2016 Annual Conference

City Attorneys' Department Track

Long Beach Convention Center
Long Beach, California

October 5 – 7, 2016

Name: _____

Mission Statement:

To restore and protect local control for cities through education and advocacy to enhance the quality of life for all Californians.

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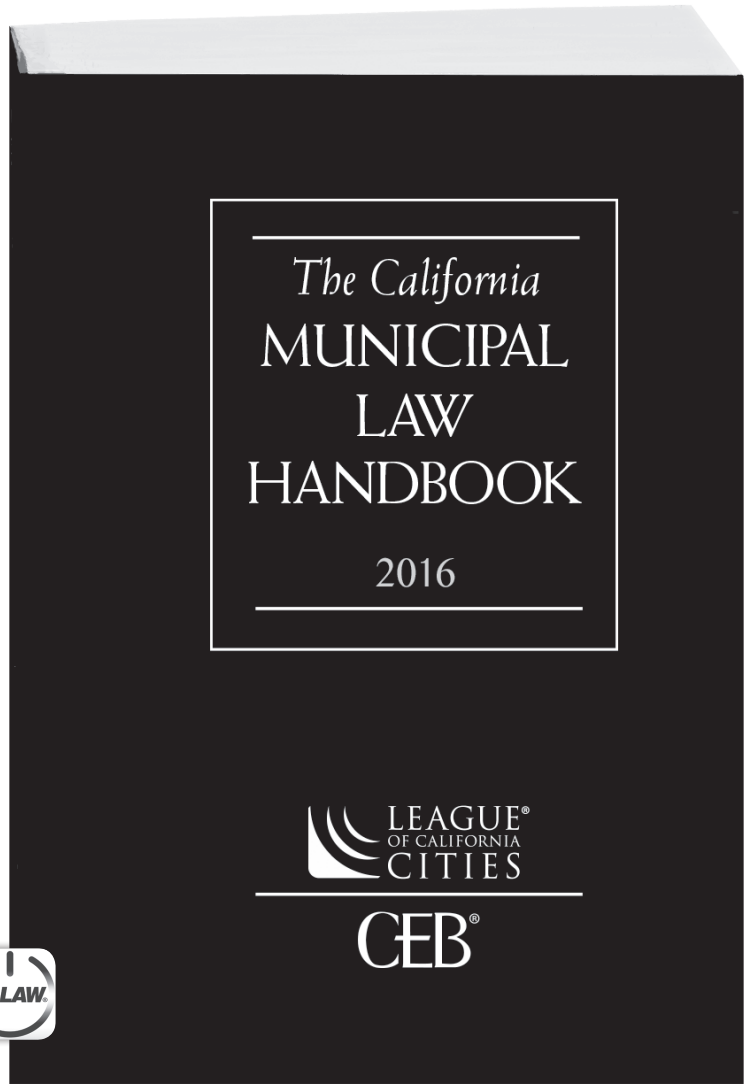

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City Attorneys' Department

2016 Annual Conference: City Attorneys' Track

Program Materials

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III. Program Materials *(continued)*

MCLE Information

The League of California Cities® is a State Bar-certified minimum continuing legal education (MCLE) provider. This activity is approved for 10.5 hours of MCLE credit, which includes 1 hour of MCLE specialty credit for Legal Competence Issues sub-field credit.

Registration Check-In

MCLE credit is being tracked through your registration for the conference. When you check in at the registration desk, you will be required to verify your State Bar number listed on your name badge, and your verification will serve as proof of your attendance.

Certificate of Attendance

Certificates of attendance are available on the materials table at the back of the City Attorneys' session room until the conclusion of the conference. ***Please make sure you pick up your attendance certificate.*** You only need one attendance certificate for all of the City Attorneys' Track sessions at this conference.

Evaluations

PLEASE TELL US WHAT YOU THINK! We value your feedback. An electronic (mobile device compatible) version of the evaluation is available at: http://www.cacities.org/caevaluations and will also be emailed after the conference. Please tell us what you liked, what you didn't, and what we can do to improve this learning experience.

2016 ANNUAL CONFERENCE

Wednesday, October 5 - Friday, October 7

Long Beach Convention Center

CITY ATTORNEYS' DEPARTMENT PROGRAM

2015-2016 City Attorneys' Department Officers:

President: Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

1st Vice President: Gregory W. Stepanicich, City Attorney, Fairfield and Mill Valley and Town Attorney, Ross

2nd Vice President: Christine Dietrick, City Attorney, San Luis Obispo

Director: Michele Beal Bagneris, City Attorney, Pasadena

Wednesday—October 5

8:00 a.m. – 6:00 p.m. **Registration Open**

1:00 – 2:45 p.m. **General Session**

Moderator: Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

City Attorney Relationships: City Manager

Speakers: Paul Arevalo, City Manager, West Hollywood
Michael Jenkins, City Attorney, West Hollywood

City Attorney Relationships: City Clerk

Speaker: Lisa Pope, Assistant City Clerk, Santa Monica

City Attorney Relationships: Councilmembers

Speakers: Richard W. Kite, Councilmember, Rancho Mirage
Steven B. Quintanilla, City Attorney, Rancho Mirage

3:00 – 5:00 p.m. **Opening General Session (whole conference; no programming)**

5:00 – 7:00 p.m. **Host City Reception & Expo**

Thursday—October 6

7:00 a.m. – 4:00 p.m. **Registration Open**

8:00 – 9:30 a.m. **General Session**

Moderator: Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

Department Business Meeting

- *– President's Report (Christi Hogin)*
- *– Director's Report (Michele Beal Bagneris)*
- *– Nominating Committee Report (Michael Jenkins)*
- *– Election of Department Officers (2nd VP) (Christi Hogin)*

Welcoming Remarks

Speaker: Charles Parkin, City Attorney, Long Beach

FPPC Update

Speaker: Randy E. Riddle, Renne Sloan Holtzman Sakai

Municipal Tort and Civil Rights Litigation Update

Speaker: Walter C. Chung, Lead Deputy City Attorney, San Diego

9:45 – 11:45 a.m. **GENERAL SESSION (WHOLE CONFERENCE; NO PROGRAMMING)**

11:30 a.m. – 1:00 p.m. **Expo Exclusive With Lunch (Whole Conference; No Programming)**

1:00 – 2:15 p.m. **General Session**

Moderator: Michele Beal Bagneris, City Attorney, Pasadena

General Municipal Litigation Update

Speaker: Javan N. Rad, Chief Assistant City Attorney, Pasadena

Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives

Speakers: Brian P. Walter, Liebert Cassidy Whitmore
Elizabeth T. Arce, Liebert Cassidy Whitmore

Thursday—October 6 (continued)

2:45 – 4:00 p.m.

General Session

Moderator: Christine Dietrick, City Attorney, San Luis Obispo

Serially? Seriously. Avoiding the Perils and Pitfalls of Serial Meetings in the Digital Age

Speakers: Kendra L. Carney, Deputy City Attorney, Tustin
James C. Sanchez, City Attorney, Sacramento

Have You Noticed? Noticing and Agenda Descriptions Under the Brown Act

Speaker: Martin D. Koczanowicz, City Attorney, Moreno Valley

Let's *Ex Parte*! The Limits and Disclosure Requirements of *Ex Parte* Contacts in the Public Hearing Context

Speaker: Ariel Pierre Calonne, City Attorney, Santa Barbara

4:15 – 5:30 p.m.

General Session

Moderator: Gregory W. Stepanicich, City Attorney, Fairfield and Mill Valley and Town Attorney, Ross

Labor and Employment Litigation Update

Speaker: Timothy L. Davis, Burke, Williams & Sorensen

AB 646 Post Impasse Fact Finding in Collective Bargaining

Speakers: Edward P. Zappia, Zappia Law Firm
Anna Zappia, Zappia Law Firm

Q & A

5:30 p.m. **Evening On Your Own**

Friday—October 7

7:30 – 10:00 a.m. **Registration Open**

8:00 – 10:15 a.m. **General Session**

Moderator: Michele Beal Bagneris, City Attorney, Pasadena

Land Use and CEQA Litigation Update

Speaker: Christian L. Marsh, Downey Brand

Legal and Practical Considerations Regarding Cultural Resources and AB 52

Speakers: Andrea P. Clark, Downey Brand
Lisa Westwood, RPA, Cultural Resources Manager, ECORP Consulting

Not Just Density Bonuses: Dealing with Demands Beyond the Bonus

Speakers: Lynn E. Hutchins, Goldfarb & Lipman
Karen M. Tiedemann, Goldfarb & Lipman

10:30– 11:45 a.m. **General Session**

Moderator: Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

Gift of Public Funds (Spoiler Alert: It's Illegal)

Speaker: Brian P. Forbath, Stradling, Yocca, Carlson & Rauth, PC

(MCLE Specialty Credit)

(*Legal Competence Issues (formerly Detection/Prevention of Substance Abuse)*

High-Tech Intimidation, Stress & the Public Official

Speaker: Richard Carlton, MPH, Director, Lawyer Assistance Program
The State Bar of California

Noon – 2:00 p.m. **Closing Luncheon With Voting Delegates & General Assembly**

MCLE Credit – 10.5 Hours

The League of California Cities[1] is a State Bar of California minimum continuing legal education (MCLE) approved provider and certifies this activity meets the standards for MCLE credit by the State Bar of California in the total amount of **10.5** hours, including one hour of Legal Competence Issues sub-field credit.

[1] *Provider No. 1985*

Notes:

City Attorney Relationships: City Manager, City Clerk, Councilmembers

Wednesday, October 5, 2016 General Session; 1:00 – 2:45 p.m.

Paul Arevalo, City Manager, West Hollywood
Michael Jenkins, City Attorney, West Hollywood
Lisa Pope, Assistant City Clerk, Santa Monica
Richard W. Kite, Councilmember, Rancho Mirage
Steven B. Quintanilla, City Attorney, Rancho Mirage

LEAGUE OF CALIFORNIA CITIES
CITY ATTORNEYS' DEPARTMENT

OCTOBER 2016 ANNUAL CONFERENCE
LONG BEACH, CA

THE CITY ATTORNEY IN CONTEXT
A CALL-IN CONVERSATION IN THREE INTERVIEWS

City Attorney - City Manager Relationship

Speakers: Paul Arevalo, City Manager, West Hollywood
Michael Jenkins, City Attorney, Hermosa Beach, Rolling Hills & West Hollywood

City Attorney - City Clerk Relationship

Speaker: Lisa Pope, Assistant City Clerk, Santa Monica
Interviewed by Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

City Attorney Relationships: Councilmembers

Speakers: Richard W. Kite, Councilmember, Rancho Mirage
Steven B. Quintanilla, City Attorney, Rancho Mirage & Desert Hot Springs

THE CITY ATTORNEY/CITY MANAGER SURVIVAL GUIDE

Michael Jenkins[1]
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www.localgovlaw.com

The majority of cities in California utilize the city manager form of government allowed by Government Code section 34851 *et seq.* or by home rule charters. Most city councils appoint a city attorney;[2] approximately 2% are elected. In a general law city, the city manager and city attorney are typically the only city officials directly appointed by the city council and are the highest ranking city employees. The subject of how and why the city attorney and city manager should get along has previously been addressed in papers delivered to the Department[3] and will not be repeated here. This paper will focus on how to manage this critically important relationship during ten specific difficult circumstances raised in the live conference program.

1. When team play interferes with independent judgment

   A successful relationship between the city attorney and the city manager and successful governance of the city both require team play. As team players, the city attorney and the city manager should endeavor to work out their disagreements in a professional and cooperative manner. When there is professional harmony, councilmembers may regard this with suspicion, wondering if the two are sufficiently independent minded. Councilmembers need to understand that city governance is improved when the organization's leaders find common ground and do not routinely undermine or disagree with each other. City hall should not be a civil war zone.

   That said, when disagreement cannot be resolved, team play must give way to independent judgment. If the city manager's policy initiative collides with the city attorney's legal judgment, that disagreement must be played out either in a confidential attorney-client privileged legal opinion or in a council meeting. The city attorney has a duty to provide his or her best legal advice to the council regardless whether it impedes a city manager initiative. A good city manager knows this and that is why this should seldom happen. By the same token, a good city attorney knows that the ultimate decision to take legal risks is made by the client, not the lawyer.

   If the city attorney thinks the city manager is pursuing a wrongheaded policy objective, the relationship should tolerate the attorney communicating his or her frank opinion. If the manager's policy objective is questionable but not unlawful, that should be the end of it, as far as the city attorney is concerned.

[1]Mike Jenkins is a partner at Jenkins & Hogin, LLP and serves as City Attorney for the cities of Hermosa Beach, Rolling Hills and West Hollywood. He has worked with a lot of city managers; he has worked with Paul Arevalo in West Hollywood for 17 years.
[2] California Government Code section 36505 allows, but does not require, a city council of a general law city to appoint a city attorney. The duties of the city attorney are enumerated in Government Code section 41801*et seq.*
[3] "The Role of the City Attorney and Development of the City Attorney/City Manager Relationship," Jeff Kolin and Jonathan P. Lowell, City Attorneys' Department, 2013 Annual Conference; "Role of the City Attorney: Relationships with Other Municipal Actors," Michael Colantuono, May 5, 2004, City Attorneys Department.

2. When the manager questions the attorney's legal judgment

The city manager is entitled to take a hard look at the city attorney's legal opinions. It is not out-of-bounds for a city manager to ask the city attorney for the authority on which the lawyer is relying and to question the opinion. The city attorney doesn't always get it right and should be willing to talk through a conclusion. Alternatively, sometimes the law is ambiguous and the manager may perceive the attorney as being unnecessarily conservative. This is a conversation the two should be able to have without being offensive (manager) or defensive (attorney).

In this circumstance, the city attorney should take a second look at his or her opinion, ask a colleague for peer review or turn to the city attorney list serve. If after further consideration the city attorney is satisfied with his or her position, and the issue is important enough to the manager, the manager and the city attorney should consider whether a second legal opinion is warranted. Experienced city attorneys know the value of an occasional second opinion from a lawyer experienced in a particular area or with a different vantage point in a situation. City attorneys, more than many practice areas, thrive on congeniality – that is reflected in the regularly updated Municipal Law Handbook and the ever-popular listserv, now known as the Forum. Hopefully the need for second opinions doesn't happen very often; if it does, there is a bigger problem.

3. When the attorney uses legal justifications to masquerade as policy advice

The papers referred to in footnote 3 discuss the importance of the city attorney and city manager understanding and adhering to their respective roles and areas of responsibility. Generally, it is preferable for the two to stick to what they do best. That said, it is not uncommon in a healthy manager/attorney relationship for both to confide with each other when they have concerns or doubts that affect the city's interests, even when doing so transgresses their respective usual boundaries.

It is not productive for city managers to avoid seeking legal advice because they think they know the answer and either don't want to hear a contrary opinion or don't want to incur the expense for legal advice. On the other hand, it is not ethical for the city attorney to push for a desired policy outcome by claiming legal imperatives. The city attorney is a legal advisor, plain and simple; as tempting as it may be on occasion to influence policy, that's not the attorney's job. The reality is that the vast majority of city attorneys are well trained to distinguish between legal constraints and policy preferences. One way to build trust in the relationship with policy makers is to be conscientious about when comments are outside the strict role. Here is an example of that: "the law allows you to notice a special meeting on 24-hour notice. Although not a legal consideration, I suggest you consider that the neighborhood is expecting that this item will be discussed at a regular meeting and I suspect calling a special meeting might be viewed as trying to dampen public participation."

4. When both the attorney and the manager routinely complain about each other to the council like bickering siblings to their parents

Sibling rivalry, which this type of behavior resembles, is as dysfunctional in a city as it is in a family. In such situations, intervention may be required. One approach would be for the mayor or a temporary council subcommittee to sit them both down together and mediate a solution.

Sometimes the root of the problem is legitimate – for example, if one has a documented concern that brings the competence, trustworthiness, ethics or character of the other into serious question. That type of concern should be brought to the attention of the city council and addressed through the performance evaluation process in compliance with the Brown Act.

5. When the attorney is consistently late in providing legal advice.

   Sometimes, a project will take longer than initially expected because of unforeseen complications, competing deadlines or the press of other business; that is understandable and forgivable. And, city managers need to have realistic expectations; sometimes legal work cannot be turned around overnight or in accordance with the manager's schedule. Conversely, city attorneys have a responsibility to inform the city manager when a particular assignment can realistically be completed and meet deadlines.

   Of course, city managers are right to gripe when the city attorney is consistently late producing legal opinions, contracts, ordinances, agenda reports and other legal work product. In those circumstances, the city manager should endeavor to work out the problem directly with the city attorney. Agree to mutually establish realistic and fair deadlines for work product and stick to them; if the deadline won't or can't be met, the city attorney should communicate that as early as possible. If that effort fails and the city attorney continues to routinely delay city business, an intervention by the mayor or the city council via a performance evaluation may be appropriate.

6. When the attorney suspects the manager is using individual councilmember briefings as serial meetings/when the manager thinks the attorney allows the council to go too far in closed session

   Individual briefings of elected officials, though allowed by Government Code section 54952.2 (b)(2), can create opportunities for Brown Act violations and city managers need to consciously avoid facilitating a serial meeting even if pressured to do so by one or more councilmembers. If the city attorney is aware that the city manager and councilmembers are engaging in illegal serial meetings despite being explicitly advised not to do so, the attorney has the option to resign his or her post under the rules of professional conduct. The manager has an ethical, legal and fiduciary obligation to avoid assisting or encouraging councilmembers to violate the Brown Act by knowingly participating in illegal serial meetings. Illegal serial meetings will inevitably have unfortunate consequences because, really, there are no secrets in most city halls. Serious legal consequences can flow from such violations.

   If the city manager believes the city attorney is allowing violations of the Brown Act in closed session or otherwise, the manager should take this up with the attorney. If the manager is unable to modify the attorney's conduct, the manager should consider obtaining a second opinion addressing the propriety of the city attorney's practices.

7. When the city attorney creates a wall around the legal department

   Some managers complain that the city attorney's office is a fortress, made impenetrable by considerations of confidentiality. In some instances these complaints have merit; on the other hand, in an organization defined by transparency and public access, it takes a special effort to maintain client confidences, which the city attorney must do. These issues are usually resolved by establishing protocols that make lawyers confident that confidential information is identified and handled appropriately.

City staff should feel comfortable approaching the city attorney's staff for legal advice. They should feel that their problem is going to be given careful and timely attention. Staff should feel confident that the city attorney will be practical and resourceful in fashioning a solution that, if legally possible, accomplishes staff's objectives. The city attorney should not cultivate an environment that city staff finds intimidating, secretive, superior, insensitive or nonresponsive.

Where the city manager cannot work collaboratively with the city attorney to achieve that kind of legal department, city council intervention may prove the only remedy.

8. When the city attorney interferes with the city manager's chain of command

What some city managers perceive to be interference may in the eyes of the city attorney be a normal incident of an attorney client relationship. It can be unrealistic, inefficient and paralyzing for the city manager to bar the city attorney from dealing directly with line staff and vice versa. On the other hand, the city manager is responsible for the management of resources and the city budget; excessive or unwarranted involvement of the city attorney can strain a budget. Ultimately, the city manager will have to decide on the correct balance. The city attorney is not in the chain of command and has no authority over staff. The line between providing legal advice and directing staff can be elusive; after all, when the attorney gives legal advice to a staff member who does not follow the advice, the attorney may need to provide the advice up the chain of command.

City managers should not be alarmed by direct relationships between key staff and the city attorney, so long as the city attorney does not exceed the bounds of his or her role as a legal advisor. Staff should get accustomed to regarding the city attorney as an ally who can be counted on to provide practical legal advice that keeps staff out of trouble and makes their lives at city hall more productive. Establishing a personal connection with the staff is essential to achieve the kind of trust and respect essential to an attorney/client relationship. Establishing rigid barriers solely to protect the chain of command can defeat the above worthwhile objectives.

9. When the city council wants to fire the city manager

When the city council loses confidence in and is considering firing the city manager, it is likely that the first person consulted is the city attorney. Where the city manager and the city attorney have a successful and collaborative relationship, that situation is a test of the city attorney's professionalism. The attorney's duty of loyalty is to the city and the attorney is bound to keep the council's confidences and yet, as a teammate of the city manager, the attorney may feel as if he or she is betraying the city manager by facilitating a termination. The anxiety of this moment is reduced where the relationship between the two professionals is founded and maintained on their understanding of their different roles in the organization and mutual obligations to the city. The city attorney should help the city council devise a game plan that places the interests of the city above all else. Every city manager knows that such a day may come; what he or she wants and deserves is a city attorney (when tasked with the unpleasant duty) who treats the manager with respect during such a difficult (and often publicly embarrassing) process.

10. When the city council wants to fire the city attorney.

See #9 above and switch places.

MIKE AND STEVE'S TEN TIPS FOR MANAGING THE CITY ATTORNEY/ CITY COUNCILMEMBER RELATIONSHIP

1. When a councilmember wants to confide something confidential with regard to a city issue, remind the councilmember that your client is the city and not each individual councilmember. You can tell the councilmember you are prepared to be discreet, but you cannot guarantee confidentiality from other councilmembers.

2. When a councilmember calls or emails, you should try to respond right away. Even if you can't respond substantively because of the press of other business, let the councilmember know when he or she can expect a substantive response.

3. When a councilmember gossips about his or her colleagues, refrain from joining in. These relationships are fluid.

4. Treat every councilmember equally; especially when you have a divided council. Each councilmember is entitled to the same degree of assistance from you.

5. Be consistent; give each councilmember the same answer, even if it is not the answer the councilmember expects or wants to hear.

6. Remain unaffiliated; you are a professional whose sole interest is to act in the best interests of the city, not a particular council majority or faction in the community.

7. Develop a thick skin; you may not be credited with your contributions to successes and you will be criticized for decisions that you didn't make. Learn to live with that.

8. Give legal advice in a way that is to the point and understandable to a non-lawyer. Councilmembers want a straight answer and don't tolerate waffling well. Granted, the law isn't always clear; make it as clear as you can.

9. Remember your role as a legal advisor. When councilmembers seek your direction on policy issues, provide them with an analytical structure that will facilitate their deliberative process. Provide the pros and cons; weigh the risks; balance the benefits and the harms. But, do not advise them how to vote.

10. Your job is to make sure the city and the council know the law and do your best to keep the city out of trouble. Never lose sight of that objective.

CITY ATTORNEY – CITY CLERK: PROTECTORS OF THE RULE OF LAW

In a certain respect the City Clerk and the City Attorney have a similar role in city hall. While the city council sets policy and the city manager implements the policy, the city clerk and the city attorney concern themselves with the process by which the decisions are made and make certain that the decisionmakers are aware of the boundaries in which they exercise their discretion.

The California City Clerks Association's *City Clerk's Handbook*'s table of contents will look familiar to city attorneys and highlight the overlapping concerns of the city clerk and the city attorney:

Chapter One City Clerk – One of the Oldest Professions
Chapter Two Organization and Administration
Chapter Three Community Relations & Communications
Chapter Four Legislative Procedures
Chapter Five Meetings, Agendas, Minutes, Follow Up
Chapter Six Elections
Chapter Seven Change of Organization and Vacation
Chapter Eight Assessments, Licenses and Other Financial Duties
Chapter Nine Projects, Grants, Capital Improvements
Chapter Ten Deeds and Deed Processing
Chapter Eleven Bids and Bid Openings
Chapter Twelve Agreements and Contracts
Chapter Thirteen Claims, Summons, Insurance
Chapter Fourteen Records Management

The City Clerk and the City Attorney can teach each other to fish.[4] With all this overlap, there are still questions that require a legal opinion and plenty of judgment calls that fall within the city clerk's area of authority. One of the best ways for this particular city hall relationship to thrive is to spend time building bureaucratic infrastructure that anticipates potential issues. Forms and templates can help sort out well travelled ground from uncharted waters. There are numerous repetitive tasks that the city clerk's office and the city attorney's office can work together to both routinize and troubleshoot. Agenda preparation and posting (meeting adjournments, special meetings, item continuances, amended agendas); Public works bid openings; Processing subpoenas and Public Records Act requests; Election procedures (ballot designations, managing ballot arguments, training poll workers, recount procedures…); Processing claims and service of lawsuits; and staff trainings. City hall is best served when the city clerk and the city attorney work as a team.

Practice Tip: Provide explanations and citation to municipal code and state law; talk through the judgment calls. The result of that type of relationship will be more consistent decisionmaking and better served residents.

The California City Clerk's Association has prepared this excellent summary and explanation of the role of the city clerk:

[4] As in the Chinese proverb corrected for gender bias: "Give a person a fish and you feed him or her for a day. Teach a person to fish and you feed him or her for a lifetime."

WORKING WITH YOUR CITY CLERK

The City Clerk is the local official who administers democratic processes such as elections, access to city records, and all legislative actions ensuring transparency to the public. The City Clerk acts as a compliance officer for federal, state, and local statutes including the Political Reform Act, the Brown Act, and the Public Records Act. The City Clerk manages public inquiries and relationships and arranges for ceremonial and official functions

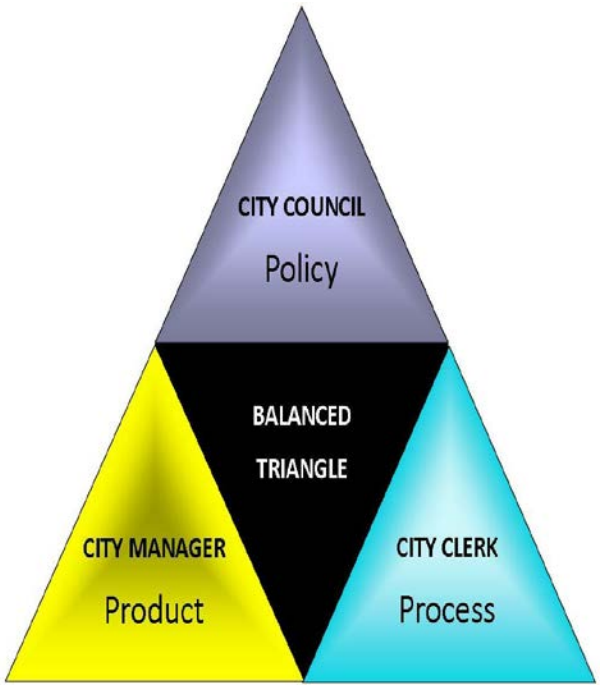
www.californiacityclerks.org

Public Service–A Balanced Triangle

Success in public service requires an even-sided, balanced triangle. The City Council, City Clerk, and City Manager must understand and respect each other's roles and share an obligation in maintaining this balance.

City Council = Policy

They establish vision and direction for the community's future



City Manager = Product

Provides services to the taxpayer that the taxpayer cannot (or will not) provide for themselves

City Clerk = Process

Ensures that the decision-making process is transparent to the public; complies with federal, state, and local regulations; and is properly recorded

[1]

Advocates for Democracy

Elected Officials, City Managers and City Clerks shoulder equal responsibility in preserving and promoting democracy, the very backbone of our society. The more we invite public participation, the more democracy will thrive, and citizens will take pride in shaping the community's future. The balance of power in local government is crucial to a democracy. Power ultimately resides with the governed, but only when the laws and actions are clearly set forth and records are accessible can people exercise their right of oversight. When people exercise their rights, democracy thrives and communities take shape and prosper.

The Role of the City Clerk

Thousands of statutes and regulations exist which protect democracy and provide a system of "checks and balances." It is the city clerk's responsibility to ensure compliance with these laws, which are complex and constantly changing and evolving. The city clerk, as the local official, must have the professional education, training, and knowledge necessary to understand and administer these laws. The city clerk is your partner in democracy.

Office of the City Clerk

- Elections Official
- Local Legislation Auditor
- Municipal Officer
- Political Reform Filing Officer
- Records & Archives
- Public Inquiries & Relationships
- City Council Support Services

Elections Official

Per Elections Code 320, the City Clerk is the Elections Official for the City, unless the City Council has by resolution requested that the board of supervisors permit the county clerk to render specified elections services to the city

- Voter Registration
- Conduct Stand-Alone or Consolidated Elections for Council/Mayor/Treasurer/City Clerk
- Ballot Measures/Charter Amendments
- Initiative (Elections Code 9214)
- Referendum (Elections Code 9236)
- Recall (Elections Code 11360)

California Law: www.leginfo.ca.gov

Local Legislation Auditor

Per Gov. Code, the City Clerk is responsible to ensure that the Brown Act (Gov. Code 54950 et. seq.) is followed. The Brown Act was enacted to ensure all actions are taken openly and that all deliberations are conducted openly. It is a misdemeanor if an elected official deliberately deprives public of information.

- Public Notices/Public Hearings
- Contracts and Agreements
- Bonds and Insurance
- Authority to Execute Instruments
- Ordinances & Resolutions
- Municipal Code

League Publication: Open & Public IV (To order call: (916) 658-8247)

Municipal Officer

The City Clerk is one of five positions that Government is vested in: Per Gov. Code 36501, general law cities are required to be governed by a City Council, City Clerk, City Treasurer, Chief of Police, Fire Chief, and such subordinate officers or employees as required by law.

- Clerk of the Council (Gov. Code 36814)
- Perform Attestations (Gov. Code 40806)
- Administer Affirmations/Oaths of Office (Gov. Code 40814) (Gov. Code 36507)
- Maintain Custody of City Seal (Gov. Code 40811)
- Accept Subpoenas and Lawsuits (Gov. Code 37105)
- Countersign General Obligation Bonds (Gov. Code 43623 43625)
- File Official Bonds (Gov. Code 36520)

Political Reform Filing Officer

The Political Reform Act of 1974 (Gov. Code 83111) addresses the financial conflicts of interests of public officials through disclosure of the official's economic interests and prohibitions on participation in making decisions that the official knows or has reason to know will result in a material financial effect on one of the official's economic interests. The City Clerk serves as the compliance officer in matters pertaining to the Act.

- Filing Official for Form 700 – Statement of Economic Interests - Disclose personal assets and income—disqualify yourself if decision affects personal financial interests.
- Filing Officer for Campaign Finance Forms – 460, 470, 495, 510 etc. - Campaign Statements and Reporting - Elected officials shall respond to wishes of all citizens equally, contributors shall not gain disproportionate influence over others.

www.fppc.ca.gov

FPPC Manual 2 for Local Elected Officials

FPPC Help Line: 1-866-275-3772 – Elected officials should contact FPPC directly and avoid asking City Clerk to ask questions for them.

California Law: www.leginfo.ca.gov
California Code of Regulations: www.calregs.com

Records & Archives

The Public Records Act (Gov. Code 6250) was enacted to provide access to information that enables the public to monitor the functioning of their government. This right of access to information concerning the conduct of the people's business is a fundamental and necessary right of every person. As the Custodian of Records for the City, the City Clerk is responsible for ensuring compliance with the Public Records Act.

- Receives and Answers Public Records Request – With few exceptions, only records available to the public are disclosable to elected officials. Records exempt from disclosure include personal information, medical information, crime/intelligence records, voter records, utility usage records.
- Indexing, Research & Retrieval
- Records Retention – All correspondence received/sent by Council Member shall be directed to the City Clerk for proper disclosure/indexing/retention. Includes e-mails.

League Publication: The People's Business (To order call: (916) 658-8247)

- Maintains and Produces Minutes of the Meetings of the City Council, Commissions and Committees
  - History and legal record.
  - Record of actions and proceedings
  - Refresh recollection.
  - Gives reader sufficient understanding of proceedings
  - Are not transcriptions.
  - Are not an exact record of discussions and conversations
  - Are not "to do" lists.

Public Inquiries & Relationships

The City Clerk serves as a liaison between the public and the City Council. The City Clerk provides easy access to information and serves as a guide to open participation in the decision- and policy- making process. The City Clerk is often the first person a member of the public contacts when seeking assistance from the City Hall.

City Council Support Services

The City Clerk provides support services to the City Council in many ways.

- Ceremonial Functions
- Resolutions, Commendations, Awards
- Administrative
- Commissions
- Resources
- Research
- History, Institutional Knowledge

FPPC Update

Thursday, October 6, 2016 General Session; 8:00 – 9:30 a.m.

Randy E. Riddle, Renne Sloan Holtzman Sakai

FPPC UPDATE: OCTOBER 2016

While it has been a rather slow period for the FPPC in terms of adopting new regulations, the agency is in the midst of an ambitious endeavor, the Political Reform Act Revision Project. I will focus most of my paper on that development, followed by a summary of some recent opinion letters and enforcement actions of interest.

POLITICAL REFORM ACT REVISION PROJECT

In its webpage focused on the project, the FPPC notes – in what will be a revelation to city attorneys who provide conflict of interest advice – that the Act has become "a body of law that can be hard to understand, overly complex, and inconsistent."

At the direction of the Commission Chair, Jodi Remke, the Commission has partnered with Boalt Hall, UC Davis Law School and California Forward "to conduct a comprehensive review and revision of the Act to ensure decades of amendments are given clarity and continuity."[1] In other words, much of the work on this project is being done by law students.

According to the agency's webpage, the project requires "balancing the Commission's mandate to provide strict enforcement while promoting accessibility to the public and transparency to the political system." The FPPC has identified four goals for the program:

- Redraft the Act with "plain English" using the simplest, most straightforward language to express ideas and minimize legalese.
- Incorporate key provisions from regulations into the Act.
- Reorganize the Act in order to have all related provisions in the same chapter with self-explanatory titles for each chapter and section.
- Repeal or amend current statutes that are inaccurate or inoperative as a result of judicial decisions and other changes in law.

The FPPC has indicated that, apart from this last bullet point, there is no intention to make any substantive changes to the Act.

[1] California Forward describes itself as "the state's leading organization on smart government and innovation with extensive experience stewarding public and stakeholder input to help solve California's most stubborn issues."

The FPPC Committee has been reviewing and commenting on the proposed changes. On June 8, the Committee sent initial comments to the FPPC in which it identified sections of the Act of interest to city attorneys that should be included in the Project.

The FPPC established two comments periods: August 3, 2016 to September 30, 2016, and November 7, 2016 to December 2, 2016. The FPPC Committee submitted comments regarding proposed changes to many parts of the Act during the initial comment period. It likely will do so again in the second comment period, assuming there additional significant changes.

Alison Leary from the League attended a meeting with FPPC staff regarding the Project, and reported the following comments that were made about the project

- There is concern about how the amendments will affect existing case law, regulations, and advice letters.
    - Chair Remke explained that all of the existing regulations and advice letters would remain in effect.
    - She explained that, once this process is complete, the FPPC will amend its regulations to adjust the cross-references.
    - She noted that, in the future, a wholesale cleanup and streamlining of the regulations may be in order.
    - Chair Remke made clear that they made edits intended to reduce ambiguities in the Act by including clarifications that have developed through case law, advice letters, or FPPC regulations.
- Some participants thought the reorganization of provisions went too far and made things more confusing. Others thought it didn't go far enough—they would like the Act to look more like a "how to guide" for the members of the public who use it (ex: organizing the act by filing type: state v. local; candidate v. ballot measure; etc.).
    - The FPPC seemed especially amenable to comments that were in favor of reorganizing the act further.
- Many thought the number of cross-references should be reduced, so that someone reading the Act would not have to flip back and forth through different provisions to figure out what it says.

As noted, one of the stated goals of the Project is to reorganize the Act in order to have all related provisions in the same chapter. One obvious consequence of this change is

that virtually every section in the Act has been renumbered. So the primary conflict of interest section of the Act – currently section 87103 – will now become section 89101.

You can find out more about the Project at http://www.fppc.ca.gov/the-law/21st-century-PRA.html.

