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MICHAEL N. FEUER, City Attorney
GABRIEL S. DERMER, Deputy City Attorney (SBN 229424)
200 North Main Street, Room 675
Los Angeles, California 90012
Telephone: 213-978-7559
Facsimile: 213-978-7011
gabriel.dermer@lacity.org

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FILED
Superior Court of California
County of Los Angeles

OCT 21 2016

Attorneys for Respondent CITY OF LOS ANGELES

Sherri R. Carter, Executive Officer/Clerk

By *[Signature]*, Deputy
Ishayla Chambers

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

SAVEVALLEY VILLAGE, an
unincorporated association,

Petitioner-Plaintiff,

v.

CITY OF LOS ANGELES, et al.,

Respondents-Defendants.

CASE NO. BS 160608

[Assigned to Hon. Richard Fruin, Dept. 15]

**RESPONDENTS' NOTICE OF
DEMURRER AND DEMURRER TO
FIRST AMENDED PETITION;
DECLARATION OF GABRIEL S.
DERMER; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF DEMURRER**

Date: December 13, 2016

Time: 8:30 a.m.

Dept.: 15

RES ID: 161021168207

RESPONDENTS' NOTICE OF DEMURRER AND DEMURRER TO FIRST AMENDED
PETITION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

1 **TO PETITIONER AND ITS COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on December 13, 2016 at 8:30 a.m., or as soon
3 thereafter as counsel may be heard in Department 15 of the above-entitled Court located at 111
4 North Hill Street, Respondents City of Los Angeles, its City Council and its Councilmembers¹
5 (sometimes collectively referred to as the "City") will and hereby do demur to the Verified First
6 Amended Petition ("Petition") filed by Petitioner SaveValleyVillage ("Petitioner").

7 This Demurrer is made pursuant to California Code of Civil Procedure sections 430.10
8 and 430.30 as set forth below:

9 **DEMURRER TO FIRST CAUSE OF ACTION**

10 1. The First Cause of Action for Writ of Mandate and Injunctive Relief fails to allege facts
11 sufficient to constitute a cause of action pursuant to Cal. Code Civ. Proc. § 430.10(e).

12 2. Petitioner fails to identify a justiciable issue upon which this Court may issue a Writ of
13 Mandate or Injunctive Relief. Specifically,

- 14 a. Petitioner fails to state facts showing that Councilmembers' voting practices violate
15 the Brown Act, Penal Code § 86, or any applicable law;
16 b. The City Council's internal rules are non-justiciable;
17 c. The reason underlying Councilmembers' votes is protected from enjoinder or
18 injunctive relief by the Mental Process Privilege;
19 d. The United States Constitution and state law do not preclude "ward courtesy" on
20 land use decisions; and
21 e. A Writ cannot issue to compel legislators' discretionary acts.

22 **DEMURRER TO THIRD CAUSE OF ACTION**

23 1. The Third Cause of Action for Declaratory Relief fails to allege facts sufficient to

24 ¹ While Respondent City of Los Angeles is a legal entity, its City Council is not and is therefore
25 erroneously named. The City likewise contends that naming the City's 15 Councilmembers
26 (Gil Cedillo, Paul Krekorian, Bob Blumenfield, David Ryu, Paul Koretz, Nury Martinez, Felipe
27 Fuentes, Marqueece Harris-Dawson, Curren Price, Herb Wesson, Mike Bonin, Mitchell
28 Englander, Mitch O'Farrell, José Huizar and Joe Buscaino) in their official capacities does not
afford Petitioner SaveValleyVillage any more potential relief than would an order against the
City, though it is submitted that Petitioner is not entitled to any relief.

1 constitute a cause of action pursuant to Cal. Code. Civ. Proc. § 430.10(e).

2 a. The Council's actions do not violate CEQA.

3 2. Petitioner fails to identify a justiciable issue on which Declaratory Relief is available.

