LEGAL ADVOCACY REPORT
March 16, 2017

The League of California Cities® Legal Advocacy Committee considered the following appellate cases for amicus support from **January 6, 2017 through March 16, 2017.** 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:

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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.

Contracts

George Loya v. Western Riverside Council of Governments, et al.; Richardson v. County of Los Angeles, et al.; Richard Ramos v. San Bernardino Associated Governments, et al.
Pending Court: Federal District Court

Case Number: 5:16-cv-02478-AB-KK (Loya); 2:16-cv-08943-AB-KK (Richardson); 5:16-cv-02478-AB-KK (Ramos)

Citation: None

Three nearly-identical class action lawsuits were filed in early November 2016 by California homeowners who obtained energy-efficient home improvements through California's Property Assessed Clean Energy (PACE) program. Named as defendants are the County of Los Angeles, two associations of cities and counties (San Bernardino Associated Governments and Western Riverside Council of Governments), and Renovate America, which helps administer the PACE program on behalf of the government entities.

The lawsuits allege that: (1) the PACE assessments are effectively mortgage loans, which are subject to state and federal disclosure requirements; (2) defendants are secretly collecting double

interest and administrative fees; (3) defendants have secretly failed to credit payments when made; and (4) defendants are secretly overcharging recording fees. Plaintiffs claim that these actions violate mortgage disclosure laws, including the Truth in Lending Act, the Home Ownership Equity Protection Act, and related restrictions on mortgage charges. The lawsuits all concede that the homeowners received multiple disclosures and agreed to pay the fees assessed. No claim is made that the property renovations were inappropriate, the work was shoddy, or that the consumers were unaware of their obligations. The defendants filed motions to dismiss each lawsuit on several grounds, including that PACE property tax assessment contracts are not mortgage loans and are therefore not subject to the statutes relied upon by plaintiffs.

Approved Action: Monitor

Environment

Environmental Law Foundation v. State Water Resources Control Board
Pending Court: 3rd District Court of Appeal

Case Number: C083239

Citation: None

The County issues permits for wells that extract groundwater. Environmental Groups complained that the extraction of groundwater near the Scott River was causing decreased flows injuring local fish populations and rendering the river less suitable for recreational activities. Environmental Groups brought an action against the County and the Board, seeking a declaration that California's common law public trust doctrine applies to groundwater hydrologically connected to a navigable river and an injunction compelling the County to stop issuing well permits until it complied with the public trust doctrine. In response, the County asserted: (1) the public trust doctrine does not apply to groundwater, (2) the County does not have a duty to regulate groundwater under the public trust doctrine, and (3) even if the doctrine applies and there is a duty, the County fulfills the duty by complying with the Sustainable Groundwater Management Act (SGMA). The trial court concluded that while groundwater itself is not protected by the public trust doctrine, the doctrine nevertheless protects navigable waters from harm caused by extraction of groundwater, where its extraction adversely affects public trust uses. The trial court further concluded that the County does have a duty to regulate extractions of groundwater, because the administration of the public trust primarily rests with the state and the County, which is a subdivision of the state, shares responsibility for administering the public trust. Finally, the trial court rejected the County's argument that the County's compliance with SGMA fulfills its public trust duty. The County has appealed.

Approved Action: File an amicus brief with the Third District Court of Appeal.

Status of Filing: The brief will be filed shortly.

The League thanks brief writer Christian Marsh with Downey Brand LLP.

Labor & Employment

City of Escondido v. Public Employment Relations Board (ECEA)
Pending Court: 4th District Court of Appeal, Div. 1

Case Number: D070462

Citation: None

The City formerly employed two senior code enforcement officers, six full-time officers, and eight part-time officers. The six full-time officers comprised an entire bargaining unit of ECEA. On March 3, 2010, the City decided to lay off all six officers, effective March 31, 2010. The City then notified ECEA of its intent to negotiate the effects of the layoffs and, on March 15, 2010, the City and ECEA met to negotiate. At the meeting, the City and ECEA discussed that code enforcement would continue at a reduced level following the layoffs. The City stated it would cease providing proactive code enforcement – focusing instead on complaint-based enforcement, and would reassign cases to the department manager, and senior and part-time officers. ECEA disputed the City could adequately continue its code enforcement using part-time officers, but ultimately agreed to a management rights clause which stated: "The City will continue to accomplish work internally within the City workforce and assign such work among various City departments. When extraordinary or specialty work must be accomplished, the City will seek the most cost effective resources to accomplish such work either through temporary employees or outside professionals."