OPINION LETTERS

The following opinion letters of interest were issued by the FPPC in recent months.

Conflict of Interest

Marcia L. Scully A-16-011. The Act's conflict of interest provisions requires an official to disqualify from budget decisions that will foreseeably have a material financial effect on the board members' interests, or those of his or her spouse. However, if a water district board member's business completely and unequivocally renounces any financial benefits resulting from the budget decision during the budget year, the board member may participate in the decision since the decision will not have a foreseeable, material financial effect on his financial interests.

Michael A. Guina A-16-002. A Mayor may participate in decisions regarding a pedestrian path within 500 feet of her residence because it is unlikely that the small improvement will have a measurable impact on her residence.

Minh C. Tran A-16-024. A planning commissioner may participate in decisions regarding the wine industry even though her husband works for a winery when the impact of the decisions will affect all wineries in the unincorporated areas of the county and wineries make up 35% of businesses in that jurisdiction. The planning commissioner may not, however, participate in decisions regarding the County's Climate Action Plan because she has a nexus in the decision at issue based on her employment.

Ruthann G. Ziegler A-16-025. The public generally exception applies to all councilmembers who have property within 500 feet of the decision areas when the only decisions at issue relate to sidewalk additions and improvements.

Michael C. Ghizzoni A-16-028. A County Supervisor was advised that she was prohibited from discussing constituent complaints with County departments when such complaints could result in enforcement actions against the developer of a project located within 75 feet of her home. She would be prohibited because the complaints and the discussion of them with County departments were inextricably interrelated to a previous

governmental decision on the project in which she had a conflict. The Supervisor's Chief of Staff would not be prohibited from discussing the complaints with County staff, because the Chief of Staff had no conflict in the matter.

Kristin Gaspar A-16-033. Mayor may participate in decisions made by the City concerning a lawsuit filed against it by a property development firm despite the fact that the attorney for the firm is a source of income to the Mayor. The attorney is a client of the Mayor's physical therapy company which thereby creates a financial interest in the attorney. However, decisions made by the city concerning the lawsuit will not have a financial effect on the financial interest.

John Bakker A-16-038. Hotel decisions, a subpart of the Grafton Plaza Project, are discrete in relationship to the entire plan and can be segmented from other decisions about the plan. However, Regulation 18706(a)(3) requires that the decisions in which the official has a conflict of interest must be considered first and a final decision reached by the agency without the disqualified official's participation. Consequently, the Vice Mayor could only participate in the segmented hotel decisions after all the project decisions for which he has a conflict are decided.

Corrine L. Neuffer A-16-049. The Act does not permit the City of San Diego Planning Commission to invoke the "legally required participation" exception since three of seven commissioners were disqualified under the Act and a fourth commissioner stated that he would voluntarily abstain. Because a quorum of commissioners not disqualified under Section 87100 could be convened with respect to the decision at issue, the Planning Commission may not invoke the exception.

Brian A. Pierik I-16-040. A city councilmember who owns a lodging business located within the Atascadero Tourism Business District and serves on the district's advisory board may not address the city council to give an update regarding district matters. If a city staff member gives the update, he must recuse himself and leave the room for the duration of the report and any discussion. However, under the personal interest exception, he may address the city council regarding district matters to represent his personal interests provided he recuses himself from voting on the matter, leaves the dais to speak from the same area as the members of the public and limits his remarks solely to his personal interests.

Fred Galante A-16-067. Councilmembers who live with adult children that are applicants for a low-income housing project may participate in project decisions because it is not foreseeable at this time that the decisions will affect the councilmembers' financial interests, including their personal finances

Thomas J. Ballanco A-16-080. A County Planning Commissioner may participate in Planning Commission decisions relating to commercial cannabis land use ordinance despite being a member and employee of a limited liability company engaged in research, development, marketing and distribution of cannabis-based therapeutic products. The decisions will not have a reasonably foreseeable, material financial effect on his financial interests.

Leigh-Anne Harrison-Bigbie A-16-083. A public cemetery manager was advised that the Act's conflict of interest provisions did not prohibit her from selling pre-need insurance to those looking to pay funeral costs in advance. The cemetery manager's duties include selling of grave sites, book keeping, preparation of Trustee meetings, and burial arrangements when the need arises. The manager is not involved in negotiations with clients or price setting and is not involved in any governmental decisions that would have a reasonably foreseeable financial effect upon the pre-need insurance company or the prospective clients.

Kyle Jones A-16-122. A city employee may communicate with the city in the same manner as any other member of the general public to represent his own personal interest in property in connection with the city's abandonment of city property on which the city relocated the employee's driveway to his home.

Chris Becnel, JD CPA A-16-097. Merely holding a private sector position is not in itself a conflict of interest under Section 1090 or the Act for an elected councilmember. However, the councilmember will have a conflict of interest under both Section 1090 and the Act in decisions regarding the contract with the councilmember's nonprofit employer.

Rae Bell Argobast A-16-060. A Board member of the Alleghany County Water District may vote to select between two proposed water plans where both plans would have some effect on property owned by the corporation of which she is the secretary and a shareholder. It is not reasonably foreseeable that the decision will materially affect the corporation because the effects are speculative.

Ariel Pierre Calonne A-16-89. Allowing food truck vending for a two-hour window in the area where the councilmember's restaurant is located would not create enough competition to contribute to a change in the value of the restaurant because the mobile food service would operate for a limited durations and sells to a different clientele than the restaurant. Therefore, the councilmember is not prohibited from participating in the decision of whether to adopt the draft ordinance because it will not have a foreseeable and material financial effect on his interests.

Randy Haney A-16-120. A city councilmember that owns a landscape company may participate in modifications to the city leaf blower ordinance where it is not reasonably foreseeable that decisions relating to the leaf blower ordinance will have a material financial effect on his business or on his personal finances. Under the facts provided, the business' current use of leaf blowers is limited and marginal to the business, and power leaf blowers play only a limited a part of his landscape design and installation services. Additionally, the councilmember has no financial affiliation with any landscape maintenance business.

Section 1090

Scott Chadwick A-16-090. Section 1090 prohibits the city from contracting with a corporate contractor where that contractor was also the prime consultant pursuant to a prior contract with the city and in that capacity advised the city and exerted influence over the city staff's formation of the second contract.

Hilda Cantu Montoy A-16-136. A councilmember may vote to ratify warrants for payments previously made on a consent calendar, even though it includes a warrant to his spouse, because the approval of the warrant is ministerial in nature. Under a Section 1090 analysis, the councilmember has a noninterest under Section 1091.5(a)(6), where the warrant involves the existing employment of his spouse (his spouse has been employed as an independent contractor to teach classes for the Kerman City Parks and Recreation Department since 2014). His noninterest pursuant to Section 1091.5(a)(6) does not require his recusal or disclosure for this decision.

Andreas C. Rockas A-16-017. A nonprofit that oversees a Joint Powers Authority (JPA) was advised that one executive from the JPA could participate in merger negotiations with another JPA even though his salary and job status may be affected as a result of the merger and Section 1090 applied because the rule of necessity applied.

Gifts and Honoraria

Nick Clair A-16-115. Raffle prizes won by public officials in three separate random drawings at the CSDA Annual Conference attended by public officials and other individuals not regulated by the Act are "gifts." Despite the fact that will be received in a competition, the competition is related to the official status of the officials, and thus constitute a "gift" to those officials within the meaning of the Act.

Humberto Peraza A-16-116. Under the Act, the value of airfare, lodging, and meals provided by the American Israel Public Affairs Committee (AIPAC) to a public official

to attend its Hispanic Outreach Summit, less the official's cost to register for the Summit, would be a reportable gift subject to limits. The value of the admission to the Summit and associated conference materials, however, would not be a gift under the Act provided that the purpose of the Summit is primarily to convey information to assist the official in the performance of the official's duties.

Colleen Winchester A-16-023. Because travel, lodging, and subsistence payments (paid by a non-profit entity) are reasonably related to a councilmember's speaking engagements at two separate policy issue-related events, the payments are not subject to gift limits. However, the payments are reportable gifts and acceptance of gifts above the $460 amount from either non-profit entity may prohibit the councilmember from participating in governmental decisions affecting those sources.

Honorable Jeffrey S. Bostwick A-16-064. A superior court judge asked whether his attendance, his wife's attendance, and his guest's attendance at an award event held for volunteers of the Boy Scouts of America is a reportable gift under the Act. The event will take place at the host's home while the host is present. The host is a personal friend whom the judge has known since 2011. The cost will exceed $50. The hospitality and long-term close personal friend exceptions apply to the gift reporting requirement for requestor and his wife.

Evann Whitelam A-16-071(a). A tour of the PG&E Energy Education Center, the 4.4-mile shuttle ride between the PG&E Energy Education Center and the Diablo Canyon Power Plant, and the Diablo Canyon Power Plant tour itself are not considered a single site for purposes of Regulation 18942.1(c)(2). However, under the facts presented, each of the phases, including the travel, qualify as informational material and would not be a gift. Informational material provided to an official for the purpose of assisting him or her in performing official duties (and that does not also provide a personal benefit) is not reportable.

Alan Seem I-16-079. The requestor sought advice regard a trip for mayors to China. The trip was aimed at improving business cooperation between China and the Silicon Valley and helping create jobs and increase economic activity in both China and the Silicon Valley. The principal purpose of the 2016 China Trip is to facilitate investment and international trade, and promote communications between China and the Silicon Valley region. The requestor was advised that the travel would be reportable but not subject to the Act's gift limit to the extent the travel payments would be from governmental entities and a nonprofit that fit the requirements for tax exempt status under Section 501(c)(3) of the Internal Revenue Code, and the activities covered were for a Legislative or governmental purpose, or an issue of state, national, or international public policy

Vicky Green A-16-084 Section1090 is not applicable to Loud and Clear Inc., an independent contractor hired by the town of Windsor to design the town's A/V system, such that it may not bid on the upcoming A/V project. In this matter, the business provided technical expertise in drafting an equipment list and system flow-chart and did not exert considerable influence over the decisions of town staff

Ronald J. Powell, Ph.D A-16-036. The Political Reform Act's prohibition on a designated employee's acceptance of honoraria does not prohibit a First 5 San Bernardino Commissioner from accepting payment for giving a speech, conducting a training or publishing an article in connection with the Commissioner's consulting business because the business is a "bona fide business." The prohibition on the acceptance of honoraria does not prohibit the Commissioner from accepting payment for authoring a book because authoring a book does not fall within the prohibition's scope.

Mass Mailing

Mass Mailing Kathrine Pittard A-16-107. The mass mailing provisions do not prohibit the agency from paying for inserts in a local newspaper that will include interviews of two elected officials. Under Regulation 18901, the newspapers distributed are excluded from the mass mailing restrictions because the newspapers are sent in response to unsolicited requests. Moreover, the inserts are not restricted under Regulation 18901.1 because they are not campaign related. However, in regard to the copies of the insert the agency will receive from the newspaper and distribute separately, the agency may not send more than 200 copies of the insert to a person's residence, place of business, or post office box including copies mailed to organizations or other governmental agencies.

Section 84308

William M. Wright A-16-055. Under the unique facts presented, the formation of a Recreation and Park District is an entitlement for use and subject to the provisions of Section 84308. The term "entitlement for use" does not have a set legal meaning. In this case, because a small group of specific, identifiable persons will derive financial benefits from and will be directly affected by this decision, formation of the district will have a direct substantial financial impact upon the applicants and is considered an "entitlement for use."

Conflict of Interest Code

John Bakker I-16-062. A city, which contracts with consultants, is responsible for ensuring that its conflict of interest code designates all public officials who make or

participate in making decisions including the consultants and that the disclosure categories are tailored to the duties performed by the designated positions. Moreover, the city's filing officer is required to determine whether required statements of economic interests have been filed and notify promptly all persons who have failed to file a statement.

ENFORCEMENT ACTIONS.

FPPC No. 15/1307. County failed to timely file a Lobbyist Employer report for the period of October 1, 2014 through December 31, 2014, in violation of Government Code Section 86117. **Total Proposed Penalty $425.**

FPPC No 14/574. Member of City Council, failed to timely file an Assuming Office Statement of Economic Interest and an Annual Statement of Economic Interest for the year of 2013, in violation of Government Code Sections 87202 and 87203. **Total Proposed Penalty: $1,400.**

FPPC No. 15/073. A member of the City Council attempted to use his official position to influence a governmental decision in which he had a financial interest, by speaking before the Planning Commission regarding the approval of SmithTech USA's application for the subdivision of two tracts of land owned by a client, in violation of Government Code Section 87100. **Total Proposed Penalty: $3,000.**

FPPC No. 15/1355. Water Agency produced and mailed 7,269 copies of the August 12, 2015 letter at public expense. The letter individually named each member of the Board of Directors, and was sent in concert with the Board of Directors. Agency produced and sent the August 12, 2015 letter, in violation of Government Code Section 89001, and Regulations 18901 and 18901.1. **Total Proposed Penalty: $3,000.**

FPPC No. 15/2078. School District produced and sent approximately 19,009 copies of a brochure at public expense, featuring the photographs and names of the members of the governing board, in violation of Government Code Section 89001. **Total Proposed Penalty: $2,000.**

FPPC No. 16/465. School District produced and sent approximately 5,000 copies of a booklet at public expense containing quotations from and credits to two members of the governing board obtained for the purpose of inclusion in the mailer, in violation of Government Code Section 89001. **Total Proposed Penalty: $2,000.**

FPPC No. 14/1316. A member of the Board of Directors for a municipal water district failed to disclose his interests in business entities, real property and sources of income on his 2012, 2013 and 2014 Annual Statements of Economic Interests, in violation of Government Code Sections 87206 and 87207. **Total Proposed Penalty: $6,000**.

Notes:

Municipal Tort and Civil Rights Litigation Update

Thursday, October 6, 2016 General Session; 8:00 – 9:30 a.m.

Walter C. Chung, Lead Deputy City Attorney, San Diego

Municipal Tort Law Update

for the League of California Cities Annual Conference

October 6, 2016

Presented by Walter C. Chung

1. *Hampton v. County of San Diego* (Dec. 10, 2015) 62 Cal.4th 340

LEGAL ISSUE OF THE CASE

UNDER GOV. CODE SECTION 830.6, DOES AN "IMPROPER EVALUATION" RESULT IN THE LOSS OF GOVERNMENTAL IMMUNITY?

FACTUAL BACKGROUND

Plaintiff Randall Hampton was seriously injured in a collision between his vehicle and another that occurred at the intersection of Miller and Cole Grade Roads in San Diego County. Hampton alleged that the accident occurred when attempting a left turn from Miller Road, a rural side road, onto Cole Grade Road, a rural two-lane thoroughfare that had paved shoulders in addition to marked lanes of traffic. Hampton suffered brain damage. Hampton and his wife sued the other driver, alleging his negligence caused the accident. Hampton was unable to recall whether he had stopped at the stop sign at the intersection. The other driver stated that Hamptons' vehicle entered the intersection "right in front of him leaving too little time to stop before the collision."

The California Highway Patrol concluded that Hampton had caused the accident by failing to stop at the stop sign on Miller Road before proceeding into the intersection.

The Hamptons also filed an additional cause of action against the County of San Diego ("County") for maintaining an allegedly dangerous condition of public property. The Hamptons' principal claim against the County was that the design and construction of the subject intersection failed to provide adequate visibility under applicable County design standards for a driver turning left from Miller Road onto Cole Grade Road. According to the Hamptons, a high embankment covered with vegetation substantially impaired visibility for drivers turning left from Miller Road onto Cole Grade Road. They alleged that the County's design drawings for the intersection did not depict or describe the embankment or take it into account as an impediment to visibility; nor did the design plan afford the visibility required by County standards.

PROCEDURAL BACKGROUND

The County moved for summary judgment arguing design immunity under Government Code section 830.6. The trial court concluded there was substantial evidence supporting each of the three elements of design immunity and granted summary judgment to the County on the basis of design immunity.

The Court of Appeal agreed with the trial court that the County had established the defense of design immunity for the purpose of summary judgment.

Plaintiffs petitioned the California Supreme Court for review. Plaintiffs framed the issues as follows: (1) Does a public official's approval of a design constitute an "exercis[e] of discretionary authority" under section 830.6 if, at the time of the approval of the design, the official did not realize the design deviated from governing standards? (2) Where a design deviates from governing standards, must the public entity show that the official who approved the design had the authority to disregard those standards?

DECISION OF CALIFORNIA SUPREME COURT

The California Supreme Court unanimously affirmed the Court of Appeal's decision upholding the trial court's judgment granting the County's motion for summary judgment based on design immunity.

1. The Defense of Design Immunity

A public entity may be liable for injuries caused by dangerous conditions of public property. (Gov. Code §§ 830, 835.) An entity may avoid liability, however, through the affirmative defense of design immunity. (§ 830.6.) "A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design." *Cornette v. Department of Transportation,* 26 Cal. 4th 63, 66 (2001).

The rationale of the design immunity defense is to prevent a jury from simply reweighing the same factors considered by the governmental entity which approved the design. *Cameron v. State of California.* 7 Cal. 3d 318, 326 (1972).

2. Discretionary Approval Element of Design Immunity

In the present case, the Hamptons conceded the first element of design immunity, causation. Neither did they challenge the trial and appellate courts' decisions concerning the reasonableness of the plan or design. Thus, according to the Supreme Court, this case concerned only the second element of section 830.6's design immunity - the discretionary approval element.

Here, the evidence was undisputed that a licensed civil and traffic engineer employed by the County had approved the relevant plans prior to construction. The plans showed, among other things, that County engineers had set out to improve visibility by lowering the grade on the thoroughfare and installing warning signs. However, the Hamptons argued that the County had failed to satisfy the discretionary approval element in the statute because it failed to establish that the employee who approved the plans was aware of existing standards or was aware that the plans deviated from those standards. Plaintiffs alleged, in essence, that the engineers applied the wrong design standards and

erred in their exercise of judgment because they were unaware of the correct standards.

The Supreme Court disagreed. According to the Court, the discretionary element of section 830.6 does not require a showing that the employee who approved the plans was aware of design standards or was aware that the plans deviated from those standards. In addition, the Court held that the discretionary approval element does not require the entity to demonstrate that the employee who had authority to and did approve the plans also had authority to disregard applicable standards.

According to the Court, plaintiffs' assertions simply claim an "improper evaluation" which cannot divest a discretionary policy decision of its immunity. The Hamptons' interpretation of the statute would lead a jury into "the sort of second-guessing concerning the wisdom of the design that the statute was intended to avoid."

As to the Hamptons' additional claim, that the County was required to establish that its employees who approved the plans had the authority to deviate from applicable visibility standards, the Court found that they had not offered any persuasive authority in support and did not decide the matter.

2. ***Burgueno v. The Regents of the University of California*** **(December 15, 2015) 243 Cal.App.4th 1052**

LEGAL ISSUE OF THE CASE

DOES THE USE OF A TRAIL FOR BOTH RECREATIONAL AND NON-RECREATIONAL PURPOSES PRECLUDE IMMUNITY UNDER GOVERNMENT CODE SECTION 831.4?

FACTUAL BACKGROUND

The Great Meadow Bikeway is a paved bike path that runs through a portion of the University of California, Santa Cruz campus known as the Great Meadow. Constructed in 1973, the purpose of the Bikeway is bicycle transportation to and from the central campus that is separate from automobile traffic. There have been a number of bicycle accidents on the Bikeway.

Some bicyclists use the Bikeway for recreation. Members of a county cycling club use the Bikeway to access mountain bike paths in the redwood forests above the university campus. The Bikeway ends at the university music center where the cycling club members then travel through the campus to reach the mountain bike paths.

Although automobiles and pedestrians are not allowed on the Bikeway, at times the Bikeway is accessed by university service vehicles and emergency vehicles. In addition, service vehicles and farm visitors in private automobiles occasionally cross the Bikeway.

Adrian Burgueno was a full-time student at the university. He lived in an off-campus apartment and commuted to the university on his bicycle. His route to campus included traveling on the Bikeway. One evening, as Adrian was leaving the campus on his bicycle, after attending his photography class, he was fatally injured in a bicycle accident on the downhill portion of the Bikeway.

PROCEDURAL BACKGROUND

Adrian's mother and sister filed an action against the Regents of the University of California, alleging that the Regents were liable for Adrian's death due to the dangerous condition of public property and for wrongful death.

The cause of action against the Regents for dangerous condition of public property alleged that the Regents had actual knowledge that students used the bikeway for commuting to campus at night, and knew or should have known that the bikeway was unsafe due to its downward curve, sight limitations, lack of runoff areas, lack of adequate signage, lack of appropriate roadway markings, and lack of physical barriers to prevent nighttime use of the bikeway. Plaintiffs

also alleged that the Regents failed to warn the public and students of the bikeway's dangerous condition.

In the cause of action for wrongful death, Plaintiffs asserted that the Regents' negligence and recklessness was the proximate cause of Adrian's death. The trial court granted the Regents' motion for summary judgment. The court held that the Regents were entitled to immunity under Government Code section 831.4, the recreational trail immunity statute.

DECISION OF CALIFORNIA COURT OF APPEAL

The Court of Appeal held that the causes of action for dangerous condition of public property and wrongful death were barred as a matter of law because the Regents have absolute immunity under the recreational trail immunity provided by section 831.4, and thus, affirmed the judgment.

Dual or Mixed Uses—Recreational and Non-Recreational

Plaintiffs argued that the Bikeway was not a trail within the meaning of section 831.4 because it was designed and used for bicycle commuting to the university campus, not recreation. Although Plaintiffs acknowledged that some bicyclists used the Bikeway to access recreational land adjacent to the campus, they argued that any such incidental use was insufficient to make it a recreational trail to which the immunity applies, as it did not change the primary character of the Bikeway.

The court disagreed with Plaintiffs' contention that a trail used for both recreational and non-recreational purposes precludes trail immunity under section 831.4. It is now well established that section 831.4 applies "to bike paths, both paved and unpaved, to trails providing access to recreational activities, and to trails on which the activities take place." *Prokob v. City of Los Angeles,* 150 Cal. App. 4th 1332, 1335 (2007). Here, the Bikeway was not intended and used for recreation; rather it was designed for its primary use as a "bicycle transportation corridor." According to the court, "[t]he fact that a trail has a dual use--recreational and nonrecreational--does not undermine section 831.4, subdivision (b) immunity." *Montenegro v. City of Bradbury,* 215 Cal. App. 4th 924, 932 (2013).

Adrian was not using the Parkway for a Recreational Purpose at the Time of his Accident

Plaintiffs argued that because Adrian was not engaged in a recreational activity when his accident occurred, the section 831.4 immunity did not apply. The court did not agree. According to the Court, it is immaterial that Adrian was not using the Great Meadow Bikeway for a recreational purpose at the time of his accident.

3. ***People v. Steele*** **(Apr. 25 2016) 246 Cal.App.4th 1110**

LEGAL ISSUE OF THE CASE

MAY A DETENTION OF A PERSON BE REASONABLE UNDER THE FOURTH AMENDMENT IN THE ABSENCE OF REASONABLE SUSPICION OF CRIMINAL ACTIVITY ON THE PART OF THAT INDIVIDUAL?

FACTUAL BACKGROUND

Shasta County Sheriff's Deputy Jerry Fernandez was on patrol in a marked patrol car with trainee Deputy Megan Bliss just after 10:00 p.m. The deputies were in full uniform and Deputy Bliss was driving.

Deputy Fernandez observed two vehicles that appeared to be traveling together. The lead vehicle was a dark colored SUV, the second vehicle was a white Jeep. There was no other vehicle traffic.

The deputies followed the two vehicles onto a rural dead end road with no streetlights. A records check on the license plates for the two vehicles revealed that the lead vehicle had an expired registration and the second vehicle was a rental car. Deputy Fernandez decided not to stop the lead vehicle because of the risk associated with stopping people at night in their own driveways without ambient light. Deputy Bliss began to make a U-turn while the two vehicles drove down a driveway off the dead end road.

As Deputy Bliss began to make a U-turn, dispatch advised the deputies that there was a felony arrest warrant for the registered owner of the lead vehicle. Deputy Fernandez decided to stop the lead vehicle based on the expired registration and the arrest warrant. As the two vehicles were coming to a stop at the end of the driveway, the patrol car entered the driveway, and Deputy Bliss activated the emergency lights. She stopped the patrol car behind and a little to the right of the second vehicle. The lead vehicle was directly in front of the second vehicle.

The deputies approached the second vehicle first for safety reasons, as they testified that they did not want "to walk past a vehicle in the middle of the night with a subject in it." Also, the deputies wanted to inform the driver of the vehicle that they were stopping the lead vehicle. Deputy Bliss contacted the driver of the second vehicle, Defendant Charles Steele, and a second or two later, Deputy Fernandez approached the vehicle and smelled the odor of marijuana emanating from the vehicle. He saw marijuana in plain sight on the backseat. A search of the vehicle resulted in the discovery of a bag of marijuana, two baggies of methamphetamine and other items.

Steele was arrested and charged with various narcotics offenses.

PROCEDURAL BACKGROUND

Steele filed a motion to suppress the evidence found in his vehicle on the ground that it was obtained during an unlawful detention. The trial court denied the motion. The court determined that the sheriff's deputies did in fact detain Steele but that the detention was justified to assure that Steele did not present a danger to the deputies while they approached and investigated the lead vehicle and its occupant.

DECISION OF CALIFORNIA COURT OF APPEAL

The Court of Appeal affirmed the judgment of the trial court denying Steele's motion to suppress the evidence.

Detention of Steel for Fourth Amendment Purposes

In this case, the court concluded that Steele was detained for purposes of the Fourth Amendment. According to the court, Steele was detained when the deputies followed the two vehicles at night onto a driveway out of sight from a nearby highway, stopping behind the two vehicles, and parking at night behind Steele's vehicle with the emergency lights activated. Under these circumstances, the court determined that a reasonable person would not have felt free to leave. Thus, the Fourth Amendment was implicated.

Steele's Initial Detention was Constitutional

Steele claimed the deputies did not have reasonable suspicion to detain him and thus his initial seizure was unconstitutional. The court did not agree. Officer safety is a weighty public interest, and accordingly, under *Steele,* "law enforcement officers may lawfully detain a defendant when detention is necessary to determine the defendant's connection with the subject of a search warrant and related to the need of ensuring officer safety."

According to the court, Steele was not detained for an independent investigatory purpose, rather the initial contact between the deputies and Steele was limited to the purpose of ensuring the deputies' safety.

The court acknowledged that the circumstances present here are "one of those rare situations" where although the deputies seized Steele when they stopped his vehicle, the initial approach of the deputies to Steele's vehicle and initial seizure were not for the purpose of arresting him or for an investigation directed at him. Rather, the court concluded the initial detention was justified for the limited purpose of protecting the deputies' safety.

The Steel court noted that both the U.S. Supreme Court and the California Supreme Court have recognized that officer safety is a "weighty government interest." *Maryland v. Wilson,* 519 U.S. 408, 413, (1997); *People v. Glaser,* 11 Cal. 4th 354, 365 (1995).

Both courts have held that law enforcement officers may lawfully detain individuals when detention is necessary to determine a person's connection with the subject of a search warrant and related to the need of ensuring officer safety.

In *Michigan v. Summers,* 452 U.S. 692 (1981), police officers executed a search warrant at a house thought to contain contraband and detained an individual during the search because he was seen leaving the premises when the officers arrived. The U.S. Supreme Court concluded that the officers lawfully detained the individual because "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."

The U.S. Supreme Court "has [also] recognized that officer safety during a traffic stop is a weighty government interest which can justify detaining the passengers of a stopped vehicle." *Maryland v. Wilson,* 519 U.S. 408, 413 (1997). Accordingly, law enforcement officers may, consistent with the Fourth Amendment, order the passengers to exit a vehicle pending completion of a traffic stop.

The court also noted that the initial police encounter with Steele was a minimal intrusion upon Steele's privacy and security interests. Steele was already parking his vehicle and the initial detention was not prolonged.

CONCLUSION

The court concluded that viewing the totality of the circumstances and weighing the interests of the government and Steele, the initial detention was justified for the limited purpose of protecting the deputies' safety.

4. ***Thomas v. C. Dillard and Palomar Community College District* (9th Cir. 2016) 818 F.3d 864**

LEGAL ISSUE OF THE CASE

CAN THE DOMESTIC VIOLENCE NATURE OF A POLICE INVESTIGATION *ALONE* BE SUFFICIENT TO ESTABLISH REASONABLE SUSPICION TO CONDUCT A *TERRY* FRISK FOR WEAPONS?

FACTUAL BACKGROUND

On September 21, 2010, the Palomar College Police Department dispatched Officer Dillard to the college's Escondido campus in response to a domestic violence call involving a black male. Dillard spoke to a college administrator but was unable to obtain any further details pertaining to the domestic violence incident that may have prompted the call.

Approximately 40 minutes later, while he was speaking with the administrator, Dillard received a call to investigate a male wearing a purple shirt pushing a female near some storage containers on the south side of the Escondido campus. When Dillard arrived on the scene, he first encountered a community service officer who had also responded to the call and who would remain at the scene. There was no further description of the "suspect," or of the alleged "pushing," and the call made no mention of domestic violence. Dillard then saw a male, wearing a purple shirt, and a female come out from behind the storage containers. The individuals turned out to be Correll Thomas, who is African-American, and his girlfriend, Amy Husky.

Dillard got out of his police car, telling Thomas and Husky that no one was in trouble. He stopped about 10 feet away from Thomas and Husky, who were standing next to each other. Dillard saw no indication that a crime had occurred. Husky exhibited no signs of domestic violence. She showed no signs of injury, and she had not been crying. She did not appear distraught. The area was open to the public.

Dillard asked Thomas and Husky whether they had identification. Thomas responded that he did. Husky responded that she did not. Dillard did not ask to see the identification. Instead, he asked Thomas whether he had any weapons on him. When Thomas responded that he did not, Dillard asked Thomas whether he would mind being searched for weapons. This was approximately 15 seconds into the encounter. Thomas responded that he did mind.

Dillard approached Thomas and asked again whether he would consent to a search for weapons. When Thomas declined, Dillard told Thomas he had received a call "about a guy in a purple shirt pushing around a girl." Thomas and

Husky both denied they had seen anything or had done anything wrong. They both denied they were fighting, or that Thomas was pushing Husky. Husky told Dillard they had just been kissing behind the storage containers. Thomas again refused to give Dillard permission to search Thomas for weapons. At that point, Dillard moved towards Thomas, attempting to grab him and place him in a controlled hold for the purpose of conducting a frisk. When Thomas stepped away to avoid being grabbed, Dillard backed off, pulled out his Taser, pointed it at Thomas and told Thomas he was going to search him. This occurred approximately 30-40 seconds into the encounter.

Thomas continued to respond to Dillard's questions but withheld his consent to being searched. He was not aggressive or belligerent. Dillard called for backup and kept his Taser pointed at Thomas. Dillard told Thomas to put his hands in the air, step forward and drop to his knees. Thomas refused to do so. However, when a backup officer told Thomas to put up his hands, he did so. Dillard told Thomas that if he did not get down on his knees by the count of three, Dillard would tase him. Dillard counted to three, and, when Thomas did not comply, tased Thomas. Dillard fired the Taser in dart mode which delivered an incapacitating surge of electrical current to the body. Thomas was handcuffed, searched (no weapons were found), and treated by paramedics. He was arrested and charged with a violation of Penal Code section 148. The charges were dismissed six months later.

PROCEDURAL BACKGROUND

Thomas filed suit against Dillard under § 1983, alleging violations of his Fourth Amendment rights to be free from unlawful seizure and excessive force. He also alleged claims under California state law for negligence and violation of California Civil Code § 52.1.

Dillard moved for summary judgment but the district court denied the motion. The court ruled that Dillard lacked reasonable suspicion to believe Thomas was armed and dangerous, and thus, that Dillard unlawfully seized Thomas for the purpose of conducting a weapons search.

The court also denied qualified immunity to Dillard.

Dillard appealed.

THE NINTH CIRCUIT'S DECISION

The Ninth Circuit held that Dillard unlawfully detained Thomas for the purpose of performing a *Terry* frisk because, according to the court, the domestic violence nature of a police investigation alone cannot be sufficient to establish reasonable suspicion for a frisk. However, the court reversed the trial court and held that Dillard was entitled to qualified immunity on that issue.

The court further held that Dillard used excessive force when he tased Thomas in order to force him to submit to the *Terry* frisk against his consent. Nevertheless, given the unsettled state of the law regarding the use of Tasers at the time, the court again held that Dillard was entitled to qualified immunity.

The Investigatory Stop

Thomas did not challenge Dillard's initial decision to stop and question him and Husky for a brief period. Campus police dispatch had informed Dillard that a man wearing the same color shirt as Thomas had pushed a woman in the very location Thomas and Husky were found. According to the court, this created a reasonable suspicion Thomas might have committed a simple assault or battery, possibly in the context of a domestic relationship. Thus, Dillard was entitled to detain Thomas briefly to investigate the report of potential criminal activity—a so-called *Terry* stop.

In conducting the stop, Dillard was permitted to ask Thomas for consent to search for weapons. However, Thomas was free to decline Dillard's request. *See Florida v. Bostick,* 501 U.S. 429, 437 (1991). According to the court, at the point Dillard unholstered his Taser, pointed it at Thomas and ordered Thomas to submit to a frisk for weapons, Dillard "exceeded the justification and authority for the *Terry* stop—to investigate a potential battery." In order to continue detaining Thomas for the search for weapons, the court ruled that Dillard needed a reasonable basis for believing Thomas might be armed and dangerous.

Here, the court determined that Dillard had no justification for ordering Thomas to submit to a *Terry* frisk, and that detaining him in order to perform the frisk violated the Fourth Amendment. In *Terry v. Ohio,* 392 U.S 1 (1968), the Supreme Court fashioned the stop-and-frisk exception to probable cause, and in the interests of crime prevention and detection, held that a *Terry* stop is justified by the concern for the safety of the officer and others in proximity. However, the Court made it clear that a frisk of a suspect for weapons requires a reasonable suspicion that a suspect "is armed and presently dangerous to the officer or to others." *Id.* at 24. A suspicion must be reasonable and individualized, and must be based on the totality of the circumstances known to the officer.

In this case, Dillard contended that a reasonable officer would have been justified in believing Thomas was armed and dangerous based on the facts known to Dillard. Such facts included two dispatches regarding potential violence against a female; Dillard encountered Thomas and Husky in the location where the pushing incident had been reported; Thomas loosely matched the minimal descriptions of the suspects in both dispatches; Thomas was wearing clothing capable of hiding a weapon; Thomas's refusal to consent to a weapons search; and Thomas's stepping away after Dillard approached him and attempted to place him in a controlled hold.

The court disagreed with Dillard and determined that none of the circumstances at the scene of the encounter justified a reasonable suspicion that Thomas was armed and dangerous. However, Dillard maintained that he was justified in his belief Thomas was armed at the time he demanded the frisk because of "the perceived domestic violence nature of the crime he was investigating."

Potential Domestic Violence Nature of the Call

The court held that, "although the domestic violence nature of a police investigation is a relevant consideration in assessing whether there is reason to believe a suspect is armed and dangerous, it is not alone sufficient to establish reasonable suspicion for a weapons search." According to the court, domestic violence is not a crime such as bank robbery or trafficking in large quantities of drugs that is, as a general matter, likely to involve the use of weapons. According to the court, "[d]omestic violence encompasses too many criminal acts of varying degrees of seriousness for an officer to form reasonable suspicion a suspect is armed from that label alone." Thus, in this case. Dillard could not rely *solely* on the domestic violence nature of a call to establish reasonable suspicion for a frisk," as according to the court, "the perceived domestic violence nature of the call did not automatically and categorically give Dillard reason to believe Thomas was armed and dangerous."