4 **DEMURRER TO FOURTH CAUSE OF ACTION**

5 1. The Fourth Cause of Action for Declaratory Relief fails to allege facts sufficient to
6 constitute a cause of action pursuant to Cal. Code. Civ. Proc. § 430.10(e).

7 2. Petitioner fails to identify a justiciable issue on which Declaratory Relief is available.

8 a. Petitioner fails to state facts sufficient to show that the Los Angeles City
9 Council's Rule 48 violates any law; and

10 b. Petitioner fails to state facts sufficient show that the City Council's voting
11 practices fail to comply with Rule 48.

12
13
14 DATED: October 21, 2016

MICHAEL N. FEUER, City Attorney

GABRIEL S. DERMER, Deputy City Attorney

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16 By: 

GABRIEL S. DERMER

Deputy City Attorney

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18 Attorneys for Respondents
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1. I am an attorney at law, duly licensed to practice before all of the courts of the State of California. I am an attorney of record for Respondents in this action. I make all statements herein of my own personal knowledge, and if called to testify as a witness in this action, I could and would testify competently to the truth of the matters set forth herein.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California on October 21, 2016.

GABRIEL S. DERMER

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The First Amended Petition filed by Petitioner SaveValleyVillage ("Petitioner")
4 contains the same problems as Petitioner's original petition. The amended Petition presents
5 non-justiciable claims about how the Los Angeles City Council votes and operates. As before,
6 the Petition fails to allege facts sufficient to support a single cause of action. The Council's
7 alleged voting practices do not violate local, state, or federal law. In short, Petitioner has failed
8 to plead a justiciable controversy. Disagreement with Respondent Councilmembers' land use
9 decisions, or the manner in which Councilmembers deal with one another, does not provide
10 grounds for relief. The Court should again sustain the Respondents' Demurrer.

11 **II. STATEMENT OF ALLEGED FACTS**

12 Petitioner's latest Petition continues to allege the City Council regularly votes to
13 approve or deny private construction projects such as condos or apartments. (Petition at 7:19-
14 27.) Land use decisions are made by public roll-call voting, governed by Los Angeles City
15 Council Rule 48, which regulates how roll call shall be taken, how votes shall be tabulated and
16 recorded, and the mechanisms that Councilmembers in attendance can employ to vote for or
17 against a measure on the council agenda. "Abstentions" by Councilmembers are recorded as
18 "Aye" votes. (Petition at 14:1-15.) Petitioner's principal complaint is that City Council's
19 unanimous approval of projects "over 99% of the time" demonstrate "unlawful voting
20 practices." (Petition at 9:22.) Essentially, Petitioner argues that it is entitled to a writ of
21 mandate because it alleges a "vote trading agreement," though it does so without alleging any
22 fact other than Councilmembers' agreements as expressed in the results of their voting. (See
23 *generally* Petition).

24 Petitioner further alleges that placing some construction projects on a "consent calendar"
25 violates CEQA, as the item allegedly receives no independent review. (Petition at 12:15-22.)
26 Finally, Petitioner alleges that "actual votes" and "non-votes" are disclosed as "yes" votes,
27 purportedly in contrast to the Council's internal rules. (Petition at 14:27.) As will be shown,
28 while Petitioner yet has many complaints, none of them present a justiciable controversy.

1 **III. ARGUMENT**

2 **A. The First Cause of Action for Writ of Mandate Fails Because It Does Not Allege**
3 **A Brown Act Violation**

4 Petitioner fails to state *facts* that show Councilmember's alleged votes and/or voting
5 procedures violate the Brown Act or Penal Code § 86. The conclusion that Councilmembers
6 vote without disagreement most of the time, or even all of the time, does not give rise to any
7 Brown Act violation.

