LEGAL ADVOCACY REPORT
May 24, 2018

The League of California Cities® Legal Advocacy Committee considered the following appellate cases for amicus support from **March 30, 2018 through May 24, 2018.** 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
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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.

AG Requests for Views

AG Opinion No. 18-201
Pending Court: N/A

Case Number: 18-201

Citation: None

The Attorney General received a request from Kern County Counsel Mark Nations for an opinion on the following question: Is it a Brown Act violation for joint powers authority members to consult appointing authority in open session?

Approved Action: File a comment letter with the California Attorney General.

Status of Filing: The letter will be filed shortly.

The League thanks letter writer Erik D. Ramakrishnan, Deputy City Attorney with the City of Fremont, and the Brown Act Committee of the City Attorney's Department.

AG Opinion No. 18-304
Pending Court: N/A

Case Number: 18-304

Citation: None

The Attorney General received a request from Mono County Counsel Stacey Simon for an opinion on the following question: Are the positions of offices of county supervisor, and member of a local transportation commission and/or member of a multi-agency joint powers agency established to provide public transportation services, incompatible public offices?

Approved Action: File a comment letter with the California Attorney General.

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

The League thanks letter writer Alison Leary, Deputy General Counsel with the League of California Cities®.

Attorney's Fees

Broten v. Target Corporation
Pending Court: 4th District Court of Appeal, Div. 1

Case Number: D070712

Citation: 2018 WL 1615403

Broten sued his former employer, Target, asserting various causes of action including retaliation and wrongful termination under the Fair Employment and Housing Act (FEHA) (Gov. Code § 12900 et seq.). Target offered to settle the case under Code of Civil Procedure section 998. Broten rejected the offer and the case proceeded to trial. The jury found that Target had two "substantial motivating" reasons to terminate Broten – his complaint of harassment and his poor job performance – but ultimately decided that Target would have terminated him based on his poor job performance alone. The jury awarded Broten no damages, and the court denied him any injunctive relief.

Target moved for costs under section 998, and Broten moved to strike and tax Target's costs. The court exercised its discretion to reduce the award based on Broten's limited finances. Broten appealed, arguing in part that the trial court erred by awarding costs because his FEHA claims were not frivolous under *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 ("*Williams*"). The Court of Appeal affirmed. Citing its prior ruling in *Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514 ("*Sviridov*"), the Court reasoned that applying *Williams* to preclude recovery of costs under section 998 unless the FEHA claims are frivolous would erode the public policy of encouraging settlement. The Court acknowledged that Division 2 of the Fourth District Court of Appeal subsequently declined to follow *Sviridov* in *Arave v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (2018) 19 Cal.App.5th 525 ("*Arave*"), but it disagreed with *Arave*'s reasoning. Specifically, the Court rejected *Arave*'s contention that *Sviridov* undermines the public policy of encouraging FEHA plaintiffs to bring meritorious claims. The Court stated:

"the more important issue is whether once a meritorious FEHA claim is brought it should be maintained in the face of a reasonable offer to settle under section 998."

Approved Action: File a letter requesting publication of the Opinion with the Court of Appeal.

Status of Filing: The court denied publication before the letter could be filed.

CEQA

Target Corporation v. Citizens Coalition Los Angeles (City of Los Angeles)
Pending Court: 2nd District Court of Appeal

Case Number: B283480

Citation: None

Target applied to the City to build a three-level structure that would house a Target, a parking structure, and retail stores and restaurants (the Project). The Project was located on a site within one of five subareas governed by a specific plan. Because the project did not meet all of the subarea's requirements, Target requested eight variances. After evaluating the Project's impacts, the City certified an Environmental Impact Report (EIR), adopted the variances, and approved the project.

La Mirada Avenue Neighborhood Association of Hollywood and Citizens Coalition Los Angeles (Petitioners) challenged the adequacy of the EIR and the City's approval of the variances under CEQA. In July 2014, the trial court upheld the adequacy of the EIR, but invalidated the variances. Target appealed, and concurrently applied to the City for a specific plan amendment that would render the variances unnecessary.