The court concluded that under the Fourth Amendment, domestic violence suspects "are not presumed to be armed," and rejected the notion that there is a blanket "domestic violence" exception to *Terry's* requirement for particularized suspicion.

Excessive Force

The court concluded that Dillard's use of the Taser constituted excessive force in violation of the Fourth Amendment. However, according to the court, under the controlling law at the time of the incident, it would not have been apparent to an officer in Dillard's shoes that using a Taser on a domestic violence suspect refusing to allow a frisk—whom the officer reasonably but mistakenly believed could be frisked—constituted excessive force. Therefore, Dillard was entitled to qualified immunity.

5. ***Lia Marie Lingo v. City of Salem*** **(9th Cir. June 27, 2016) 2016 WL 4183128, amended on August 8, 2016**

LEGAL ISSUE OF THE CASE

SHOULD THE EXCLUSIONARY RULE APPLICABLE IN CRIMINAL CASES ALSO APPLY IN § 1983 CASES?

FACTUAL BACKGROUND

Plaintiff Lia Lingo was engaged in an ongoing dispute with her neighbor, Suzanne Tegroen, regarding Tegroen's pet dog. In the course of the day on June 13, 2010, Lingo and Tegroen each contacted the Salem, Oregon, Police Department. That same night, Officer Steven Elmore was dispatched to Tegroen's residence to investigate.

Tegroen told Officer Elmore that she felt verbally abused by Lingo and felt the need to tread lightly around her. Officer Elmore responded that Lingo's actions did not sound like they were criminal, but that he would try to speak with Lingo to ease tensions.

Officer Elmore walked to Lingo's house and noticed that its rear outside light was on. Rather than go to the front door of the home, Elmore walked through Lingo's carport and knocked on the rear door located within. A visitor answered the door and went to get Lingo. Officer Elmore stated that as soon as the door was opened, he smelled marijuana. Another officer, Justin Carney, who arrived later, also smelled marijuana coming from the house. Lingo repeatedly refused to give the officers permission to search her home, and she was placed under arrest for endangering the welfare of a minor, namely, Lingo's two minor children who lived at the house. Following Lingo's arrest, the police obtained a warrant to search Lingo's home for controlled substances, based on an affidavit from Officer Elmore describing the marijuana odor he smelled at the house. Pursuant to the warrant, Salem police uncovered considerable evidence of marijuana usage.

PROCEDURAL BACKGROUND

Lingo was charged by the district attorney with two counts of child endangerment in violation of Oregon state law. She moved to suppress the evidence the police obtained in their search of her home, arguing that the officers violated the Fourth Amendment by entering her carport and approaching her home's back door. Lingo argued that any evidence collected by the police thereafter should be suppressed as the fruit of that initial search.

The trial court agreed and granted Lingo's motion to suppress. The charges against Lingo were later dropped.

Lingo then filed the instant suit under § 1983 against the two officers and the City of Salem, alleging that the officers violated her First, Fourth, and Fourteenth Amendments. The officers and the City moved for summary judgment and Lingo moved for partial summary judgment. The parties did not dispute the district court's conclusion that the officers violated Lingo's Fourth Amendment rights when they entered the curtilege of her home and approached the back door of her home.

The district court agreed with Lingo that the officers "had indeed violated the Fourth Amendment by entering her home's curtilage, but concluded that the exclusionary rule does not apply to § 1983 claims." The district court, therefore, held that the officers' initial violation of the Fourth Amendment did not taint their ultimate arrest of Lingo and found that, based on the marijuana they smelled at the house, the officers had clear probable cause to arrest her.

The district court granted summary judgment to both officers and the City. Lingo timely appealed.

THE NINTH CIRCUIT'S DECISION

On appeal, Lingo challenged only the district court's ruling that her arrest was valid. Specifically, she contended that the district court erred in concluding that the officers had probable cause to arrest her. She argued that her arrest was unlawful because the officers may not establish probable cause through evidence they gathered as a result of their illegal entry into her carport. Thus, according to Lingo, the officers' unlawful entry into her home's curtilage necessarily tainted the arrest that followed.

Lingo contended that the exclusionary rule and its "fruit-of-the-poisonous tree" doctrine under *Wong Sun v. United* States*,* 371 U.S. 471, 487-488 (1963) which requires suppression of other evidence that is derived from-and is thus tainted by-the illegal search or seizure, applied in this case.

The Ninth Circuit did not agree. First, according to the court, the exclusionary rule itself should not be applied in a § 1983 case. The rule and its "fruit-of-the-poisonous-tree" doctrine are not constitutionally required, but instead are a "judicially created means of deterring illegal searches and seizures. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

Second, the exclusionary rule is not "a personal constitutional right of the party aggrieved." *Calandra*, *supra*, at 348. It does not proscribe the introduction of illegally seized evidence in all proceedings or against all persons. According to the court, therefore, Lingo's suggestion that "probable cause may be supported only by information that was obtained in accordance with the Fourth Amendment should be rejected".

6. ***Utah v. Strieff*** **(June 20, 2016) 136 S.Ct. 2056**

LEGAL ISSUE OF THE CASE

DOES THE EXCLUSIONARY RULE AUTOMATICALLY APPLY WHEN THERE IS A FOURTH AMENDMENT VIOLATION?

FACTUAL BACKGROUND

An anonymous tipster called the South Salt Lake City police drug tip line to report "narcotics activity" at a particular residence. A narcotics detective investigated the tip, and over the course of about a week, the officer conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. The visits were sufficiently frequent to raise the officer's suspicions that the occupants were dealing drugs.

One of those visitors was Plaintiff Edward Strieff. The officer observed Strieff exit the house and walk toward a nearby convenience store. In the store's parking lot, the officer detained Strieff, identified himself, and asked Strieff what he was doing at the residence. The officer requested Strieff's identification and he produced his Utah identification card. The information on the card was relayed to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic offense. The officer then arrested Strieff pursuant to that warrant. When the officer searched Strieff incident to the arrest, he discovered a baggie of meth and drug paraphernalia.

PROCEDURAL BACKGROUND

The State charged Strieff with unlawful possession of meth and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. The prosecutor conceded that the officer lacked reasonable suspicion for the stop and that the stop was illegal, but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the evidence. The Utah Court of Appeals affirmed but the Utah Supreme Court reversed.
The U.S. Supreme Court granted certiorari "to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant."

DECISION OF U.S. SUPREME COURT

The Supreme Court held that the evidence the officer seized as part of his search incident to arrest is admissible because the discovery of the arrest warrant

attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest.

Attenuation Doctrine

The exclusionary rule is the primary judicial remedy for deterring Fourth Amendment violations. The rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and "evidence later discovered and found to be derivative of an illegality, the so-called "fruit of the poisonous tree." *Segura v. United States,* 468 U.S. 796, 804 (1984).
The Supreme Court has recognized several exceptions to the rule. One exception is the attenuation doctrine, which evaluates the causal link between the government's unlawful act and the discovery of evidence which may have had nothing to do with a defendant's actions.

The Supreme Court considered three factors articulated in *Brown v. Illinois,* 422 U.S. 590 (1975) in determining whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person: (1) the "temporal proximity" between the initially unlawful stop and the search; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

7. ***Estate of Armstrong v .Village of Pinehurst*** **(4th Cir. Jan. 11, 2016) 810 F.3d 892**

CASE HOLDING

The use of a Taser as a pain compliance device in response to resistance that does not raise a risk of immediate danger (apart from the fact of resistance alone) is unreasonable force in violation of the Fourth Amendment.

NOTE: The *Armstrong* decision applies in the five states in the Fourth Circuit: North Carolina, South Carolina, Maryland, Virginia, and West Virginia. The decision is not binding in the Ninth Circuit, but it would be highly persuasive in this circuit.

SUMMARY OF THE FACTS

Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia. On April 23, 2011, he had been off his prescribed medicine for five days and was poking holes through the skin in his leg "to let the air out." His sister was worried by his behavior and convinced him to check into the hospital. However, during the evaluation procedure, Armstrong apparently became frightened and left the hospital. Based on his flight from the hospital and his odd behavior over the previous week, the examining doctor judged Armstrong a section 5150, a danger to himself, and issued involuntary commitment papers to compel his return. The doctor did not designate Armstrong a danger to others.

The local police were called as soon as Armstrong left the hospital, and an officer, a sergeant, and a lieutenant arrived within minutes. Armstrong was contacted near a busy intersection close to the hospital's main entrance. The officers engaged Armstrong in conversation while they waited for the commitment order. At that point in time, Armstrong was calm and cooperative. However, Armstrong was acting in a strange manner. He had wandered across a busy highway and then proceeded to eat grass and dandelions and put cigarettes out on his tongue.

As soon as they learned that the commitment papers were complete, the three police officers surrounded and advanced toward Armstrong. Armstrong reacted by sitting down and wrapping himself around a four-by-four post that was supporting a nearby stop sign. The officers tried to pry Armstrong's arms and legs off of the post, but he was wrapped too tightly and would not budge. Within a short period of time, Armstrong was encircled by six people—the three police officers who were struggling to remove Armstrong from the post, two hospital security guards, and Armstrong's sister, who was pleading with him to return to the hospital.

Thirty (30) seconds after the officers told Armstrong his commitment order was final, the lieutenant instructed an officer to prepare to tase Armstrong. The officers did not attempt to engage in further conversation with Armstrong. The officer drew his taser, set it to "drive stun mode," and announced that if Armstrong did not let go of the post, he would be tased. That warning had no effect, so the officer deployed the taser five separate times over a period of approximately two minutes. However, rather than have its desired effect, the tasing actually increased Armstrong's resistance. After the tasing ceased, the two hospital guards jumped in to assist the three police officers who were trying to pull Armstrong off of the post. The group of five successfully removed Armstrong and laid him face down on the ground.

Armstrong was handcuffed, but even after being cuffed, he continued to kick the sergeant so the police shackled his legs. At that point, Armstrong was no longer moving and the officers administered CPR and called for the paramedics. Armstrong was taken to the hospital where he was pronounced dead shortly after admission.

PROCEDURAL BACKGROUND

Armstrong's Estate filed a complaint in state court under § 1983, alleging, among other things, that the three police officers used excessive force in violation of Armstrong's Fourth and Fourteenth Amendment rights when seizing him. The officers removed the case to U.S. District Court and brought a motion for summary judgment based on qualified immunity. The district court granted the motion and the Estate filed a timely notice of appeal to the Fourth Circuit.

THE FOURTH CIRCUIT OPINION

The Fourth Circuit concluded that viewing the facts in the light most favorable to Armstrong, the facts, as alleged, showed that the officers used excessive force in violation of the Fourth Amendment. However, according to the court, the officers were entitled to qualified immunity because Armstrong's right not to be tased "while offering stationary and non-violent resistance to a lawful seizure" was not clearly established on April 23, 2011, the date of the incident.

Graham v. Connor Factors

The court analyzed the officers' use of force under the Fourth Amendment's "objective reasonableness" standard as set forth in *Graham v. Connor.* Among the factors considered by the court were: (1) Armstrong had not committed a crime; (2) the officers knew the individual they were confronting (Armstrong).was mentally ill; (3) the sole justification for the seizure was to prevent a mentally ill man from harming himself by preventing him from leaving; and (4) Armstrong's non-compliance with lawful police orders and non-violent resistance to his seizure by not letting go of the pole justified only a limited degree of force in

response. These factors, according to the court, weighed in favor of Armstrong. The court was of the view that the situation would have been perceived by a reasonable officer as a "static impasse with few, if any, exigencies, and lacking much danger or urgency where the *Graham* factors would justify only a limited degree of force."

Use of the Taser

The court devoted a considerable portion of its opinion discussing the use of the Taser. According to the court, "deploying a Taser is a serious use of force." "It is designed to cause excruciating pain, and application can burn a subject's flesh." The court cited cases from other circuits that have made similar observations. The leading Ninth Circuit case on the subject is *Bryan v. MacPherson,* 630 F.3d 805 (9th Cir. 2010). "The psychological effects, the high levels of pain and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted." P. 825

CONCLUSION

The court concluded that "Taser use is unreasonable force when used in response to resistance that does not raise a risk of immediate danger." The court stressed that it is the element of an immediate safety threat posed by a subject that would justify the use of the Taser. Accordingly, in this case, when the officer deployed his Taser, "Armstrong was a mentally ill man being seized for his own protection, was seated on the ground, was hugging a post to insure his immobility, was surrounded by three police officers and two hospital security guards, and had failed to submit to a lawful seizure for only 30 seconds. A reasonable officer would have perceived a static stalemate with few, if any, exigencies—not an immediate danger so severe that the officer must beget the exact harm the seizure was intended to avoid."

The court determined that, viewing the evidence in the light most favorable to Armstrong, the officers used excessive force when seizing Armstrong. However, the court concluded that at the time the officers acted, the law was not clearly established that Armstrong had a constitutional right not to be tased "while offering stationary and non-violent resistance to a lawful seizure." Accordingly, the officers were shielded from civil liability for their alleged unconstitutional actions under the doctrine of qualified immunity.

Notes:

General Municipal Litigation Update

Thursday, October 6, 2016 General Session; 1:00 – 2:15 p.m.

Javan N. Rad, Chief Assistant City Attorney, Pasadena

General Municipal Litigation Update

Cases Reported from May 9, 2016
Through September 9, 2016

Javan N. Rad
Chief Assistant City Attorney
City of Pasadena

League of California Cities
2016 Annual Conference

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I. Land Use

City of Perris v. Stamper, 1 Cal.5th 576 (2016)

Holding: In a condemnation proceeding, the essential nexus and rough proportionality inquiries under *Nollan* and *Dolan* must be decided by a court, not a jury. Additionally, the "project effect" rule generally applies when it is probable at the time a dedication requirement is put in place that the property subject to the dedication will be included in the project for which condemnation is sought.

Facts: Defendants owned a 9.12-acre property, and the city sought to condemn a 1.66-acre strip of land on the property to complete the realignment of Indiana Avenue, in order to facilitate truck traffic that would accommodate a recently-built Lowe's distribution center. Indiana Avenue was historically undeveloped, but, in 2005, the city updated the circulation element of its general plan to re-route Indiana Avenue. In 2008, the city sought to obtain the 1.66-acre strip of land, and filed suit in 2009. The property owners sought $1.3 million, predicated on the property being put to its highest and best use (light industrial), and the city's last offer was $54,800, premised on its present use (agricultural). The city argued that any proposed development of the strip of land for light industrial use would trigger a requirement by the city that the same strip of land be dedicated for road construction, invoking the *Porterville* doctrine – which holds that where condemned property would have to be dedicated as a condition of developing the larger parcel to its highest and best use, the condemned property must be valued at its current use. The trial court found the *Porterville* doctrine applied here. Additionally and separately, the court denied the property owners' motion, grounded in the "project effect" rule of CCP Section 1263.330, to preclude evidence that they would have been required to dedicate the 1.66-acre strip of land before obtaining a land use permit for light industrial activities at the property. The court entered judgment in the amount of $44,000 (relying on a stipulated agricultural value of the strip of land). The property owners appealed. The Court of Appeal held that a jury (not the court) should consider the questions of whether (1) whether the dedication requirement was reasonably probable; and (2) the constitutionality of the dedication requirement. The court further held that the

project effect rule does not apply here, affirming the trial court's decision in that regard. The Supreme Court granted petitions for review from both the city and the property owners.

Analysis: The Supreme Court held that the nexus and rough proportionality inquiries under *Nollan* and *Dolan* are reserved for a court to decide – not a jury. The court noted that both English law and the Seventh Amendment to the U.S. Constitution do not guarantee a right to a jury trial in eminent domain proceedings, and the California Constitution only guarantees a right to jury trial to determine just compensation owed for a taking. Therefore, legal questions that affect the type of compensation must be decided by a court, even on mixed issues of law and fact, where the legal issues predominate. The court summarized the *Nollan* and *Dolan* inquiry to be where "a court typically need only determine whether the condemner has done its constitutionally required homework."

Additionally, the court held that the "project effect" rule would apply, and the *Porterville* doctrine does not apply, when it is probable at the time a dedication requirement is put in place that the subject property will be included in the project for which condemnation is sought. The court remanded the matter to the trial court for further proceedings.

***Spring Valley Lake Assn. v. City of Victorville*, 248 Cal.App.4th 91 (2016)**

Holding: City violated the Subdivision Map Act by failing to affirmatively address seven matters covered by Government Code Section 66474 before approving a parcel map.

Facts: The city issued several land use approvals for the construction of a commercial retail development anchored by a Walmart store, and a homeowners' association (HOA) filed suit, challenging the land use approvals, including the approval of an environmental impact report (EIR). The trial court granted the writ petition, in part, reciting concerns over the EIR and the insufficient evidence to support the project's parcel map approval and zone change, and ordered the city to set aside the project approvals, among other things. Both Walmart and the HOA appealed.

Analysis: The Court of Appeal rejected Walmart's claims on appeal, but accepted some of the HOA's arguments. Of note, the court agreed with the HOA that the city violated the Subdivision Map Act in approving the proposed parcel map for the project. The court held that that the city's findings failed to comply with Government Code Section 66474. That section provides that cities or counties "shall deny approval of a . . . parcel map" if they make any of seven findings, such as inconsistency with applicable general and specific plans, and the like. While the statute facially does not require cities and counties to affirmatively address the statute, the court found that the city was required to either (1) affirmatively make all seven negative findings; or (2) deny approval of the parcel map.

***Center for Biological Diversity v. Cal. Dept. of Fish & Wildlife*, 1 Cal.App.5th 452 (2016)**

Holding: Appellate courts do not have authority on direct appeal to issue writs of mandate in California Environmental Quality Act matters, and trial courts retain jurisdiction over the lead agency to ensure compliance with the writ of mandate.

Facts: This CEQA litigation involving the proposed 12,000-acre Newhall Ranch project west of Santa Clarita in Los Angeles County proceeded from a 2010 certification of an EIR/EIS, to a 2012 judgment by the trial court, a 2014 Court of Appeal opinion, and a 2015 Supreme Court opinion (62 Cal.4th 204 (2015)). Upon remand to the Court of Appeal, the developer and Department of Fish & Wildlife requested the Court of Appeal (in lieu of the trial court) to retain jurisdiction to supervise the completion of the environmental review process, which would be, following the unpublished portion of the Court of Appeal's 2016 opinion, focused on addressing greenhouse gas and unarmored threespine stickleback issues.

Analysis: The Court of Appeal held that it would not issue its own writ of mandate on direct appeal. The court concluded that neither Public Resources Code Section 21168.9(a) (identifying actions that may be taken upon remand by appellate court) nor its limited legislative history gives appellate courts the authority to supervise the implementation of a writ of mandate. The court then recited a series of CCP and CEQA statutes to support its conclusion that it should

not issue a writ of mandate and supervise it in a direct appeal of a CEQA matter. However, the court noted it does have a duty to decide issues relating to the scope of the writ of mandate, but then remand the matter to the trial court.

***Lone Star Security & Video, Inc. v. City of Los Angeles*, ___ F.3d __, 2016 WL 3632375 (9th Cir. 2016)**

Holding: Local ordinances banning mobile billboards did not violate the First Amendment.

Facts: The cities of Los Angeles, Santa Clarita, Rancho Cucamonga, and Loma Linda passed virtually identical ordinances banning mobile billboards and establishing a civil penalty and impoundment process for violations of the ordinance. The ordinances were enacted following Vehicle Code amendments allowing local governments to regulate mobile billboard advertising. The lawsuits against the four cities were consolidated at the District Court level, and the court, on cross-motions for summary judgment, found that the mobile billboard bans did not violate the First Amendment. Plaintiffs appealed.

Analysis: The Ninth Circuit affirmed the District Court's grant of summary judgment in favor of the cities, finding the ordinances to be content neutral, finding that they regulate the manner – not the content – of affected speech. The court also distinguished the ordinances from *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), in that the billboard ordinances do not single out a single subject matter for differential treatment. Next, the Ninth Circuit found that the ordinances were narrowly tailored to the cities' interests, which included eliminating visual blight and promoting the safe and convenient flow of traffic. Finally, the court concluded that the ordinances left open adequate alternatives for advertising – such as stationary billboards, bus benches, flyers, newspapers, and handbills.

II. Medical Marijuana

***City of San Jose v. MediMarts, Inc.*, 1 Cal.App.5th 842 (2016)**

Holding: Fifth Amendment privilege against self-incrimination does not apply where medical marijuana dispensary wishes to refrain from paying city's medical marijuana dispensary tax, over a concern that paying the tax would force dispensary to admit to criminal violation of federal drug laws.

Facts: Since 2010, by way of a voter initiative, the city had taxed marijuana businesses up to 10 percent of their gross receipts. A medical marijuana dispensary (a collective entity), which had previously paid a marijuana business tax to the city, ceased paying the tax, and submitted tax returns showing no money due. After a number of administrative hearings, the dispensary owed the city approximately $767,000 in taxes, penalties, and interest over a two-year period. The city filed suit to collect the monies, and the dispensary cross-complained. The dispensary then sought a preliminary injunction to prevent the city from taking any action to shut down the dispensary or declare it a nuisance. The trial court denied the motion, finding the dispensary and its president were not entitled to assert the Fifth Amendment privilege against self-incrimination, rejecting their argument that payment of the tax would force them to admit criminal liability for violating federal drug laws. The dispensary and its president appealed.

Analysis: The Court of Appeal affirmed the denial of the preliminary injunction. The dispensary did not assert the Fifth Amendment argument on appeal, and the Court of Appeal noted case law holding that the privilege against self-incrimination is a personal right, and the dispensary does not enjoy that right. Additionally, the court pointed out that the tax is imposed on legitimate businesses for a use not prohibited by the state or city, and is a non-criminal and revenue-raising measure.

***The Kind and Compassionate v. City of Long Beach*, 2 Cal.App.5th 116 (2016)**

Holding: City's prohibition of medical marijuana dispensaries does not discriminate against persons with disabilities.

Facts: Two medical marijuana dispensaries and three patients sued the city and three employees/officers, relating to the city's enforcement of zoning ordinances prohibiting the operation of medical marijuana dispensaries within the city. Among other things, Plaintiffs argued the city discriminated against them, as the regulations have an adverse impact on persons with disabilities. The trial court sustained the city's demurrer, with leave to amend, but after Plaintiffs failed to file an amended complaint, the court dismissed the matter. Plaintiffs appealed. At oral argument on appeal, the Plaintiffs effectively conceded the validity of the city's demurrer, presenting no basis for reversal of the dismissal.

Analysis: The Court of Appeal affirmed the dismissal, explaining why the trial court's rulings were correct "[t]o avoid any ambiguity in the appellate record." The court held that the Plaintiffs' discrimination claims lacked merit, as "there is no right to convenient access to marijuana." The court then went on to describe the nature of the city's permissive zoning ordinance, and how Plaintiffs did not have a vested right to operate a medical marijuana dispensary in the city. As to the Plaintiffs' tort causes of action, the court noted that the city's enforcement of its medical marijuana ordinances is not, by itself, a violation of law.

***Wilson v. Lynch*, ___ F.3d ___, 2016 WL 4537376 (9th Cir. 2016)**

Holding: Medical marijuana cardholder's Second Amendment rights were not violated when firearms dealer refused to sell gun to cardholder.

Facts: Plaintiff held a medical marijuana card in Nevada, but was a non-using cardholder who only obtained the card to support marijuana legalization. The U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) issued an open letter to firearms licensees giving guidance on processing an ATF form where prospective purchasers are an unlawful user of a controlled substance. The firearms dealer knew Plaintiff held a medical marijuana card, and refused to sell

her a firearm. Plaintiff filed suit, alleging a variety of constitutional and other claims, chiefly among them a Second Amendment claim, and the District Court granted the Government's motion to dismiss. Plaintiff appealed.

Analysis: The Ninth Circuit affirmed, finding that the ATF open letter only bars Plaintiff from (now) purchasing firearms, but does not prevent Plaintiff from having previously acquired legal firearms before obtaining a medical marijuana card, and keeping those firearms to protect herself or her home. Additionally, the court pointed out that Plaintiff "could acquire firearms and exercise her right to self-defense at any time by surrendering her [medical marijuana] card." The court applied intermediate scrutiny to the Plaintiff's Second Amendment challenge, and noted that, even where the ATF's open letter is applied as against the Plaintiff (who obtained a medical marijuana card for expressive purposes), "the Constitution tolerates . . . modest collateral burdens in various contexts." The court also upheld the dismissal of the Plaintiff's free speech, due process, and equal protection claims, as well as her Administrative Procedures Act claim.

III. Conflicts of Interest

***People v. Hubbard*, 63 Cal.4th 378 (2016)**

Holding: A school superintendent, who oversees the budget and business affairs of a school district, owes a duty to safeguard school district funds, and can be prosecuted for misappropriation of public funds under Penal Code Section 424(a)(1).

Facts: The superintendent of a school district had an employment contract which included duties to provide leadership and direction in the area of "budget and business affairs." The superintendent also taught some statewide classes for school administrators about their fiduciary responsibility to protect school district funds. During the superintendent's tenure, he issued memos directing that an employee's salary and car allowance be increased. Such payments required Board approval, and the superintendent admitted there was no documentation that the Board approved the payments. The superintendent was tried and convicted on two counts

of misappropriating public funds in violation of Penal Code Section 424(a)(1). The superintendent appealed. The Court of Appeal reversed the convictions, finding the superintendent could not have violated Section 424 because he did not have the unilateral authority to approve the payments to the employee. The Attorney General petitioned for review, and the California Supreme Court granted review.

Analysis: The Supreme Court found that Section 424 applies only to those public officers "charged with the receipt, safekeeping, transfer, or disbursement of public monies," agreeing with the Superintendent's argument. The court noted the Legislature's purposes of enacting Section 424 in 1872 appeared to be to (1) protect the public fisc; and (2) hold accountable those in a position to place public funds at risk. In other words, it is not enough that one be a public employee. Even though the Supreme Court agreed with the superintendent's proposed reading of the scope of Section 424, the court, nonetheless, found the evidence sufficient to convict the superintendent. The court noted that to ascertain whether an employee could be liable under Section 424, one would need to review their actual and formal job responsibilities as it pertains to public funds. In this case, and applying that standard, the court found the superintendent exercised a "degree of material control over the funds' disposition."

***California American Water Co. v. Marina Coast Water Dist.*, ___ Cal.App.5th ___, 2016 WL 4400452 (2016)**

Holding: Public entities are not bound by the 60-day statute of limitations of the validation statutes (CCP Sections 860 through 870), where they seek to invalidate a contract through Government Code Section 1090 – which is covered by a four-year statute of limitations.

Facts: The county water agency (Monterey), a water district (Marina), and a regulated water utility (Cal American) agreed to pursue a desalination project, and entered into a series of agreements thereon. Years later, a Monterey director disclosed that he was a paid consultant through Marina, and the Monterey director resigned from his seat shortly thereafter. The Monterey director was eventually convicted for violating Government Code Section 1090. In this civil action, after a

number of motions and a bench trial, the trial court concluded that the longer four-year statute of limitations under Government Code Section 1090 applied to claims from Monterey and Cal American, and that the Monterey director violated Section 1090 by participating in four of the five contracts at issue. Marina appealed.

Analysis: The Court of Appeal affirmed the judgment. The court noted that CCP Section 869 exempts public agencies from the 60-day limitation period governing validation actions. Additionally, the court found that Monterey brought suit within the four-year limitation period of Government Code Section 1090, and that the Monterey director had a sufficient "financial interest" in the desalination project contracts to constitute a Section 1090 violation.

IV. Anti-SLAPP Motions

***Rand Resources, LLC v. City of Carson*, 247 Cal.App.4th 1080 (2016)**

Holding: Anti-SLAPP statute does not protect city and mayor from contract and tort claims brought by city's exclusive negotiating agent seeking to attract a National Football League team to the area, as the identity of the city's exclusive negotiating agent is not a matter of "public interest."

Facts: A development company (Rand Resources) held an exclusive agency agreement (EAA) to seek to bring an NFL team to the city. However, Rand Resources alleges that, during the pendency of the EAA, developer Leonard Bloom and U.S. Capital (collectively "Bloom") began to act as the city's agent and representative, and that Bloom, the city, and the mayor made efforts to conceal their meetings and communications. Rand Resources claimed that Bloom's actions destroyed the exclusivity of the EAA, and deprived Rand Resources of the opportunity for a multi-million-dollar commission. Rand Resources then brought suit against the city, the mayor, and Bloom. The city, the mayor, and Bloom filed anti-SLAPP motions to strike, and the trial court granted the motions, finding that (1) the property negotiations involved a "matter of public interest;" and (2) Rand Resources had not demonstrated a probability of prevailing on the merits. Rand Resources appealed.

Analysis: The Court of Appeal reversed, finding Rand Resources complaint did not present an issue of "public interest." The court recognized that having an NFL team in the city is a matter of public interest, but it pointed out that is not the crux of this case. The lawsuit did not involve communications pertaining to the actual development of real estate. Rather, the case involved the identity of the agent representing the city in negotiating matters that might (potentially) lead to an NFL team. The court distinguished this case from other cases which involved communications pertaining to an actual planned development – which would be a matter of public interest.

***City of Montebello v. Vasquez*, 1 Cal.5th 409 (2016)**

Holding: Councilmembers' deliberations and votes qualified as statements "made before a legislative . . . proceeding," bringing Government Code Section 1090 action within the anti-SLAPP statute.

Facts: The City Council voted 3 to 2 to award an exclusive commercial waste hauling contract to Athens, who had already been the city's residential waste hauler for over 40 years. In the next two years following the award, Athens contributed $37,300 to defeat the mayor (who was re-elected), $45,000 to re-elect a councilmember who voted for the contract (who was not re-elected), and $352,912.73 to defeat the recall of the other two councilmembers who voted for the contract (who were recalled). The city administrator retired around that time, as well. The city, represented by outside counsel, brought a Government Code Section 1090 action against the three councilmembers who voted to approve the contract, as well as the city administrator. A few days later, in a separate action brought by a resident, the trial court set aside the Athens contract, a decision that was affirmed on appeal (*Torres v. City of Montebello*, 234 Cal.App.4th 382 (2015)). In view of the Athens contract being set aside, the defendants in the case at bar brought an anti-SLAPP motion, arguing that their votes as councilmembers were protected activity in connection with an issue of public interest. The trial court denied the motion, the Court of Appeal affirmed, and the Supreme Court then granted review.

Analysis: The Supreme Court reversed the Court of Appeal's opinion affirming denial of the anti-SLAPP motion. First, the court found that the public enforcement exemption to the anti-SLAPP statute did not apply here. The court concluded the exemption should be narrowly read, to be used only when a city's action is brought in the name of the People by the city attorney's office, acting as a public prosecutor. Here, the city was represented by outside counsel, and suing in its own name. Second, the Supreme Court found the defendants' actions to be covered under CCP Section 425(e)(1) and (2). The councilmembers' deliberations and votes qualified as statements "made before a legislative . . . proceeding," and the city administrator's contract negotiations were "made in connection with an issue under consideration or review" by the City Council. Finally, the court found that, because of the disputed facts and the early stage of the case, it was premature to conclude that the defendants' actions were illegal as a matter of law. The court remanded the matter to the Court of Appeal, who did not reach the second-step issue under the anti-SLAPP statute – whether the city could establish a likelihood of success.

V. Brown Act

Cruz v. City of Culver City, 2 Cal.App.5th 239 (2016)

Holding: Six-minute colloquy on non-agenda item at City Council meeting to place item on next meeting agenda did not violate the Brown Act.

Facts: Since 1982, the city has had parking restrictions (of one form or another) on a street adjacent to a church, which jammed the street with parked cars during church services. In April 2014, a lawyer for the church sent a letter to a city traffic analyst, asking about the process to change the restrictions, and the traffic analyst advised that the parking restrictions did not provide a means for non-residents to change the parking restrictions. In August 2014, the church sent a letter to a councilmember, asking him to address the "onerous parking restrictions." The councilmember raised the letter at a City Council meeting, and, after a six-minute colloquy between the mayor and the public works director, the parking restrictions were placed on the next City Council meeting agenda for discussion. Residents of

the street filed suit, essentially arguing that city could not hear what the residents contended was an appeal of the parking restrictions. The trial court granted the residents' anti-SLAPP motion, and they appealed.

Analysis: The Court of Appeal affirmed. The court found that the public interest exception to the anti-SLAPP statute, which only applies to those actions brought solely in the public interest, does not apply here. If the city kept the parking restrictions at status quo, that would directly benefit the plaintiff resident homeowners, rendering the public interest exception inapplicable here. Next, the court held that the residents were unlikely to prevail, as the six-minute colloquy at the City Council meeting fell within all three exceptions in the Brown Act related to the discussion of non-agenda items (briefly responding to statements/questions; asking a question for clarification; and asking for an item to be placed on a future agenda). The court also pointed out that the residents could not bring their dispute through the Brown Act, if a matter were wrongly placed on the agenda for other reasons – the court noted that the time to raise those issues would be at the City Council meeting where the parking restriction item is agendized.

***Center for Local Government Accountability v. City of San Diego*, 247 Cal.App.4th 1146 (2016)**

Holding: A demand to "cure and correct" a violation of the Brown Act is only required for past actions of a legislative body. The demand is not required for ongoing or threatened actions.

Facts: The city had a long-standing ordinance providing for a Tuesday non-agenda public comment period over a continuous two-day (Monday/Tuesday) regular weekly City Council meeting. Plaintiff sued, arguing the lack of a non-agenda public comment period on Mondays violated the Brown Act. The city demurred, arguing that the Plaintiff failed to provide a "cure and correct" demand. The city also argued that the lawsuit was moot, as the city had adopted an ordinance providing for non-agenda public comment on both days of the weekly City Council meeting. The trial court sustained the city's demurrer on both grounds, and the Plaintiff appealed.

Analysis: The Court of Appeal reversed the trial court, relying on legislative history to find that a "cure and correct" demand is only required for past actions of a legislative body, and is not required for ongoing or threatened future actions. Additionally, the court held that matter was not moot, because (1) the city's change in practice (to allow comment on both days) is not a change in its legal position; and (2) the city had not conceded that its former practice (to allow public comment on only Tuesdays) violated the Brown Act. Accordingly, the court ordered that the Plaintiff be given leave to amend its complaint.

VI. Employment

***City of Petaluma v. Superior Court*, 248 Cal.App.4th 1023 (2016)**

Holding: Written factual investigation prepared by outside attorney, who was retained by city attorney, and where report was maintained in confidence, was privileged under attorney-client privilege and work product doctrine.

Facts: Plaintiff, a firefighter and paramedic, filed a charge with the EEOC alleging sexual harassment and retaliation. The city attorney hired an outside attorney to investigate the EEOC charge, to assist him in preparing the city to defend in an anticipated lawsuit. The outside attorney provided a written report, and the outside attorney's communications were been maintained in confidence. Plaintiff later filed suit, alleging harassment, discrimination, and retaliation claims. In discovery, Plaintiff sought the report prepared by the outside attorney, and the city objected, claiming the attorney-client privilege and work product doctrine. Plaintiff moved to compel the disclosure of the report, which the trial court granted. The city then petitioned for writ of mandate.