8 And in terms of Penal Code § 86, that criminal statute does not give rise to any private
9 right of action. A statute creates a private right of action only if the enacting body so intended.
10 *Farmers Ins. Exch. v. Superior Court*, 137 Cal.App.4th 842, 849 (2006). That intent need not
11 necessarily be expressed explicitly, but if not so expressed it must be strongly implied. *Id.*
12 (citing *Vikco Ins. Services, Inc. v. Ohio Indemnity Co.*, 70 Cal.App.4th 55, 62 (1999)). Private
13 rights of action under criminal statutes have rarely been implied, and when one has been read
14 into a criminal statute "there was at least a statutory basis for inferring that a civil cause of
15 action of some sort lay in favor of someone." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316
16 (1979).

17 The Petition cites to *Bd. of Soc. Welfare v. County of L. A.*, 27 Cal. 2d 98 (1945) as
18 ostensible support of it being able to enforce a "public duty" set forth in Penal Code § 86. That
19 case, in which the Board of Social Welfare brought a proceeding in mandamus to compel the
20 County of Los Angeles to comply with its orders to reissue warrants to three recipients of old
21 age aid, is of no relevance to Petitioner's claims here. There, the Board of Social Welfare was
22 designated as the agency to assist the needy aged, *Bd. of Soc. Welfare*, 27 Cal. 2d at 101, most
23 unlike here where Petitioner is clearly not a designated entity to oversee the City Council.

24 Equally important, the Petition is wholly devoid of any facts supporting the conclusion
25 that Councilmembers are engaged in criminal bribery. The allegation that Councilmembers
26 unanimously agree 99% of the time does not give rise to a reasonable inference that a
27 Councilmember "gives, or offers or promises to give, any official vote in consideration that
28 ...another member of the legislative body ...shall give this vote either upon the same or another

1 question.” See Penal Code § 86. And Petitioner still cannot compel Councilmembers to
2 exercise their discretion in any particular way. *California Ass’n for Health Serv’s. at Home v.*
3 *State Dept. of Health Serv’s.*, 148 Cal.App.4th 696, 708 (2007). Chaos would result if a
4 resident or voter could successfully sue an individual legislator for his or her voting
5 preferences. And to the extent Petitioner argues it is not bringing an action against any
6 individual Councilmember, then Penal Code § 86 is plainly inapposite given that the statute
7 prohibits “members of a legislative body” from asking or receiving bribes and is inapplicable to
8 a governmental entity.

9 Petitioner is again effectively asking this Court to examine the deliberative and mental
10 processes behind each Councilmembers’ vote. Plainly, such processes and issues are non-
11 justiciable. It is not the Court’s function to “decide whether the Legislature properly weighed
12 the evidence offered by proponents and opponents of a law.” *Buhl v. Hannigan*, 16
13 Cal.App.4th 1612, 1621 (1993). Petitioner should not ask this Court to dictate the manner in
14 which Councilmembers vote. Furthermore, the injunctive relief sought crosses deeply into the
15 realm of a court examining Councilmembers’ deliberative mental processes. The mental
16 process privilege, which provides a “limited privilege not to disclose or be examined
17 concerning. . .the mental processes by which a given decision was reached” prevents such an
18 intrusion. *San Joaquin County Local Agency Formation Commission v. Superior Court* 162
19 Cal.App.4th 159, 171 (2008)(prohibiting discovery of thought process of city commissioners
20 in action challenging denial of a service application).

21 The amended Petition fails to allege facts sufficient to support a legal conclusion that
22 Councilmembers are trading votes in violation of Penal Code § 86, engaging in private
23 deliberations in violation of the Brown Act or otherwise violating the law. Indeed, “ward
24 courtesy” by individual Councilmembers is not unlawful. *Arroyo Vista Partners v. County of*
25 *Santa Barbara*, 732 F. Supp. 1046, 1056 (1990 C.D. Cal.). The *Arroyo Vista* Court dismissed a
26 developer’s claims that the Santa Barbara County Board of Supervisor’s “policy” of “ward
27 courtesy” constituted violations of federal equal protection, first amendment, procedural due
28 process or substantive due process. The Court noted that councilmembers may adopt a wide

1 range of individual discretionary actions and policies, or none at all, without offending the
2 Constitution.