In July 2016, the City adopted an ordinance adding a new subarea tailored to large-scale retail superstores to the specific plan and re-designated the project site to the new subarea. The City also approved an addendum to its original EIR, finding the physical impacts of the Project had not changed and none of the circumstances requiring subsequent environmental review under Public Resources Code section 21166 or CEQA Guidelines section 15162 had occurred. Based on the rezoning, the Court of Appeal dismissed Target's appeal of the July 2014 ruling as moot. Petitioners then filed new actions, asserting the City's creation of a new sub area constituted a new project under CEQA and, therefore, required a new EIR rather than an addendum to the existing EIR. Petitioner also claimed that the creation of the new subarea constituted impermissible "spot zoning." The trial court declined to reach the spot zoning issue, but ruled that the City violated CEQA. The court found - without affording deference to the City - that the creation of the new subarea constituted a new project under CEQA.

Approved Action: File an amicus brief with the Court of Appeal in support of the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writers Michelle Ouellette and Sarah Owsowitz with Best, Best & Krieger LLP.

Youth for Environmental Justice et al. v. City of Los Angeles et al.
Pending Court: 2nd District Court of Appeal

Case Number: B282822

Citation: None

Nonprofit groups brought a lawsuit against the City alleging that the City employed a citywide practice of "rubber stamping" oil-drilling applications in violation of CEQA. The California Independent Petroleum Association (CIPA) was granted permission to intervene. After the City's Zoning Administrator voluntarily issued new guidelines on the processing and environmental review of oil drilling applications (Memo No. 133), the Nonprofits elected to dismiss their claims in exchange for a partial fee payment. The City and the Nonprofits accordingly entered into a settlement agreement.

CIPA filed a countersuit against the Nonprofits and the City on due process grounds, seeking declaratory and injunctive relief negating the settlement agreement and Memo No. 133. The Nonprofits and the City filed special motions (anti-SLAPP motions) to strike CIPA's countersuit on the basis that the suit was premised on communications and conduct in furtherance of the rights of petition and free speech—namely, the implementation and enforcement of a settlement agreement—and that CIPA cannot establish a probability of success on the merits. The trial court denied the motions. The court reasoned that even if the basis for CIPA's complaint was protected speech, CIPA showed a probability of prevailing on the merits of its due process claim by alleging that Memo No. 133 alters the parameters of existing oil drilling permits held by CIPA's members. The City and the Nonprofits appealed.

Approved Action: File an amicus brief with the Court of Appeal in support of the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Sean Hecht, Co-Director, Frank G. Wells Environmental Law Clinic, UCLA School of Law.

Coastal Act

HomeAway.com, Inc. and Airbnb, Inc. v. City of Santa Monica
Pending Court: Ninth Circuit Court of Appeals

Case Number: 18-55367

Citation: None

The City prohibits short-term rentals in residential neighborhoods, both to preserve residential units for long-term residents, and to protect the character and aesthetics of those neighborhoods. In 2015, the City eased the prohibition, and allowed rental of portions of units so long as at least one permanent resident remained onsite, and the hosts complied with reasonable rules and regulations including licensing and payment of transient occupancy tax. The Ordinance also

placed restrictions on internet platforms, such as Airbnb and Homeaway.com, prohibiting them from completing booking transactions for unlicensed short-term rentals within the City.

Airbnb and Homeaway.com filed suit, seeking to enjoin the City from enforcing the ordinance. Airbnb and Homeaway.com argued that the ordinance violated the California Coastal Act (Cal. Pub. Res. Code § 30500 et seq.), the federal Communications Decency Act (47 U.S.C. § 230), and the First Amendment. The district court denied the injunction. On the federal statutory and First Amendment claims, the district court followed the decision in *Airbnb, Inc. v. City & County of San Francisco*, 217 F.Supp.3d 1066 (N.D. Cal. 2016), which is identical with respect to all federal claims. The Court further affirmed that the City's constitutional authority to regulate local land use is not preempted by the Coastal Act.

