LEGAL ADVOCACY REPORT
January 7, 2019

The League of California Cities® Legal Advocacy Committee considered the following appellate cases for amicus support from **August 29, 2018 through January 7, 2019.** League amicus filings are available at www.cacities.org/recentfilings. To submit a request for amicus assistance, go to www.cacities.org/requestamicus. For more information about the Legal Advocacy Program, go to the Legal Advocacy Center at http://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys or contact the League's Legal Department staff:

Patrick Whitnell, General Counsel, at (916) 658-8281 or pwhitnell@cacities.org
Corrie Manning, Assistant General Counsel, at (916) 658-8267 or cmanning@cacities.org
Alison Leary, Deputy General Counsel, at (916) 658-8266 or aleary@cacities.org
Janet Leonard, Legal Services Manager, at (916) 658-8276 or jleonard@cacities.org

We gratefully acknowledge and thank all of the attorneys identified below who volunteered and devoted their time, effort and expertise to advocate on behalf of California cities. We also thank their associated public agencies and law firms for the generous support.

ADA

Vos v. City of Newport Beach
Pending Court: U.S. Supreme Court

Case Number: 18-672

Citation: 892 F.3d 1024

Newport Beach City Police responded to a call that Gerritt Vos was behaving erratically with a pair of scissors at a 7-Eleven. While Vos was alone inside the store, the eight officers at the scene discussed non- and low-lethal options for resolving the situation, but then Vos charged the doorway with the scissors over his head. One officer fired non-lethal rounds, and two officers fired lethal gunshots, causing his death. Vos' blood later tested positive for both amphetamine and methamphetamine, and his medical history revealed that he had been diagnosed as schizophrenic. Vos' parents brought suit against the City and three officers on twelve causes of action, including excessive force in violation of the Fourth Amendment and violation of Title II of the Americans with Disabilities Act based on Vos' schizophrenia. The district court granted

summary judgment on all claims in favor of the City and officers.

In a 2-1 decision, the Ninth Circuit found that summary judgment on the Fourth Amendment claim was not proper because the *Graham v. Connor* factors did not weigh in favor of deadly force. The court also determined other factors (tactics prior to confrontation, the suspect's mental illness, and whether proper warnings were given) weighed against deadly force. However, the court went on to find that the officers were entitled to qualified immunity because it was not "beyond debate" that the officers had acted unconstitutionally.

On the ADA claim, the Ninth Circuit found that summary judgment was improper because the facts arguably show the officers could have accommodated Vos' disability, including by using de-escalation, communication, or specialized help. The City then filed a Petition for Certiorari with the United States Supreme Court.

Approved Action: File an amicus brief with the United States Supreme Court, supporting the City's Petition for Certiorari.

Status of Filing: The brief was filed and the matter is pending.

The League thanks brief writer Lee H. Roistacher with Daley & Heft, LLP.

CEQA

Canyon Crest Conservancy v. County of Los Angeles, et al
Pending Court: 2nd District Court of Appeal

Case Number: B290379

Citation: None

This case involves a request for attorneys' fees following a CEQA challenge to the County's approval of an application to construct a single-family residence on a vacant lot in an oak woodland (Project). The Project required removal of one oak tree and encroached within the protected zone of nine others. Although the final approval did not make findings with respect to the woodland, the approval for the Project imposed various conditions to help protect the trees. The County conducted an initial environmental study, concluded the Project would not result in a significant impact on the environment, and issued a negative declaration. The planning department, planning commission, and Board of Supervisors each conducted hearings on the Project and approved the Project and the negative declaration. CCC then filed a writ petition and a motion for administrative stay, asserting a full EIR was required. The court granted CCC's motion for administrative stay, finding that granting the stay would not be against the public interest and that CCC demonstrated a reasonable probability of succeeding on its claim.