Analysis: The Court of Appeal reversed. The court found that the outside attorney's factual investigation was privileged, as the dominant purpose of her representation was to provide professional legal services to the city attorney so that he could advise the city on the appropriate course of action. The court also held that the city's "avoidable consequences" defense did not waive the privilege, since

the Plaintiff no longer works for the city, and the city did not seek to rely on the outside attorney's post-employment investigation itself as a defense.

***City of Carlsbad v. Scholtz*, 1 Cal.App.5th 294 (2016)**

Holding: A judgment denying a petition for writ of mandate challenging an evidentiary ruling of a hearing officer is a non-appealable interlocutory judgment.

Facts: The city terminated a police officer, who challenged the termination through a hearing before a hearing officer, who would submit his recommendations to the City Council for a final decision. The police officer asserted that the city penalized him more harshly than it had penalized other similarly situated police officers. After the hearing officer ruled for the police officer on two *Pitchess* issues (on involving other officers' personnel records), and then excluded certain evidence (that the city wished to admit), the city filed a petition for writ of mandate with the trial court. The trial court essentially denied the city's writ petition summarily, because the city could seek judicial relief at the conclusion of the administrative process. The court then entered judgment, and the city appealed.

Analysis: The Court of Appeal dismissed the appeal for several reasons. First, the hearing with the hearing officer is not the final step in the administrative process, so the city would have an adequate remedy at that point. Second, the city failed to establish irreparable harm, because the administrative hearing is closed to the public, and the court did not perceive a substantial threat to the unauthorized disclosure of *Pitchess* information, as one officer had no reprimand in his file, and the other officer was willing to testify.

***City of Eureka v. Superior Court*, 1 Cal.App.5th 755 (2016)**

Holding: Video of arrest captured by a police car's mobile audio video (MAV) recording system is not a police officer personnel record, and is therefore not protected by the *Pitchess* statutes.

Facts: Officers arrested a minor, and the arrest was captured by the police car's MAV recording. Charges were filed against the minor, but later withdrawn. A citizen submitted a personnel complaint against the officers, in relation to their handling of the incident of the minor, and the police department conducted a personnel investigation. Separately, a sergeant was charged with misdemeanor assault by a police officer, and making a false report, and those charges were later dismissed. A local reporter then made a public records request for the MAV recording, and the city declined to produce the MAV recording, claiming it exempt from disclosure as a personnel record and as an investigatory file. The reporter also sought the MAV recording through the juvenile court, and the court allowed the release of a redacted video to protect the minor's name and identity. The city appealed.

Analysis: The Court of Appeal affirmed the release of the redacted MAV recording. The court concluded that the MAV recording is not a "personnel record" as defined by the *Pitchess* statutes, as the MAV recording was not "generated in connection" with the appraisal or discipline of the of the sergeant. The court further noted that if the MAV recording were considered a personnel record, it may convert virtually all MAV recordings into personnel records. Finally, the court noted that, just because the city might use MAV recordings to evaluate whether to initiate disciplinary proceedings against officers, that does not convert a MAV recording into a personnel record. The court limited its holding, however, pointing out it expressed no opinion on (1) whether the MAV recording is a public record under the Public Records Act; and (2) whether a juvenile court is authorized to order disclosure of *Pitchess* material in certain circumstances.

VII. Torts

Vasilenko v. Grace Family Church, 248 Cal.App.4th 146 (2016)

Holding: Overflow parking lot staffed by church attendants, where visitors were required to cross five-lane street to get to church, gave rise to an ordinary duty of care set forth in Civil Code Section 1714.

Facts: A church had an agreement with a swim school, located across the five-lane street, to use the swim school parking lot when the church parking lot was full. There was no traffic signal or marked crosswalk at the nearest intersection to cross the five-lane street. Church members served as volunteer parking attendants at the swim school lot. When Plaintiff went to a function at the church, the church lot was full, and an attendant told Plaintiff to park at the swim school lot, but did not instruct him how to cross the five-lane street. Plaintiff joined two others, and attempted to cross the five-lane street. Plaintiff was hit by a car and injured. Plaintiff sued, alleging his injuries were caused by the inadequate supervision and training of parking lot attendants. The church moved for summary judgment, which the trial court granted, finding the church did not owe a duty of care in the crossing of a public street, which the church did not own or control. Plaintiff appealed.

Analysis: The Court of Appeal reversed, finding this case distinguishable from cases where businesses tell visitors where to park. Here, the church operated the swim school lot (when its church lot was full), which it directed its visitors to, and where the visitors were then required to cross the five-lane street. As such, the court concluded that a reasonable juror could infer that the Plaintiff would not have been struck by a car, if the church had not operated the swim school lot.

***Chang v. County of Los Angeles*, 1 Cal.App.5th 25 (2016)**

Holding: County's reservation of rights agreement with sheriff's deputies found to be sufficient to imply that the county reserved the right to decline to indemnify deputies for actions taken with actual malice.

Facts: Sheriff's deputies were sued by a jail inmate in an underlying action for civil rights violations, and they signed agreements with the county for the county to defend them, but under a reservation of rights. After trial, the jury found the deputies acted with malice, oppression or reckless disregard in violating the inmate's civil rights, and the judgment, including attorney's fees, amounted to $451,086.47 (including punitive damages), which had not yet been paid. The deputies requested the county indemnify them, and after being denied, the deputies brought suit to compel payment of the judgment. The trial court granted the

deputies' motion for summary judgment, finding the county was required to indemnify the deputies, excluding punitive damages. The county appealed.

Analysis: The Court of Appeal reversed. The court concluded that when a public entity defends an employee under a reservation of rights that includes a reservation of the right not to pay a judgment based on malice (among other things), if the employee is later found to have acted with actual malice, the reservation of rights would allow the public entity to decline to indemnify the employee. Here, the court held that the trial court should have denied the deputies' motion for summary judgment. The jury in the underlying civil rights case found the deputies acted with malice, so there would at least be a triable issue of fact as to whether the deputies did, in fact, act with malice.

***Castro v. County of Los Angeles*, __ F.3d ___, 2016 WL 4268955 (9th Cir. 2016) (*en banc*)**

Holding: Jail officials liable for due process violations where they did not timely respond when Plaintiff sought help, and county and sheriff's department subject to *Monell* liability where sobering cell did not have sufficient visual surveillance and audio monitoring to prevent against violations.

Facts: Plaintiff was arrested for public drunkenness, and placed in the police station's sobering cell. Several hours later, another individual (Gonzalez) was arrested and book on shattering a glass door with his fist at a nightclub. The intake form described Gonzalez as combative, yet he was placed in the same sobering cell with Plaintiff. Shortly after, Plaintiff pounded on the window, but was unable to get the attention of deputies. The sobering cell was not audio-monitored, and a community volunteer checked the cell 20 minutes after Plaintiff sought help, at which point he saw Gonzalez "inappropriately" touching Plaintiff's thigh. The volunteer did not intervene, but reported the conduct to the station's supervising officer, who arrived six minutes later, finding Plaintiff lying unconscious in a pool of blood. Plaintiff suffered significant brain injuries from the incident. Plaintiff sued the county, the sheriff's department, and the individual defendants for Fourteenth Amendment (due process) violations (as a pre-trial detainee), and obtained a jury verdict in excess of $2 million. A three-judge panel of the Ninth

Circuit affirmed the judgment as against the individual defendants, but reversed as to the entity defendants. The Ninth Circuit then granted *en banc* review.

Analysis: The *en banc* panel affirmed the jury verdict against the individual defendants, after establishing and applying a four-factor test to review the elements of a pre-trial detainee's Fourteenth Amendment failure-to-protect claim, finding "no difficulty" in concluding there was sufficient evidence to sustain the jury verdict against the individual defendants. The panel also affirmed the jury verdict against the county and sheriff's department for a *Monell* violation for insufficient visual surveillance and audio monitoring of the sobering cell, finding substantial evidence to support the jury's conclusion that the jail cell design might lead to a constitutional violation.

VIII. Miscellaneous

***Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (*en banc*)**

Holding: The Second Amendment does not permit a member of the general public to carry a concealed firearm in public.

Facts: Applicants in San Diego County and Yolo County sought to carry concealed firearms, but were told they could not establish good cause. Plaintiffs, which included residents of the counties and several gun rights organizations, challenged the counties' interpretation and application of the good cause requirement under California law. The District Courts granted summary judgment favor of the counties in both cases. Three-judge panels reversed these decisions, finding that, because (1) a concealed carry permit is restricted to those making a good cause showing; and (2) open carry is also restricted, the good cause definition for a concealed carry license violates the Second Amendment. At that point, the sheriff in the *Peruta* case advised the court he would not seek *en banc* review nor defend the county's position in *en banc* proceedings, so the State of California sought to intervene to petition for rehearing *en banc*. The Ninth Circuit granted rehearing *en banc* in both cases, which were argued together.

Analysis: The *en banc* panel of the Ninth Circuit, in a 7-4 opinion, affirmed the District Courts' grants of summary judgment in favor of the counties. The court held that the Second Amendment does not permit a member of the general public to carry concealed firearms in public, and the court left open the Second Amendment questions involving open carry, finding "no need to answer it here." The court also found that the State's motion to intervene in *Peruta* was timely, because (1) Plaintiffs did not oppose intervention; and (2) the State only had a strong incentive to intervene after the sheriff's departure created a void.

***Gingery v. City of Glendale*, ___ F.3d ___, 2016 WL 4137637 (9th Cir. 2016)**

Holding: City's installation of monument commemorating comfort women was not preempted by the foreign affairs doctrine.

Facts: The city installed a public monument commemorating "comfort women," whom South Korea asserts, but Japan disputes, were forced to serve as sexual partners to the Imperial Japanese Army in occupied territories before and during World War II. Plaintiffs, a Japanese-American resident of Los Angeles, and a non-profit corporation, argued that the monument interferes with the federal government's foreign affairs power and violates the Supremacy Clause, as it disrupts the U.S. government's policy of nonintervention and encouragement of a peaceful resolution of the comfort women dispute. The District Court granted the city's motion to dismiss on two independent grounds, that the Plaintiffs (1) lacked standing; and (2) failed to state a claim that the monument conflicted with the executive branch's foreign policy. Plaintiffs appealed.

Analysis: The Ninth Circuit found the individual plaintiff had standing, finding the District Court erred in that regard. Plaintiff alleged he avoids using the park where the monument was installed because he was offended by the government-sponsored display. The court likened the Plaintiff's standing here to environmental plaintiffs whose use of a park and park facilities has been diminished. On the merits, the court found that the Plaintiffs failed to state a claim that the monument is preempted under the foreign affairs doctrine, which states that the federal government holds the exclusive authority to administer foreign affairs. The court concluded that the city's expression, through the monument, of a particular

viewpoint of a matter related to foreign affairs, did not violate the foreign affairs doctrine. To that end, the court recited a number of examples where American cities expressed views on events that occurred in foreign countries (through both monuments and public positions), finding that, in this case, the city did not insert itself into foreign affairs.

***Weiss v. City of Los Angeles*, 2 Cal.App.5th 194 (2016)**

Holding: Vehicle Code imposes nondelegable duty upon cities to conduct initial review of parking ticket challenges.

Facts: The Vehicle Code provides a three-step process for challenging parking citations – initial review, administrative hearing, and de novo appeal to the Superior Court. The city has delegated its initial review duties to Xerox. After an initial review by Xerox, a motorist learned of the results through one of 97 form letters drafted by the city, on city letterhead, and sent by Xerox. At the first phase of trial, putting aside the issue of whether Xerox was authorized to conduct the initial review, the trial court found the city's system of initial reviews complied with the Vehicle Code. In the second phase of trial, the court found the Vehicle Code imposed a nondelegable duty on the city to also perform the initial review. The trial court awarded the Plaintiff $721,994.81 in attorney's fees pursuant to the private attorney general fee statute. The city and Xerox appealed.

Analysis: The Court of Appeal affirmed. The court found that the Plaintiff, even though he paid his parking citation at the initial review, still had standing under the "public interest" exception to pursue mandamus relief. Next, after reviewing the statutory scheme of the Vehicle Code provisions, the court agreed with the trial court that the city is required to perform the initial review, and may not delegate that duty to Xerox. The court also found the "home rule" doctrine did not apply in this case. Even though the processing of parking citations is a core municipal function, the city outsourced its duty to perform initial reviews by way of contract, and not by ordinance, regulation, or charter provision. As to attorney's fees, the court affirmed the trial court's award, finding that the Plaintiff succeeded in ending Xerox's initial review practice, when, for example, Xerox conducted over 135,000 initial reviews in one year, when they had no power to conduct the review at all.

Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives

Thursday, October 6, 2016 General Session; 1:00 – 2:15 p.m.

Brian P. Walter, Liebert Cassidy Whitmore
Elizabeth T. Arce, Liebert Cassidy Whitmore

League of California Cities

City Attorneys' Annual

Conference

Guiding Legislative Bodies Through Trial: City and Trial Attorney Perspectives

Thursday, October 6, 2016

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I. Introduction

Lawsuits happen. This is the unfortunate reality of being an employer. Generally speaking, there are procedural and tactical considerations that are common to most employers, public and private, when they are defendants in a lawsuit. For example, regardless of whether you are a private or public employer, litigation inevitably results in discovery, appearances in court, filing motions, and constant evaluation and reevaluation of the case.

However, there are also a number of legal intricacies involved in representing a City in litigation, which normally involves advising the legislative body (i.e. City Council). Among other things, those who represent public entities are limited by the Brown Act in their ability to communicate with and obtain direction from the City Council about a pending lawsuit. Additionally, there are often multiple persons within a city who have some control over and input regarding the litigation aside from the City Council, such as any individual defendants, the Mayor, City Attorney, City Manager/Administrator, Human Resources Director, Risk Manager, Department Head and insurer. Thus, counsel representing a city must be mindful of these other persons who will also want to weigh in on litigation decisions and strategy, while keeping in mind that the client is normally the city.

The purpose of this paper is to provide practical guidance on navigating legislative bodies through lawsuits. In it, we cover important topics such as identifying the client, working with stakeholders, and ensuring compliance with the Brown Act. We also provide an overview of the entire litigation process and offer strategies that we have found to be helpful when communicating with elected officials about litigation.

II. Who is the client? Who are the other stakeholders?

Public agencies act through their legislative bodies, which will be the City Council for a city. The City Council, for example, creates rules, binds the agency, and often delegates its authority where permissible under the law.[1] In the context of legal actions, the City Council plays a significant role in the litigation from start to finish. Among other things, the City Council has the power to commence a lawsuit, authorize settlement, and give direction to City employees. Thus, when a city is named as a defendant in a lawsuit, the municipal organization is "the client" which acts through the legislative body.[2]

[1] *See*, Gov. Code, §§ 37100 *et seq.*, 50001 *et seq*.

[2] *See*, Cal. Bar Rule 3-600, defining the client as "In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting

A. Designated Representatives

Lawsuits against cities also frequently require participation from a number of individuals other than the elected officials. First, there is typically at least one high level City employee that makes the day-to-day decisions regarding the litigation ("Designated Representative" or "DR"). The City Attorney often serves as the DR. The Designated Representative, however, is not necessarily an attorney; he or she can be the city's risk manager, the director of human resources, a department head or the city manager. In many instances, there is not a single designated representative. Multiple people may serve as the point of contact in any given litigation. It is important for defense counsel to familiarize him or herself with each of these individuals and know what type of authority has been delegated to them by the governing body.

The City Council will rely on the DR to work closely with the attorneys who are litigating the case for the city. This individual who is the DR should have a firm grasp of the facts of the case and he or she should possess a general understanding of the agency's litigation strategy (i.e., early mediation, affirmative defenses, etc.). Additionally, the DR should be advised of and understand the important dates associated with the litigation (e.g., dates for depositions, important hearings, etc.), and work with defense counsel to update the City Council on significant developments in the litigation. The City Council and/or charter or municipal code may delegate some form of settlement authority to the DR, and if there is a mediation, the DR may serve as the city's representative.

B. Individual Defendants

When individual defendants (i.e., employees of the public agency) are named in a lawsuit, they are also important stakeholders and decision-makers. Depending on the allegations made and the facts of the case, the attorneys representing the agency may also represent the individual defendant. Before this determination can be made, the attorneys must conduct a thorough conflict assessment to determine if joint representation is permissible or if the individual should have his or her own counsel. Defense counsel must obtain written permission from the City and the individual defendant when their interests potentially conflict vis-à-vis a conflict waiver before offering any legal advice to either defendant.[3] Joint-representation alters the dynamics of the litigation because it adds an additional decision-maker—the individually named defendant—into the mix.

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through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."

[3] Rules Prof. Conduct, rule 3-310.

1. Member of the City Council as a Defendant

Occasionally, a member of the City Council will be named as a defendant in a lawsuit. Conflicts of interest can arise in the litigation setting when an elected official is also named as an individual defendant in the litigation. Being able to identify potential conflicts of interest is critical and the legislative body must address them. Conflict of interest law is governed by statute and common law.[4] Actual conflicts of interest need not exist in order to preclude a Councilmember from participating in a discussion or decision regarding a matter. In some instances, the mere appearance of a conflict may be enough to require the Councilmember to recuse himself or herself from the matter.[5] As with any other individual defendant, if there is a potential conflict, defense counsel must obtain written permission from the agency and the individual Councilmember defendant through a conflict waiver before offering any legal advice to either party.[6]

Aside from a potential conflict of interest associated with having multiple defendants in a case, there are other circumstances where litigation may present conflicts. Occasionally, one or more the Councilmembers are friends with or a relative of the plaintiff who is suing the public agency. Or, it is not uncommon that a Councilmember has some other connection to the Plaintiff, be it business-related, social, or an indirect relationship (e.g., their children attend the same school, they are a member of the same social organization, they sit on another board together, they work together, etc.). Moreover, in some instances the Councilmember will actually have an interest in the matter that is outside the scope of his or her duty as a legislator. This happens, for example, when a business entity sues a City and one of the members of the City Council works for that business. Another conflict may arise when the City Council actually supports the plaintiff's position in the litigation. These are only a few examples, among many, of potential conflicts of interest.

Consequently, defense counsel will likely need to assess if the defendant Councilmember shall be restricted from participating in closed session discussions and other decision-making regarding the litigation. This will generally involve an analysis of Gov. Code section 1090, the Political Reform Act, and common law conflict of interest cases. Depending on the outcome of the conflict analysis, the defendant legislator may need to abstain from voting on anything tied to the pending litigation, or only certain issues, or he or she may need to leave the closed session meeting when the other legislators

[4] *See, e.g.*, Gov. Code § 1090 et seq.; Gov. Code § 87100; 67 Ops.Cal.Atty.Gen. 369, 381 (1984).
[5] *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.
[6] Rules Prof. Conduct, rule 3-310.

discuss the litigation. Regardless, this determination must be made early on to avoid any potential conflict of interest issues or the appearance of a conflict of interest.

If there is any question as to whether a potential conflict of interest exists, there are extremely important legal considerations that must be addressed immediately. Among other things, the governing body will ultimately need to decide in consultation with its legal counsel, if a conflict of interest (or potential conflict or appearance of a conflict) exists that may prohibit the individual legislator from taking part in any communication regarding the case or voting on something pertaining to the litigation (i.e., settlement).

2. Attorney-Client Privilege

An important consideration in deciding whether to jointly represent the City and individual employees of the City is that there is no attorney-client privilege between them in regards to the litigation[7]. This can be difficult for a City Council to accept or understand, as the individual defendants are entitled to get the same legal advice from the lawyer as the City Council regarding the lawsuit. Thus, any decision to provide joint representation should carefully evaluate whether the City Council will be comfortable with the ability of individual defendants to learn information the City Council may be aware of regarding the litigation.

3. Duty to Defend

Government Code section 825 requires a public entity to defend a current or former public employee, upon his or her request, for claims and actions arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity. Section 825 also allows the public entity to conduct the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity. Consequently, a city is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the city.

However, section 995.2 also authorizes a public entity to refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following: (1) the act or omission was not within

[7] *Nowell v. Superior Court for Los Angeles Cnty.* (1963) 223 Cal.App.2d 652, 657, finding, "Where two or more persons engage an attorney to represent all of them, the privilege is waived as between the parties, but it remains as to strangers."

the scope of his or her employment; (2) he or she acted or failed to act because of actual fraud, corruption, or actual malice; and (3) the defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee.

4. Indemnification

There are special indemnification provisions applicable to claims of intentional torts by elected officials. Government Code Section 815.3 provides that public entities are not liable to a plaintiff for the intentional torts of elected officials, unless they are co-defendants in a lawsuit. If they are co-defendants, and the elected official is held liable for an intentional tort, other than defamation, the trier of fact must determine if the intentional tort arose from and was directly related to the elected official's performance of his or her official duties" and if so, the public entity shall be liable.[8] If not, the plaintiff shall first seek recovery of the judgment against the elected official's assets, but if the court determines those assets are not adequate to satisfy the entire judgment, the court shall determine the amount of the deficiency and plaintiff may seek to collect the remainder of the amount from the public agency.[9] If the public agency pays any portion of the judgment where there has been a finding that the official's conduct did not arise from or directly relate to performance of his official duties, the public entity is required to pursue all available creditor's remedies against the elected official for indemnification, including garnishment, until the elected official has fully reimbursed the public entity.[10]

The City can choose to indemnify a member of the City Council or employee for punitive damages. However, the decision to do so can only be reached at the conclusion of the litigation.[11] Importantly, section 825 of the Government Code does not require the public entity to pay for punitive or exemplary damages of an employee, rather it authorizes a public entity to pay that part of a judgment if the City Council makes certain findings set forth in the Code. Those findings include that: (1) the judgment is based on an act or omission of the employee acting within the course and scope of his or her employment as an employee of the public entity; (2) at the time of the act giving rise to the liability, the employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity; and (3) payment of the claim or judgment would be in the best interests of the public entity.[12]

[8] Gov. Code, § 815.3.
[9] *Id*.
[10] *Id.*
[11] Gov. Code § 825
[12] *Id.*

C. Insurance Carrier or JPA

The insurance carrier or joint powers authority (JPA) is often another stake-holder in the case. Additionally, in many cases there may be an "excess carrier" in addition to the primary insurer or JPA who only gets involved in the litigation if the liability exceeds a certain amount, typically at least one million dollars. The carrier or JPA may be able to assert control over the litigation, to a large extent, because of their ability to force a settlement depending upon the terms of their coverage or JPA agreement. The legislative body, the DR, and individual defendants should have a clear understanding of the carrier/JPA's authority to control the litigation and to force a settlement, and what, if any excess coverage exists, at the onset of the litigation.

Each should also know the carrier/JPA's general litigation temperament—i.e., are they committed to early settlement, do they want to "fight until the end," etc. Additionally, the legislative body should be made aware of any coverage limitations that may exist. For example, back wages or intentional conduct may not be covered by the JPA or carrier. It is important to identify and resolve all possible issues regarding coverage of the litigation and who will pay for any settlement or judgment at the outset of the litigation to avoid surprises for the City Council and to enable the City Council to make good decisions about litigation strategy. This may require the city to retain and consult with separate insurance coverage counsel.

Finally, there may be circumstances where it is appropriate for a representative from the insurance carrier or JPA to attend the closed session meeting where the litigation will be discussed. However, if the city is adverse or may become adverse to the carrier/JPA, then it may not be appropriate for the carrier/JPA to be present during closed session.

III. Communications with the Elected Body and the Brown Act

Public agency clients often ask:

(1) Who should communicate with the legislative body regarding pending litigation?
(2) How often should there be a communication with the legislative body about pending litigation and what should they be told?

A. Who should communicate with the legislative body about the litigation?

The overwhelming majority of the communications with the legislative body regarding the litigation should come during closed session via the "pending litigation"

exception to the Brown Act.[13] Importantly, closed sessions are permitted to allow the City Council *to confer with, or receive advice from its legal counsel* regarding pending litigation when discussion in open session of a matter would prejudice the position of the local agency in the litigation.[14] Prior to discussing pending litigation in closed session, the legislative body must state on its agenda the title of or otherwise specifically identify the litigation to be discussed, unless to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties, or jeopardize its ability to conclude existing settlement negotiations to its advantage.[15]

The DR should be present and an active participant during the closed session discussion regarding the pending litigation. This is the opportune time for the legislative body to provide direction to the DR, give the DR settlement authority, and to ask questions about the case. However, the City Council must be cautious not to misuse the pending litigation exemption to discuss matters outside of the purview of the litigation. Doing so could result in a violation of the Brown Act. Moreover, all closed session participants should be reminded that what was said in closed-session should remain in closed session; both the Brown Act and the attorney-client privilege demand this.

The DR can also have discussions with members of the legislative body regarding the litigation outside a noticed meeting if certain precautions are observed.. For instance, less than a quorum of the City Council might be established to oversee the litigation, and those members can meet directly with the DR and/or the city's litigation counsel to discuss matters relating to the litigation. Also, the DR and/or the city's litigation counsel can communicate with individual members of the legislative body, for instance to explain in greater detail or answer questions of members. Since these communications will take place outside of a regular or special meeting, they are not agendized and do not enjoy any closed-session privilege under the Brown Act. However, those discussions will likely be covered by the attorney-client privilege. In the event the DR and members meet outside the presence of litigation counsel, then those discussions are still privileged if the DR is relaying attorney-client communications to the members.

It is important that the DR, litigation counsel, and City Council members are cognizant of potential serial Brown Act violations when engaging in the above communications. That is, if the DR communicates with a member of the legislative body about the litigation, the elected official should refrain from communicating with other City Council members outside of a regular or special meeting about what the DR said. Similarly, the DR should not tell other City Council members what a particular member's

[13] Gov. Code § 54956.9.
[14] *Id.*
[15] *Id.*

views are regarding the litigation which were conveyed outside the meeting. Doing so could result in a serial Brown Act violation if it reaches a quorum.[16]

B. How often should there be a communication with the legislative body about pending litigation and what should they be told?

At the onset of the litigation, litigation counsel should provide the legislative body with a detailed assessment of the case in closed session. This could include going through each cause of action with the City Council and identifying the strengths and weaknesses of the case. Counsel should also provide the City Council with an early valuation of the case, be upfront about the cost associated with litigation, and determine if early mediation is desirable. Counsel should be forthright with the legislative body and provide them with an honest assessment of the lawsuit. This helps set the legislative body's expectations early on, and it allows the body to make informed decisions regarding the trajectory of the litigation, potential exposure, early settlement, etc.

Following the initial assessment, the attorneys litigating the matter should keep the legislative body reasonably informed about the case.[17] The frequency of the communication depends on the occurrence of significant events or milestones in the litigation. Aside from the initial briefing, the City Council may need to be briefed about important case filings, key depositions, and before and after mediations or settlement conferences. If there is a settlement offer or if there are significant changes in circumstances regarding the litigation, counsel should notify the City Council as quickly as possible.[18] Depending on timing issues, this may require a special meeting if the next regularly scheduled meeting is too far out. Counsel should also update the legislative body as trial nears to prepare the City Council for trial and explore final settlement possibilities.

Counsel can also communicate with the legislative body about the case via a memorandum. This allows counsel to update the City Council without having to appear at a meeting in closed session. However, many legislative bodies and litigation counsel do not prefer this method for a number of reasons. First, the legislative body cannot ask questions to counsel when they go this route. It is essentially a "one-way communication." Moreover, this route has its risks; it is not uncommon for members of legislative bodies to mishandle counsel's memorandum (i.e., the elected official shares the memorandum with

[16] *See*, Gov. Code § 54952.2.
[17] Rule Prof. Conduct, rule 3-500, "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."
[18] *See*, Rule Prof. Conduct, rule 3-510 regarding communicating settlement offers to the client.

people outside of the legislative body, which then raises breach of attorney-client communication concerns). For this reason, we caution the use of this technique, and it should be limited to communications that are not highly sensitive regarding the case (e.g., it can be used to update the legislative body on upcoming hearing dates, depositions, other procedural matters, etc.)

IV. When a member of the Legislative Body Is Also a Witness

Members of the City Council are sometimes witnesses who are called to testify at a deposition or during trial. Depending on the nature of the case, the elected official may or may not be allowed to testify. As a general rule, the fact that an elected official will be a witness in the litigation does not, without more, create a conflict that requires the official to be recused from participating in litigation closed sessions and decisions.

A. High Ranking Government Official

Absent extraordinary circumstances, elected officials, agency heads and top-level government executives are not subject to deposition.[19] The rationale for this policy is that such officials must be free to conduct their jobs without the constant interference of the discovery process.[20] The general rule that high-ranking government officials should not normally be required to sit for a deposition is based upon the recognition that:

> [A]n official's time and the exigencies of his everyday business would be severely impeded if every plaintiff filing a complaint against an agency head, in his official capacity, were allowed to take his oral deposition. Such procedure would be contrary to the public interest, plus the fact that ordinarily the head of an agency has little or no knowledge of the facts in the case.[21]

[19] *Westly v. Superior Court* (2004) 125 Cal.App.4th 907, 910-911; *Kyle Engineering Co. v. Kleppe* (9th Cir. 1979) 600 F.2d 226, 231.
[20] *Church of Scientology of Boston v. I.R.S.* (D. Mass. 1990) 138 F.R.D. 9, 12 *citing United States v. Miracle Recreation Equip. Co.* (S.D. Iowa 1987) 118 F.R.D. 100, 104; *Community Federal Savings and Loan Assn. v. Federal Home Loan Bank Bd*. (D.C.D.C. 1983) 96 F.R.D. 619, 621 (deposition of agency official permitted only when official has relevant first-hand knowledge of matters not available from another source); *Capitol Vending Co. v. Baker* (D.D.C. 1964) 36 F.R.D. 45, 46 (oppressive to require government official to submit to interrogation that would disturb government business).
[21] *Union Savings Bank of Patchogue, N.Y. v. Saxon*, 209 F. Supp. 319, 320 (D.D.C. 1962); *see also Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, 1468.

Further, limiting depositions of high-ranking officials prevents a party from seeking discovery from the official without first establishing that the official has personal knowledge of a specific incident or event at issue in the case.

As such, top government officials are only subject to deposition under two conditions: (1) where the government official has "direct personal factual information pertaining to material issues in an action" and (2) "upon a showing that the information to be gained from such a deposition is not available through any other source."[22] If the Councilmember is directly involved in the matter, such as in an employment case in which the Councilmember made an employment decision at issue in the litigation, the Councilmember will normally be subject to deposition.

B. The Deliberative Process Exception

As a general rule, inquiry into a public official's legislative motive is impermissible.[23] This privilege has been coined the "deliberative process" doctrine.[24] The concept of deliberative process is rooted in the constitutional doctrine of separation of powers, which has regularly been addressed by both Federal and California courts.[25] The deliberative-process privilege exists to protect the integrity of the legislative decision-making process. The privilege ensures that any attempt to internalize one's thoughts is mitigated; the privilege is intended to encourage open debate.[26] The deliberative-process privilege "rests on the policy of protecting the decision making processes of government agencies," and "the key question in every case is whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion in the agency and thereby undermine the agency's ability to perform its functions."[27]

The quintessential act that is subject to the deliberative process exception would be a decision to vote on a particular piece of legislation. An elected official cannot be subject to judicial inquiry to probe why he or she voted the way he or she did. That is part of the deliberative process. Whether the deliberative process privilege applies to particular

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[22] *Westly, supra*, 125 Cal.App.4th at 911 *citing to Church of Scientology of Boston, supra*, 138 F.R.D. at 12.
[23] *Soon Hing v. Crowley* (1885) 113 U.S. 703, 710.
[24] *Regents of Univ. of Cal. v. Superior Court* (1999) 20 Cal.4th 509, 540.
[25] *See, United States v. O'Brien* (1968) 391 U.S. 367, 377; *People v. Bigler* (1855) 5 Cal. 23, 35; *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 727.
[26] *Rogers v. Superior Court* (1993) 19 Cal. App.4th 469, 478.
[27] *San Joaquin Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159, 170-71.

decisions is a fact-based inquiry that the Court must evaluate on an individualized basis.[28] "Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence."[29]

C. Preparing the Councilmember to testify

In some matters, the deliberative process privilege may not prevent members of the City Council from having to testify in a lawsuit regarding a decision made by the legislative body. This is common when an employee who serves at the pleasure of the legislative body has filed a lawsuit after being non-renewed or terminated with or without cause. Another example is when the legislative body has approved a contract and then later decides to terminate the contract. Because the legislative body likely made this decision to not renew or to terminate the contract, they are percipient witnesses to the case, and there is a strong argument to be made that the deliberative process privilege does not apply. Additionally, the public agency may need to have the legislators testify to prove that the public agency acted lawfully in that situation.

Like any other witness, Councilmembers must be well-prepared to before they testify. Counsel will need to meet with each Councilmember who is called to testify in order to prepare them for either their deposition or giving testimony at trial. Councilmembers are particularly dangerous witnesses because they often have a vast body of public statements that they have made as part of their election campaigns, City Council meetings, public events, and media inquiries. Those statements often provide a wide variety of potential impeachment material that counsel must anticipate and plan for.

The Councilmember should understand their role as witnesses and they should know the types of questions that may be asked during the deposition or trial. It is extremely important to emphasize that there is a difference between knowledge and recollection. Councilmembers are accustomed to providing answers to the public in many situations and are often uncomfortable stating they do not have knowledge about a topic affecting their agency. They need to feel comfortable with providing a response indicating that they "do not know" if they truly do not know the answer. Witnesses should never guess or speculate. Additionally, Councilmembers may need to be reminded that they are testifying as an individual legislator and not as the "voice" of the City.

Finally, though attorneys will make necessary objections, witnesses should still be cognizant of privileges that may apply. For example, if employee X sues the City, that person is probably not entitled to *other employees' personnel or private information*. Nor

[28] *California First Amendment Coalition v. Superior Court* (1998) 67 Cal. App. 4th 159, 172-173.
[29] *Id.*

are they entitled to information or documentation that may be protected by the attorney-client or work-product privileges. The Brown Act and deliberative process exception will limit what can be said by the legislative body as well.

V. The nature of litigation and communications with the media

It is important to walk members of the legislative body through the nature of litigation early on. Frequently, the City Council is unaware that lawsuits can take quite some time before they actually make it to trial (if they ever get to that point). Depending on which court the plaintiff filed the case in, the actual trial date may be set for a year or more after the filing of the complaint.

A particular concern throughout the life of the litigation will be communications with the media and the public about the litigation. Normally counsel for the agency will not want individual Councilmembers commenting on the litigation. Additionally, lawsuits often involve sensitive or confidential matters, such as private personnel decisions or police officer personnel information, that could lead to further legal issues for the City if those matters are disclosed to the public. But Members of the City Council often feel a strong obligation to communicate with and answer questions from their constituents and the media about litigation against the entity. Although ideally a single point person will be identified for all litigation communications, that approach is not always acceptable to elected officials who have to be able to respond to questions at community and other public events. Thus, agency counsel may need to work with legislators to develop talking points that do not damage the agency's position in the litigation and will help communicate the agency's case theme.

VI. Closing thoughts

Litigation can present a number of issues ranging from potential conflicts of interest to whether the opposing party is entitled to testimony from a member of the City Council. Moreover, lawsuits require, among other things, ongoing communications between counsel, stake-holders, and the City Council. Consequently, remaining mindful of the various laws and legal principles applicable to public entities and elected officials in litigation will help counsel navigate the City Council through trial.

Serially? Seriously. Avoiding the Perils and Pitfalls of Serial Meetings in the Digital Age

Thursday, October 6, 2016 General Session; 2:45 – 4:00 p.m.