On appeal, the Airbnb and Homeaway.com argue: (1) the ordinance is preempted by the CDA's broad immunity to online marketplaces for third party listings; (2) the ordinance violates the First Amendment as it is a content-based regulation of commercial speech and strict scrutiny should apply; and (3) the Coastal Act preempts the ordinance because the City did not seek the California Coastal Commission's approval to enact its ordinance.

Approved Action: Join in an amicus brief with IMLA and CSAC, supporting the City.

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

The League thanks brief writer Christi Hogin with Best Best & Krieger LLP, City Attorney for the Cities of Lomita, Malibu and Palos Verdes Estates.

Conflict of Interest

San Diegans for Open Government v. Public Facilities Financing Authority of the City of San Diego, et al.
Pending Court: California Supreme Court

Case Number: S245996

Citation: 16 Cal.App.5th 1273

In 2015, the City of San Diego (City) and the Public Facilities Financing Authority of the City of San Diego (PFFA) adopted an Ordinance and Resolution authorizing the issuance of bonds to refund and refinance the remaining amount owed by the City on bonds issued in 2007 to construct "Petco Park" baseball stadium. Thereafter, San Diegans for Open Government (SDOG) – a nonprofit organization allegedly comprised of taxpayers in the City – filed a complaint challenging the validity of the 2015 bonds. SDOG alleged that one or more members of the financing team that participated in the preparation of the 2015 bonds had a financial interest in the sale in violation of Government Code section 1090. The trial court determined that SDOG lacked standing to pursue a section 1090 challenge because it was not a party to the bond transaction, and dismissed the complaint. SDOG appealed.

The Court of Appeal reversed. Citing the "strict and important policy embodied in section 1090" and various recent cases upholding taxpayer standing to assert 1090 claims (e.g., *McGee v.*

Balfour Beatty Construction, LLC (2016) 247 Cal.App.4th 235 and *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115; but see *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679), the Court concluded that SDOG's interest as a taxpayer of the City was sufficient to support standing. The California Supreme Court granted review.

Approved Action: File an amicus brief.

Status of Filing: The amicus request was subsequently withdrawn.

Contracts

Synergy Project Management, Inc. v. City and County of San Francisco
Pending Court: 1st District Court of Appeal

Case Number: A151199

Citation: None

The City contracted with prime contractor Ghilotti Brothers, Inc. (GBI) to undertake a major street renovation project (Project). GBI's primary subcontractor on the Project was Synergy. In accordance with the Subletting and Subcontracting Fair Practices Act (Public Contract Code §§ 4100 et seq.) (SSFPA), which the City had incorporated into its Administrative Code, Article 4, Section 4.04 of the contract between the City and GBI gave the City the right to direct GBI to remove any subcontractor for unsatisfactory performance.

After Synergy caused repeated safety problems (including five gas line breaks), the City invoked Article 4, Section 4.04, and directed GBI to remove Synergy. GBI complied and removed Synergy, but later objected to the removal, claiming that it was unwarranted. Synergy also submitted written objections to the City. The City then initiated an administrative hearing pursuant to Public Contract Code section 4107.

GBI and Synergy objected to the hearing, arguing that the hearing officer lacked jurisdiction because the City, rather than GBI, initiated the hearing. The hearing officer disagreed and ruled that Synergy's removal was proper under Section 4107(a)(7), because Synergy's work was "substantially unsatisfactory and not in substantial accordance with the plans and specifications." Synergy and GBI then petitioned the superior court for a writ directing the City to withdraw the hearing officers' statement of findings for lack of jurisdiction. The court granted the writ and vacated the hearing officer's statement of findings, finding that neither section 4107 nor the contract conferred jurisdiction for a hearing initiated by the awarding agency, rather than the prime contractor. The City appealed.

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

Status of Filing: The brief will be filed shortly, if a volunteer brief writer is identified to draft the brief.