The property owner then requested that the County vacate the Project approvals to avoid the cost of litigation. CCC filed a motion for attorneys' fees, contending they obtained the primary objective sought in the action. The court denied the motion, finding CCC was not a successful party under CCP section 1021.5 or the catalyst theory. The court reasoned the action did not cause the County to reconsider the project in light of its environmental impacts. The court also

found CCC failed to establish that: (1) CCC enforced an important right affecting the public interest; (2) the action conferred a significant public benefit on the public; (3) private enforcement was necessary; or (4) the financial burden of private enforcement warrants subsidizing CCC's attorneys. CCC appealed.

Approved Action: File an amicus brief with the Court of Appeal, supporting the County and Real Party in Interest.

Status of Filing: The case settled before the brief was filed.

StopTheMilleniumHollywood.com v. City of Los Angeles
Pending Court: 2nd District Court of Appeal

Case Number: B282319

Citation: None

In 2011, Millennium Hollywood, LLC (Developer), filed a Master Land Use Permit Application with the City for a mixed-use development (Project). As part of its application, the Developer proposed custom development regulations that would be incorporated in the Project approvals. The development regulations would require the Project to meet mandatory standards for building height, density, massing, grading, open space, landscaping, lighting, parking, signage, etc. The application also included a Land Use Equivalency Program (LUEP), which would allow the Developer to request and obtain a transfer of land uses before development of any Project phase so long as the Project stays within a floor area ratio of 6:1 and trip cap of 1498 new peak hour vehicle trips per day.

The City prepared and approved an Environmental Impact Report (EIR), which included a project description that stated the Project is for a mix of land uses, including some combination of residential units, hotel rooms, offices, restaurants, a fitness club, and retail, and incorporated the development regulations and LUEP that the Developer submitted with its application. The EIR analyzed three potential development scenarios to determine the maximum environmental impacts of the project. Petitioners sued, alleging in relevant part that the EIR's project description violated CEQA, because the Project consisted of zoning and development standards that would guide future development, rather than specific, proposed buildings. The trial court agreed, holding that the City violated CEQA by approving an EIR with an ambiguous Project description. The court explained that "[a]nalyzing a set of environmental impact limits instead of analyzing the impacts for a defined project is not consistent with CEQA." The City appealed.

Approved Action: File an amicus brief with the Court of Appeal, supporting the City.

Status of Filing: The brief was filed and the matter is pending.

The League thanks brief writers Whitman F. Manley and Sara F. Dudley with Remy Moose Manley, LLP.

Code Enforcement

Rasooly v. City of Oakley
Pending Court: 1st District Court of Appeal

Case Number: A152709

Citation: 29 Cal.App.5th 348

The City "red tagged" a vacant industrial building owned by Michael Rasooly, alleging that structural deterioration rendered it unsafe to occupy. The City issued a "Notice and Order to Repair or Demolish Structure" (2017 Notice). The City physically posted the 2017 Notice on the property and sent it by certified mail to a post office box listed as Rasooly's address on county tax rolls for the property. Because Rasooly failed to check his post office box for 30 days, the mailing was returned to the City undelivered.

After the 20-day period provided under the City's Municipal Code for administrative appeal of the 2017 Notice lapsed, Rasooly challenged the 2017 Notice. Under Code of Civil Procedure section 1094, the City moved to dismiss the action on the basis that Rasooly failed to pursue his administrative remedies. Rasooly opposed the motion, arguing that service of the 2017 Notice did not comply with the requirements of the 2012 International Property Maintenance Code (IPMC), which the City's Municipal Code adopted by reference, and that he did not receive actual notice of the 2017 Notice, in violation of his due process rights. The trial court granted the motion, and Rasooly appealed. The Court of Appeal affirmed, holding that (1) the IPMC authorizes service through certified mail and posting, and (2) due process does not require actual notice, only a method reasonably certain to accomplish that end. The court explained that Rasooly's failure to check his mail or visit his property did not give rise to a claim that his due process rights were violated for lack of actual notice.

Approved Action: File a letter requesting publication of the opinion.

Status of Filing: The letter was filed and the Court published the opinion.

The League thanks letter writer Krista MacNevin Jee with Jones & Mayer.