Kendra L. Carney, Deputy City Attorney, Tustin
James C. Sanchez, City Attorney, Sacramento

The Brown Act in the Digital Age

In 1952, a *San Francisco Chronicle* 10-part series entitled "Your Secret Government," exposing the secret meetings conducted by local governments was published.[1] In response, legal counsel for the League of California Cities drafted state legislation to create a new state open meeting law.[2] Assembly Member Ralph M. Brown carried the legislation, which Governor Earl Warren signed into law on 1953.[3] The act, which came to be known as the Ralph M. Brown Act, or the Brown Act for short, added Chapter 9 [§§ 54950-58] to the California Government Code.

At the time the Brown Act was created, only about half of U.S. households owned a television set.[4] By 1960, four out of every five U.S. households had a telephone.[5] In the 1970s, technology had evolved to the point that individuals - mostly hobbyists and electronics buffs - could purchase unassembled personal computers, but early computers could not perform many of the useful tasks that today's computers can.[6] In 1984, the percentage of U.S. households with home computers was 8%. In 2013, that figure was 85%, with 74% of all households having Internet access.[7] Although many American households still have desktop computers with wired Internet connections, many others also have laptops, smartphones, tablets, and other devices that connect people to the Internet via wireless modems and fixed wireless Internet networks, often with mobile broadband data plans.[8] In 2015, nearly two-thirds of Americans owned a smartphone[9] and 65% of adults used social networking sites, up from 7% in 2005.[10]

The proliferation of technology in the past three decades has resulted in the growth of individual and household ownership of personal computers, cell phones, and mobile electronic devices. These technologies have increased the speed, volume, and

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[1] LEAGUE OF CALIFORNIA CITIES, OPEN & PUBLIC V: A GUIDE TO THE RALPH M. BROWN ACT 9 (2016), https://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx.

[2] *Id.*

[3] *Id.*

[4] MITCHELL STEPHENS, *History of Television*, GROLIER ENCYCLOPEDIA, https://www.nyu.edu/classes/stephens/History%20of%20Television%20page.htm (last visited June 27, 2016).

[5] U.S. CENSUS, *Telephones*, HISTORICAL CENSUS OF HOUSING TABLES, https://www.census.gov/hhes/www/housing/census/historic/phone.html (last visited June 27, 2016).

[6] HISTORY CHANNEL, INVENTION OF THE PC, http://www.history.com/topics/inventions/invention-of-the-pc (last visited June 27, 2016).

[7] U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE U.S., http://www.census.gov/hhes/computer (last visited June 27, 2016).

[8] *Id.*

[9] Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CTR., Apr. 1, 2015, http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015.

[10] Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CTR., Oct. 8, 2015, http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015.

frequency in which individuals communicate at home, work and school. The power of social networking is such that, the number of worldwide users is expected to reach some 2.5 billion by 2018, around a third of Earth's entire population.[11]

While social media has enabled individuals, groups, businesses, and societies to become globally connected, local agencies must address emerging legal issues related to social media that conflict with the Brown Act. The main problem with the Brown Act is that it was created in an era where communication vehicles were much more limited and it was easier to hide from the public eye.[12] In 1953, the only way the public could practically interact with their elected officials was through these periodic in-person meetings.[13] An article noted how technology has affected how local officials communicate: "Local public officials are often frequent and zealous users of technology and social media. Given the rapid speed with which people can now send e-mails and text messages and post comments online, a casual e-mail conversation between two city council members or an offhand comment on a newspaper website may quickly and inadvertently turn into a 'meeting' under the Brown Act."[14]

I. Legislative Intent of the Ralph M. Brown Act

The legislative intent of the Brown Act was expressly declared in its original statute[15]:

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

[11] *Social Networks – Statistics & Facts*, STATISTA, http://www.statista.com/topics/1164/social-networks (last visited June 27, 2016).
[12] Seth Rosenblatt, *Let's bring the Brown Act into the 21st century*, EDSOURCE, Jan. 21, 2013, https://edsource.org/2013/lets-bring-the-brown-act-into-the-21st-century/25885.
[13] *Id.*
[14] Kara Ueda, *The Brown Act and the Perils of Electronic Communication*, WESTERN CITY, June 2011, http://www.westerncity.com/Western-City/June-2011/The-Brown-Act-and-the-Perils-of-Electronic-Communication.
[15] Ch. 1588, Regular Sess. (Cal. 1983).

"Open meetings in the context of the Brown Act are meant to require that discussions occur in front of a public audience and provide the public with an opportunity to attend and participate."[16] The Brown Act only applies to "local agencies" and "local legislative bodies." A "local agency" is a county, city, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, agency, or local public agency.[17] A "legislative body" includes the governing body, commission, committee, board, or other body of a local agency. Thus, the Brown Act applies to city councils, which are the local governing body of the city. The Brown Act also applies to boards and commissions.

The initial Brown Act included open meeting notification requirements and provisions for closed sessions. The Brown Act has since been expanded and has served as the model for the Bagley-Keene Act for state government.

a. <u>Definition of a "Meeting"</u>

A "meeting" means "any congregation of a majority of the member of a legislative body at the same time and location, including teleconference locations, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body." Cal. Gov't Code § 54952.2 (West 2016). "Deliberation" refers to not only collective decision-making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. *Page v. Mira Costa Cmty. Coll. Dist.*, 180 Cal. App. 4th 471, 502 (2009). The California Supreme Court has stated that deliberative action includes a "collective decision-making process" and "deliberative *gathering*." *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 376 (1993), quoting *Sacramento Newspaper Guild*, 263 Cal. App. 2d, 47, 48 (1968). It also includes "informal sessions at which a legislative body commits itself *collectively* to a particular future decision concerning the public business." *Roberts*, 5 Cal. 4th at 376, quoting *Stockton Newspapers, Inc. v. Redevelopment Agency*, 171 Cal. App. 3d 95,102 (1985). "Action taken" means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance. Cal. Gov't Code § 54952.6 (West 2016).

A local agency employee or official may answer questions or provide information outside of a meeting as long as that person does not communicate the comments or positions of members of the legislative body to other members. Cal. Gov't Code §

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[16] Oona Mallett. *Who's Afraid of the Big, Bad Wolfe? A Call for a Legislative Response to the Judicial Interpretation of the Brown Act*, 39 MCGEORGE L. REV. 1073, 1076 (2008).
[17] CAL. GOV'T CODE § 54951.

54952.2(b)(2) (West 2016). The following types of interaction of a local body do not constitute a "meeting" for the purposes of the Brown Act[18]:

- Individual contacts between a member of a legislative body and another person that does not violate the meeting requirement (e.g., a member contacting a constituent); or
- Attendance by a majority of a local body, provided that a majority does not discuss business among themselves within the body's subject matter jurisdiction at any of the following events:
    - Conferences;
    - Open, publicized meetings to address a community topic;
    - Open and noticed meeting of another local body;
    - Ceremonial or social events; or,
    - Open and noticed meeting of a standing committee of that body.

b. Serial meeting

A majority is prohibited from using "a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action" on business within its subject matter jurisdiction outside of a meeting. Cal. Gov't Code § 54952.2(b)(1) (West 2016). A series of private meetings (known as serial meetings) by which a majority of the members of a legislative body commit to a decision or engage in collective deliberation concerning public business violates the Brown Act's open meeting requirement. *Page*, 180 Cal. App. 4th at 503-04. The California Supreme Court has emphasized that "the Brown Act cannot be avoided by subterfuge; a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement." *Id.* at 504, quoting *Roberts*, *supra*, 5 Cal. 4th at p. 376. The Attorney General has opined that "while the Brown Act makes exceptions for specified matters – such as litigation, employee discipline, and negotiations for real estate transactions – these exceptions must be construed narrowly, in favor of the public's right of access to public information." 94 Cal. Op. Att'y Gen. 82 (2011).

c. Ways to Create a Serial Meeting

In general, a serial meeting occurs through a (1) "hub- spoke" or (2) "daisy-chain."

[18] CAL. GOV'T CODE § 54952.2(c).

i. **Hub-Spoke**

A hub-spoke distribution is a system of connections arranged like a wire wheel. One individual member acts as the hub, or the center of the wheel and feeds and receives information to and from other members. "The hub-spoke version of a meeting occurs when one board member, or representative of a board member, individually contacts other members to discuss an item of business or transaction."[19] "When a person acts as the hub of a wheel (member A) and communicates individually with the various spokes (members B and C), a serial meeting has occurred." [20] This centralized network system allows one person to coordinate messages and create a concerted plan to engage in public business through a series of communications that violates the Brown Act.

ii. Daisy-Chain

"The daisy-chain meeting occurs when one member calls another to discuss business and the second member calls a third to discuss the conversation, and so on."[21] "For example, a chain of communications involving contact from member A to member B who then has communications with member C would constitute a serial meeting in the case of a five-person body."[22] This sequence of relaying information from one person to the next, like a chain link, is similar to the game of "telephone," and violates the Brown Act.

d. Individual Contact between Members of the Public and Members of a Local Legislative Body

Individual contacts or conversations between a member of a legislative body and any other person do not violate the Brown Act. Cal. Gov't Code § 54952.2(c)(1) (West 2016). According to the Attorney General's office, in its 2003 Pamphlet on the Brown Act[23]:

> The purpose of this exception appears to be to protect the constitutional rights of individuals to contact their government representatives regarding issues which concern them. To harmonize this exemption with the serial meeting prohibition, the term "any other person" is construed to mean any other person other than a board member or agency employee. Thus, while this provision exempts from the [Brown] Act's coverage conversations between board members and members of

[19] Mallett, *supra* note 16, at 1076.
[20] CALIFORNIA ATTORNEY GENERAL'S OFFICE, THE BROWN ACT: OPEN MEETINGS FOR LOCAL LEGISLATIVE BODIES 11 (2003).
[21] Mallett, *supra* note 16, at 1076.
[22] California Attorney General's Office, *supra* note 20, at 11.
[23] California Attorney General's Office, *supra* note 20, at 13.

the public, it does not exempt conversations among board members, or between board members and staff in a daisy-chain or hub-spoke manner to develop a collective concurrence.

A Brown Act violation can still occur when a constituent is involved in orchestrating a collective concurrence among a legislative body. If a resident contacts his council member regarding a constituent issue and secures the member's support for a water conservation plan, then there is no Brown Act violation pursuant to Cal. Gov't Code § 54952.2(c)(1). However, if the constituent contacts (assuming a 9 member body) at least five council members and conveys to one member that four other council members are already in support of the measure and states that the Member's support will ensure the proposal succeeds, the interaction is in danger of triggering a "hub-spoke" serial meeting. It is up to the member, who is likely more knowledgeable about the Brown Act, to halt the conversation. While there are obvious practical hurdles to proving such communications have occurred, Councilmembers should be vigilant in discouraging such constituent communications and should remember that it is the Councilmember, not the constituent, who is subject to the law and who will be held accountable for the violation of the law if discovered. And, as discussed below, word can travel fast and wide in the digital world and in the world of a public official, even the perception of misconduct can all too often define reality.

e. Common Ways to Create a Serial Meeting Violation Prior to Social Media

i. In-Person

A series of individual meetings that lead to a collective concurrence violates the Brown Act. State law has abrogated a court decision that held otherwise. In 2006, in *Wolfe v. City of Fremont*, the plaintiff city resident alleged that a city manager violated the Brown Act by meeting individually with a majority of council members on a proposed policy governing police response to residential home invasion alarms to obtain their support and collective concurrence. *Wolfe v. City of Fremont*, 144 Cal. App. 4th 533, 538-39 (2006), *as modified on denial of reh'g* (Nov. 30, 2006), *overturned due to legislative action*. The court affirmed the trial court's decision in favor of the defendant city manager. *Id.* at 547. The court reasoned that serial individual meetings that do not result in a "collective concurrence" do not violate the Brown Act. *Id.*, n. 6. "Accordingly, if city council members discuss a policy in private meetings without asking or telling each other how they will vote, their actions will not violate the Brown Act despite the fact that the deliberations are conducted outside a publicly noticed meeting."[24]

[24] Mallett, *supra* note 16, at 1081.

Subsequent state legislation, SB 1732 (Romero), Chapter 63, Statutes of 2008, abrogated *Wolfe* and disapproved the *Wolfe* court's holding to the extent it construes the prohibition against serial meetings as a "series of individual meetings by members of a body [that] actually result[s] in a collective concurrence rather than also including the process of developing a collective concurrence as a violation.[25]

Therefore, under current state law, a series of individual meeting that lead to a collective concurrence violates the Brown Act.

ii. Telephone

A series of individual telephone conversations that lead to a collective concurrence violates the Brown Act. In *Stockton Newspapers, Inc.*, plaintiff newspaper agency alleged that a local redevelopment agency attorney contacted members of the agency through a series of individual telephone conversations to secure a collective commitment to approve the transfer of real property for a planned waterfront development. *Stockton Newspapers, Inc.*, 171 Cal. App. 3d at 99. The court held that the series of telephone contacts constituted a meeting within and violated the Brown Act. *Id.* at 98-99. The court reasoned that the ease by which personal contact is established by use of the telephone and its common use to conduct business rendered a physical presence of the members of a legislative body to establish an informal meeting unnecessary. *Id.* at 102. If face-to-face contact of the members of a legislative body were necessary for a "meeting," the objective of the open meeting requirement of the Brown Act could all too easily be evaded. *Id.*

Therefore, serial meetings conducted via telephone violate the Brown Act.

iii. E-mails

A series or chain of individual e-mails that lead to a collective concurrence violates the Brown Act. In an Attorney General Opinion, counsel concluded that:

> A majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act even if the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board.

[25] SB 1732, Ch. 63, Reg. Sess. (Cal. 2008).

The opinion noted that the use of e-mails to develop a "collective concurrence" for a future action item includes "any exchange of facts," "substantive discussions 'which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue' regarding an agenda item." 84 Cal. Op. Att'y Gen. 30 (2001). The Attorney General opinion stated that there is "no distinction between e-mails and other forms of communication such as leaving telephone messages or sending letters or memorandums. *Id.* If e-mails are employed to develop a collective concurrence by a majority of board members on an agenda item, they are subject to the prohibition of section 54952.2, subdivision (b) [of the Cal Gov't Code]."*Id.* Due to the ease of forwarding e-mails, a "daisy-chain" serial meeting is likely to occur by e-mail.[26]

Unfortunately, with the reply-all button so readily accessible, creating an "exchange of facts" is all too easy. One way to manage this is to blind copy all recipients other than agency staff on an email. This will prevent elected officials from even accidentally replying to all original recipients and creating a serial communication. While this analysis is hard to reconcile with the reality of e-mail and smart phone communication, this should not discourage staff from conducting business with a council via email. Email is an efficient means to communicate with elected officials regarding factual information relating to agenda items or issues of interest. However, staff and elected officials should be mindful of the content of their responses, careful when replying, and aware of the potential for creating a "daisy-chain" serial meeting.

Therefore, serial meetings conducted via e-mail violate the Brown Act.

iv. Cell Phones & Text Messages

A series of cell phone text messages that lead to a collective concurrence violates the Brown Act. According to a 2013 article, "The use of texting during city council meetings seems to be a growing problem in California, and would seem to undermine both the spirit, if not the law, of the Brown Act and Public Records Act."[27] It seems that e-mail communications that would violate the Brown Act would similarly apply to "text messages between various members of a particular board or council."[28] Text messages sent to council members during an open meeting would qualify as secretive because members of the public are not privy to the content of the text message.[29] If a group text message or a series of text messages include a majority of the board or council members and relate to the deliberations at hand, then the board or council has violated the Brown

[26] Ueda, *supra* note 14.
[27] *A&A: Councilmembers texting during meeting a Brown Act Violation?*, FIRST AMENDMENT COALITION, May 23, 2013, https://firstamendmentcoalition.org/2013/05/aa-councilmembers-texting-during-meeting-a-brown-act-violation.
[28] *Id.*
[29] *Id.*

Act. In addition, since text messages could qualify as "other writings" distributed to at least a majority of the members, the messages would be subject to the California Public Records Act.[30]

It is undetermined whether private communications on personal electronic devices are subject to the California Public Records Act. In *City of San Jose v. Super. Ct. (Smith)*, the plaintiff submitted a public records request for "all voicemails, emails or text messages sent or received on private electronic devices" used by the Mayor, members of the City Council, or their staff. *City of San Jose v. Super. Ct. (Smith)*, 169 Cal. Rptr. 3d 840, 843 (2014). The City had disclosed records sent or received on private electronic devices using these *public officials' City accounts*, but it refused Smith's request for communications sent or received on these individuals' personal electronic devices using their private accounts (e.g., a message sent from a private gmail account using the person's own smartphone or other electronic device).[31] The Court of Appeal reasoned that the writings sought by the plaintiff were not "prepared, owned, used, or retained" by a "local agency" as called for by Cal. Gov't Code section 6252 within the California Public Records Act. *Id.* at 855. The City cannot, for example, "use" or "retain" a text message sent from a council member's smartphone that is not linked to a City server or City account. *Id.* at 850. The case is currently pending in the California Supreme Court, which granted review of the case. We await Supreme Court direction on the important issue.

II. Legal Issues with Digital and Social Media

The Internet and various social media apps and websites provide abundant opportunities for elected officials to post their opinions, thoughts and general comments about city issues. Local journalists and news and community bloggers report on city meetings and events and even provide a running commentary of council and commission meetings as they happen. And most newspapers have websites where members of the public and local officials can — and frequently do — comment on the articles. When these entries or articles are especially timely or controversial, they practically invite comments by interested residents and local officials.

As of the time of preparing this presentation, no court has specifically ruled on the Internet or social media posts in regards to Brown Act requirements. However, the same serial meeting rules that apply to e-mail may likely apply to other digital and social online conduct such as texting, tweeting, liking, swiping, and commenting on stories and third party blogs and posts.

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[30] *Id.*

[31] Mark S. Askanas, *Messages on Government Officials' Personal Devices and Private Accounts Not Subject to California Public Records Act*, JACKSON LEWIS, Mar. 31, 2014, http://www.jacksonlewis.com/resources-publication/messages-government-officials-personal-devices-and-private-accounts-not-subject-california-public-records.

a. Definitions of Digital and Social Media

i. Digital Media

Digital media is defined primarily as digital tools we use to communicate.[32] The term media generally includes all the tools people use to connect and share ideas across distances, across time and to more people at once than would be possible with just a voice and body. Although the broad definition could include interpersonal and non-mass media, like the telephone, digital media specifically relates to the use of computers. The digital media world encompasses computers, the software to run them, and the movement and storage of digital information via networks and storage (hard drives and cloud services).[33]

But digital media is not simply communication through media using digital tools. While the radio streaming online and a reading a newspaper on a tablet qualify as digital media, such a broad definition fails to include two important elements that have been made possible by the combination of computers, software, and networks: interactivity and group forming.[34]

Interactivity is made possible because computer networks allow users to specify where a message is to go, and get a return message right away. This is a feature that is built into the telephone, but most mass media are one-way, or broadcast, media. Digital media networks are a horse of a different color. A user can still send the same message to many people (streaming radio, movies or viewing a web page), but it also creates interaction such as choosing and rating shows or posting pictures and comments on another's social media outlet.[35]

The second unique feature of digital media is that people participating in a network can organize themselves into groups around any sort of topic.[36] This feature has enormous value since it assists individuals to coordinate, communicate, and collaborate on a variety of issues, from organizing a birthday party to a company meeting in multiple cities.

ii. Social Media

The interactivity and group forming capabilities of digital media unleash tremendous communication potential for communities and several potential pitfalls for elected officials under constraints of the Brown Act.

[32] "What is Digital Media?" *Centre For Digital Media.* https://thecdm.ca/program/digital-media
[33] *Id.*
[34] *Id.*
[35] Mullen, Eileen. "What is Digital Content?" *E Content Magazine.* (December 19, 2011) http://www.econtentmag.com/Articles/Resources/Defining-EContent/What-is-Digital-Content-79501.htm
[36] *Id*.

Social media is a commonly used term to describe interaction on websites and apps like Facebook, Twitter, Instagram, Snapchat, and others. Social media are web-based communication tools that enable people to interact by both sharing and consuming various content and participating in social networking. This is a broad definition–but social media is a very broad concept, and the types of communication and networking apps evolves on a daily basis.[37]

Common social media features include but are not limited to: (1) user accounts or the ability to log in and identify oneself for identification in interactions with others; (2) a profile page to represent the individual logged in and generally including a photograph, biographical information, links to websites or recent posts, and other recent activity; (3) connections such as friends, followers, topics identified by hashtags and likes; (4) feeds which provide real-time information about activity; (5) the ability to personalize a user profile and other settings to control the personal information and activity presented to others; (6) notifications to constantly update users regarding specific information or activities of others; (7) the ability to post content such as photographs, videos, or comments; and (8) the opportunity to comment or vote including a "like" button or swipe indicator or a section to post written comments.[38] For example, blogs are one of the oldest forms of social media. The key features that make blogs part of social media are their user accounts, comment sections and networks.

b. Common Types of Digital and Social Media and Potential Ways to Create a Serial Meeting Violation in the Digital Age

i. Blogs and Comments

A blog is a "website that contains online personal reflections, comments, and often hyperlinks provided by the writer."[39] Bloggers have the opportunity to reach hundreds or even thousands of people each and every day. Blogs are used for many purposes. Businesses use blogs to communicate and interact with customers and other stake holders. Newspapers use blogs to offer a new channel for their writers and readers. Individuals create blogs to share their expertise or day to day life with the world.

The common features that differentiate blogs from regular websites area combination of the following:

- content is published in a chronological fashion;
- content is updated regularly;
- readers have the ability to comment;
- other blog authors can interact via trackbacks and pingbacks; and

[37] "Social Media." *WhatIs.com.* http://whatis.techtarget.com/definition/social-media
[38] *Id.*
[39] "Blog." *Merriam-Webster.* (2015) http://www.merriam-webster.com/dictionary/blog?utm_campaign=sd&utm_medium=serp&utm_source=jsonld

- content is syndicated via RSS feeds.[40]

Blog comments allow readers to interact with the blogger as well as other readers. Most blogs allow a space at the end of each post for a blog reader to leave a comment. The blog commenting space is important because it adds an interactive element to the blog.[41] Blog comments are what make a blog interactive and social. The most popular blogs have a very interactive community who voice their opinions on posts frequently.[42] Leaving blog comments allows readers to join in on the conversation about a topic that interests them. People who leave comments on a blog can also leave links to other blogs or websites or their own blogs to further the conversation.

ii. Facebook and what it means to "like" a post

Facebook is a social networking website that allows users to create profiles, upload photos and video, send messages and keep in touch with friends, family, and colleagues. Within each member's personal profile is a wall which is similar to a virtual bulletin board where users can post text, video or photos.[43] An interactive album feature allows the member's contacts, known as "friends" to comment on other user's photos and identify users in the photos. Facebook also allows a user to post status updates like a mini blog. [44]

Unlike a regular blog, Facebook offers users the option to keep all communications visible to everyone, block specific connections, or keep all communications private.[45] Users communicating privately can use an email-like component called messenger.[46]

Clicking "like" below a post on Facebook is an easy way to communicate approval without leaving a comment.[47] In *Bland v. Roberts*, Daniel Carter, an employee of a Virginia sheriff's office, "liked" the standing sheriff's opponent during an election and was subsequently fired (along with several others who had made similar infractions).[48] He sued, asserting "liking" was a First Amendment right.[49] The court was faced with whether the simple act of clicking a button actually showed thought and/or expression on the part of the user.

[40] "5 Major Differences Between A Blog and Website." *My Blogger Tricks.* http://www.mybloggertricks.com/2011/11/5-major-differences-between-blog-and.html
[41] "What are Blog Comments?" *Brick Marketing, Full Service SEO Solutions Firm.* http://www.brickmarketing.com/define-blog-comments.htm
[42] Gunelius, Susan. "What Are Blog Comments?" *About Tech.* http://weblogs.about.com/od/partsofablog/qt/BlogComments.htm
[43] "Facebook." *WhatIs.com*. http://whatis.techtarget.com/definition/Facebook
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] "What Does It Mean To Like Something on Facebook?" *Facebook.* https://www.facebook.com/help/110920455663362
[48] *Bland v. Roberts*, 730 F. 3d 368 (4th Cir. 2013), p. 372.
[49] Id. at 373.

Because this click of a button "literally cause[d] to be published the statement that the user 'likes' something, which is itself a substantial statement",[50] the court found it did. Clicking the "like" button on Facebook is speech. The court stated it was insignificant whether the user had typed the message or clicked the button causing a thumbs-up icon and Facebook generated message to appear.[51] In the digital era of social media, the communicative use of the "like" button on Facebook makes it clear how a rather simple function can take on expressive contours. In the Brown Act context, how a single click on a post about something within an elected official's subject matter jurisdiction could be found to form a part of the deliberative process A single click by "friends" that constitute the majority of the legislative body could easily be found to be a Brown Act violation, and one that is well documented and broadly broadcast at that.

iii. Snapchat

Snapchat is a mobile app that allows users to capture videos and pictures that are deleted after a few seconds.[52] When a user decides to send a message they get to decide whether it will live for one to ten seconds on the recipient's device. Once the time allotted has run, the message is most likely deleted from both devices and even from Snapchat's records.

Snapchat itself does not allow users to save received messages. But most cell phones allow users to capture a photo of the screen at any time, thereby creating a long lasting copy of the message. Additionally, there is a way to restore deleted Snapchat pictures on some devices.[53]

The fleeting life span of Snapchat's temporary communications make it attractive to some senders. However, law enforcement may still access basic information about users via subpoenas and search warrants.[54] Basic information does not include the actual content though, just the fact that a message was sent. But for the Brown Act, the timing of a communication, for instance, between councilmembers during a council meeting, may be sufficient to prove unlawful, private communication. The actual content of the Snapchats are much less likely to be available to law enforcement or the public.[55] Snapchat deletes all other content based information from its servers as soon as both

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[50] Id. at 386.
[51] *Bland v. Roberts*, 730 F. 3d 368.
[52] Magid, Larry. "What is Snapchat and Why Do Kids Love It and Parents Fear It?" *Forbes.* (May 1, 2013) http://www.forbes.com/sites/larrymagid/2013/05/01/what-is-snapchat-and-why-do-kids-love-it-and-parents-fear-it/#5a3fa6112551.
[53] *Id.*
[54] Hoppe, Ian. "Does Law Enforcement Have Access to Your Snapchat Photos? A Simple Guide." *Alabama Media Group.* (November 14, 2014). http://www.al.com/business/index.ssf/2014/11/snapchat_subpeona.html
[55] *Id.*

parties have seen the content.[56] If the receiving party does not open the chat, the content of the message is deleted from their servers 30 days after initially sent.[57]

Snapchat is currently at the forefront of social media evolution and enables users to communicate more like they communicate in real life, with specific people and for specific periods times. Thus, violations of the Brown Act occurring via Snapchat are more akin to speaking directly to a majority of a local governing body in person or over the phone.

iv. Twitter

Twitter is a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages.[58] Users post tweets, which may contain photos, videos, links and up to 140 characters of text.[59] These messages are posted to the user's profile, sent to their followers, and are searchable on twitter search.[60]

A tweet is any message posted to Twitter.[61] The user can select whether tweets are public or private. If tweets are public, anyone who runs a search for a keyword in those tweets may be able to see that message.[62] If a message begins with @username, it is a reply to another user.[63] Direct Messages are private messages sent from one Twitter user to another Twitter user or a group of users; and does not appear in public for anyone else to read.[64] A retweet is a tweet that is forwarded to a user's followers.[65] Basically, a re-posting of another's tweet. Twitter's Retweet feature allows users to quickly share messages with groups.

For example, Council Member A, of a five member city council, tweets a comment about an upcoming agenda item. Council Members B and C, who follow Council Member A on twitter, retweet the first comment in an effort to encourage the public to attend the meeting. Depending on the content of the original tweet, once the tweets were posted, has a majority of the council "met" about the item without proper notice to the public? Arguably they have, even though the messages themselves are public and the public may immediately respond.

v. Instagram

According to Instagram, the picture sharing app "is a fun and quirky way to share your life with friends through a series of pictures. Snap a photo with your mobile phone,

[56] *Id.*
[57] *Id.*
[58] "Getting Started with Twitter." *Twitter*. https://support.twitter.com/articles/215585#
[59] *Id.*
[60] *Id.*
[61] "New User FAQs." *Twitter*. https://support.twitter.com/articles/13920#
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*

then choose a filter to transform the image into a memory to keep around forever."[66] Users capture photos and post them online and have the option to include a message. All photos are public by default, which means they are visible to anyone using Instagram. Users can opt to make their profiles private which allows only user selected followers to see their photos.[67] Similar to the Facebook button, users can tap to "like" or comment on other user's photos.[68]

Since Instagram is all about visual sharing, are these pictures sufficient to be considered protected speech or speech at all? The adage that a picture is worth a thousand words is certainly correct here. A unanimous Supreme Court specifically extended the First Amendment to written, visual and spoken expression posted on the Internet in 1996.[69] Instagram holds the ability to deliver visual expression to many recipients quickly and conveniently and creates a platform for the sharing visual cues with people all over the world. Instagram is currently used for social and political reform efforts.[70] Photos documenting social issues, such as famine in South Sudan, are frequently used to communicate issues and shape social opinions.[71] And, politicians already use Instagram to spread politics to a variety of demographics and communicate with potential voters.[72] Within the Brown Act context, a picture of a project site or a simulation of a project with a brief note conveying support or opposition, liked by a majority of a legislative body considering the project could certainly violate the Brown Act and may also raise ex parte due process concerns.

c. Social Media Legal Issues Relating to the Brown Act

The speed at which a comment or post on a blog, Facebook, Snapchat, Instagram or other online forum or platform can travel, the number of people the content can reach, and the interactivity among users creates potential danger when considering the application of the Brown Act. Online discussion of city business by a quorum of the legislative body arguably becomes a meeting with the mere click of a button. Should a council member post a blog entry about an upcoming agenda item, which is then commented on or retweeted, liked, photographed and posted by other council members, a discussion among the elected officials ensues electronically on the Internet.

Whether this constitutes a Brown Act violation remains to be determined. The fact that the forums described above are public and allow the public to also comment on statements by the councilmembers seems to suggest the council was not holding "secret" meetings. But the discussion of city issues also did not occur pursuant to a noticed

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[66] "FAQ." *Instagram*. https://www.instagram.com/about/faq/
[67] *Id.*
[68] Moreau, Elise. "What is Instagram." *About Tech*. (March 28, 2016). http://webtrends.about.com/od/prof4/a/What-Is-Instagram-Wiki.htm
[69] *Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al.*, 521 U.S. 844 (1997).
[70] Google sites. "Instagram and Nonverbal Communication" https://sites.google.com/site/tomcom125/instagram-as-a-form-of-mass-nonverbal-communication
[71] *Id.*
[72] *Id.*

meeting under the Brown Act.[73] Instead, the council used a series of electronic communications to discuss and deliberate on an item within their subject matter jurisdiction.

And, openness of a conversation to the public is not the critical factor under the Brown Act. This discussion about city business, whether in person with a majority of the council, over the phone, via email or text would not comply with the Brown Act. As discussed above, the main problem faced with the Brown Act and digital and social media is that the Act was drafted when communication was much more limited and it was significantly easier to have private conversations. New technology offers elected officials great communication potential with little effort, but public officials may inadvertently find themselves in the midst of an e-mail conversation or conversation thread with other members of their commission or city council without any such intent, or much thought or effort. While it may seem behind the times or even counter to the concept of enhanced public transparency, such communications nonetheless present significant risks of Brown Act violations.

i. Open Meeting Law Issues

A June 2009 study by the Public Policy Institute of California reveals these interesting trends:

- 76 percent of Californians have access to the Internet;
- Rural Californians are as likely to use the Internet as urban Californians and almost as likely to have access to high speed Internet;
- Latinos are less likely to use information technology than whites, blacks, and Asian Pacific Islanders;
- Those with disabilities also are less likely to use a computer and the Internet;
- Renters are less likely to have access to the Internet and broadband technology than homeowners; and
- Access also varies by income as well.[74]

The potential to inadvertently hold a "meeting" as defined by the Brown Act is startling and should give city attorneys second thought when advising elected officials about their use of social media. As discussed above, when a government body meets, the meeting is to be open to the public, in a public location, with no restrictions on who may attend and where open discussion is allowed. Statutes and rules are designed to ensure that fair notice is given to the public of what will be discussed at a public meeting so the individual citizen can make an informed decision on whether or not he or she wants to

[73] *See also* 84 Ops. Cal. Atty. Gen. 30 (2001) (opinion of the attorney general that the Brown Act does not allow a quorum of a legislative body to discuss agency business over e-mail even if those e-mails are made publicly available and posted to the agency's website).
[74] Baldassare, Mark, Bonner, Dean, Petek, Sonja, and Shrestha, Jul. "Just the Facts: California's Digital Divide." *Public Policy Institute of California Statewide* Surveys. (June 2013). http://www.ppic.org/content/pubs/jtf/JTF_DigitalDivideJTF.pdf

attend that particular meeting. Additionally the rules are to govern conduct so that an orderly meeting can be held.[75]

With so many people having access to digital and social media, it is ironic that elected officials discussing a topic in public on social media may be a violation of the Brown Act. One could argue that social media platforms are significantly more open, transparent and accessible than a council meeting at city hall. Yet, local officials should be wary of commenting on any other official's social media content out of a fear that more than one other official doing so would unintentionally create a "serial" meeting.

However, not all social media discussions are public and not everyone may be heard either. Until the Brown Act catches up with the digital era, it is best to caution elected officials from participating in discussion on social media. Posting their own comment may be safest, but liking, retweeting, and commentating on other official's sites and posts may be a violation of the Brown Act.

ii. First Amendment Issues

In 1996, in the landmark case *Reno v. ACLU*, a unanimous Supreme Court specifically extended the First Amendment to written, visual and spoken expression posted on the Internet. While the First Amendment does not give anyone the right to say whatever they wants, whenever they want, to whomever we want, it similarly does not justify violations of the Brown Act**.**

Local officials typically use social media to post information showing their position and activity for constituents. Social media is used successfully to publicize information about election day polling places and results, as well as important city functions. However, the interactivity provides the public and other members with a vehicle to respond which may be both critical of the official and trigger a "meeting" according to the Brown Act.

There may be technological ways to limit how much conversation occurs on a user's page though. However, it would be ill advised for an elected official to delete any posts other than their own from a site they or the City host.

iii. Public Resources Issues

Another consequence of the mass information accessible as a result of digital and social media is the lack of control an official or agency may have over distribution of information. While more individuals can contribute, elected officials should be mindful of their use of public resources to maintain social media connections. There are existing restrictions on use of public resources for personal and political purposes. Specifically, California law prohibits elected officials from using public resources for personal or

[75] Oona Mallett. *Who's Afraid of the Big, Bad Wolfe? A Call for a Legislative Response to the Judicial Interpretation of the Brown Act*, 39 McGeorge L. Rev. 1073, 1076 (2008).

campaign gains.[76] "Personal purposes" refers to actions for personal enjoyment, private gain or advantage or an outside endeavor not related to business. "Personal purposes" do not include the incidental and minimal use of public resources, such as an occasional telephone call.[77] While an occasional personal message or post may not pose a significant problem, public officials and employees should be cautious about using city digital media to promote campaigns and personal issues.

iv. Public Records Retention

Considering how a local entity can track elected official's and the agency's use of social media for records retention purposes is overwhelming. Yet, more and more agencies are increasingly using social media platforms to engage with and inform the public.[78] This activity may create records that must be captured and managed to comply with records retention requirements.[79] Not only is it difficult to identify what data should be saved, but technology changes so rapidly it makes it difficult to anticipate how to adapt to the next new app. And, comments and conversations on these platforms only enhance the likelihood that a digital Brown Act violation may come back to haunt an elected official when captured and disclosed in a PRA request.

d. Advising Agency Officials and Staff to Best Avoid Creating Serial Meetings

A review of the above discussion shows generally that human interaction via digital and social media does not fit neatly within the confines of the Brown Act. It may seem that clicking a key or tapping a button does not register the same trace of expression and communication as does the written or spoken word. Instead, the reach of communication through social media and the ability to converse in seconds, in public, from anywhere exposes the limitations of the Act. Since even clicking "like" on Facebook is considered a statement of expression, officials must think twice before participating in social media platforms.