West Coast Air Conditioning Co. v. California Department of Corrections & Rehabilitation
Pending Court: California Supreme Court

Case Number: D071106

Citation: 21 Cal.App.5th 453

In February 2015, CDCR published an invitation for bids for an air conditioning and reroofing project at Ironwood prison (the Project). In accordance with California law, the invitation provided that the "award of the contact, if it will be awarded, will be to the lowest responsible bidder whose proposal complies with all requirements." West Coast and Hensel Phelps Construction (HP) were among the companies to submit bids for the Project. In May 2015, CDCR found HP to be the lowest responsible bidder and awarded HP the contract. West Coast was listed as the next lowest responsible bidder. West Coast filed a petition challenging the award of the contract to HP on the grounds that HP's bid was materially defective.

The trial court agreed with West Coast and issued an injunction nullifying the award and ceasing work on the project. After CDCR refused to award the remainder of the contract to West Coast, West Coast sought to recover its bid preparation costs (stipulated to be $250,000) under a promissory estoppel theory. The trial court awarded the costs. The Court of Appeal affirmed. The Court of Appeal rejected CDCR's contention that West Coast could not recover its bid preparation costs because West Coast had already obtained "effective" relief under *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Auth.* (2000) 23 Cal.4th 305, 313 when the trial court granted West Coast's request for a permanent injunction preventing HP from continuing to perform the contract. The court reasoned that the injunction was not an effective remedy for West Coast "without either an award of the public works contract to it or an award of damages equal to its bid preparation costs."

Approved Action: File a letter requesting depublication of the Opinion with the Court of Appeal.

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

The League thanks letter writer Michael Mauer with Best Best & Krieger LLP.

Preemption

City of Redondo Beach v. State of California, et al.
Pending Court: Los Angeles County Superior Court

Case Number: BS172218

Citation: None

On July 11, 2017, the California Attorney General issued Opinion No. 16-603, concluding in relevant part that the California Voter Participation Rights Act (CVPRA), Cal. Elections Code §§14050 to 14057, applies to charter cities. The CVPRA prohibits a "political subdivision" from holding a municipal election on any date other than a statewide election date if holding an election on a non-statewide election date previously resulted in turnout at least twenty-five

percent below the average turnout in that jurisdiction for the last four statewide general elections.

The City of Redondo Beach (City), a charter city, filed an action against the State seeking a determination that the CVPRA does not apply to charter cities. The City contends that, as applied to charter cities, the CVPRA violates Article XI, section 5 of the California Constitution. The City reasons that the timing of municipal elections is a municipal affair, not a matter of statewide concern, and the CVPRA is irreconcilably inconsistent with the City's Charter, which commands that general municipal elections be held in March of odd-numbered years. The City seeks: (1) a writ of mandate prohibiting the State from enforcing or implementing the CVPRA against the City; (2) injunctive relief restraining the State from enforcing or implementing the CVPRA against the City; and (3) a declaration that the CVPRA is unconstitutional as applied to charter cities.

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

Status of Filing: The brief will be filed shortly, if a volunteer brief writer is identified to draft the brief.

Proposition 26

Spencer v. City of Burbank
Pending Court: 2nd District Court of Appeal

Case Number: B287904

Citation: None

The City operates its own electric utility. Each year, the City transfers a percentage of funds from the utility to its general and street lighting funds. The transfers are authorized by provisions of the City Charter that were first approved by the voters in the 1950s and reapproved in 2007. Specifically, the Charter provides that the City council has the discretion to transfer up to 5% of the utility's gross retail sales of electricity to the general fund and up to 2% for street lighting or other general fund purposes. Since the 1950s, the cost of the 5% transfer has been part of the City's electric rates and is included as a cost in the rate making process. The cost of the street lighting transfer has been added to each bill as a separately listed surcharge.

