forms;
6. study recurring enrollee concerns and complaints and make recommendations for their resolution;
7. participate in an annual review of the District's administration of the Health Benefits Program;
8. review and make recommendations about the District's health benefits budget;
9. if health care legislation that necessitates modification of the District's Health Benefits Program is enacted before termination of this agreement, assess the effects of such legislation and make

recommendations to the District and the Exclusive Representatives about appropriate action to take.

D. Any action of the [JLMBC] must be approved by the affirmative vote of the voting District member and all but one of the voting Employee Members at a meeting of the [JLMBC] at which a quorum is present. A quorum shall consist of the voting District member and any five voting Employee Members.

E. Any changes proposed by the [JLMBC] in the benefit program, providers, and consultants shall be submitted to the Board of Trustees for its consideration.

(CT at 000027-28.)

On January 12, 2010, CalAware submitted a written demand to the District and JLMBC that the JLMBC comply with the requirements of the Brown Act. (CT at 000006, 000031.) On January 15, 2010, the JLMBC responded that it was not subject to the Brown Act. (CT at 000006, 000032.)

Prior to this exchange, the Chancellor of the California Community Colleges requested an advisory opinion from the California Attorney General as to whether the JLMBC had to comply with the Brown Act. On December 31, 2009, the Attorney General issued Opinion No. 08-806 (*92 Ops.Cal.Atty.Gen. 102 (2009)*), concluding that the JLMBC was not a "legislative body" subject to the Brown Act.

This lawsuit followed.

3. PROCEDURAL HISTORY

On February 5, 2010, CalAware filed a Petition for Writ of Mandate, An Injunction and Declaratory Relief to challenge JLMBC's refusal to comply with the Brown Act. (CT at 000001.) JLMBC and District's Answer was filed and served on April 15, 2010. (CT at 000039.) CalAware's Replication was filed and served on May 21, 2010. (CT at 000175.)

Trial on CalAware's Petition for a writ of mandate was held on June 30, 2010, before the Honorable David P. Yaffe. (CT at 000257.) At the trial, Judge Yaffe denied the writ and ordered Respondents to prepare a judgment for his consideration and use based upon his tentative ruling-minute order. (CT at 000249.)

Judge Yaffe did not expressly rule on whether JLMBC was a "legislative body" under the Brown Act, but observed:

> The position advocated by petitioner would be much stronger if the issue involved only the interpretation of the Ralph M. Brown Act, an open meeting law, the very purpose of which is to make local entities conduct their business in public.

(CT at 000261.)

However, Judge Yaffe went on to explain:

> The issue presented to the Court in this proceeding, however, requires the Court to interpret TWO legislative schemes, the Ralph M. Brown Act AND the Educational Employment Relations Act (EERA), Government Code Section 3540 et seq, the purpose of which is to require public school districts, including community college districts, to recognize and bargain collectively with labor unions representing the district's employees. [¶]
>
> How a Court is to resolve the tension between the two legislative schemes is made clear by the legislature itself, which expressly

provides in the EERA, Government Code Section 3549.1(a), that meetings and negotiations between management and labor are NOT subject to the public meeting law, the Ralph M. Brown Act.

(CT at 000261, 262.)

In Yaffe's view:

The JLMBC has been created by the parties to filter out the changes that are brought to the negotiating table by requiring some degree of consensus by both labor and management members of the JLMBC in order to submit a change to the board of trustees for its consideration.

(CT at 000262.)

Respondents prepared a [Proposed] Order and Judgment to which CalAware filed and served written objections. (CT at 000250.) Judge Yaffe sustained CalAware's objections and the amended Judgment was signed and filed on July 23, 2010. (CT at 000257.) Notice of Entry of Judgment was likewise served on July 23, 2010. (CT at 000266.) Notice of Appeal was timely filed and served on September 17, 2010. (CT at 000268.)

4. STANDARD OF REVIEW

Because the central issue for determination here is the interpretation of statutes (the Brown Act and the Educational Employment Relations Act ("EERA") [5]) and their application to facts which are undisputed (CT at 000260), the Court of Appeal reviews the decision of the lower court *de novo*.

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[5] *Section 3540, et seq*.

> The central issue is the applicability of the Brown Act, specifically, whether LAXT's board of directors is a legislative body within the meaning of *section 54952, subdivision (c)(1)(a)*, so as to be subject to the Act. As an appellate court, ". . .we 'conduct independent review of the trial court's determination of questions of law.' [Citation.] Interpretation of a statute is a question of law. [Citation.] Further, application of the interpreted statute to undisputed facts is also subject to our independent determination.