3 Regardless, the fact remains that a court of equity is “without jurisdiction” to enjoin the
4 allegedly criminal acts taken by Councilmembers – acts for which there is no factual support –
5 because Petitioner’s requested civil order would have the “collateral effect of depriving [a
6 Councilmember] of the jury trial “and the “higher burden of proof required in criminal
7 prosecutions.” *Monterey Club v. Superior Court of Los Angeles County*, 48 Cal. App. 2d 131,
8 146 (1941).

9 In sum, because no Brown Act violation is alleged, and no writ should issue to interfere
10 with Councilmembers discretion, the demurrer should be sustained without leave.

11 **B. The Third Cause of Action for Declaratory Relief Fails Because It Does Not**
12 **Allege A CEQA Violation**

13 Petitioner complains that the City Council “consent calendar” violates CEQA’s
14 “independent judgment” requirement. (Petition at 12:13). As this Court has already held in the
15 related case (BS157989), this is not so. CEQA does not require “public discussion” or in-
16 meeting Councilmember debate. Where a “consent vote” adopts a CEQA analysis prepared by
17 the City itself, the City satisfies the primary concern of the “independent judgment”
18 requirement. The requirement is focused on ensuring that CEQA documents reflect the
19 agency’s “independent judgment and analysis,” rather than an agency simply adopting a third
20 party’s analysis. *See* Cal. Code Regs. Tit. 14 (“CEQA Guidelines”) § 15074(b); *Eureka*
21 *Citizens for Responsible Gov’t v. City of Eureka*, 147 Cal.App.4th 357, 369 (2007).

22 Additionally, City Council is presumed to have performed its official duty of
23 independent review when it takes a consent vote to approve a staff report analysis at a public
24 meeting. *See* Evid. Code § 664; *Gentry v. City of Murrieta*, 36 Cal.App.4th 1359, 1397-98
25 (1995) (although the CEQA action did not “show on its face” a statement that the city exercised
26 its independent judgment, the city exercised its independent judgment under CEQA based upon
27 a staff report reflecting a discussion and analysis of necessary issues.)

28 Further, CEQA allows Council to adopt the prior findings of a lower administrative

body as its own independent judgment and analysis. *Vedanta Society of Southern California v. California Quartet, Ltd.* 84 Cal.App.4th 517, 528-529 (2000) (In certifying an EIR “there is no reason an elected body cannot adopt the detailed findings and explanations made by the lower unelected body from which the ... administrative appeal is taken.”)

Lastly, both the separation of powers and mental process privilege allow Councilmembers to vote their approval in silence because they have the “privilege not to disclose” their mental processes. *See San Joaquin County Local Agency Formation Commission v. Superior Court* 162 Cal.App.4th 159, 170 (2008) (prohibiting discovery of thought process of city commissioners in action challenging denial of an application); *Fairfield v. Superior Court of Solano County*, 14 Cal.3d 768, 773-782 (1975) (denying discovery of the decisionmaker’s thought process on the basis of relevancy.)

Ultimately, as with its first cause of action, Petitioner is seeking a writ compelling Councilmembers to exercise their discretion in a certain manner. But such a writ cannot issue. *California Ass’n for Health Serv’s. at Home v. State Dept. of Health Serv’s*, 148 Cal.App.4th 696, 708 (2007). In conclusion, Petitioner’s third cause of action must fail, and the demurrer should be sustained.

C. The Fourth Cause of Action for Declaratory Relief Fails Because It Does Not Allege Any Justiciable Controversy or Claim

Petitioner’s fourth cause of action alleges that the City Council tabulates “actual votes” and “non-votes as Yes votes.” (Petition at 14:28). Yet Council Rule 48 states that the Council clerk counts one “aye” vote for each Councilmember present who did not vote. In other words, the Rule, as written and practiced, recognizes no legal difference between “aye” votes and “aye” votes by “not voting.” There are no “non-votes.” There are only “aye” votes and “nay” votes, and there is no allegation or suggestion that those votes are wrongly reported.