ECEA later filed an unfair practice charge with PERB alleging that the City violated the MMBA by unilaterally transferring the work of full-time officers to part-time officers outside the bargaining unit without negotiating the transfer decision. PERB agreed and concluded that the City's March 3, 2010 layoff decision was simultaneously a decision to transfer work outside the bargaining unit. The City appealed and the Court of Appeal reversed PERB in an unpublished decision. The Court found no evidence to support PERB's conclusion that the transfer decision occurred simultaneously. Rather, the evidence showed the City first raised the possibility of transferring work out of the unit on March 15, 2010, and ECEA failed to request to negotiate.

Approved Action: File an amicus letter with the Fourth District Court of Appeal, supporting the City's request for publication.

Status of Filing: The Court of Appeal denied the request for publication before the letter was filed.

Preemption

City of Malibu vs. Kent, et al.
Pending Court: California Supreme Court

Case Number: S240239

Citation: 2017 WL 167914

The California Department of Health Services (DHS) is responsible for licensing drug and alcohol rehabilitation facilities. There are two types of facilities that may be issued a license: (1) a residential facility, or (2) an integral facility – wherein separate buildings are integral components of a single rehabilitation facility. A residential facility is exempt from local ordinances not otherwise applicable to single-family residences, an integral facility is not. Passages Malibu operates a drug and alcohol rehabilitation program in eight separate structures on five contiguous lots in an R-1 zone in the City. Five of the structures are permitted as single-family residences, two are permitted as guest houses, and one is permitted as a pool house. DHS granted individual residential facility licenses for each of the eight structures. With these eight licenses, Passages operates one program serving up to 48 patients, and claims exemption from the City's zoning code. The City filed a petition for writ of mandate and complaint alleging that DHS unlawfully issued the eight licenses to one integral facility. Passages demurred, arguing that nothing in section 11834.09 of the Health and Safety Code prohibited DHS from issuing residential facility licenses to each building within an integrated facility. The trial court agreed. The Court of Appeal affirmed. The City has petitioned the California Supreme Court for review.

Approved Action: File a letter with the California Supreme Court supporting the City's petition for review.

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

The League thanks letter writer Holly O. Whatley with Colantuono, Highsmith & Whatley, PC.

Proposition 218

Plantier, et al. v. Ramona Municipal Water District
Pending Court: 4th District Court of Appeal, Div. 1

Case Number: D069798

Citation: N/A

RMWD provides wastewater services in the unincorporated area of Ramona. RMWD recovers costs for these services by allocating charges pursuant to a schedule of Equivalent Dwelling Units (EDUs). EDUs for each parcel are determined based on occupancy type. RMWD's Board periodically revises its schedule of EDUs. In 2012, RMWD sent Plantier, a Ramona property owner, a letter seeking over $100,000 in back due wastewater service charges and fees. The charges were assessed because Plantier's property had changed occupancy type – to 6.8 EDUs instead of 2. Plantier sent several letters to RMWD protesting the charges, and arguing that the EDU schedule violates Prop 218 because it is not sufficiently proportional to actual water usage. He requested a formal hearing with RMWD's Board, and the hearing was held, but the Board denied his claims. Plantier then submitted an administrative claim and draft complaint to RMWD setting forth the same Proposition 218 argument, which RMWD again rejected. In 2015, Plantier filed suit against RWMD on behalf a certified class of RMWD wastewater customers (collectively Plaintiffs). RMWD requested that the court hold a mini-trial on the issue of whether Plaintiffs had improperly failed to exhaust their administrative remedies prior to filing this lawsuit, since Plaintiffs did not submit a written protest or attend RMWD's Prop 218 rate increase hearings. The trial court granted RMWD's motion, then ruled that Plaintiffs' failure to submit any protest during the Prop 218 hearings barred the lawsuit. Plaintiffs appealed.

Approved Action: Join in an amicus brief with the California Association of Sanitation Agencies, supporting the RMWD.

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

The League thanks brief writers Daniel S. Hentschke, and Michael Colantuono and Eduardo Jansen with Colantuono, Highsmith & Whatley, PC.

Section 1983 Actions

Diaz v. City of Anaheim
Pending Court: U.S. Supreme Court

Case Number: 16-1040

Citation: 840 F.3d 592

While on patrol, Anaheim Police Officers Bennallack and Heitmann observed Diaz standing in the alley of a neighborhood known for gang activity, talking to the occupants of a vehicle. The Officers turned into the alley to make contact. When Diaz saw the vehicle, he turned and fled. The Officers exited the vehicle and took chase. Diaz led the Officers into a courtyard. Based on the way Diaz was running (holding an object in the front of his waistband and not pumping his arms), both Officers believed he was armed. When Diaz reached a fenced-in corner, he began to turn. Believing that Diaz was armed and that he was going to shoot, Officer Bennallack shot Diaz. As the Officer fired, he saw Diaz throw a dark object over the fence and heard him yell, "Gu . . . !" After the shooting, no object was found. Diaz was later pronounced dead.