International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal.App.4th 287, 293 ("***International Longshoremen's***"); ***Furtado v. Sierra Community College*** (1998) 68 Cal.App.4th 876, 880 ("The facts in this matter are undisputed; the issue on appeal is whether the actions taken violated the Brown Act. . . .Accordingly, our review is de novo.")

Here, the determination of the application of the Brown Act to the JLMBC also involved the interpretation of the EERA which governs labor relations between the District and its employees and includes not only protections for effective labor negotiations but safeguards to ensure that the public remain informed and allowed to comment at the outset of the process on proposals involving matters affecting the public fisc. The trial court's decision exempting JLMBC from the safeguards in the Brown Act and the EERA enacted to ensure that the public is informed and able to participate in the process—based upon undisputed facts—should also be conducted *de novo*.

5. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT JLMBC WAS NOT SUBJECT TO THE PROVISIONS OF THE BROWN ACT

The Legislature declared the intent of the Brown Act in its opening section:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other **public agencies in this State exist to aid in the conduct of the people's business**. **It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly**. **The people of this State do not yield their sovereignty to the agencies which serve them**. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. **The people insist on remaining informed so that they may retain control over the instruments they have created**.

Section 54950.

The Brown Act is to be interpreted liberally to effectuate its purposes, not to circumvent them. *Cal. Constitution, Art. I, sec. 3(b);* ***Epstein v. Hollywood Entertainment District II Business Improvement District*** (2001) 87 Cal.App.4th 862, 868, 869 ("***Epstein***"). The Brown Act is intended to ensure the right of public participation "in all phases of local government decision-making and to curb the misuse of the democratic process by secret legislation of public bodies." ***Id***.

The provisions of the Brown Act seek to foster maximum public participation in government. For example, the Brown Act provides that, "[**a]ll 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…." *Section 54953*.

It is against this backdrop that the determination of the application of the Brown Act to JLMBC must be determined.

A. <u>JLMBC Is Subject To The Brown Act Because It Was Created By The District</u>

Section 54952(b) defines a "legislative body" subject to the Brown Act as: "A commission, **committee**, board, or other body of a local agency, **whether** permanent or temporary, **decision-making or advisory**, **<u>created by</u>** charter, ordinance, **resolution, or formal action of a legislative body**."

The term "created by" has been interpreted repeatedly by the Second District in the context of the Brown Act to mean that the local agency was "involved in the creation of" the legislative body. Based either upon the District's approval of the Master Agreement or the adoption of Rule 101702.10 as part of the District Board's Rules, the District was involved in the creation of JLMBC.

This Court's decision in ***International Longshoremen's*** provides useful guidance in this case. In ***International Longshoremen's***, the Second Court was faced with the question whether the Board of Directors of the Los Angeles Export Terminal, Inc. ("LAXT"), a private for profit corporation created to manage coal facility at the Los Angeles Terminal, was covered by the Brown Act as a "legislative body" created by the City of Los Angeles.

As detailed by the Court:

> 28 private companies based in Japan, 6 domestic companies and the Harbor Department negotiated and reached agreement on a complex contractual arrangement known as the shareholders' agreement. Under the agreement, LAXT would be formed as a private, for profit corporation to design, construct and operate a dry bulk handling facility for the export of coal on land leased from the Harbor

> Department. LAXT was to be capitalized with $ 120 million. The Harbor Department, as a 15 percent shareholder, would contribute $ 18 million and would be entitled to nominate three of the nineteen LAXT board members.

International Longshoremen's, 69 Cal.App.4th at 290-291.

> Thereafter:
>
> Pursuant to a charter provision requiring the Los Angeles City Council (City Council) to approve contracts with a payment commitment extending beyond three years, the shareholders' agreement was submitted to the City Council for its consideration. On February 23, 1993, the City Council adopted Ordinance No. 168614, stating: "The Shareholders' Agreement is hereby approved and the Mayor of Los Angeles, or the President of the Board of Harbor Commissioners or the Executive Director of the Harbor Department is hereby authorized to execute said agreement."

International Longshoremen's, 69 Cal.App.4th at 291.

As a result of the City Council's involvement, the City was involved in bringing LAXT into existence.