Again, the Council’s practice conforms to longstanding precedent as well as common law. Substantial authority affirms that legislative bodies may record abstentions by present voting members as “aye” votes. (*See, e.g., Dry Creek Valley Assoc. v. Board of Supervisors*, 67 Cal.App.3d 839, 845 (1977)(upholding procedure that recorded abstentions by present

1 supervisors as votes in favor of a motion on the floor). This practice is also consistent with
2 longstanding common law. (*Id.* citing *Martin v. Ballinger* (1938) 25 Cal.App.2d 435, 439
3 (finding that abstention “is, in effect, a declaration that [he consents]”); *State ex rel. Young v.*
4 *Yates* (1897) 47 P. 1004, 1006 (finding that a legislator “shall be deemed to assent to the act of
5 those who do vote”).)

6 Unquestionably, the alleged voting practice complies with Rule 48. There is nothing in
7 the Rule that mandates the Clerk record and announce some “aye” votes separately from other
8 “aye” votes (those by abstention). Members of the public can certainly tell whether each
9 Councilmember voted *for* or *against* a given measure. Further, nothing in the Rule requires a
10 quota of Councilmembers to mechanically vote “aye” versus doing so by abstention.

11 Further, City Council Rule 48 is an internal rule of the Los Angeles City Council. The
12 Court should find this internal rule to be non-justiciable. There is no manageable standard for
13 regulating internal voting procedures, and judicial regulation would infringe upon the
14 legislative body’s deliberations. (*Davids v. Akers*, 549 F.2d 120, 125-26 (9th Cir.
15 1977))(upholding dismissal of challenge to Arizona state legislature’s internal appointment of
16 committee members in part on justiciability grounds.) The *Davids* court noted that “Plaintiff’s
17 simplistic notions of representation are a poor basis for transferring decisions [. . .] from
18 Arizona’s House of Representatives to a [. . .] court. (*Id.*, 549 F.2d at 125.) Furthermore, the
19 voting procedures envisioned by Rule 48 are not in violation of the Brown Act or any other
20 controlling statute, so “it is not the function of the courts to decide whether the Legislature [. . .]
21 selected the ‘correct’ remedy for a given problem.” (*Buhl v. Hannigan*, 16 Cal.App.4th 1612,
22 1621 (1993).) By the same token, this Court should not consider Petitioner’s opinions
23 regarding Council Rule 48. The demurrer should be sustained without leave.

24 **D. The Petition Fails To Allege Any Justiciable Controversy or Claim**

25 As shown, Petitioner cannot maintain any cause of action against Respondents and there
26 is no actual, justiciable controversy presented. Petitioner cannot seek declaratory relief simply
27 because it disagrees with the mechanisms of City Council votes on projects or because it
28 disagrees with the Council’s land use decisions.

1
2 It is the prerogative of the Legislature to prescribe the powers and
3 authority of an executive agency created to deal with a specific public problem...
4 The manner in which this authority is exercised is a matter of administrative
5 discretion. The wisdom or effectiveness of the exercise of either legislative or
6 administrative discretion is judged essentially by the political process. In short,
7 the judicial branch of government is not the overseer of the other two. A citizen's
8 mere dissatisfaction with the performance of either the legislative or executive
9 branches, or disagreement with their policies does not constitute a justiciable
10 controversy.

Zetterberg v. State Dept. of Public Health, 43 Cal.App.3d 657, 662-65

(1974)(dismissing declaratory relief action attempting to specify the duties of State Department
of Public Health and California Air Resources Board.)

11 IV. CONCLUSION

12 For all of the foregoing reasons, Respondents respectfully request that the Court sustain
13 the entirety of their Demurrer without leave to amend.

14 DATED: October 21, 2016

MICHAEL N. FEUER, City Attorney

GABRIEL S. DERMER, Deputy City Attorney

16 By: 

GABRIEL S. DERMER

Deputy City Attorney

18 Attorneys for Respondents
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