[76] *See Stanson v. Mott*, 17 Cal. 3d 206, 210-11(referring to expenditure of staff "time and state resources" to promote passage of bond act); *Vargas v. City of Salinas*, 46 Cal. 4th 1, 31-32 (2009). *See also People v. Battin*, 77 Cal. App. 3d 635, 650 (4th Dist. 1978) (county supervisor's diversion of county staff time for improper political purposes constituted criminal misuse of public monies under Penal Code section 424), *cert. denied*, 439 U.S. 862 (1978), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983); Cal. Gov't Code § 8314.
[6] Cal. Gov't Code § 8314(a).
[77] Cal. Gov't Code § 8314(b)(1).
[78] National Archives and Records Administration. *White Paper on Best Practices for the Capture of Social Media Records.* (May 2013). http://www.archives.gov/records-mgmt/resources/socialmediacapture.pdf
[79] *Id.*

Given that the Brown Act and the courts have barely dipped into the technology pool by addressing emails, it is best for public officials to take a conservative approach with other social media. While a social media presence is certainly acceptable and may even be expected for a successful campaign, officials should avoid commenting, liking, tweeting, retweeting, or posting regarding topics within the jurisdiction of the governing body on which they sit. Posting general city information without personal comment or opinion is acceptable as it is likely posted publicly elsewhere. Posting a picture of the official at a city event without comment on any other city affairs is a safe bet too. But a seemingly innocent engagement in public or private social media discussion online may find the official charged with a Brown Act violation.

And as always, it is prudent for everyone to keep in mind that anything posted via the Internet may someday be found. From picture evidence of questionable behavior at best to interesting internet dating profiles, and angry retorts to an off color joke, everything should be considered accessible. Best practices for posting online should prioritize respect, honesty, clarity, and especially for elected officials, transparency. Importantly, there are methods to engage in social media without triggering Brown Act concerns. Until the law is able to converge with technology, public officials should be mindful of accidentally holding an online meeting.

Have You Noticed? Noticing and Agenda Descriptions Under the Brown Act

Thursday, October 6, 2016 General Session; 2:45 – 4:00 p.m.

Martin D. Koczanowicz, City Attorney, Grover Beach, King City and Tulare

“HAVE YOU NOTICED?”

NOTICING & AGENDA REQUIREMENTS UNDER THE BROWN ACT

League of California Cities
2016 Fall City Attorney Conference

Presented by the Martin D. Koczanowicz

Koczanowicz & Hale

HAVE YOU NOTICED?

Notice and Agenda Requirements

□ WHY DO WE NEED TO NOTICE

Under the California Gov't Code[1] §§ 54950-54963 (Ralph M. Brown Act), meetings of public bodies must be open and public, decisions must be made in a public forum, and action taken in violation of open meeting laws may be voided. In addition, each meeting of a public body must be properly noticed and each agenda must contain sufficient information to inform the public of what actions will be taken by that legislative body.

The legislative intent in adoption of the Brown Act was well expressed in § 54950:

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Consequently, as a general rule, no action can be taken by the governing body on an item or a subject matter that is not properly noticed on a timely posted agenda.

□ WHO'S COVERED BY THE NOTICING REQUIREMENTS

For our purposes, the noticing requirements apply to the City Councils and any board, commission, committee, task force or other advisory body created by the Council, whether permanent or temporary, decision making or advisory (§ 54952(b)). In addition, noticing requirements pertain to any standing committee of a covered board, regardless of number of members (§ 54952(b)) as well as governing bodies of non-profit corporations formed by a public agency or which includes a member of the City Council and received public money from that Council (§ 54952 (c)). Only advisory committees, composed solely of the members of the legislative body that are less than quorum and no continuing subject matter jurisdiction or fixed meeting schedule are exempt from the Brown Act (§ 54952(b)).

For a City Attorney, that means that the same level of attention given to the agenda posting, content and adherence to the Brown Act for the City Council meetings should be given to the Planning Commission meetings (far greater exposure to a challenge of a decision than City

[1] All Code sections referenced refer to California Government Code unless otherwise noted.

Council) and all of the "minor" advisory commissions and committees that many cities have installed to assist Council on various issues.

As a practical matter, budgetary constraints for contract City Attorneys and time and staffing for in-house attorneys, at times may preclude such detailed review, or attendance at the actual meetings. It is important to provide good training on the noticing requirements and agenda content to attending staff on regular basis and to the "legislative bodies" annually.

□ AGENDA REQUIREMENTS FOR REGULAR MEETINGS

Each legislative body (excluding advisory or standing committees) shall by some formal method (resolution, Ordinance, by-laws etc.) specify the date, time and place for its regular meetings (§ 54954(a)). In many jurisdictions the city council adopts a Resolution annually, setting the schedule for the regular meetings for the upcoming year. Some jurisdictions have certain set defaults for their regular meetings. For example, if a city council meets on Mondays, they can choose to skip the meeting on Mondays that are holidays, or to automatically meet on the Tuesday that follows. These "default rules" again should be established by formal action of the legislative body and be encompassed in the annually adopted schedule.

Every regular meeting of a legislative body of a local agency must be properly noticed by posting of an agenda that advises the public of the meeting and the matters or issues that the legislative body will be discussing and /or deliberating as action items. Some of the basic requirements are set out below:

- Agendas must be posted **at least** 72 hours before the regular meeting in a set location(s) freely accessible to the members of the public. (§§ 54954(a), 54954.2(a). There is no prohibition against posting of the agenda and distributing and making agenda packets available to the legislative body and the public earlier than three days before the meeting. In some instances, (annual budget document, large environmental impact report, disposition or development agreement) early distribution is preferred to provide sufficient time for review.

- Mail notice at least three (3) days before regular meeting to those who request it and provide the agenda packet at the same time as it is distributed to a majority of the legislative body. If requested, the agenda and documents in the agenda packet shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. (§ 54954.1);

- In the rare instance that a member of the legislative body is participating by phone, skype or other electronic means, the agenda must also be posted at the location from which the call is made, and the public must have access to that location (§54953(b)(1)).

- If a City maintains a website, the agenda must be posted on that website §54954.2(a)(1). The requirement is excused in the event that the website is down temporarily for maintenance and/or repairs.

□ CONTENT REQUIREMENTS OF AGENDA

The Agenda must include the time date and location of the meeting. In addition, the following apply:

- The agenda should contain a brief (20 words or less) general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. (§54954.2) The purpose of the brief general description is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor, attend or participate in the meeting of the body.

- Agenda description must not be misleading. The brief description of an item that the Council will consider or deliberate, cannot be ambiguous or misstate the item under discussion. An item on the agenda describing consideration of contract for Interim Finance Director, was not sufficient notice of actually considering the termination of the sitting Finance Director (*Moreno v. City of King* (2005) 127 Cal App 4th 17, 25 Cal Rptr 3d 29.)

- Agendas must have enough information to enable members of the public to determine the general nature of subject matter of each agenda item to be discussed. A description of each item generally need not exceed 20 words, although the description must be sufficient to provide interested persons with an understanding of the subject matter which will be considered. *(Carlson v. Paradise Unified School Dist*. (1971) 18 Cal.App.3d 196, 200).

- Agenda and any published notice must also include any recommendations forwarded from Planning Commission (or potentially other advisory bodies) to the City Council as it related to approval of development agreements and land use requirements. (*Rialto Citizens for Responsible Growth vs. City of Rialto* (4th Dist. 2012) 208 Cal App 4th 899)

- In any situation where an environmental determination will be considered and acted on, as part of the action taken by the Council or Planning Commission, that actual action needs to be specifically and separately identified on the agenda. So for example an agenda item which states: "Consideration and approval of Conditional Use Permit for Sports Arena and Football stadium and related approvals" would not be in compliance with noticing requirements if "the related approvals" included an action on an environmental determination or document. The agenda should also state: "and consideration of a Mitigated Negative Declaration related to the project". (See also *San Joaquin Raptor Rescue Center v. County of Merced, et al.* (5th Dist. 2013) 216 Cal.App.4th 1167*)*

□ OTHER RELATED NOTICE REQUIREMENTS

Though not directly on point for agenda noticing requirements under the Brown Act, other noticing obligations exist for various subjects or issues deliberated by City Councils. With regard to most land use entitlements or zoning decisions, 10-day noticing requirements are covered in §§65090-65096. For adoption of development impact fees 14-day noticing requirement is mandated by §66016. Lastly separate 45-day noticing requirements must be observed for hearings under Proposition 218.

□ NO ACTION CAN BE TAKEN ON ITEMS THAT ARE NOT NOTICED

The Board cannot discuss or take action on any item that is not on the agenda. Council can respond or ask staff to briefly respond to questions from the public or other limited routine comments, but no action can be taken on any of those items. Council can however direct staff to agendize any of such item for a discussion at a future meeting.

Exceptions:

- Council, after publicly identifying an item during the meeting, can take action on an item that was not agendized if such item was listed on an agenda for a meeting that took place less than five days before and was continued to the meeting at which the action is being taken (§54954.2(b)(3)).
- Council can, in an emergency situation (an emergency situation exists if the legislative body determines a work stoppage, crippling disaster, or other activity severely impairs public health, safety or both), deliberate and take action on an item that was not an agenda § 54954.2(b)(1).
- Council can take action on an item not on the agenda if Council determines that there exists an immediate need to take action and the need to take action was not known when the agenda was posted. § 54954.2(b)(2). This exception is used most frequently to "add" an item to the agenda during the meeting. Staff must be able to provide the Council, with the required information to make the necessary findings. Usually the item ends up being considered as there exists a deadline for the Council's action that may not have been known at the time of agenda posting. Financial benefit to the City constitutes a need (i.e. grant application deadline or opportunity to realize some savings through an agreement with another jurisdiction or group of jurisdictions which came to staff's attention). Also often approval of a letter in support or opposition that needs to be filed by a certain date causes this section to be invoked. The supporting facts need to be clearly enumerated and circumstances identified, before Council votes to place the item on the agenda. Also the reason why the item cannot wait till the next regular meeting should be clearly stated.

Note that a separate "supermajority" vote is needed to consider hearing the item. Once that vote is taken in the affirmative, the item is then placed on the agenda and considered as a separate item with a normal voting process applicable to such items.

Caution should be given to prevent abuse of this process. There may be times when staff wishes to accommodate an applicant in a last minute addition, or to justify a delay in preparation of a staff report. Generally, these circumstances would not qualify for this exception. The use of this process should be limited to truly time urgent circumstances which cannot wait till the next meeting and which arose since the posting of the agenda.

□ NOTICE REQUIREMENTS FOR SPECIAL MEETINGS

- Written notice must be send to each member of the legislative body and to each local newspaper of general circulation that has requested such notice in writing. This notice must be delivered by personal delivery or any other means that ensures receipt, at least 24 hours before the time of the meeting. (§ 54956; 53 Ops. Cal.Atty.Gen. 245, 246 (1970)). This usually also includes an agenda for that meeting.

- The notice must contain a brief general description of each item to be discussed or addressed, including closed session items.

- The notice must include the time and location of the meeting. A special meeting and all proceedings thereof are void where notice thereof is not given and one board member is absent. *Orange v. Clement* (1919, Cal App) 41 Cal App 497.

- Note that in a general law city no Ordinances may be adopted at a special meeting (§36934).

□ NOTICE REQUIREMENTS FOR EMERGENCY MEETINGS

- Deliver notice of emergency meetings at least one (1) hour in advance to those who request it. (§§ 54956, 54956.5)

- Notify the media of special or emergency meetings, if requested one hour prior to the meeting (§ § 54956, 54956.5(b)(2)).

- The minutes, the list of people notified about the emergency meeting, a copy of a roll call vote and any action taken during the meeting, shall be posted in a public place as soon as possible after the meeting and remain posted for at least 10-day (§54956.5(e)).

□ ADJOURNMENT AND CONTINUANCES

Regular and special meetings may be adjourned to a future date. (§ 54955). If the subsequent meeting is conducted within five (5) days of the original meeting, matters properly placed on the agenda for the original meeting may be considered at the subsequent meeting. (§ 54954.2(b)(3).) If the subsequent meeting is more than five (5) days from the original meeting, a new agenda must be prepared and posted pursuant to § 54954.2. Hearings continued pursuant to § 54955.1 are subject to the same procedure.

The process has been recognized and supported by the Courts. Council has the ability to continue the public comment on an item that is being continued to another meeting. § 54955.1 allows for any hearing by a legislative body of a local agency to be continued in the manner set forth in § 54955 of the Act, and a library commission and its commissioners did not violate § 54954.3(a) of the Act by allowing public comment only at a continued hearing on the same agenda. *Chaffee v. San Francisco Library Com*. (2004) 115 Cal App 4th 461, 9 Cal Rptr 3d 336

□ NOTICING FOR MEETINGS VIA TELECONFERENCES

There are those rare occasions when a Council Member is away from the city but has a specific need or desire to participate in the Council meeting. Such participation can legally occur by electronic means. That could be telephone, SKYPE or video conferencing. § 54953(b)(1) permits the use of teleconferencing. Noticing a meeting which includes teleconferencing must comply with the following:

- Agenda posted no later than 24 hours prior to the special meeting and 72 hours prior to the regular meeting and posted **at all** teleconference location.
- Each teleconference location must be identified in the agenda.
- Each teleconference location must be open and accessible to the public.
- Notice must include the time and location of the meeting and identify the teleconference location(s).
- Must contain a brief description of each item to be discussed or addressed, including closed-session items.
- Must have a roll call vote on all items. (departure from normal meeting procedures, where only clarity on who voted in what manner is required)
- Quorum of the Council must participate in the usual meeting location within the Council's boundaries.

□ CLOSED SESSIONS

Under the Brown Act, closed sessions must be expressly authorized by explicit statutory provisions. Prior to the enactment of § 54962 which prohibits any closed session that is not statutorily authorized by the Code, the courts had recognized impliedly authorized justifications for closed sessions. (*Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813; *Sacramento Newspaper Guild v. Sacramento County Bd. Of Suprs.* (1968) 263 Cal.App.2d 41.) That legislation made it clear that closed sessions cannot be conducted unless

they are expressly authorized by statute. The attorney general has stated, “if a specific statutory exception authorizing a closed session cannot be found, the matter must be conducted in public regardless of its sensitivity.” *Rowen v. Santa Clara Unified School District* (1981) 121 Cal.App.3d 231, 234; 68 Ops. Cal.Atty.Gen. 34, 41-42 (1985).

Items to be discussed in closed sessions must be included on the agenda and must be announced before going into closed session.

□ NOTICING ITEMS FOR CLOSED SESSIONS

There are several statutorily permitted subjects which can be presented to the Council in Closed Session. The most common include: Tort Claims (§54956.95), Personnel (§ 54957(b)(1)), Pending/Potential Litigation (§ 54956.9), Labor Negotiations (§ 54957.6), Property Negotiations (§ 54956.8).

Though there are no mandatory descriptions or specific language for noticing closed sessions, Code provides for “safe harbor” provisions for each of the categories which contain the necessary information. They are set out in detail in § 54954.5. Use of these “safe harbor” descriptions will generally safeguard the Council Members and the city from potential noticing violations by providing substantial compliance with the Code.

□ EMPLOYEE APPOINTMENT, DISCIPLINE AND EVALUATIONS

Council may meet in closed session to discuss the appointment, employment, performance, evaluation, discipline, complaints about or dismissal of an existing or potential employee (§ 54957(b)(1)). Instead of closed session, the employee may request a hearing in a public meeting on any charges or complaints against the employee, and must be noticed in writing 24 hours prior to the closed session of that option and that specific charges or complaints will be discussed by the Council.

Where plaintiff, former librarian of defendant community college, contended that defendant's Board of Trustees violated the Brown Act by taking action regarding plaintiff's employment in closed session rather than an open public meeting, plaintiff's argument that the Board mischaracterized the agenda item pursuant to which her employment was reviewed, thereby violating § 54954.5, which sets forth the posting requirements for describing closed session items was rejected by the Court. Plaintiff's assertion that the "public employee performance evaluation" agenda classification is inappropriate "for consideration of matters constituting charges and complaints against the employee and for which discipline and/or dismissal is contemplated," and that the appropriate agenda item was "Public employee discipline/dismissal/release was incorrect. § 54960.1 denies relief if the agenda item was in "substantial compliance" with §§ 54954.2 and 54954.5. (Gov C § 54960.1(d)(1)), and here, the Board was found to have been in substantial compliance with those statutes. *Furtado v. Sierra Community College* (1998, Cal App 3d Dist) 68 Cal App 4th 876. But also see *Moreno vs. City of King* pg.4 above for different facts resulting in a different ruling by the Court.

With regard to employment vs. appointment of an employee (may include contractors serving in the role of an employee, like a contract City Attorney) until an actual appointment is being deliberated, the noticing should reference “Public Employee Employment; Position: City Attorney”.

Please also note that §54957(b)(4) precludes discussion or action on proposed compensation, other than a reduction in pay which is a consequence of a disciplinary process. Consequently, city manager and/or city attorney contracts which include compensation need to be approved in open session and be agendized as a separate item.

□ PENDING/POTENTIAL LITIGATION

Closed session pertaining to pending or potential litigation is permitted only if open discussion "would prejudice the position of the agency in the litigation." The litigation must be named on the posted agenda or announced in open session unless doing so would jeopardize the city’s ability to service process on an unserved party or conclude existing settlement negotiations to its advantage. (§ 54956.9). As a practical matter it is inconceivable how an attorney would advise the client (City Council) regarding matter in litigation in a public meeting, without waiving the Attorney/Client communication privilege, thus prejudicing client’s position in litigation. In my experience, other than a brief report of information that is already in the public domain, (appeal being filed, case being dismissed, date of an important hearing) all discussions pertaining to litigation are conducted in closed session.

To qualify for closed session regarding litigation, the subject must pertain to:

- Existing litigation (§ 54956.9(a));
- Threatened or anticipated litigation (§s 54956.9(d)(1), (d)(2));or
- Initiation of litigation (§ 54956.9(c)).

Note that in the instance of threatened or anticipated litigation Council needs to identify the facts and circumstances which give rise to the anticipated litigation unless the potential plaintiff or defendant is unaware of those facts or circumstances and disclosure would prejudice city’s position. If the city receives a written claim or threat of litigation the City has an obligation to make the writing available for public inspection upon demand and/or state the circumstances giving rise to the potential litigation.

The purpose of § 54956.9 is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach non-litigation oriented policy decisions.” *Trancas Property Owners Assn. v. City of Malibu*, 138 Cal. App. 4th 172, 184-84, 41 Cal. Rptr. 3d 200 "Pending litigation" also includes taking action upon the settlement of a lawsuit. 75 Ops. Cal. Att'y Gen. 14 (1992). Advisory committees may also meet with legal counsel in a closed session to discuss pending litigation. 67 Ops. Cal. Att'y Gen. 111 (1984), though the scope of such meeting would be very narrow and limited to issues which would be under the advisory’s body purview.

Closed session item would not include meeting with an adversary and his or her counsel to settle potential litigation. *Page v. Miracosta Community College Dist.*, (2009)180 Cal. App. 4th 471. Nor would legal counsel include in a closed session a mediator with whom members of a legislative body conferred with during a mediation with an adversary to settle potential litigation. *Id.* at 504. Neither of those scenarios would fit into the overall exception for litigation closed session being allowed "only if discussion in public would prejudice the city's position in the litigation".

During the public meeting in which the closed session is held, the legislative body shall report any action taken in closed session regarding approval given to its legal counsel to initiate, intervene or defend a lawsuit, or approval to settle pending litigation. § 54957.1(a)(2) and (a)(3). The body must report the adverse parties and the substance of the litigation. However, in the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendant or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, defendants and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless disclosure would jeopardize service of process on a party or affect settlement negotiations. § 54957.1(a)(2).

□ PERMISSIBLE SCOPE OF DISCUSSION IN REAL ESTATE NEGOTIATIONS

Closed Session is permitted with the Council to discuss, with an agency's identified bargaining agent, the negotiating strategy, price or payment terms. The parcel, negotiators and the prospective seller or purchaser must be on the agenda. (§ 54956.8) Final price and payment terms must be disclosed when the actual lease or contract is brought for approval. Reportable action is required when Council's action in closed session renders the agreement completed (§54957.1(a)(1)(A).

□ PERMISSIBLE SCOPE OF DISCUSSION IN LABOR NEGOTIATIONS

Council can meet in closed session with its negotiators to receive updates and instruct the agency's identified negotiator on negotiating strategy, compensation issues and any other matter within the statutorily provided scope of representation (§ 54957.6). Again agenda needs to identify the negotiating team and the bargaining group which is being discussed.

□ HOW TO FIX NOTICING PROBLEMS IF IMPROPERLY NOTICED

§54960.1 provides for the process of challenging and curing any violations of the open meeting laws. City has 30 days from the receipt of the written demand to cure, to correct the challenged action and advise the requesting party of the correction. The most common way to correct the error or mistake in noticing process is to void the challenged action and to re-notice and rehear the item. Code provides for several exceptions and other detailed processes and should be carefully consulted in the event your agency receives a written demand for correction or similar notice of alleged violation of the Brown Act. Time is of the essence in dealing with such

corrections and deadlines need to be strictly followed to preserve your city's ability to effectively defend or respond to such notice.

□ CONCLUSION

Generally speaking, it is better to be "over-noticing" than "under-noticing" the actions and deliberations of the governing body. In my experience the issues arise when the client tries to straddle the line in order to accomplish some "needed" outcome or due to time crunches some last minute item is added to the agenda.

Even though the corrective process is not complicated or burdensome if an error is made, the negative publicity surrounding the Council decision which was made "in violation of open meeting laws" and had to be voided and redone, will have a lasting effect which is likely to be brought up again and again by the vocal minority during public comment. It is best to err on the side of conservative advice on these items and keep everyone "on notice"!

Notes:

Let's *Ex Parte*! The Limits and Disclosure Requirements of *Ex Parte* Contacts in the Public Hearing Context

Thursday, October 6, 2016 General Session; 2:45 – 4:00 p.m.

Ariel Pierre Calonne, City Attorney, Santa Barbara

Let's Ex Parte! The Limits and Disclosure Requirements of Ex Parte Communications in the Public Hearing Context

Ariel Pierre Calonne
City Attorney
City of Santa Barbara

League of California Cities
Annual Conference
October 2016 Long Beach

This paper examines California law governing whether, when, and how city decisionmakers must refrain from or disclose *ex parte* communications.

INTRODUCTION

Ex parte is a Latin phrase that literally means "from one party."[1] Generally speaking, an *ex parte* communication is any material or substantive oral or written communication with a decisionmaker that is relevant to the merits of an adjudicatory proceeding, and which takes place outside of a noticed proceeding open to all parties to the matter.[2]

Ex parte communications to a judicial officer or quasi-judicial decisionmaker raise a number of serious legal concerns. As a result, *ex parte* communications are restricted, and even prohibited, in some circumstances.

The doctrinal foundation for restricting *ex* parte communications rests upon fundamental fairness concerns flowing from the Magna Carta,[3] English common law[4], American common law requiring "fair procedures,"[5] and the Fifth and Fourteenth Amendments which provide that no person shall be "deprived of life,

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[1] In the legal context, *ex parte* means "on one side only; by or for one party; done for, in behalf of, or on the application of one party only." (Black's Law Dict. (6th ed. 1990) p. 76, col. 1.)

[2] See, e.g., Gov. Code, § 11430.10 [California Administrative Procedures Act]; 12 C.F.R. § 263.9 [Federal Reserve Uniform Rules of Practice and Procedure].

[3] *Duncan v. State of La.* (1968) 391 U.S. 145, 169 (Conc. Opn. Of Black, J.) ["'The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."'"

[4] ". . . in determining what due process of law is, under the Fifth or Fourteenth Amendment, the court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Tumey v. State of Ohio* (1927) 273 U.S. 510, 523.

[5] *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 555

liberty, or property, without due process of law."[6] And, "A fair trial in a fair tribunal is a basic requirement of due process."[7] The law relating to *ex parte* communications has grown from concerns about fundamental fairness.

Two precepts underlie *ex parte* contact fairness and due process considerations: The need for judicial impartiality and the truth-seeking benefits of an adversarial system.

Judicial impartiality is a cornerstone of American justice. In *Tumey v. State of Ohio* (1927) 273 U.S. 510, the United States Supreme Court had no trouble finding a due process violation when an Ohio criminal statute authorized a mayor to hear certain cases in which he or she had a direct pecuniary interest due to a local ordinance that compensated the mayor with fees collected from convicted defendants. While there was no evidence of actual bias in *Tumey*, the Court concluded that any ". . . procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict . . ." denies due process because the judge's impartiality is put into question.[8] Certainly *ex parte* contacts present a "possible temptation" that might impugn a decisionmaker's impartiality.[9]

Adversarial systems work to ensure discovery of the truth. The United States Supreme Court points out that: "[t]he system assumes that adversarial testing will

[6] U.S. Const., 5th and 14th Amends.; see also Cal. Const., art. I, § 7 [state clause's prescriptions as substantially overlapping those of the federal Constitution] *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212; Code Civ. Proc., § 1094.5 [*Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 273.

[7] *In re Murchison* (1955) 349 U.S. 133, 136; *Withrow v. Larkin* (1975) 421 U.S. 35, 46; *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1581. In this context, we are referring to procedural due process. (See *Mathews v. Eldridge* (1976) 424 U.S. 319.

[8] *Id.*, at p. 532.

[9] See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 5; "One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisors in private."

ultimately advance the public interest in truth and fairness."[10] Because *ex parte* communications are not recorded, they cannot be rebutted by the non-present party or given adequate appellate review.[11] The Third Circuit Court of Appeals applied this principle to conclude that:

> ". . . *ex parte* communications run contrary to our adversarial trial system. The adversary process plays an indispensable role in our system of justice because a debate between adversaries is often essential to the truth-seeking function of trials."[12]

In California, earlier cases echoed the adversarial truth-seeking interest behind controlling *ex parte* communications in administrative proceedings:

> "Administrative tribunals exercising quasi judicial powers which are required to make a determination after a hearing cannot act on their own information. Nothing may be treated as evidence which has not been introduced as such, inasmuch as a hearing requires that the party be apprised of the evidence against him in order that he may refute, test and explain it."[13]

The more modern California view does not compel a purely adversarial model for administrative decision making, and hence casts some doubt on the continuing value of the "truth-seeking" rationale for controlling *ex parte* communications:

> ". . . these decisions and numerous others stand for the proposition that the pure adversary model is not entitled to constitutionally enshrined exclusivity as the means for resolving disputes in '[t]he incredible variety of administrative mechanisms [utilized] in this country....' The mere fact that the decision-maker or its staff is a more active participant in the factfinding process—similar to the

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[10] *Polk County v. Dodson* (1981) 454 U.S. 312, 318.

[11] *In re Kensington Intern. Ltd.* (3d Cir. 2004) 368 F.3d 289, 310.

[12] *Ibid.*

[13] *La Prade v. Department of Water and Power of City of Los Angeles* (1945) 27 Cal.2d 47, 51–52.

> judge in European civil law systems—will not render an administrative procedure unconstitutional."[14]

Indeed, legislative bodies now have considerable constitutional leeway to craft alternative decisionmaking systems which may not be adversarial:

> """[l]egislatures and agencies have significant comparative advantages over courts in identifying and measuring the many costs and benefits of alternative decisionmaking procedures. Thus, while it is imperative that courts retain the power to compel agencies to use decisionmaking procedures that provide a constitutionally adequate level of protection ..., judges should be cautious in exercising that power. In the vast bulk of circumstances, the procedures chosen by the legislature or by the agency are likely to be based on application of a *Mathews*-type cost-benefit test by an institution positioned better than a court to identify and quantify social costs and benefits."""[15]

So, while some courts focus their *ex parte* due process concerns on the need for confrontation and rebuttal by the adverse parties, judicial impartiality is a more persistent rationale, particularly in non-adversarial systems.

Finally, the California Supreme Court recently summarized the basic requirements of due process in California administrative decisionmaking, again focusing upon the need for impartiality:

> "'The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." 'The opportunity to be heard must be afforded 'at a meaningful time and in a meaningful manner.' To ensure that the opportunity is meaningful, the United States Supreme Court and this court have identified some aspects of due

[14] *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1581 [citing *Withrow v. Larkin* (1975) 421 U.S. 35].

[15] *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 230; quoting *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 288 and referring to the seminal procedural due process analysis in *Mathews v. Eldridge* (1976) 424 U.S. 319, 348.

> process as irreducible minimums. For example, whenever 'due process requires a hearing, the adjudicator must be impartial.'
>
> Beyond these broad outlines, however, the precise dictates of due process are flexible and vary according to context."[16]

In sum, the simple human need for fairness, reflected in western jurisprudence since at least 1215 when it was pronounced in the *Magna Carta*, underlies the legal concerns about *ex parte* communications during administrative decisionmaking processes. Fairness certainly requires an impartial decisionmaker, and often the appearance of impartiality can become as important a factor in the legal review of fairness as actual impartiality. Fairness may also require the opportunity for adversarial examination of evidence in some, if not most, administrative decisionmaking systems.

CALIFORNIA LAW ON EX PARTE COMMUNICATIONS

In 1945, the California Supreme Court determined that due process does not allow using evidence gathered *ex parte* in an administrative hearing. In *La Prade v. Department of Water and Power of City of Los Angeles* (1945) 27 Cal.2d 47, the Court considered a civil service matter in which an employee was discharged upon the basis of an investigative report which was offered into evidence after the hearing. The divided 4-3 Court held:

> "Administrative tribunals exercising quasi judicial powers which are required to make a determination after a hearing cannot act on their own information. Nothing may be treated as evidence which has not been introduced as such, inasmuch as a hearing requires that the party be apprised of the evidence against him in order that he may refute, test and explain it. And the action of such a tribunal based upon the report of an investigator, assuming it is competent evidence, when forming the basis for the tribunal's determination, is a denial of a hearing, unless it is introduced into evidence and the accused is given an opportunity to cross-examine the maker thereof and refute it."[17] [18]

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[16] *Id., at p.* 212.

[17] *Id.*, at pp. 51–52; *La Prade* relied heavily upon *Morgan v. U.S.* (1936) 298 U.S. 468, 480 which discussed a federal livestock ratemaking statute: "That duty is

By 1950, a unanimous California Supreme Court squarely addressed the problem of individual *ex parte* contacts by decisionmakers. In *English v. City of Long Beach* (1950) 35 Cal.2d 155, the Court considered a Long Beach police officer who had been terminated due to a disability. Members of the civil service board:

> ". . . took evidence outside the hearing and outside the presence of English or his attorney. Some of them talked to one of the examining doctors, and one member questioned his personal physician concerning the relation of English's asserted disability to the performance of the duties of his position. The information thus received was imparted to other board members, and was considered and relied upon by them in arriving at their decision."[19]

The Court noted that: "[t]he principal question is whether English was deprived of a fair trial."[20] And:

> "The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing." . . .
>
> A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its termination upon information received without the knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a

widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such."

[18] Despite *Morgan* and its progeny, Congress did not restrict *ex parte* administrative communications in formal rulemaking and administrative adjudications until 1976. (*Due Process and Ex Parte Contacts in Informal Rulemaking* (1979) 89 Yale L.J. 194, 197.)
[19] *Id.*, at p. 157.
[20] *Id.*, at p. 158.

> hearing necessarily contemplates a decision in light of the evidence there introduced."[21]

Again, in a case involving a city manager's decision to demote a city employee based in part upon evidence received *ex parte*, the Court of Appeal emphasized that:

> "The fact that Personnel Director Fong may have presented the City Manager with substantial evidence supporting his decision not to follow the recommendations of the Commission did not cure the error caused by the Commission's failure to transmit a statement of facts to the City Manager. Rather it led to further abuse of appellant's right to a fair hearing. A decision maker such as the City Manager, who is required by city ordinance to make a determination after a requested hearing cannot act upon his own information, and nothing can be considered as evidence that was not introduced at a hearing of which petitioner had notice or at which he was present."[22]

On the other hand, it is also clear that some kinds of *ex parte* evidence do not raise due process concerns. In 1957, the Court of Appeal in *Flagstad v. City of San Mateo* (1957) 156 Cal.App.2d 138 held that *ex parte* evidence which is *disclosed* before a hearing does not violate due process:

> "Plaintiff complains that defendants rely upon information acquired by the council members other than at the hearing. . . . Here the mayor stated at the outset of the hearing that the councilmen had 'had a look' at the property. Members of the council asked questions and expressed views at the public hearing which quite fully revealed their investigation. There was no concealment. Those protesting the variance were free to challenge any views so expressed, and took frequent advantage of this opportunity."[23]

And, more recently, the Court of Appeal has held that *ex parte* information is evidentiary only if it is "considered by . . . [the decisionmaker] . . . for its bearing

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[21] *Id.*, at p. 158-59.

[22] *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 274–75.

[23] *Id.*, at p. 141.

on the issues resolved by the findings in his proposed decision."[24] So, non-substantive communications that do not bear on the ultimate decision are consistent with due process requirements.

Surprisingly, there is no California statutory law restricting *ex parte* communications with city decisionmakers. At the state level, the California Administrative Procedures Act expressly forbids *ex parte* communications.[25] Likewise, the California Coastal Act defines and requires disclosure of *ex parte* communications.[26] On the other hand, the Porter-Cologne Water Quality Control Act was amended in 2012 to exempt certain water board proceedings from the *ex parte* communication restrictions of the California Administrative Procedures Act.[27] Many other state agencies have specialized *ex parte* communication rules.[28] These state statutes provide some value in determining due process minima.

WHETHER, WHEN, AND HOW TO ADDRESS EX PARTE COMMUNICATIONS

Due to the absence of statutory guidance, we must synthesize the case law to determine whether, when, and how to address *ex parte* communications. Mindful that fundamental fairness is our guide, and that *Mathews v. Eldridge* (1976) 424 U.S. 319 remains vital in providing a procedural due process framework,[29] several relatively clear principles emerge.

[24] *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1314.

[25] "While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." (Gov. Code, § 11430.10(a); Gov. Code, § 11425.10.)

[26] Pub. Resources Code, §§ 30322 and 30324.

[27] Wat. Code, § 13287 (Stats. 2012, ch. 551.)

[28] See, e.g.,Pub. Resources Code, § 663.2 [State Mining and Geology Board]; Bus. & Prof. Code, § 19872 [Gambling Control Commission].

[29] " . . . identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be

1. Procedural Due Process Relates Only to Adjudicatory Proceedings.

Ex parte communications are a concern only in adjudicatory or quasi-judicial decisionmaking matters, as opposed to purely legislative proceedings. While many factors go into to determining whether a matter is quasi-judicial, the typical characteristics are three-fold: 1) Does the matter require advance notice and a hearing; 2) must the decision be predicated upon specific findings of fact; 3) does the decision apply existing law to specific facts to make an individualized determination of a specific person's rights or interests in life, liberty or property.[30] [31] It is a good practice to identify quasi-judicial matters on meeting agendas so that the public, parties and decisionmakers are aware of due process concerns that might limit *ex parte* communications.