> *Section 54952, subdivision (c)(1)(A)*, does not define what is meant by the term "created by." The ordinary definition of "to create" is "**to bring into existence**." (Webster's New Internat. Dict. (3d ed. 1986) p. 532.) **Here, the City Council, as well as the harbor commission, played a role in bringing LAXT into existence**. [¶] Specifically, on February 23, 1993, the City Council adopted Ordinance No. 168614, stating: "The Shareholders' Agreement is hereby approved and the Mayor of Los Angeles, or the President of

the Board of Harbor Commissioners or the Executive Director of the Harbor Department is hereby authorized to execute said agreement."

International Longshoremen's, 69 Cal.App.4th at 295.

The Second District followed ***International Longshoremen's*** with ***Epstein***. In ***Epstein***, the Court was faced with the question whether a not for profit Property Owners Association (the "POA") that was formed to manage a Business Improvement District in Hollywood was governed by the Brown Act. This Court held that the City was involved in the creation of the POA, hence, the POA was required to comply with the Brown Act.

> The facts of this case come within the parameters of our holding in *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc*. (1999) 69 Cal. App. 4th 287 [81 Cal. Rptr. 2d 456] because City "played a role in bringing" the POA "into existence." The POA was not simply a preexisting corporation which just happened to be available to administer the funds for BID II. Instead, the record indicates that the POA was formed and structured in such a way as to take over administrative functions that normally would be handled by City.

Epstein, 87 Cal.App.4th at 864. Specifically:

> The POA was, in fact, "created" by City, because City "played a role in bringing" the POA "into existence." (*International Longshoremen's, supra, 69 Cal. App. 4th at p. 295*.) City specifically provided in the first Ordinance that BID I would be governed by a nonprofit association, and even set forth a partial summary of the management and operation of such proposed association. Within days of the adoption of the first Ordinance, the POA's articles of incorporation were prepared, and less than a month later, were filed

> with the Secretary of State. The POA's sole purpose was to "develop and restore the public areas of the historic core of Hollywood." And it was the POA that did, in fact, take over governance of BID I. Obviously, **when City adopted the first Ordinance creating BID I that called for the creation of a nonprofit association to govern the BID I programs, the City "played a role in bringing the POA into existence.**"

Epstein, 87 Cal.App.4th at 870-871.

Finally, in ***Frazer v. Dixon Unified School District*** (1993) 18 Cal.App.4th 781, the Court was faced with the application of the Brown Act to an advisory committee charged with advising the school superintendent as to a controversial curriculum change. The Court held: "the hearing and review committees appointed by the District pursuant to a written board policy were advisory committees within the meaning of *section 54952.3*, whose meetings and deliberations were subject to the Brown Act." ***Frazer***, 18 Cal.App.4th at 785.

> It is now well settled that the term meeting, as used in the Brown Act *(§ 54950, 54953*), is not limited to gatherings at which action is taken by the relevant legislative body; deliberative gatherings are included as well. (*Sacramento Newspaper Guild, supra, 263 Cal.App.2d at p. 48*.) **Deliberation in this context connotes not only collective decisionmaking, but also the collective acquisition and exchange of facts preliminary to the ultimate decision**. (*Id., at pp. 47-48; Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal.App.3d 231, 234 [175 Cal.Rptr. 292*].)

Frazer, 18 Cal.App.4th at 794.

Judge Yaffe correctly acknowledged that "[t]he JLMBC has been created by the parties to filter out the changes that are brought to the negotiating table by

requiring some degree of consensus by both labor and management members of the JLMBC in order to submit a change to the board of trustees for its consideration…." (CT at 000262.)

Both the "creation" of JLMBC by the Respondents and its purpose to "filter out" proposed changes and form "some degree of consensus" establish JLMBC as an "advisory" committee to the District and the District Board. ***International Longshoremen's***, 69 Cal.App.4th at 295; ***Epstein***, 87 Cal.App.4th at 870-871; ***Frazer***, 18 Cal.App.4th at 794. JLMBC is a "legislative body" subject to the Brown Act.

B. <u>The Attorney General's Opinion That JLMBC Was Not Created By The District Is Unpersuasive And Incorrect</u>

In response to a request from the Chancellor of the California Community Colleges the California Attorney General issued an opinion (*92 Ops.Cal.Atty.Gen. 102 (2009)*, the "Opinion") that JLMBC did not have to comply with the Brown Act. The Opinion is so fatally flawed that it provides no useful guidance for the question at hand.

The crux of the Opinion is that:

> We believe, however, that careful scrutiny of the District Board's rule, placed in its proper contextual relationship to the [Master Agreement], compels a different view. Subdivision (b) of section 54952 applies to legislative bodies that are created by local agencies. That is not the case here. On closer inspection, it is apparent that the JLMBC finds its genesis not in the Rule adopted by the District Board, but in the Master Agreement between the District and its employee labor representatives.