Diaz's estate and mother (plaintiffs) sued for federal civil rights violations including excessive use of force. The case proceeded to a jury trial. Plaintiffs moved to bifurcate the liability phase from the damages phase of the trial, to avoid the risk that prejudicial information unknown to Officer Bennallack at the time of the shooting would taint the jury's consideration of Officer Bennallack's use of deadly force. The district court granted the motion in part, severing punitive damages from liability but not compensatory damages. The trial proceeded for six days – during which the City presented evidence of Diaz's gang membership and drug use. Following trial, the jury returned a defense verdict. Plaintiffs appealed, arguing that the trial court abused its discretion in refusing to bifurcate liability and damages and thereby admitting certain gang and drug evidence. A unanimous three-judge panel agreed with the plaintiffs, relying on what happened at trial after the bifurcation decision was made to find that the district court abused its discretion in denying plaintiff's motion to bifurcate. The City's petition for rehearing en banc was denied. The City will file a petition for certiorari with the Supreme Court.

Approved Action: Join with IMLA in filing an amicus brief supporting the City's petition for certiorari.

Status of Filing: The brief will be filed shortly.

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

Takings

Colony Cove Properties, LLC. v. City of Carson
Pending Court: Ninth Circuit Court of Appeals

Case Number: 16-56255

Citation: None

The City has an ordinance that requires mobilehome park owners to submit an application to the City's Mobilehome Park Rental Review Board (Board) in order to increase rents at one of the 21 rent-controlled mobilehome parks. The Board may only grant "fair, just, and reasonable" increases – meaning that they provide fair return on investment to the park owner but also protect tenants from excessive increases. City guidelines permit, but do not require, the Board to utilize certain formulas when making this determination. One of the formulas the Board may utilize takes into account a park's debt service obligations. Another formula excludes debt service expenses when calculating profit. In April 2006, Colony Cove purchased a rent-controlled mobilehome park in the City, relying on an $18 million mortgage with annual interest payments exceeding the Park's net operating income. To make up the difference, Colony Cove applied for a rent increase of $200 in 2006 and again in 2007. The Board rejected the requested increases and, instead, granted modest increases of approximately $30 and $20. Colony Cove then filed suit under section 1983 for inverse condemnation, alleging that application of the formula excluding debt service expenses deprived Colony Cove of a fair return on its investment. Over the City's objection, the trial court: (1) sent the questions of liability and damages to a jury; (2) excluded evidence of park valuation, economic performance, and additional rent increases; (3) interpreted "economic impact" as a loss of profit instead of evaluating whether Colony Cove is substantially deprived of all of the mobile home park's economic value; and (4) instructed the jury that it could find a taking if the City's action was "unjust" or "unfair." The jury found in favor of Colony Cove, awarding damages, fees and costs of over $7 million. The City appealed.

Approved Action: File an amicus brief with the Ninth Circuit in support of the City.

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

The League thanks brief writer Christine Van Aken with the San Francisco City Attorney's Office.

Trespass

Hensley v. San Diego Gas & Electric Co
Pending Court: 4th District Court of Appeal, Div. 1

Case Number: D070259

Citation: None

On October 21, 2007, while Hensley was away on a business trip, wildfires occurred near his home that required his wife and daughter to evacuate. Though the home was not completely destroyed, it was damaged to the extent that Hensley was not able to move home until late November 2007. Hensley sued San Diego Gas & Electric Co. (SDG&E), whose power equipment allegedly ignited the fire, asserting various causes of action including trespass and nuisance. Hensley alleged that he suffered emotional distress as a result of the damage to his home, which exacerbated his pre-existing Crohn's disease and eventually forced him to stop working. Hensley sought millions of dollars in damages based on this emotional distress. The trial court bifurcated the trial and ordered the damages phase to take place before the liability phase. SDG&E then moved to exclude evidence of Hensley's asserted emotional distress, arguing that Hensley was not legally entitled to recover for pure emotional distress under theories of trespass and nuisance. The trial court granted the motion, ruling that damages are recoverable in trespass and nuisance actions for annoyance and discomfort, but not for pure emotional distress, such as Hensley's worry and frustration. Hensley appealed the trial court's order excluding evidence of Hensley's emotional distress following the parties' execution of a stipulated judgment. The Court of Appeal reversed the trial court's order. The Court held that emotional distress proximately caused by a trespass or nuisance is recoverable as annoyance and discomfort damages, regardless of the personal physical presence of the property owners at the time of the trespass or nuisance. SDG&E will soon file a petition for review with the California Supreme Court.

Approved Action: Monitor