2. *Ex Parte* Communication is Evidence-Gathering That Takes Place Outside the Formal Proceedings.

Ex parte communications include oral and written information, but can also include any other sensory communication, such as visual or auditory information obtained during a site visit.[32]

3. *Ex Parte* Communications Must Be Substantive and Relevant to the Matter in Order to Impact Due Process Rights.

Mere casual or non-substantive communications do not violate the due process rights of non-present parties to a quasi-judicial matter.[33] This limitation is

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affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.

[30] See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.

[31] See *Franchise Tax Bd. v. Superior Court in and for Sacramento County* (1950) 36 Cal.2d 538, 549 ["There is no constitutional requirement for any hearing in a quasi-legislative proceeding."]

[32] *Flagstad v. City of San Mateo* (1957) 156 Cal.App.2d 138.

[33] *Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305.

important to local elected officials because they are often expected to be available so that concerns or complaints may be expressed by their constituents. Thus, the mere expression of support or opposition to a particular decision does not raise due process concerns when it is not accompanied by substantial factual information that influences the decisionmaker's analyses or conclusions.

4. Substantive *Ex Parte* Communications Which are Disclosed Prior to a Quasi-Judicial Hearing Do Not Raise Due Process Concerns.

California case law is clear that pre-hearing disclosure of *ex parte* communications adequately protects the due process interests of the non-present parties to the matter.[34] The disclosure should be complete, detailed and as early in the process as is reasonable. Some agencies require written disclosure.[35]

5. *Ex Parte* Communications After a Quasi-Judicial Hearing Must Be Prohibited If the Decision is Not Final.

A corollary to the due process protection provided by pre-hearing disclosure of *ex parte* communications is that there must be no *ex parte* communications during the interstitial period between closure of a hearing and a final decision. This arises most often when a city decisionmaker closes a quasi-judicial hearing and directs the preparation of written findings by staff. "Lobbying" by parties to the matter or other persons must be rejected. Many cities have differing approaches to *ex parte* communications that arise as a result of public testimony rights under the Brown Act.[36] A simple admonition on the record advising the decisionmakers not to consider Brown Act-required public comment should be a sufficient balance between the due process and First Amendment interests at stake.

[34] *Flagstad v. City of San Mateo* (1957) 156 Cal.App.2d 138.

[35] The California Coastal Commission, for example, requires use of "standard disclosure forms." (Pub. Resources Code, § 30324.)

[36] Gov. Code, 54954.3. See also, Gov. Code, § 54954.2(a)(2) ["No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3."]

EXAMPLES OF CITY COUNCIL EX PARTE CONTACT RULES

Santa Barbara City Council Procedures (2015)

4.14.4. Identification of Quasi-Judicial Matters on the Agenda. The City Administrator/City Clerk, in conjunction with the City Attorney, will identify agenda items involving quasi-judicial decisions on the Council agenda. This identification is intended to inform the Council, interested parties, and the public that this policy will apply to the item, but failure to identify an item shall not be cause for a continuance.

4.14.5. Policy to Avoid Ex Parte Contacts. Ex parte contacts are substantive oral or individual written communications concerning quasi-judicial matters that occur outside of noticed public hearings. City Councilmembers should avoid and discourage ex parte contacts if at all possible.

4.14.6. Disclosure of Ex Parte Contacts. If an ex parte contact does occur (which it might because the public has a hard time understanding that on quasi-judicial matters the Council's decision making is confined to the hearing), the Councilmember must disclose the contact and the substance of the information communicated on the record at the start of the public hearing. This disclosure allows people who may have a different point of view or contrary evidence to make their points during the hearing in response to the information you may have obtained through the ex parte contact. The disclosure might go something like this: "I was approached by the appellant last week and they told me that neighborhood traffic is much greater than the City's baseline assumptions."

4.14.7. Ex Parte Contacts After the Hearing. Ex parte contacts after a public hearing is closed and before a final decision is rendered are prohibited because there is no opportunity for rebuttal.

Berkeley Rules of Procedure and Order (2016)

Following any staff presentation, each member of the City Council shall verbally disclose all ex parte contacts concerning the subject of the hearing. Members shall also submit a report of such contacts in writing prior to the commencement of the hearing. Such reports shall include a brief statement describing the name, date, place, and content of the contact. Written reports shall be available for public review in the office of the City Clerk prior to the meeting and placed in a file available for public viewing at the meeting.

Berkeley Land Use Resolution (2004)

3. Council members and Commissioners may receive information relevant to the land use decision by contacts with the parties, the public or staff and are not confined to reading the record or hearing presentations at public hearings.

4. Where information of a specific nature is gathered by a member of the City Council or a board or commission, through contacts outside the record, and the information is not already in the record, the member shall, to the extent feasible, keep contemporaneous notes of the substance of the contact and shall disclose the contact and its substance on the record prior to the commencement of the hearing to which such contact relates. Where the information is received during the pendency of a hearing the matter shall be disclosed prior to completion of the hearing and the parties and public shall have an opportunity to respond if the matter is substantially new information.

5. Where such contacts were made and information gathered prior to a pending decision by the Council or any decision making body whether or not to grant a hearing, the substance of the information shall be reported to the secretary of the relevant body as soon as it is made. The secretary shall maintain a file on such disclosed contacts for review by members of the public.

Palo Alto City Council Procedures and Protocols Handbook (2013)

2) Restrictions on Council Communications Outside of Quasi-Judicial and Planned Community Zone Hearings

It is the policy of the Council to discourage the gathering and submission of information by Council Members outside of any noticed public meeting, prior to final recommendations by the Architectural Review Board or Planning &

Transportation Commission. The following procedural guidelines are intended to implement this policy, but shall not be construed to create any remedy or right of action.

3) Identification of Quasi-Judicial/Planned Community Matters

The City Attorney, in conjunction with the City Clerk and City Manager, will identify agenda items involving quasi-judicial/planned community decisions on both the tentative and regular Council agendas. This identification is intended to inform the Council, interested parties, and the public that this policy will apply to the item.

4) Council to Track Contacts

Council Members will use their best efforts to track contacts pertaining to such identified quasi-judicial/planned community decision items. Contacts include conversations, meetings, site visits, mailings, or presentations during which substantial factual information about the item is gathered by or submitted to the Council Member.

5) Disclosure

When the item is presented to the Council for hearing, Council Members will disclose any contacts which have significantly influenced their preliminary views or opinions about the item. The disclosure may be oral or written, and should explain the substance of the contact so that other Council Members, interested parties, and the public will have an opportunity to become apprised of the factors influencing the Council's decision and to attempt to controvert or rebut any such factor during the hearing. Disclosure alone will not be deemed sufficient basis for a request to continue the item. A contact or the disclosure of a contact shall not be deemed grounds for disqualification of a Council Member from participation in a quasi-judicial/planned community decision unless the Council Member determines that the nature of the contact is such that it is not possible for the Council Member to reach an impartial decision on the item.

6) No Contacts after Hearings

Following closure of the hearing, and prior to a final decision, Council Members will refrain from any contacts pertaining to the item, other than clarifying questions directed to City staff.

Santa Monica Rules of Conduct for City Council Meetings

RULE 14. DISCLOSURE FOR QUASI JUDICIAL MATTERS.

On quasi-judicial matters, Councilmembers shall verbally disclose off the record contacts relating to the item, after the item is called and before Council consideration of the matter. Disclosure shall include the identity of an individual(s) with whom the Councilmember had contact, and the nature of the contact.

Mountain View City Council Code of Conduct (2015)

4.7 Quasi-Judicial Role/Ex Parte Contacts

The City Council has a number of roles. It legislates and makes administrative and executive decisions. The Council also acts in a quasi-judicial capacity or "like a judge" when it rules on various permits, licenses, and land use entitlements.

In this last capacity, quasi-judicial, the Council holds a hearing, takes evidence, determines what the evidence shows, and exercises its discretion in applying the facts to the law shown by the evidence. It is to these proceedings that the rule relative to ex parte contacts applies.

4.7.1 Ex Parte Contacts/Fair Hearings. The Council shall refrain from receiving information and evidence on any quasi-judicial matter while such matter is pending before the City Council or any agency, board, or commission thereof, except at the public hearing.

As an elected official, it is often impossible to avoid such contacts and exposure to information. Therefore, if any member is exposed to information or evidence about a pending matter outside of the public hearing, through contacts by constituents, the applicant or through site visits, the member shall disclose all such information and/or evidence acquired from such contacts, which is not otherwise included in the written or oral staff report, during the public hearing, and before the public comments period is opened.

Matters are "pending" when an application has been filed. Information and evidence gained by members via their attendance at noticed public hearings before subordinate boards and commissions are not subject to this rule.

Thousand Oaks Municipal Code (1984)

Sec. 1-10.08. Ex parte communications.

No official or employee shall encourage, make or accept any ex parte or other unilateral application or communication that excludes the interests of other parties in a matter under consideration when such application or communication is designed to influence the official decision or conduct of the official or other officials, employees or agencies in order to obtain a more favored treatment or special consideration to advance the personal or private interests of him/herself or others. The purpose of this provision is to guarantee that all interested parties to any matter shall have equal opportunity to express and represent their interests.

Any written ex parte communication received by an official or employee in matters where all interested parties should have an equal opportunity for a hearing shall be made a part of the record by the recipient.

Any oral ex parte communication received under such conditions should be written down in substance by the recipient and also be made a part of the record.

A communication concerning only the status of a pending matter shall not be regarded as an ex parte communication.

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Notes:

Labor and Employment Litigation Update

Thursday, October 6, 2016 General Session; 4:15 – 5:30 p.m.

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LABOR AND EMPLOYMENT LAW UPDATE FOR OCTOBER 2016 LEAGUE OF CALIFORNIA CITIES CONFERENCE

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Race Discrimination

Jumaane v. City of Los Angeles (2015) 241 Cal.App.4th 1390.

Plaintiff Jabari Jumaane, an African-American firefighter employed with the Defendant City of Los Angeles, filed suit against the City alleging racial discrimination, harassment, and retaliation under the Fair Employment and Housing Act ("FEHA"). This matter proceeded to a jury trial and the City prevailed.

Mr. Jumaane alleged that because he had a long history of publicly protesting racism in the fire department, he received two adverse employment actions. The first adverse action was a 10 day suspension in 1999 for five counts of misconduct. The misconduct alleged that Mr. Jumaane failed to report for duty at his assigned location, failed to maintain sufficient inspection records, failed to provide his supervisors requested documents, and insubordination for refusing to turn off a tape recorder during a meeting with his supervisor. The second adverse employment action was a 15 day suspension in 2001. The 2001 suspension was based on Mr. Jumaane's insubordination for intentionally violating a supervisor's directive and parking his assigned on-call vehicle in an unauthorized area in the City Hall parking structure rather than garage the vehicle at his home. Mr. Jumaane served the 2001 suspension on April 16 through April 30, 2001. On April 16, 2002, Mr. Jumaane filed his complaint with the Department of Fair Employment and Housing ("DFEH") alleging FEHA claims and filed suit against the City on April 18, 2003.

Mr. Jumaane filed for a new trial based on juror misconduct and it was granted. The retrial rendered a verdict in favor of Mr. Jumaane on the causes of action for race discrimination based on a disparate impact theory, harassment, retaliation, and failure to prevent discrimination, harassment and retaliation. The jury, however, found that the City's treatment of Mr. Jumaane was not racially motivated. The City moved for judgment notwithstanding the verdict arguing based on the one year statute of limitation that an employee has to file an administrative charge under the FEHA. Specifically, the City contended that the evidence of events that occurred before April 16, 2001, one year from Mr. Jumaane's DFEH complaint, did not fall within the continuing violation exception to the statute of limitations under FEHA because it was not part of a pattern and was thus, outside the statute of limitations. The City also argued that evidence of events on and after April 16, 2001 was insufficient to prove discrimination, harassment or retaliation. After the Trial Court denied the City's motion, the issue was taken up on appeal.

The Court of Appeal reversed the Trial Court and entered judgment for the City. The Court noted that a plaintiff cannot normally recover for acts occurring more than one year before the filing of the DFEH complaint. The Court of Appeal noted that when a defendant asserts a statute of limitations defense, it is the plaintiff's burden to prove the timeliness of his DFEH Complaint fell within the continuing violation doctrine. For the continuing violation doctrine to apply, a plaintiff must show that the conduct outside the limitations period satisfied the following three elements: (1) the conduct was similar or related to the conduct that occurred earlier; (2) the conduct was reasonably frequent; and (3) the conduct had not yet become permanent. Here,

because Mr. Jumaane's 1999 suspension was permanent and Mr. Jumaane knew that further efforts to stop the discrimination and harassment were futile, the continuing doctrine did not apply and all of the claims related to the 1999 suspension were barred by the statute of limitations.

The Court of Appeal further held that because most of Mr. Jumaane's claims were barred by the statute of limitations, the evidence of events within the limitations period were insufficient to allege a claim for race discrimination, harassment and retaliation. First, Mr. Jumaane's race discrimination claim based on a theory of disparate impact required proof that a facially neutral policy caused a protected group to suffer adverse effects. Here, Mr. Jumaane failed to show how the disciplinary policy had a disproportionate impact on African-Americans. In addition, because the jurors found that the City's individual treatment of Mr. Jumaane was not racially motivated, the Court of Appeal held that his discrimination claim under both theories of disparate impact and disparate treatment failed. Second, the only evidence of harassment within the limitations period was the 2001 suspension for insubordination. However, a disciplinary suspension is within the scope of personnel management decisions and does not constitute harassment under FEHA as a matter of law. Third, Mr. Jumaane's retaliation claim failed because the City presented a legitimate, non-retaliatory reason for the 2001 suspension and Mr. Jumaane failed to offer any evidence that the suspension was unjustified or that it was a pretext for retaliation. And finally, because a prima facie case of discrimination, harassment or retaliation was not proved at trial, Mr. Jumaane's claim for failure to prevent discrimination, harassment and retaliation under the FEHA, necessarily failed.

Although this case was largely won on a statute of limitation defense, it also demonstrates that well documented disciplinary actions are the best defense to subsequent discrimination claims.

Disability Discrimination

Mayo v. PCC Structurals, Inc., 795 F. 3d 941 (9th Cir. 2015)

Plaintiff Timothy Mayo was a welder for Defendant PCC Structurals, Inc. and had been diagnosed with a major depressive disorder in 1999. Mr. Mayo was terminated from his employment after making threatening remarks against his supervisors. Mr. Mayo sued the company under Oregon disability law and the American with Disability Act (ADA). Mr. Mayo argued the statements which formed the basis for his termination were the symptoms of and caused by his disability and as a result, the termination of his employment was discriminatory. Defendant PCC Structruals moved for summary judgment and the District Court granted the motion on the grounds that Mr. Mayo was no longer a "qualified individual" once he made his violent threats and therefore was not entitled to protection under the ADA and Oregon's disability discrimination statute.

After 11 years of employment without incident, in 2010 things changed and Mr. Mayo and other co-workers started having issues with a supervisor. Mr. Mayo and his co-workers met with the company's human resources director to discuss these issues. Following the meeting, Mr. Mayo made threatening comments to other co-workers. He told one co-worker that he felt like coming to work with a shotgun and "blowing off" the heads of the supervisor and another manager. He told another co-worker that he planned to come down to the company and "take out"

management. He told a third co-worker that he wanted to bring a gun and "start shooting people" and that all he had to do was show up at the company at 1:30 p.m. because that is when all the supervisors would have their daily walk-through.

Mr. Mayo's co-workers reported these threats to management, which prompted a senior manager to have a meeting with Mr. Mayo. When asked if he planned to carry out his threats, Mr. Mayo explained that "he couldn't guarantee he wouldn't do that." The senior manager immediately suspended Mr. Mayo's employment and barred him from company property. Mr. Mayo eventually went on a medical leave. At the end of his leave, his psychologist and nurse practitioner cleared him to return to work. Nevertheless, Mr. Mayo's employer terminated his employment.

Mr. Mayo opposed the employer's summary judgment motion on the grounds that because his statements were the symptoms of and caused by his disability, the termination of his employment was discriminatory. The District Court granted the company's motion for summary judgment on the reasoning that Mr. Mayo was no longer a "qualified individual" once he made his violent threats and therefore was not entitled to protection under the ADA and Oregon's disability discrimination statute. The Ninth Circuit agreed.

The Ninth Circuit explained that "an essential function of almost every job is the ability to appropriately handle stress and interact with others." Therefore, the Ninth Circuit noted, even if Mr. Mayo was disabled, he could not satisfy his burden of proving that he was qualified at the time of his discharge. The Ninth Circuit further explained that "while an employee can be qualified despite adverse reactions to stress, [Mr. Mayo] is not qualified when that stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions[,]" regardless of the reasons why he made those threats. Because Mr. Mayo's threats showed that he could not perform an essential function of his job, he was not qualified and therefore not entitled to the ADA and Oregon disability law protections.

This case does not hold that all forms of employee misconduct fall outside of the ADA. The Ninth Circuit emphasized that its holding is limited to the "extreme facts" of this case. It specifically held that off-handed expressions of frustration or inappropriate jokes will not necessarily render an employee not qualified. It also stated that employees who are simply rude, gruff, or unpleasant do not automatically fall into the same category as Mr. Mayo. Even still, the decision was based on a similar analysis in the Ninth Circuit's decision in *Weaving v. City of Hillsboro* (9th Cir. 2014) 763 F. 3d 110. The *Weavering* decision was highlighted in last year's Labor and Employment Law Update. In that case, the Ninth Circuit held that a Police Sergeant's purported ADHD disability was insufficient to establish protection under the ADA when he was terminated by his employer after acting inappropriately towards other police officers under his supervision.

These decisions provide guidance to employers and support for adverse actions against employees with purported disabilities who commit serious misconduct, especially when the employee admits the misconduct and tries to excuse it on the grounds that their disability caused them to violate the employer's rules.

Age Discrimination

France v. Johnson, 795 (9th Cir. 2015) F.3d 1170

Plaintiff John France, a 54 year old border patrol agent assigned to the Tucson Sector of Border Patrol, applied for a promotion. After a selection process, he was not selected for promotion. He sued his employer for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). The District Court granted the employer's motion for summary judgment, finding that Mr. France had failed to demonstrate a genuine dispute of material fact on the employer's reasons for not selecting him for promotion. Mr. France appealed.

Twenty-three other eligible candidates applied for the same promotion and twelve were selected for a panel interview based upon their scores on a promotional assessment test. Mr. France was one of the twelve candidates selected for the panel interview and Mr. Gilbert and two other supervisors conducted the interview. Mr. France was not one of the six interviewees who were selected for final consideration. Mr. Gilbert recommended four of the final six candidates to his supervisor, David Aguilar, who, in turn, recommended the same four candidates to his supervisor. The four candidates who made up the final group were aged 44, 45, 47, and 48.

Mr. France sued, claiming the decision not to promote him was age discrimination. After discovery, the employer moved for summary judgment and asserted that Mr. France was not promoted based on legitimate nondiscriminatory reasons. In support of that contention, Mr. Gilbert said that Mr. France lacked leadership and judgment. Specifically, the employer provided evidence that Mr. France had a "big mouth" and did not know "when to turn it on or off." Mr. Aguilar cited six reasons why he did not believe Mr. France merited a promotion, including that Mr. France lacked leadership, flexibility, and innovation. Mr. France countered with evidence that these criticisms of him were merely excuses to hide the age discrimination that he suffered. He and another agent declared that in a staff meeting, Mr. Gilbert expressed his preference for "young, dynamic agents." Mr. France also explained that Mr. Gilbert had approached him repeatedly about retirement even though Mr. France stated clearly to Mr. Gilbert that he did not want to retire. There was also evidence by other border patrol agents about Mr. Aguilar's preference to promote younger and less experienced agents.

The Ninth Circuit first evaluated whether Mr. France established a *prima facie* case that the refusal to promote him was based on in age discrimination by using the well-established legal framework under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To do so, Mr. France had to produce evidence that he was: (1) at least 40 years old; (2) qualified for the position for which an application was submitted; (3) denied the position; and (4) the promotion was given to a substantially younger person. The employer claimed Mr. France could not meet his burden because the four individuals that were selected for promotion were not substantially younger than him. The difference between Mr. France's age and the average age of the four other persons was eight years. While some other circuits have adopted a bright line rule that an age difference of less than ten years is insufficient to satisfy the fourth element of an age discrimination claim, the Ninth Circuit adopted an approach established by the Seventh Circuit that an age difference of less than ten years creates a rebuttable presumption that the age difference is insubstantial.

The Ninth Circuit then proceeded to evaluate Mr. France's evidence in support of his contention that his employer considered his age to be a significant factor in the promotion decision. The Ninth Circuit pointed to the age-based comments made by Mr. Gilbert, the fact that Mr. Gilbert approached Mr. France repeatedly about retirement despite Mr. France's stated unwillingness to retire, and Mr. Aguilar's supposed preference for young agents and that was a sufficient showing to establish the elements of an age discrimination claim.

Having found that Mr. France could make out a *prima facie* case, the Ninth Circuit turned its focus to Mr. France's evidence that his employer's stated reasons for refusing to promote him were not believable. The Ninth Circuit noted that where a plaintiff opposing summary judgment presents direct evidence of a discriminatory motive, the burden-shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) does not apply. In this case, however, the Ninth Circuit found that Mr. France's direct evidence of discriminatory animus (i.e., Mr. Gilbert's statement that he preferred "young, dynamic agents") was "thin support" to create a genuine issue of material fact by itself. However, the totality of Mr. France's evidence of bias, including the circumstantial evidence discussed above, should be evaluated under the *McDonnell Douglas* framework. The Ninth Circuit ultimately decided, considering all of the evidence, that Mr. France had established a genuine issue of material fact concerning whether his employer's stated reasons for refusing to promote him were pretextual and reversed the District Court's grant of summary judgment.

Although the employer was not able to prevail on its summary judgment motion, this case highlights the framework under which discrimination cases for failure to promote our analyzed. During promotional processes, establishing a multilayered selection process for a defensible promotional process will only be successful if the persons on the panel themselves have not engaged in discriminatory behavior.

Reasonable Accommodation

Castro-Ramirez v. Dependable Hwy. Express (2016) 246 Cal.App.4th 180

Luis Castro-Ramirez was employed by Dependable Highway Express ("DHE") as a truck driver. At the time of hire, he had advised his supervisor that he could not work nights because his son required daily dialysis, and he was responsible for administering treatment and attending to his son's needs. For approximately three years, DHE limited Mr. Castro-Ramirez's schedule so that he worked day shifts only, and he performed satisfactorily. However, when a new supervisor took over, that supervisor changed Mr. Castro-Ramirez's schedule to require him to work a later shift. Mr. Castro-Ramirez objected to the change and explained that he could not care for his son while working the later shift, but the supervisor did not change the assignment, and did not grant Mr. Castro-Ramirez's request to take a day off instead. When DHE customers requested that Mr. Castro-Ramirez resume making deliveries to them on the earlier shift, the supervisor provided false information in response. Ultimately, DHE terminated Mr. Castro-Ramirez when he did not report to work on an even later shift that his supervisor had assigned, even though he had attempted to return to work the next day, and DHE policy allowed for discipline less than termination in similar situations.

Mr. Castro-Ramirez filed suit against DHE claiming failure to provide reasonable accommodation, failure to engage in good faith interactive process, hostile work environment, failure to prevent harassment, associational disability discrimination, failure to prevent discrimination, and retaliation under the FEHA, as well as wrongful termination in violation of public policy. The Trial Court ruled that none of the claims could be heard by a jury, and specifically found that there was no evidence that Mr. Castro-Ramirez's termination was due to his association with his disabled child or his request for accommodation. Mr. Castro-Ramirez abandoned his reasonable accommodation, interactive process, and harassment-related claims, but he appealed the Trial Court's dismissal of the remaining four claims.

In its initial decision, the Court of Appeal overturned the Trial Court's ruling, noting that association with a disabled person is written directly into the definition of "disability" under the FEHA. Under the Court of Appeal's reasoning, a person associated with a disabled person is also "disabled" for that reason and so entitled to reasonable accommodation for that reason. The Court of Appeal recognized that this interpretation of the FEHA was contrary to federal case law interpreting the ADA. Noting that the FEHA expressly declares that it provides protections to disabled persons that are independent of those provided by the ADA, the Court of Appeal reasoned that this is one of the situations where the FEHA provides for a greater protection. Further, the Court of Appeal observed that, unlike the FEHA, the ADA does not include associational disability in its definition of disability. As such, the Court of Appeal determined that the federal cases relied upon by DHE were not relevant to the analysis under the FEHA. On rehearing, the Court of Appeal retained this analysis, but emphasized that it did so due to the "significantly intertwined" discrimination issue, and was not deciding whether the FEHA imposes a separate duty to provide reasonable accommodation to an employee who associates with a disabled person.

Based on the evidence regarding the supervisor's conduct, the Court of Appeal ruled both initially, and on rehearing, that a jury should decide whether DHE had terminated Mr. Castro-Ramirez's employment for discriminatory reasons or for legitimate business reasons. Specifically, the Court of Appeal noted in both opinions that both Mr. Castro-Ramirez's new and former supervisors were aware that he needed to work an early shift to return home in time to administer his son's dialysis, the new supervisor had changed the shift despite that knowledge, had lied to customers about doing so, and otherwise had no legitimate business reasons for his conduct. The Court of Appeal further observed on rehearing that a jury could reasonably infer that the supervisor "wanted to avoid the inconvenience and distraction plaintiff's disabled son posed . . . . and engineered a situation which plaintiff would refuse to work the shift, giving [the supervisor] reason to terminate [plaintiff.]"

Regarding Mr. Castro-Ramirez's retaliation claim, the trial court had relied upon a prior appellate decision ruling in *Rope v. Auto-Chlor Sys. Of Washington*i in ruling that requesting reasonable accommodation is not a protected activity. In its initial opinion, the Court of Appeal had determined that the California Legislature had overruled Rope on that point in enacting A.B. 987, which expressly identifies a request for accommodation as a protected activity, even if that request is not granted. On rehearing, however, the Court of Appeal expressly declined to rule on the applicability of A.B. 987 to Mr. Castro-Ramirez's retaliation claim, but retained its disagreement with the reasoning in Rope. Supplementing its initial opinion, the Court of Appeal determined that Mr. Castro-Ramirez had not "merely" requested reasonable accommodation but

had voiced-' complaints and concerns about the changed shifts, which a jury could find was based on a good faith belief that the supervisor was acting unlawfully. Accordingly, the Court of Appeal reasoned, a jury could consider Mr. Castro-Ramirez's conduct a form of protected activity that would support a retaliation claim. For similar reasons, the Court also ruled that a jury could also find that Mr. Castro-Ramirez could state a claim for wrongful termination in violation of public policy.

As noted above, even as modified on rehearing, the Court of Appeal's rulings are unprecedented, and with a strong prospect for review by the California Supreme Court, or direct Legislative action, the future validity of the rulings is uncertain. For now, as in all accommodation issues, employers would be well-advised to take a careful, case-by-case approach when faced with an employee's request for accommodation based on association with a disabled person. Employers should not reject outright an employee's request for accommodation due to association with a disabled person. Employers should ensure that supervisors notify Human Resources regarding any requests or comments by employees raising such issues, and refrain from taking any other action.

Equal Employment Opportunity Commission (EEOC) Charges

EEOC v. McLane Co. Inc. (9th. Cir. 2015) 804 F. 3d 1051

Prior to returning to work after a maternity leave, Damiana Ochoa was required by her employer, Defendant McLane Company, to pass a physical strength test. McLane had a company-wide policy of requiring strength tests for all positions classified as physically demanding. This policy applied to all new employees, and any employee returning from a leave of absence of 30 days or longer. Ms. Ochoa failed the strength test three times, and McLane terminated her employment as a result. Ms. Ochoa thereafter filed a charge with the EEOC, alleging sex discrimination under Title VII.

The EEOC initiated an investigation of the employer in response to Mr. Ochoa's charge. In the course of the EEOC's investigation, McLane voluntarily provided information regarding the individuals who had been required to take the test at the Arizona subsidiary where Ms. Ochoa worked. This information included each test taker's job classification, reason for taking the test, score (pass or fail), and gender. Each test taker was identified by an "employee ID number" generated specifically for the purpose of the EEOC investigation. However, McLane refused to provide certain personal identifying information, or "pedigree information." Specifically, the pedigree information included each test taker's name, social security number, telephone number, and last known address. McLane also refused to voluntarily disclose the rationales for termination, for employees who were terminated after taking the strength test.

The EEOC then issued an administrative subpoena seeking information from McLane facilities nationwide. The District Court refused to enforce the subpoena to the extent it required production of pedigree information, stating that it was not relevant to the EEOC's investigation. The District Court also refused to enforce the subpoena to the extent it required information on the reasons any employee was terminated after they took the strength test. The District Court found this was unduly burdensome.

On appeal, the Ninth Circuit addressed whether the pedigree information, including each test taker's name, address, and social security number, was relevant to the EEOC's investigation. The Ninth Circuit stated that, with administrative investigations, something is "relevant" if it helps the EEOC determine whether there is "reasonable cause" to believe the underlying discrimination charge is true. This is a lower standard than in the trial setting, as the EEOC was not required to show that the evidence in question would tend to prove a charge of unlawful discrimination.

Using this broader standard of relevance, the Ninth Circuit found that the pedigree information was relevant because it would allow the EEOC to contact *other* McLane employees and applicants regarding their experience with the strength test.

The Ninth Circuit noted, McLane could have routinely excused male employees' failure to pass the test, but granted no such exemptions to similarly situated female employees. As this could be useful in determining the existence of a "pattern or practice" of discrimination, the court deemed it relevant.

The lower standard for relevance adopted by the Ninth Circuit should be considered when an employer is responding to EEOC charges especially when the employer objects to providing specific information that was requested by the EEOC.

First Amendment

Heffernan v. City of Patterson (2016) 136 S. Ct. 1412

In 2005, Jeffrey Heffernan was a police officer in Paterson, New Jersey. He worked in the office of the Chief of Police, James Wittig. At that time, the Mayor of Paterson, Jose Torres, was running for reelection against Lawrence Spagnola. Mr. Torres had appointed to their current positions both Chief Wittig and a subordinate who directly supervised Officer Heffernan. Officer Heffernan was a good friend of Mr. Spagnola.

During the campaign, Officer Heffernan's mother, who was bedridden, asked Officer Heffernan to pick up a large sign supporting Mr. Spagnola. Officer Heffernan went to a Spagnola distribution point and picked up the sign. While there, he spoke to Mr. Spagnola's campaign manager and staff. Members of the Patterson police department saw him, sign in hand, talking to campaign workers. Word quickly spread throughout the department. The next day, Officer Heffernan's supervisors demoted him from detective to patrol officer. In this way, they punished Officer Heffernan for what they thought was his "overt involvement" in Mr. Spagnola's campaign. In fact, Officer Heffernan was not involved in the campaign but had picked up the sign simply to help his mother.

Officer Heffernan subsequently filed a lawsuit under 42 U.S.C. § 1983, claiming that Chief Wittig and the other supervisors had demoted him because he had engaged in conduct that (on their mistaken view of the facts) constituted protected speech under the First Amendment.

The District Court found that Officer Heffernan had not engaged in any First Amendment conduct, and, for that reason, he had not been deprived of any constitutionally protected right.

The Third Circuit Court of Appeals affirmed. It wrote that "a free-speech retaliation claim is actionable under § 1983 only where the adverse employment action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights." Officer Heffernan filed a petition for certiorari and the U.S. Supreme Court agreed to decide whether the Third Circuit was correct.

With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. In order to answer the question presented, the Supreme Court assumed that the exceptions do not apply here. The Supreme Court presumed that the activities that Officer Heffernan's supervisors thought he had engaged in are of a kind that they cannot constitutionally prohibit or punish, but that the supervisors were mistaken about the facts. Officer Heffernan had not engaged in those protected activities.

The Supreme Court concluded that the employer's reason for demoting Officer Heffernan is the determining factor when deciding liability for violation of the First Amendment. When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.

This case demonstrates the need for a careful investigation of the facts before disciplining an employee who has engaged in apparent misconduct. In particular, even though the employee did not engage in protected activity, the employee was nevertheless able to state a claim when he alleged that his employer took the discipline against him because of the mistaken belief that he engaged in it.

Fair Labor Standards Act

Flores v. City of San Gabriel (9th Circuit 2016) 824 F.3d 890

The City of San Gabriel offered a flexible benefits plan under which employees received a set amount of "cafeteria dollars." Under the plan, employees were required to apply a certain amount of dollars towards dental and vision coverage and with the remaining dollars could choose from several options, including applying them to medical premium costs directly, with any unused portion paid to them as taxable cash each pay period. Employees providing proof of other medical coverage could opt out of City medical coverage altogether and also receive a cash payment each pay period. The City did not include either type of cash payment in the regular rate of pay used to calculate employees' overtime compensation.

A group of fifteen police officers sued the City, claiming that the City had violated the FLSA by excluding the cash payments from their regular rate of pay. In defense, the City made a number of arguments, including that the exclusions were appropriate under Section 207(e)(2) as a form of "other similar payment." The City argued that Section 207(e)(2) applied because the amount of cash paid was fixed, regardless of the number of an employee's hours worked. However, the District Court ruled that "[s]ince the employees receive these payments periodically and the

payments are subject to taxes, they are remuneration for work performed and therefore must be included in the regular rate of pay used in calculating overtime."

The City had also pointed out that requiring cash payments such as theirs to be included in the regular rate of pay would discourage employers from providing such an option. For that reason, the City argued, interpreting the FLSA to exclude those payments from the regular rate of pay would ultimately benefit the employees and should be adopted on that basis. Although the District Court considered the City's point "compelling," it ultimately concluded that the employer was the true beneficiary of the lower overtime costs that would result and that "an increase in costs cannot be the basis for exclusion of cash payments from regular rate calculation." Overall, the District Court found that the City had not met its burden to demonstrate that it had lawfully excluded the cash payments under Section 207(e)(2).

On appeal to the Ninth Circuit, the City again argued that the cash payments were excluded lawfully under Section 207(e)(2) because they were "not compensation for hours worked" by the police officer plaintiffs. While noting that the legality of excluding such cash payments was "a question of first impression in this and other circuits" and characterizing it as a "close question," the Ninth Circuit affirmed the District Court's ruling that the cash payments could not be excluded under Section 207(e)(2). The Ninth Circuit similarly rejected the City's policy-based argument regarding the likely resulting elimination of cash payments by employers, commenting, "The potential effect of our ruling on municipal decision-making does not give us license to alter the terms of the FLSA."

In addition to contending that the cash payments they had received could not be excluded from their regular rate of pay, the employees went a step further and argued that the City's flexible benefits plan was not "bona fide" within the meaning of Section 207(e)(4) due to the comparative amounts of available plan benefits that had been paid out to City employees and the amounts that had been applied directly to payment of medical or other premiums. The District Court had ruled against the employees after first noting that the term "bona fide' was not defined in Section 207(e)(4) and that the interpretative bulletin in Section 778.215 and the 2003 Opinion Letter were entitled to "respect" but not deference. The District Court found the bulletin sufficiently persuasive in terms of setting forth factors affecting what could be considered "bona fide." However, the District Court reached the opposite conclusion regarding the 2003 Opinion Letter, to which, the District Court emphasized, it did "not resort to for guidance." Notably, the District Court did not find, as the City had argued, that the 2003 Opinion Letter was inconsistent with the interpretative bulletin; however, the District Court did find that the 2003 Opinion Letter had not sufficiently explained the basis for adopting a 20 percent standard in that opinion, or in the prior opinions. Moreover, the district court found that the prior opinions in which the DOL had applied the 20 percent standard on an individual employee basis rather than on a plan basis expressly conflicted with the interpretative bulletin, under which a plan could be bona fide "even if an employee receives all or a portion of the contribution as payment."