92 Ops.Cal.Atty.Gen. at 9.

According to the Attorney General's reasoning:

> [T]he District's [Rule 101702.10] here merely implements a predecessor provision in the Master Benefits Agreement, which is the product of the collective bargaining process between labor and management. The existence of the Master Agreement compelled the adoption of the District's Board Rule. The Master Agreement, not the District Board Rule, creates the JLMBC and prescribes its composition, duties, and scope of authority.

The flaw in the Opinion's reasoning is obvious. Without citing or analyzing ***International Longshoremen's***, the Attorney General overlooked the fact that District was "involved in the creation" of JLMBC *because* the District entered into the Master Agreement and adopted Rule 101702.10. ***International Longshoremen's***, 69 Cal.App.4th at 295; ***Epstein***, 87 Cal.App.4th at 864. The District was no less involved in creating JLMBC by agreeing to the Master Agreement than the City and the Harbor Commission were involved in the creation of the LAXT by agreeing to the Shareholders' Agreement in ***International Longshoremen's*** or than the City was in assisting the creation of the POA by creating the Business Improvement District in ***Epstein***.

In the end, the task of interpreting and applying the Brown Act is the responsibility of this Court and Opinions of the Attorney General, even if generally considered persuasive (when logical and apt), are not controlling. As the Court observed in declining to follow cited Attorney General Opinions it found inapt, "In the end, however, whatever the force of administrative construction ... final responsibility for the interpretation of the law rests with the courts." ***Shapiro v. Board of Directors of The Centre City Development Corporation*** (2005) 134 Cal.App.4th 170, 183 n17 ("***Shapiro***").

6. THE TRIAL COURT ERRED AS A MATTER OF LAW IN RULING THAT *SECTION 3549.1* COMPLETELY EXEMPTS JLMBC FROM COMPLYING WITH THE BROWN ACT

The trial court's application of *Section 3549.1* to exempt JLMBC from complying with the Brown Act was materially in error, both in interpreting the provisions of the Brown Act and of the EERA. Either JLMBC does not come within the definition of a "public school employer" that may engage in "meeting and negotiating" or, if it is, it *must* conduct open meetings at which the public is allowed to review and comment on any proposals before "meeting and negotiating" takes place.

A. JLMBC Does Not Come Within The Definition Of A Public School Employer That May Engage In Meeting And Negotiating

The role of courts in interpreting statutes is straightforward.

> In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Code of Civil Procedure § 1858.

> In ascertaining the Legislature's intent, we turn first to the language of the statute, giving the words their ordinary meaning. [Citations omitted.] We must follow the statute's plain meaning, if such appears, unless doing so would lead to absurd results the Legislature could not have intended.

Vigilant Insurance Company v. Chiu (2009) 175 Cal.App.4th 438, 443-444; ***Murphy v. Kenneth Cole Productions, Inc.*** (2007) 40 Cal.4th 1094, 1103.

Section 3549.1 provides in pertinent part:

All the proceedings set forth in subdivisions (a) to (d), inclusive, are exempt from the provisions of …the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5), unless the parties mutually agree otherwise:

(a) Any meeting and negotiating discussion **between a public school employer and a recognized or certified employee organization**.

"Meeting and negotiating" and "public school employer" are defined in the EERA in *Section 3540.1* to mean:

(h) "**Meeting and negotiating**" means meeting, conferring, negotiating, and discussing **by the exclusive representative and the public school employer** in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, is not subject to subdivision 2 of *Section 1667 of the Civil Code*. The agreement may be for a period of not to exceed three years.

[¶]

(k) "**Public school employer**" or "**employer**" means **the governing board of a school district**, **a school district**, a county board of education, a county superintendent of schools, or a charter school that has declared itself a public school employer pursuant to subdivision (b) of *Section 47611.5 of the Education Code*.

The EERA does not include advisory committees, such as JLMBC, in its definition of either the governing board of a District or the District itself.

However, the Brown Act provides some insight into how JLMBC should properly be characterized.

Under the Brown Act a "local agency" is defined as:

"[L]ocal agency means a county, city, whether general law or chartered, city and county, town, **school district**, municipal corporation, district, political subdivision, or any **board, commission or agency** thereof, or other local public agency.

Section 54951.

As pertinent here, a "legislative body" is defined as:

(a) **The governing body** of a local agency or any other local body created by state or federal statute.

(b) A commission, **committee**, board, or other body of a local agency, **whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body**.

Section 54952.