Employment

Abarca v. Citizens of Humanity, LLC
Pending Court: 2nd District Court of Appeal

Case Number: B283154

Citation: None

Citizens terminated Abarca's employment because Abarca was not a good worker. Upon receiving his termination notice, Abarca reported a work-related injury, applied for worker's compensation, and retained an attorney. His attorney referred him to a doctor who issued a report stating, under penalty of perjury, that Abarca was temporarily totally disabled from a

work-related injury beginning on the date of his termination. The doctor later extended his diagnosis of temporary total disability, ultimately concluding that Abarca could not return to work and needed rehabilitation. Based on the doctor's reports, Abarca received state disability benefits. Before his state disability benefits expired, Abarca sued Citizens, alleging wrongful termination, disability discrimination, failure to provide reasonable accommodation, and failure to engage in the interactive process.

Before trial, Citizens moved to exclude evidence that Abarca suffered any damages as a result of his termination on the grounds that judicial estoppel barred him from contradicting prior sworn testimony that his damages resulted from a work-related injury. The trial court denied the motion. At trial, Abarca's doctor testified that Abarca was not temporarily totally disabled when he was terminated, and that he could have continued working. The jury ultimately found Citizens engaged in a good faith interactive process and reasonably accommodated Abarca. However, the jury also found that both Abarca's poor job performance and his physical condition were substantial motivating factors in his termination, and awarded Abarca damages for wrongful termination. The jury also awarded punitive damages based on a finding that Citizens defrauded the state. Citizens filed a motion for new trial and for judgment notwithstanding the verdict, asserting that judicial estoppel barred Abarca's claims as a matter of law. The trial court reduced the compensatory damages, but otherwise denied the motion. Citizens appealed.

Approved Action: File an amicus brief with the Court of Appeal, supporting Citizens of Humanity LLC.

Status of Filing: The brief was filed and the matter is pending.

The League thanks brief writer Stanley W. Lamport with Cox, Castle & Nicholson LLP.

Housing

Anderson v. City of San Jose
Pending Court: 6th District Court of Appeal

Case Number: H045271

Citation: None

In 2015, the Legislature amended the Surplus Land Act. (Gov. Code §§ 54220-54233.) In 2016, the City considered the changes to the Act and revised its policy for the sale of surplus land to reflect most—but not all—of the Surplus Land Act as amended. The City departed from the Act in several ways. First, the City exempted high-rise rental developments in the downtown area from affordable housing requirements. Second, the City reserved the right to request that a property be sold for a use other than affordable housing in specific cases. Finally, the City authorized affordable for-sale units developed pursuant to the Act to be sold to moderate-income residents, instead of only low-income residents. These departures from the Surplus Land Act were done for the stated purpose of "preserv[ing] the City's ability to determine appropriate uses for its surplus properties, and to protect the value of properties that will never be appropriate for [residential] development…."

Two low-income individuals who rent housing in San Jose and two organizations with the stated goal of promoting affordable housing (collectively, petitioners) sued the City, seeking, in relevant part, declaratory relief that the City is required to comply with the Surplus Land Act and a writ of mandate requiring the City's full compliance. The City demurred, arguing that, as a charter city, the home rule doctrine allows the City to implement its own policy for selling its surplus land. The trial sustained the demurrers, finding that the Surplus Land Act does not address a matter of statewide concern. In doing so, the trial court rejected petitioners' attempt to reframe the question of whether the Surplus Land Act addresses a matter of statewide concern as whether "the issue of the shortage of affordable housing for lower-income households is a matter of statewide concern." Petitioners appealed.

Approved Action: File an amicus brief with the Court of Appeal, supporting the City.

Status of Filing: The brief was filed and the matter is pending.

The League thanks brief writers Amy E. Hoyt and Gregg W. Kettles with Best Best & Krieger LLP.