Spencer challenged the transfers, alleging that they are proceeds of taxes that were not approved by the voters in violation of Propositions 26 and 218. The City argued that: (1) Prop 26 does not apply to the charges because it is not retroactive and the charges were established by the charter before Prop 26 was passed; (2) even if the charges are taxes, they were approved by the voters as part of the Charter and, therefore, comply with Props 26 and 218; and (3) the charges are part of the reasonable cost of providing electric service since they are mandated by the Charter. The trial court rejected the City's arguments and directed the City to remove the charges from its electric rates. The court found the Charter merely authorized the City council to make the transfers. Since the City council took action to continue the transfers annually, the charges were not

grandfathered or approved by the voters in compliance with Props 26 and 218. The City has 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 thanks brief writer Adam Hofmann with Hanson Bridgett.

Section 1983 Actions

Joseph Ryan v. Robert Fabela
Pending Court: Ninth Circuit Court of Appeals

Case Number: 18-15232

Citation: None

Joseph Ryan worked as Senior Counsel for SCVTA under the supervision of General Counsel, Robert Fabela. Ryan provided legal services to SCVTA's Administrative Services Department, including David Terrazas. Ryan did not get along with Terrazas and other members of the Department. The relationship problems were well documented, and Fabela's performance evaluations of Ryan in 2013 and 2014 identified the problem.

In June 2014, Terrazas was running for reelection to the Santa Cruz City Council. Sometime that month, Ryan created a Facebook page (Page) titled "Anyone but Terrazas for city council." The Page was only up for around a day. During the Page's existence, Ryan posted on it, making statements critical of Terrazas. In February 2015, Fabela learned of the website when SCVTA received a letter from an attorney hired by Terrazas claiming Terrazas had been retaliated against for opposing improper behavior at SCVTA. Thereafter, Fabela began discussing termination of Ryan. On June 5, 2014, Fabela signed a settlement agreement under which Terrazas received approximately $25,000. The same day, Fabela informed Ryan that his employment would be terminated.

Ryan filed suit against SCVTA and Fabela, asserting claims that were all later dismissed except for one: Ryan's claim against Fabela in his individual capacity for First Amendment retaliation in violation of 42 U.S.C. § 1983. Fabela moved for summary judgment, arguing that Ryan's First Amendment rights were not violated and, even if they were, Fabela is entitled to qualified immunity because Ryan's rights were not clearly established such that it was unreasonable for Fabela to believe that it was lawful to terminate him. The district court denied the motion.

Approved Action: Join in an amicus brief with CSAC.

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Alison Turner with Greines, Martin, Stein & Richland LLP.

Takings

Building Industry Association-Bay Area v. City of Oakland
Pending Court: Ninth Circuit Court of Appeals

Case Number: 18-15368

Citation: None

The City enacted a public art ordinance, which requires certain multifamily residential and commercial development projects to devote 0.5 to 1.0% of project building costs to install publicly accessible art onsite or in a nearby right-of-way, or make an in-lieu payment to the City's public art fund. BIA asserted a facial challenge to the validity of the ordinance on two grounds. First, BIA alleged that the ordinance is an unlawful exaction that violates the Takings Clause of the Fifth Amendment under the "exactions doctrine" articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. John's River Water Management District*, 570 U.S. 595 (2013). Second, CBIA alleged the ordinance compels speech in violation of the First Amendment.

The City filed a motion to dismiss, which the district court granted. In dismissing BIA's takings claim, the court declined to apply the *Nollan/Dolan/Koontz* exactions doctrine, explaining that the doctrine does not apply in a facial challenge; rather, the doctrine applies only to discretionary decisions regarding individual properties. The court explained that generally applicable ordinances such as the ordinance at issue are assessed under the regulatory takings framework set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and held that the ordinance does not cause a large enough loss of property value on its face to constitute a taking under *Penn Central*. In dismissing BIA's First Amendment claim, the court applied rational basis review (finding the ordinance does not require specific speech or significantly deter speech, and contains an in lieu fee alternative) and held that the City satisfied its burden of establishing that the ordinance is reasonably related to a legitimate governmental purpose. BIA appealed.

Approved Action: File an amicus brief with the Ninth Circuit, supporting the City.

Status of Filing: The brief will be filed shortly.

The League thanks brief writers Margaret M. Sohagi and Philip A. Seymour with the Sohagi Law Group.