Under the Brown Act, JLMBC is not a "local agency" because that is defined as the District itself or a *commission* or *board* or *agency* of the District. Likewise, JLMBC is not the governing board of the District. Under the Brown Act, JLMBC is an advisory committee created by the governing body of the District through adoption of the Master Agreement and Rule 101702.10 of the District Board's Rules. JLMBC is a "legislative body" not the "local agency" itself.

In this light, JLMBC cannot reasonably be seen as the District or as the governing board of the District to which *Section 3549.1* would apply to exclude *all* JLMBC proceedings from the Brown Act. *Compare* ***Shapiro v. San Diego City Council*** (2002) 96 Cal.App.4th 904, 917 ("Statutory exceptions authorizing closed

sessions of legislative bodies are construed narrowly and the Brown Act sunshine law is construed liberally in favor of openness in conducting public business.")

Moreover, the law does not permit the District to delegate to JLMBC the District's power to "meet and negotiate" contrary to (or to circumvent) the specific provisions of the EERA (*Section 3547*) and the Brown Act (*Section 54953*). In ***Shapiro***, the Court was faced with the question whether the board of directors of a nonprofit corporation (Respondent Centre City Development Corporation, "Center City") created by the city of San Diego could meet in closed session with legal counsel for San Diego's redevelopment agency under *Section 54956.9* concerning pending eminent domain litigation involving the redevelopment agency.

Section 54956.9 (which is the exclusive statutory expression of the attorney client privilege afforded governmental agencies) only permitted closed sessions to allow a governmental entity which was a party to pending litigation to meet with its attorneys. Since Center City was not a party to the eminent domain litigation, the redevelopment agency could not delegate its privilege to the Center City Board to meet in closed session with the redevelopment agency's attorneys concerning the litigation.

> [W]e look to the content of *section 54956.9* to determine whether a meeting between the legislative body of one local agency and the legal counsel of another local agency falls within the narrow category of closed-session meetings permitted by *section 54956.9*. Doing so, we conclude that nowhere in the plain text of *section 54956.9* is the practice authorized.

Shapiro, 134 Cal.App.4th at 182.

Since JLMB is neither the District nor the governing body of the District, any attempt by the District or the District Board to delegate their power to meet and negotiate to JLMBC in circumvention of the law must not be permitted.

Yet, that is exactly what the District has tried to do with JLMBC. As Judge Yaffe observed: "[t]he JLMBC has been created by the parties **to filter out the changes that are brought to the negotiating table** by requiring some degree of **consensus by both labor and management members of the JLMBC** in order to submit a change to the board of trustees for its consideration." (CT at 000262.)

Such activities are "meetings" within the definition of the Brown Act. ***Frazer***, 18 Cal.App.4th at 794 ("Deliberation in this context connotes not only collective decisionmaking, but also the collective acquisition and exchange of facts preliminary to the ultimate decision.")

B. <u>If JLMBC Does Come Within The Definition Of A Public School Employer Then *Section 3547* Requires JLMBC To Comply With The Brown Act Before It May Engage In Meeting And Negotiating</u>

If, contrary to CalAware's primary contention, JLMBC is deemed a "public school employer" subject to *Section 3549.1*, it cannot circumvent the Brown Act in discharging its duties. *Section 3547* provides for open meetings and public participation in all proposals from a public school employer or exclusive representatives *prior to* engaging in meeting and negotiating.

> (a) **All initial** proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, **shall be presented at a public meeting of the public school employer** and thereafter shall be public records.
>
> **(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer**.

Section 3547.

Delegating to JLMBC the power to conduct "meeting and negotiating" with the purpose of "filtering out" initial proposals to form a "consensus" (CT at 000262) but not allowing the public to learn of these proposals until they are "recommend[ed]" to the District Board would circumvent the statutory requirements to hold public meetings to allow public participation in the process at the outset. The stratagem is anathema to both the Brown Act and the EERA and should not be permitted to continue.

7. CONCLUSION

For the foregoing reasons, the trial court's denial of a writ of mandate should be reversed and the lower court ordered to enter the writ as sought.

DATED: April 5, 2012, LAW OFFICES OF KELLY A. AVILES

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CERTIFICATE OF COMPLIANCE WITH RULE 14(c)(1) OF CALIFORNIA RULES OF COURT

I, Dennis A. Winston, am appellate counsel in this matter and I hereby certify, pursuant to Rule 14(c)(1) of the California Rules of Court, that Appellant's Opening Brief contains 5,660 words, according to the computer program count used to produce this brief.

_____

Dennis A. Winston