Immunities

City of Los Angeles v. Superior Court (Babakhanyan)
Pending Court: California Supreme Court

Case Number: S251661

Citation: None

Simon Astrayan swerved off a road and into the concrete wall of a flood control channel. Astrayan's surviving spouse and children sued the City and County of Los Angeles, alleging dangerous conditions of public property — chiefly in the absence of a guardrail between the road and shoulder at the location of the accident. The City moved for summary judgment on the basis of Government Code section 830.6 design immunity, which requires proof of three elements: (1) that the City's design was a cause of the accident; (2) that the City approved the design in an exercise of its discretion; and (3) that substantial evidence supported the reasonableness of the design. In support of its motion, the City produced undisputed evidence satisfying all three elements. Although the trial court found that the City's evidence on all three elements was undisputed, the court denied the City's motion. The court reasoned that the City failed to foreclose the possibility that it had lost its design immunity due to a hypothetical change in conditions at the accident scene since the time of the design.

The City petitioned the Court of Appeal for writ of mandate, arguing that the City bears the burden of disproving changed conditions only if changed conditions are alleged in the complaint and that the complaint did not allege any changed conditions. On September 19, 2018, the Court of Appeal denied the City's petition "for failure to demonstrate entitlement to extraordinary relief." The City filed a petition for review with the California Supreme Court, arguing (1) Government Code section 830.6 design immunity is an immunity from suit rather than an ordinary defense to liability; and (2) the trial court's refusal to grant summary judgment in this

case constitutes an extraordinary circumstance requiring writ relief.

Approved Action: File a letter supporting the City's Petition for Review.

Status of Filing: The letter was filed and the Court denied review.

The League thanks letter writer Steven J. Renick with Manning & Kass, Ellrod, Ramirez, Trester LLP.

Land Use

San Diego Unified Port District v. California Coastal Commission (Sunroad Marina Partners)
Pending Court: California Supreme Court

Case Number: S252474

Citation: 27 Cal.App.5th 1111

The Port of San Diego ("Port") is one of four California ports that must submit a "port master plan," which is akin to a "local coastal program" and dictates land uses within the Port's boundaries, to the California Coastal Commission ("Commission"). The Commission must certify port master plan compliance with the California Coastal Act ("Act") and can withhold certification of a proposed plan or amendment for failure to comply with the Act. In 2015, the Port sought to amend its port master plan to allow construction of 500 hotel rooms to be allocated among up to three hotels in the same area on Harbor Island and submitted a proposed amendment to the Commission for certification. Citing Public Resources Code section 30213, which provides that "lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided," the Commission refused to certify the amendment, asserting the amendment does not provide sufficient low-cost overnight accommodations.

The Port sought a writ of mandate from the trial court directing the Port to reconsider the proposed amendment, which the trial court granted, finding the Commission's requirement of low-cost lodging opportunities exceeded its authority. On remand, the Commission again refused to certify the amendment, again citing an insufficient number of low-cost accommodations. The Port objected to the Commission's return on the writ, which the trial court sustained. The Commission appealed, arguing the Act allows it to refuse to certify a proposed port master plan amendment for failure to provide sufficient low-cost overnight accommodations. The Court of Appeal reversed, finding the Act allows the Commission to require the Port to include low-cost overnight accommodations in its port master plan, distinguishing authority limiting the Commission from doing so as to local coastal programs. The Port filed a petition for review.

Approved Action: File a letter supporting the San Diego Unified Port District's petition for review.

Status of Filing: The letter was filed but the Court denied the petition for review..

The League thanks letter writer Alison Leary with the League of California Cities.

Other

Aguilar v. City of Los Angeles
Pending Court: 2nd District Court of Appeal

Case Number: B289349

Citation: None

In 1997, the City adopted a Living Wage Ordinance (LWO), which requires that certain employers pay a living wage to their employees. The City excluded certain employees from the LWO, including those "required to possess an occupational license." The LWO does not define the term occupational license. However, the Office of Contract Compliance (OCC), which is charged with applying the LWO exemptions to applications, established a three-prong test to determine what constitutes an occupational license. The three minimum criteria are: (1) the employer must require the license as a condition of the employment; (2) the license must be granted by a governmental authority or agency; and (3) the license is required to perform the primary duty of the job. In 2010, Avis submitted an application to the City seeking a determination that its "Shuttlers," who transport Avis vehicles to and from different rental locations, were exempt from the LWO. Applying its three-prong test, the OCC determined that a Class C drivers' license is an occupational license for Avis Shuttlers, because (1) Shuttlers are required to hold a Class C driver's license; (2) the license was granted by a governmental authority, the DMV; and (3) the license is required to perform the primary duty of the job, transporting cars. The OCC, therefore, sent Avis a determination letter approving its exemption application. A group of Shuttlers then sought a writ of mandate to reverse the exemption decision. Applying "independent review" and affording the OCC's decision "little weight," the trial court determined that an occupational license must be defined as a license obtained for the specific purpose of performing the occupation at issue. Finding that a Class-C driver's license is not obtained specifically for the purpose of performing the job of a Shuttler, the trial court reversed the exemption decision and issued the requested writ of mandate. The City appealed.

Approved Action: File an amicus brief with the Court of Appeal, supporting the City.

Status of Filing: The brief will be filed shortly.

The League is in the process of recruiting a brief writer.

Preemption

United States v. State of California
Pending Court: Federal District Court

Case Number: 2:18-at-01539

Citation: None

In 2015, the Obama-era FCC adopted net neutrality rules for internet service providers (ISP). Net neutrality is the principle that ISPs should enable access to all websites and content without

intentionally throttling or favoring certain content, applications, or users. In December 2017, the FCC reversed these rules and the prior net neutrality requirements have expired. In response, the State enacted SB 822 (Weiner), which prohibits ISPs from engaging in certain activities that impact a user's ability to lawfully access content on the Internet. On the same day that the Governor signed SB 822, the U.S. Department of Justice filed a Complaint for Declaratory and Injunctive Relief in federal district court, arguing that SB 822 is preempted by federal law.

Approved Action: Join in an amicus brief to be filed with the district court by the Santa Clara County Counsel's Office in support of the State.

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Danielle Goldstein with the Santa Clara County Counsel's Office.

Proposition 218

Wilde v. City of Dunsmuir
Pending Court: 3rd District Court of Appeal

Case Number: C082664

Citation: 29 Cal.App.5th 158

In March 2016, the City Council of the City of Dunsmuir ("City") adopted Resolution 2016-02 ("Resolution") increasing water rates. The rate schedule was the result of studies, public meetings, and town halls beginning in 2015. The revenue was appropriated for upgrading the City's 105-year-old water storage tank and water mains. The rate increases were spread over five years. To successfully oppose the Resolution, ratepayers were required to submit 800 protests under Proposition 218. Only 40 did so.

After the Resolution's adoption, Leslie Wilde collected sufficient signatures to qualify a referendum on the rate increases. The City refused to place the referendum on the ballot, on the basis of the City Attorney's opinion stating that rate increases were not subject to referendum. Wilde filed a writ of mandate, which the trial court denied. Wilde appealed. The Third District Court of Appeal reversed and remanded with instructions to place the referendum on the ballot for the next municipal election. The court held that Proposition 218 did not curtail the voters' referendum powers. The court also held that the Resolution is neither an administrative action nor an action that affects essential government services, such that it would be exempt from voter referendum. The City intends to file a petition for review.

Approved Action: File an amicus letter requesting depublication of the opinion and a letter supporting the City's petition for review.

Status of Filing: The letters were filed and the matter is pending.

The League thanks letter writer Michael G. Colantuono with Colantuono, Highsmith & Whatley, P.C.

Public Records Act

Sander v. Superior Court (State Bar of California)
Pending Court: California Supreme Court

Case Number: S251671

Citation: 26 Cal.App.5th 651

Richard Sander and the First Amendment Coalition (Petitioners) submitted a CPRA request to the State Bar of California (Bar) seeking individually unidentifiable records for all applicants to the California Bar Examination from 1972 to 2008 in the following categories: race or ethnicity, law school, transfer status, year of law school graduation, law school and undergraduate GPA, LSAT scores, and performance on the bar examination. Making these records available in a manner that protects the applicants' privacy would require the Bar to anonymize the data through a series of data manipulations. The Bar denied the request.

Petitioners filed a petition for a writ of mandate. The trial court denied the petition, reasoning that disclosure of the bar admissions data would require the Bar to create new records—a duty not imposed by the CPRA. Petitioners appealed. The First District Court of Appeal affirmed, holding that the CPRA does not require agencies to change or create new data in response to a request for public electronic records. The court explained, "There is no doubt that a government agency is required to produce non-exempt responsive computer records…,[b]ut it cannot be required to create a new record by changing the substantive content of an existing record or replacing existing data with new data." Petitioners have filed a Petition for Review with the California Supreme Court, and have also filed a request for depublication of the Court of Appeal decision.

Approved Action: File a letter opposing the depublication request.

Status of Filing: The letter was filed and the court denied the depublication request and the petition for review.

The League thanks letter writer Andrea Velasquez, Senior Deputy City Attorney with the Sacramento City Attorney's Office.

Telecommunications

City of Seattle v. United States
Pending Court: Other Federal Court

Case Number: 18-9571

Citation: None

In order to accelerate the deployment of 5G wireless technology, the FCC has adopted the Declaratory Ruling and Third Report and Order (Ruling and Order) that limits local authority over the public right of way with respect to the deployment of 5G antenna and equipment, limits

the application fees and ongoing rent that can be charged for the use of the public right of way, and shortens the "shot clock" for local agencies to consider applications filed by telecommunications providers.

The League has joined with a coalition of cities, counties, and other municipal leagues to bring a challenge to the Ruling and Order in the 9th Circuit Court of Appeals.

Approved Action: Join the case as a plaintiff.

Status of Filing: The parties are currently briefing the issue of whether the court should issue a stay to prevent the regulations from taking effect until the litigation is resolved. The brief will be filed shortly.

The League thanks brief writer Kenneth S. Fellman with Kissinger & Fellman.

AG Requests for Views

AG Opinion No. 18-901
Pending Court: State Administrative Proceeding

Case Number: 18-901

Citation: None

The Attorney General received a request from Loressa Hon, Acting Executive Director of the Fair Political Practices Commission, for an opinion on the following questions:

1. Is the Bagley-Keene Open Meeting Act (BK Act) violated if the Commission votes on an agenda item where the agenda states only that the matter will be discussed, not specifically that the Commission would take any action on the item, but the top of the agenda contains a general statement that the Commission may act on any item listed on the agenda?
2. Is the BK Act violated if a majority of FPPC Commissioners meets outside a public meeting (e.g., over lunch) and talks about how the BK Act applies to the FPPC?
3. Is the BK Act violated if one member of the public sends an email to five FPPC Commissioners and other members of the public and one Commissioner responds by email, but only to the members of the public?

Approved Action: Monitor

AG Opinion No. 18-902
Pending Court: State Administrative Proceeding

Case Number: 18-902

Citation: None

The Attorney General received a request from Sacramento County Counsel Robyn Truitt Drivon for an opinion on the following question:

> When a subdivider owns one parcel and subdivides that parcel pursuant to a parcel map, then sells off the resulting new subdivided parcels, and subsequently acquires a contiguous parcel and seeks to divide that parcel pursuant to a parcel map, should the local agency count the previously subdivided contiguous parcels as part of the application?

Approved Action: Monitor

AG Opinion No. 18-903
Pending Court: State Administrative Proceeding

Case Number: 18-903

Citation: None

The AG's Office has requested views on the following question: Did a written communication from a constituent agency representative and his alternate to the joint powers agency board to which they were appointed constitute an improper "serial meeting" under the Brown Act?

Approved Action: File a comment letter arguing that in order for a communication to be considered a violation under the Brown Act, it must involve collective discussion of or deliberation on an issue by a majority of the legislative body.

Status of Filing: The letter was filed and the matter is pending.

The League thanks letter writers Eric Ramakrishnan with the City of Fremont, and Paul Zarefsky with the City of San Francisco.