Having declined to apply a 20% test on either an individual employee, or plan basis, the District Court focused instead on the purpose of the City's plan. Specifically, the District Court found relevant that the plan was for the purpose of providing insurance benefits to employees, that the employees had options as to which benefits to select under the plan, and that an employee could not opt out without providing proof of other medical coverage. In addition, the District Court

noted the undisputed fact that in the three years prior to litigation "the majority of contributions into the Plan were used for the purchase of benefits rather than dispensed as direct cash payments." For those reasons, the District Court ruled that the contributions made by the City to third parties under the plan could lawfully be excluded from the regular rate of pay.

Although the Ninth Circuit agreed with the District Court that the 2003 Opinion Letter and the 20% thresholds that the Department of Labor (DOL) had adopted there were not persuasive, and characterized the issue as a "closer question" than exclusion of the cash payments, it ultimately did not find that the City's plan was "bona fide." Of the factors that the District Court had found relevant, the Ninth Circuit focused particularly on the percentage of available contributions under the plan that was paid out as cash. Where the District Court had found acceptable that the payments taken as cash represented less than a majority of total plan payments, the Ninth Circuit found that the cash payments, which represented "[f]orty percent or more" of the payments made under the plan, were not "incidental," as required in the interpretative bulletin for the plan to be "bona fide." Accordingly, the Ninth Circuit agreed with the employees and, overruling the District Court in that regard, directed that the City include the value of the full plan benefit in calculating the regular rate of pay for each employee.

For both the District Court and the Ninth Circuit, having found the City liable for failing to include the cash payments in calculating employees' overtime rates, the final issue for consideration was the applicable statute of limitations and availability of "liquidated damages. A plaintiff seeking to recover damages under the FLSA for unlawful overtime practices, such as incorrect determination of the regular rate of pay, may recover payments owed under a two year statute of limitations. However, when a violation is "willful," the statute of limitations extends to three years. The United States Supreme Court has interpreted the term "willful," as that term is used in the FLSA, to mean "that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute."

The District Court determined that the City's violation was not willful because the there was no published decision analyzing whether cash payments made in lieu of benefits must be included in regular rate of pay. In support of its ruling, the District Court cited to a decision from the Third Circuit Court of Appeal, which had previously been cited with approval by the Ninth Circuit, in which the Third Circuit ruled that an employer's violation was not willful because the case involved "close questions of law and fact" and "a case of first impression with respect to one of the governing exemptions."

Despite citing most of the same authority as the District Court, the Ninth Circuit determined that the City's conduct had been willful. In reaching its contrary ruling the Ninth Circuit cited primarily to its 2003 decision in *IBP v. Alvarez* and its statement there that an employer's conduct is willful "when it is on notice of its FLSA requirements yet [takes] no affirmative action to assure compliance with them." *IBP v. Alvarez* decision had involved an employer who had been involved in prior litigation with the DOL and had taken steps that the Ninth Circuit had characterized as intended to evade its obligations under the FLSA. By contrast, in *Flores,* the Ninth Circuit noted that the City had provided no evidence of affirmative action by the City to ensure that its exclusion of the cash payments complied with the FLSA. Unlike the District Court, the Ninth Circuit did not find the circumstances mitigated by the lack of case law addressing exclusion of the cash payments. In a strongly worded concurrence, two of the three

judges on the Ninth Circuit panel expressed their opinion that the Ninth Circuit had gone "off track" in its line of decisions regarding willfulness.

In addition to actual damages, whether under a two-year or three-year statute of limitations, successful employees may also double their recovery due to recovery of additional "liquidated damages" equal in amount to actual damages. However, if the court finds that the employer showed that it acted in "good faith" and had "reasonable grounds" to believe that its practice complied with the FLSA, then the court may exercise its discretion to deny liquidated damages or to reduce the amount awarded. Applying this standard, the District Court and Ninth Circuit again reached opposite rulings consistent with their opposing "willfulness" determinations. The District Court had denied liquidated damages, finding sufficient evidence of "good faith" due to the lack of settled case law regarding excludability of cash payments; however, the Ninth Circuit described the City's efforts as "paltry" and "grasping at straws." The Ninth Circuit found that evidence of consultation between human resources and payroll in determining how to categorize a payment was insufficient without an explanation as to why the City had determined that the cash payments were properly excluded from the regular rate of pay. In addition, the Ninth Circuit considered irrelevant the City's evidence that it had appropriately included other types of payments in the regular rate of pay and had often provided greater compensation for overtime than the law required.

The City's petition's petition for rehearing and *en banc* review was denied by the Ninth Circuit. It is believed that the City will seek to appeal this matter further to the Supreme Court. In light of this decision, employers who offer cafeteria plans that allow any amount back as taxable income should engage in internal fact-finding to evaluate the potential dollar amounts involved in employees' regular rates of pay. For the non-exempt employees who received a cash payment, the employer should review the City's records for two or three years to identify the employees who worked overtime in a given pay period. Recalculate the regular rate of pay for each affected employee in each pay period, and then calculate the difference in overtime payment already received by him or her, and the additional overtime payment due.

In addition, to help to determine whether the City's plan would be considered "bona fide" under the *Flores* standard, for each calendar year in which employees, both exempt and non-exempt, received cash payments from the optional benefits plan, determine the total amount of cash paid out, and the total amount of money that the City paid into the plan. Then calculate the percentage of total money in the plan that was paid out as cash. Finally, because the analytical framework in *Flores* and the other published decisions in the Ninth Circuit currently applies to <u>all</u> forms of compensation not expressly excluded under Section 207(e), not just the cash payments directly at issue, employers should review its practices and identify any other monetary items that the employer provides to its non-exempt employees and that may also be considered a form of "compensation," that is not included in the regular rate of pay. As a related consideration, because an employee's entitlement to overtime pay depends solely on his or her non-exempt status, employers will want to ensure that it has recently undertaken an analysis of the positions that are considered exempt, particularly in light of the recent changes and additional scheduled changes under both California wage and hour law and the FLSA that alter the criteria for employees to continue to qualify as exempt.

Firefighters Procedural Bill of Rights (FFBOR) and Public Safety Officers Procedural Bill of Rights (POBR)

Poole v. Orange County Fire Authority (2015) 61 Cal.4th 1378

Plaintiff Steve Poole was employed as a firefighter with Defendant Orange County Fire Authority (OCFA). Mr. Poole received an annual performance review from his supervisor which stated that he needed improvement. Mr. Poole requested his personnel file, was allowed to review it and make copies of his performance evaluation. After learning that his supervisor maintained and used a daily log with notes to draft the performance evaluation, Mr. Poole requested a copy of the notes. His request was denied. Mr. Poole filed a petition and complaint in Superior Court seeking, among other things, a writ of mandate to obtain the notes in his supervisor's daily log and directing the OCFA to comply with Government Code Section 3255 before including adverse comments in his personnel file. The Superior Court denied relief, concluding that Mr. Poole's supervisor's daily log was not subject to Section 3255 because "[if the supervisor] made a negative note about [Plaintiff] in his notes, but did not address it in the yearly evaluation, it does not exist, at least for personnel purposes." The Court of Appeal reversed, reasoning that the daily log constituted a "file used for ... personnel purposes" pursuant to Section 3255 because a substandard performance evaluation was based on adverse comments contained in the daily log, and because Mr. Poole's supervisor orally revealed some of the contents of the daily log to a battalion chief. The matter was ultimately decided by the California Supreme Court.

When Mr. Poole initially obtained a copy of his performance evaluation, he showed a copy of it to his union representative. The level of detail in the performance review caused the union representative to wonder whether Mr. Poole's supervisor may have been maintaining a separate file outside of Mr. Poole's official personnel file. The union representative demanded that OCFA provide a copy of any separate file.

As it turns out, Mr. Poole's supervisor maintained what he called a "daily log" regarding each of the employees that he supervised. He created the log using both a computer and handwritten notes. He had a separate file for each employee, and he stored them on a flash drive and also in hard copy, which he kept in his desk with the employee's name on it. He included in the log "[a]ny factual occurrence or occurrences that would aid [him] in writing a thorough and fair annual review." In practice, Mr. Poole's supervisor would address with the employee behavior recorded in the daily log about which he had concerns, and if the behavior nevertheless continued there was a chance it might be mentioned in the employee's performance review. However, many incidents recorded in the daily log were never included in a performance review.

After learning of the daily log, Mr. Poole also wrote to OCFA claiming the inclusion of negative comments in the daily log without providing Mr. Poole an opportunity to review those comments violated Government Code Section 3255. This section of the FFBOR requires the employer to inform the firefighter of any comment adverse to his interest in a personnel file "or any other file used by the employer for personnel purposes." It also allows the firefighter the opportunity to place a rebuttal in his personnel file on any adverse comments within it.

The California Supreme Court disagreed with the Court Appeal and reversed the appellate court's decision. In doing so, the Supreme Court first analyzed the phrase "used for any personnel purposes by his or her employer" as set forth in Government Code Section 3255. It agreed that the phrase "should be interpreted to encompass any written or computerized record that, although not designated a personnel file, can be used for the same purposes as a file of the sort described in Section 3256.5; [specifically] a record that may be used by the employer to make decisions about promotion, discipline, compensation, and the like."

Next, the Supreme Court found that a supervisor's log that is used solely to help its creator remember past events does not fall within the scope of that definition. The Supreme Court held that "Even if a supervisor uses his or her notes to help draft performance evaluations and other documents that ultimately are placed in a personnel file, the notes themselves are not a file preserved by the employer for use in making decisions about the firefighter's employment status."

As a caveat, the court made several notable observations on which it based its holding, including: (1) Mr. Poole's supervisor was not the appointing authority for Mr. Poole, and his comments could adversely affect Mr. Poole only if and when they were placed in a personnel file; (2) the documents Mr. Poole's supervisor prepared with the assistance of the log, including performance evaluations and improvement plans, were disclosed to Mr. Poole before they were entered into his personnel file; and (3) there was no evidence that Mr. Poole's supervisor's daily log would be available to anyone making personnel decisions in the future.

Employers should note the above caveats provided by the Supreme Court when determining whether any adverse comments maintained by a supervisor must be disclosed to firefighter and produced upon request. Additionally, because the POBR has an identical provision to this section of the FFBOR , this Supreme Court decision also applies to covered police officers.

Ellins v. City of Sierra Madre (2016) 214 Cal. App. 4th 445.

Plaintiff John Ellins was employed as a peace officer for the Defendant City of Sierra Madre's Police Department. The Department terminated Mr. Ellins in February 2011. Mr. Ellins appealed to a hearing officer, who affirmed the Department's the dismissal. In January 2013, the City of Sierra Madre adopted the hearing officer's decision. Mr. Ellins then petitioned the Superior Court for a writ of mandate to overturn his dismissal. The trial court denied the petition and Mr. Ellins appealed. The sole issue on appeal was whether Mr. Ellins's termination for insubordination was invalid because he had a valid reason for refusing to submit to an interrogation based on his contention that the Department violated POBRA by not properly advising Ellins of the nature of the investigation prior to his interrogation.

As a peace officer, Mr. Ellins had access to the California Law Enforcement Telecommunications System ("CLETS") database, which is a confidential law enforcement database that allows police officers to access several integrated databases containing an individual's criminal history, driver's license and vehicle registration. When he joined the Department, Mr. Ellins was informed that the use of the CLETS database for any reason other than for official business was improper and grounds for immediate dismissal.

In May 2010, Ellins made 12 inquiries using the CLETS database regarding his ex-girlfriend and members of her family with no official reason to do so. In the summer of 2010, the Department received a letter from Mr. Ellins's ex-girlfriend informing the Department that Mr. Ellins had located her in New York by using the CLETS database. The Department hired an outside consultant to investigate. In September 2010, the Department formally notified Ellins an investigation had been opened "regarding alleged abuse of [Ellins'] peace officer powers and duties." Mr. Ellins agreed to be interviewed on October 13, 2010. Minutes before the interview was to begin, the consultant notified Mr. Ellins – orally and in writing – of the allegations that he improperly accessed the CLETS database regarding his ex-girlfriend and her family. Mr. Ellins' representative requested one hour to discuss in private with Mr. Ellins the nature of the investigation and the consultant agreed. Twenty five minutes later, Mr. Ellins stated that on the advice of his representative he would not participate in the interview. Mr. Ellins' commanding officer ordered him to sit for the interview and Mr. Ellins refused. The interview was re-scheduled three more times and Mr. Ellins did not appear for the interviews based on alleged medical reasons.

In December 2010, the Department issued a notice of disciplinary action to terminate on the following grounds: (1) Mr. Ellins made unauthorized searches into the CLETS database, and (2) Mr. Ellins was insubordinate for disobeying a commanding officer's direct orders to submit to interrogation. The Department terminated Ellins in February 2011.

The sole issue on appeal was whether Mr. Ellins' termination for insubordination on October 13, 2010, was invalid because he had a valid reason for refusing to submit, namely that the Department violated POBR by not properly advising Mr. Ellins of the nature of the investigation prior to his interrogation. The Court of Appeal first looked to determine the meaning of the requirement in Section 3303(c) that an employing department inform a public safety officer of the nature of the investigation "prior to" any interrogation. The Court of Appeal noted that the POBR was silent on the issue of how much notice of the nature of the investigation is needed prior to the interview. The Court of Appeal determined that Section 3303(c) requires an officer to be informed "reasonably prior" to the interrogation, meaning "with enough time for the officer to meaningfully consult with any representative he elects to have present." The time required depends on whether the officer is already represented, and the nature, complexity and number of the allegations. The Court of Appeal noted, however, that if an employing department had reason to believe that providing the information would risk the safety of interested parties or the integrity of evidence in the officer's control, the employing department may delay notice until the time scheduled for the interrogation as long as thereafter it grants sufficient time for consultation.

In reaching its determination, the Court of Appeal also noted the fact that a requirement of reasonable advance notice is contemplated in other subdivisions of Section 3303, that the requirement of reasonable advance notice is consistent with the legislative purpose behind POBR, that it tracks the two models the legislature used in fashioning POBR, specifically the National Labor Relations Act and the rights accorded to suspects under criminal investigation, and that it is consistent with precedent that had infused a reasonableness requirement into Section 3303(i) which grants an officer the right to request a representative.

The Court of Appeal then addressed whether the Department had complied with this standard. The Court of Appeal determined that the Department had provided Mr. Ellins with notice of the nature of the investigation "reasonably prior" to his interrogation. The Court of Appeal noted that good cause existed for delaying informing Mr. Ellins until just prior to the interrogation, as it was necessary to avoid any possibility of retaliation against Ms. Ellins's ex-girlfriend. Further, the consultant provided Mr. Ellins and his representative the time they had requested to confer. Accordingly, the Court of Appeal affirmed the Trial Court's denial of Ellins's petition for writ of mandate.

Unless there are special circumstances similar to the ones outlined by this decision, police departments should provide notice of the nature of an investigation on a date before the initial investigative interview. Additionally, because the FFBOR has an identical provision to this section of the POBR, this Court of Appeal decision also applies to covered firefighters.

Meyers-Milias-Brown Act (MMBA)

Friedrichs v. California Teachers Association (2016) 136 S Ct. 1083.

On March 29, 2016, the United States Supreme Court issued a brief order affirming the decision of the Court of Appeals in the closely watched fair share fee case of *Friedrichs v. California Teachers Association*. Based on the January 2016 oral argument in the case, most watching the case expected the US Supreme Court to overrule prior US Supreme Court precedent and prohibit public agencies from requiring all employees to either join the union or pay a "fair share" service fee ("agency fee") to cover the cost of the union's obligatory representation of all unit members. Unions and local agencies across the state were preparing for the ruling that could have had a major impact on the coffers and strength of public employee unions.

The one sentence per curium decision stated in its entirety, "The judgment is affirmed by an equally divided court." The recent death of Justice Anton Scalia is widely believed to have changed the outcome in this case from a 5-4 majority to overturn the lower court decision to the 4-4 vote that leaves the lower court decision upholding fair share fees for public employee unions in place.

California, along with 23 other states across the nation, authorize non-union members to be required to pay fair share fees to cover collective bargaining and related costs of unions' representation of all employees in the bargaining units they represent. The Supreme Court previously approved of such fair share fees in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209 finding that the fees are necessary to avoid non-members from acting as "free loaders," by securing the benefits of union representation without paying their "fair share."

The *Friedrich's* plaintiffs argued that their free speech and associational rights are violated by being required to support public sector unions that engage in activities that are inherently political. The plaintiffs in the case have suggested that they will return to efforts to overturn the long-standing precedent when a new Justice is appointed to the Court. The success of these efforts will depend in large part of who is appointed to fill the vacancy in the US Supreme Court. Although this case involved a school district, the constitutional analysis in it applies equally to cities governed by the MMBA.

San Diego Housing Commission v. Public Employment Relations Board (2016) 246 Cal.App.4th 1.

The Fourth Appellate District of the Court of Appeal decided two cases on March 30, 2016 concluding that MMBA factfinding applies to so-called "single issue" bargaining disputes, and not just to impasses arising in MOU bargaining. The Court of Appeal also rejected constitutional challenges to the MMBA factfinding provisions.

The San Diego Housing Commission ("Commission") challenged the Public Employment Relations Board's ("PERB") granting of an employee organization's request for factfinding under the MMBA for an impasse in negotiations over the effects of the Commission's decision to layoff off two employees represented by the Service Employees International Union, Local 221 ("SEIU"). The Commission argued that the MMBA's factfinding provision applied only to an impasse arising during negotiation of a comprehensive MOU, not to an impasse arising from a discrete bargainable issue. The Superior Court agreed with the Commission's interpretation of the MMBA and issued a judgement declaring that the MMBA's factfinding provisions only apply to an impasse in negotiations over a new or successor MOU and not from other negotiations. The Superior Court also issued a writ of mandate commanding PERB to dismiss the factfinding proceeding, rescind any requirement that the Commission participate in factfinding for impasses not involving MOU negotiations, and reject requests for the Commission to participate in factfinding for impasses not involving negotiation of an MOU. PERB appealed the Superior Court's decision.

The Court of Appeal agreed with PERB and overruled the Superior Court's decision that concluded factfinding did not apply to an impasse in negotiations regarding the impacts of the layoff decision. The Court of Appeal concluded that factfinding applies to "any bargainable matter," and not just to impasses arising during comprehensive MOU bargaining. The Court of Appeal also ordered that the appeal considered with the appeal in *County of Riverside v. Public Employment Relations Board* (Mar. 30, 2016, D069065) 246 Cal.App.4th 20.

The Court of Appeal also rejected all of the arguments made by the Commission as well as those made by the League of California Cities and the California State Association of Counties who submitted arguments in the case as Amici Curiae. After an overview of the meet and confer obligations under the MMBA and a discussion of the legislation adding factfinding requirements to the MMBA, the Court of Appeal discussed PERB's 2014 decisions concluding that factfinding applies "'to any bargaining impasse over negotiable terms and conditions of employment, and not only to impasses over new or successor [MOUs].'" (*San Diego Housing Commission* at p. 10, quoting PERB decisions in *County of Contra Costa* (2014) PERB Dec. No. Ad-410-M, pp. 2-3, and citing *City & County of San Francisco* (2014) PERB Dec. No. Ad-419-M.)

The Court of Appeal explained that PERB's interpretations of the public sector labor relations statutes are entitled to deference, unless it is clearly erroneous, because it is an agency with specialized knowledge of these laws. The Court of Appeal went on to agree with PERB's decision on the following:

1. The MMBA does not contain any language expressly limiting the factfinding provisions to impasses occurring during comprehensive MOU negotiations.

2. PERB has consistently applied analogous factfinding provisions under EERA and HEERA to all types of bargaining disputes.
3. Applying the factfinding requirements to all bargaining disputes is consistent with the legislative history of AB 646 .
4. Applying factfinding to all bargaining disputes is consistent with the MMBA-established duty to bargain on any bargainable issue, and furthers the purposes of the MMBA.

County of Riverside v. Public Employment Relations Board (2016) 246 Cal.App.4th 20.

The Court of Appeal ordered the *San Diego Housing Commission* case discussed above to be considered along with the case of the *County of Riverside v. Public Employment Relations Board.* The latter case involved an impasse in bargaining over the effects of the County's decision to implement a new background check policy for information technology employees represented by SEIU, Local 721. The Trial Court ruled that the County was not required to comply with the factfinding requirements of the MMBA when the parties reached impasse over the effects bargaining, and issued an injunction precluding PERB from processing factfinding requests under the MMBA for matters other than those involving new or successor MOU negotiations. The County and Union filed cross appeals, and the Court of Appeal reversed the Trial Court's decision.

The Court of Appeal referenced the conclusions in the *San Diego Housing Commission* case discussed above, and also rejected the County's arguments that the MMBA's factfinding provisions violate the City and County "home rule" powers protected by the State Constitution (the Trial Court had also rejected these home rule arguments). Noting that factfinding panels make only advisory recommendations, the Court explained, "The factfinding provisions do not delegate to factfinding panels any power to make any binding decisions affecting public agency operations . . . [and] [t]he public agency still retains the ultimate power to refuse an agreement and make its own decisions." The Court of Appeal distinguished the State Supreme Court's decision invalidating binding interest arbitration provisions, based on the binding nature of arbitration decisions. (*County of Riverside v. Superior Court* [2003] 30 Cal.4th 278.)

The Court of Appeal went on to find that the Trial Court should have granted PERB's anti-SLAPP motion dismissing the case, and consequently found that PERB is entitled to an award of attorney fees and costs in the case.

This decision reaffirms PERB's administrative determination that factfinding is required when timely requested by unions during impasse procedures for any mandatory subjects of bargaining and not merely limited to MOU negotiations. As a result, cities should prepare and plan its bargaining strategy to take into account the MMBA's factfinding criteria and timelines to be successful in negotiations especially when it is anticipating difficult negotiations.

NEW LAWS EFFECTIVE IN 2016

Fair Employment And Housing Act (FEHA)

AB No. 987

Effective January 1, 2016, this amendment to the FEHA prohibits an employer from retaliating or otherwise discriminating against a person for requesting an accommodation of his or her disability or religious belief regardless whether the accommodation was granted. This amendment overrules the contrary holding in *Rope v. Auto-Chor System of Washington* (2013) Cal.App.4th 635.

FAIR PAY ACT

SB No. 358

Effective January 1, 2016, this amendment to Labor Code Section 1197.5 was enacted to address the gender wage gap in California. California has prohibited gender based wage discrimination since 1949 and enacted Section 1197.5 of the Labor Code to redress the segregation of women into historically undervalued occupations. It evolved over the years to substantially mirror the Federal Equal Pay Act. The 2015 amendment sought to improve the existing legislation and to make it easier for employees to bring gender-based wage claims, as the standards have been lowered. The Act generally prohibits employers from paying any employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility.

The Act changes the comparative analysis from "equal work" to "substantially similar work" and eliminates the "same establishment" requirement. Substantially similar work is determined by reviewing a composite of skill, effort and responsibility when performed under similar working conditions. The Act requires that an employer affirmatively demonstrate that wage differentials are based on lawful, nondiscriminatory factors including: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex. The new law also includes an anti-retaliation provision which prohibits employers from taking adverse action against any employee who invokes or assists in the enforcement of the Act.

Employers will want to review compensation practices and recordkeeping to ensure compliance with the Act. Among other things, employers will want to ensure that job descriptions are current, compensation for substantial similar work is provided, and employees with responsibilities for setting salaries are aware of these standards.

Healthy Workplaces, Healthy Families Act of 2014

AB No. 304

Effective July 1, 2015, this amendment provides some clarification to the Paid Sick Leave Law that took effect July 1, 2015. On July 13, 2015, Governor Brown signed into law AB 304, which

is intended to amend the Paid Sick Leave Law in multiple aspects, including the permissible accrual methods an employer may use in calculating sick leave pay. The new amendments are effective immediately. These changes include, among other things, requiring the employee to work for the same employer for more than 30 days within the previous 12 months in order to qualify for sick leave.

It remains an open question whether the Act is unconstitutional as applied to charter cities who have exclusive authority to provide for employee compensation. See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278.

Labor Code

AB No. 1509

Effective July 1, 2015, this amendment to the Labor Code expands the whistleblower and anti-retaliation protections to prohibit employers from retaliating against an employee when his/her family member engages in whistleblowing (Section 1102.5) or other described protected activity, such as complaining of unsafe working conditions (Section 6310). For example, if a married couple is working for the same employer and the husband complains of discrimination, that is not a legal basis to take action against the wife. The amendment also expands joint employer liability by changing definition of employer under anti-retaliation law to include "client employers" – a specific definition related to companies who contract for labor.

"An employer, or person acting on behalf of the employer, shall not retaliate against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in any conduct delineated in this chapter." This language was added to Labor Code sections 98.6(e), 1102.5(g); and 6310(c).

"For purposes of this section, "employer" or "person acting on behalf of the employer" includes, but is not limited to, a client employer as defined in paragraph (1) of subdivision (a) of Section 2810.3 and an employer listed in subdivision (b) of Section 6400." Labor Code Sections 98.6(g), 1102.5(h), and 6310(d). Section 2810.3 defines "client employer" as a business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

Employers will want to update their employment policies and training to address this new law.

EEOC Regulations

Federal Register, Vol. 81, No. 95 (May 17, 2016).

On May 17, 2016, the EEOC issued final rules on how employer-provided wellness programs can comply with the ADA and the Genetic Information Nondiscrimination Act (GINA). These new regulations will go into effect on January 1, 2017 under 29 CFR Parts 1630 and 1635.

Although the ADA and GINA generally prohibit employers from obtaining and using health care information about an employee or an employee's family members, both statutes contain an

exception that permits health-related questions and medical examinations in connection with a voluntary wellness program. The regulations address the impact that financial incentives have on the voluntary nature of such programs. The final ADA regulations provide that wellness programs that are part of a group health plan and that ask questions about employees' health or include medical examinations may offer incentives of up to 30 percent of the total cost of self-only coverage. The final GINA regulations provide that the value of the maximum incentive attributable to a spouse's participation may not exceed 30 percent of the total cost of self-only coverage, the same incentive allowed for the employee. No incentives are allowed in exchange for the current or past health status information of employees' children or in exchange for specified genetic information (such as family medical history or the results of genetic tests) of an employee, an employee's spouse, and an employee's children.

In addition, the regulations require that any wellness program offered by an employer be reasonably designed to promote health and prevent disease in order to ensure that the programs are not used for an improper purpose.

Finally, the regulations include requirements to protect the confidentiality of any medical information collected as part of a wellness program.

Notes:

AB 646 Post Impasse Fact Finding in Collective Bargaining

Thursday, October 6, 2016 General Session; 4:15 – 5:30 p.m.

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League of California Cities Annual Conference

Post-Impasse Factfinding and Status of AB 646 Legal Challenges

October 5-7, 2016

Ed Zappia

I. Factfinding Procedure/Timing

II. Substantive Factors of Factfinding

III. Impacts on Bargaining and Meeting and Conferring/Planning for Bargaining in Light of Factfinding

IV. Preparing for Factfinding

V. Prevailing in Factfinding

VI. Status of Challenges to Factfinding

I. Factfinding Procedure/Timing

Meeting and Conferring over a Single Issue vs. Negotiating a New or Successor MOU

MMBA/California Government Code 3505. The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

3505.4. (a) An employee organization may request that the parties' differences be submitted to a factfinding panel

Not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.

Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel.

The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate.

The panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

II. Factfinding Factors

3505.4(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

(e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

Conclusion of Factfinding Process

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which **shall be advisory only**.

The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs shall be equally divided between the parties.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, **after holding a public hearing regarding the impasse**, implement its last, best, and final offer, but shall not implement a memorandum of understanding.

The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

III. Impact on Negotiations and Meeting and Conferring / Planning for Bargaining in Light of Factfinding

a. Increase burden of preparation negotiations. Burden is completely on the agency.

b. Identify key anticipated issues in upcoming negotiations.

c. Prepare to justify agency's positions/proposals with costing, documents, salary information (internally and in surrounding communities), salary history, external factors.

d. Have to "win" on key issues in bargaining. Prepare to be second-guessed, subject to scrutiny.

e. Increase time to complete negotiations/number of sessions?

f. Promote bad faith bargaining, since posturing for factfinder?

g. Adversely impact good faith bargaining to finality?

h. Increase impasses and/or threat of impasse?

i. Note-taking mandatory/document trail/costing/fiscal impact mandatory.

j. Written proposals, supported by evidence, mandatory.

IV. Preparing for Factfinding

a. Comparable to preparing for trial.

b. Gather documents/exhibits.

c. Prepare briefs.

d. Prepare witnesses.

e. Justify each factfinding factor/proposal.

f. Selection of factfinding panel representative.

g. Formal or Informal?

V. Prevailing in Factfinding

a. Clear, concise presentation, supported by documents/evidence.

b. Presentation of agency history, goals.

c. Agency proposals/LBFO supported by evidence, related to relevant factors.

d. Agency proposal consistent with surrounding community standards re relevant factors.

e. Union proposals not consistent with relevant factors.

f. Rebut union proposals as unreasonable, not consistent with relevant factors, or not consistent with community standards.

VI. Current Status of Legal Challenges to Factfinding

(County of Riverside v. PERB; San Diego Housing Commission v. PERB)

A. Summary of Challenges

1. Single Issue

    a. Contrary to language and intent

2. MOU-Constitutionality

    a. Interferes with agency budget and compensation
    b. Delays impasse/implementation
    c. Delays budget
    d. Contracts out to private body

3. Impact on Bargaining

    a. Adverse, because not bargaining to finality
    b. Not mutual

B. Superior Court Rulings

- Superior Courts ruled in favor of the local entities, concluding that AB 646 did not apply to single issues being bargained during the term of a closed memorandum of understanding.
- In County of Riverside, the court also concluded that although it was a close call, AB 646 is constitutional because it did not "substantially interfere" with public entities' exclusive right to manage and control their own budgets and employees' compensation.
- PERB moved for dismissal under the anti-SLAPP statute alleging that its processing of the union's demand for fact finding under AB 646 was protected activity as an "official proceeding" under the anti-SLAPP statute and thus, the lawsuit challenging that action was subject to dismissal.

- The superior Court denied PERB's anti-SLAPP motion, concluded that the motion was frivolous and awarded the County attorney's fees for defending the anti-SLAPP motion.
- PERB appealed the single issue rulings and the anti-SLAPP denial, and the County cross-appealed the ruling on constitutionality.

C. Court of Appeal Ruling

- On March 30, 2016, in two separate opinions (*San Diego Housing Commission v. Public Employment Relations Bd.* (2016) 246 Cal. App. 4th 1; County of Riverside v. Public Employment Relations Bd. (2016) 246 Cal.App.4th 20), the Court of Appeal reversed the trial courts and essentially deferred to PERB's interpretation of AB 646 declaring PERB the expert on such matters.
- Thus, the Court of Appeal agreed with PERB that AB 646 does apply to single issues that arise during the pendency of a closed memorandum of understanding.
- The Court of Appeal also concluded that AB 646 is constitutional because the fact finding panel's recommendations do not result in a binding decision and entities have the option of rejecting the fact finding panel's recommendations.
- The Court of Appeal also concluded that PERB's anti-SLAPP motion should have been granted because the action being challenged (PERB's processing of the union's fact finding request) was an official proceeding protected by the statute.
- The case was remanded to the Superior Court for further proceedings consistent with the decisions.
- Petitions for review filed with the Supreme Court were denied.

Notes:

Land Use and CEQA Litigation Update

Friday, October 7, 2016 General Session; 8:00 – 10:15 a.m.

Christian L. Marsh, Downey Brand

DOWNEYBRAND

League of California Cities

CEQA & Land Use Litigation Update

Cases Reported from
May through August 2016

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Friday, October 7, 2016
8:00 – 10:15 a.m.
Long Beach Convention Center
Long Beach, California

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CEQA & LAND USE LITIGATION UPDATE[1]

I. PUBLISHED CEQA DECISIONS

Between May and August 2016, California courts of appeal published thirteen decisions under the California Environmental Quality Act (CEQA), granting relief in favor of the petitioner (and against the public agency) in only four cases. Of the four cases decided against public agencies, three of them involved challenges to climate or energy impacts in environmental impact reports.

A. Scope of CEQA

1. *Delaware Tetra Technologies, Inc. v. County of San Bernardino* (2016) 247 Cal.App.4th 352

- Memorandum of understanding governing groundwater pumping project did not constitute a "project" under CEQA as it did not foreclose alternatives or mitigation measures, it did not commit the agency to a particular course of action, and it ensured the agency retained full discretion to approve, deny, or condition the project.

This case is one of six[2] related actions before the Fourth District Court of Appeal challenging the Cadiz Valley Water Conservation, Recovery, and Storage Project, which proposed to install 34 new wells on Cadiz's land in Eastern San Bernardino County to extract an average of 50,000 acre-feet of groundwater from the underlying aquifer system for 50 years. The project was proposed as a public/private partnership between Cadiz and the Santa Margarita Water District (SMWD) that would deliver the water for municipal and industrial uses in Southern California. This case (and a related but unpublished case) involved the challenge by Delaware Tetra Technologies, Inc. to the County of San Bernardino's 2012 approval of a pre-project Memorandum of Understanding (MOU) among the County, Cadiz, SMWD, and the Fenner Valley Mutual Water Company. The County determined that the MOU did not constitute "approval" of a "project" subject to CEQA. Tetra challenged that determination claiming that the County should have conducted full environmental review prior to approving the MOU.

Because the Cadiz Project is located within San Bernardino County, it is subject to the County's Desert Groundwater Management Ordinance (Ordinance), which requires operators of groundwater wells to either secure a permit from the County or qualify for an "exclusion." SMWD and Cadiz had intended to proceed under the exclusion process based on a comprehensive Groundwater Monitoring, Management, and Mitigation Plan (GMMMP) to be negotiated with the County. In May of 2012, the County approved an MOU for the project in which the parties agreed that a GMMMP would be developed and that the GMMMP would govern the operation and management of the project. At that time, SMWD was in the process of undertaking environmental review as lead agency for the project and had released the draft Environmental Impact Report (EIR), but had not yet certified a final EIR.

[1] Authored by Downey Brand attorneys Christian Marsh, Donald Sobelman, Kathryn Oehlschlager, Arielle Harris, and Pejman Moshfegh.

[2] The Court of Appeal published two of the six cases, this one and *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326, summarized later in this report.

Relying on the California Supreme Court's opinion in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, Tetra argued that approval of the MOU constituted "approval" of a "project" requiring environmental review. Tetra claimed that the MOU was one of four governmental approvals necessary for the project to proceed, and, therefore, environmental review was required for the earliest commitment to the project. The court disagreed, finding that MOU merely established a process for completing the GMMMP and that the interim County retained *full discretion* to consider the final EIR and then to approve, disapprove, or condition the project.

The court distinguished the facts from those in *Save Tara* (where the City of West Hollywood contractually bound itself to sell land) and *RiverWatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186 (where the water district contractually bound itself to deliver water for 60 years). Unlike those cases, the MOU here would "not foreclose alternatives or mitigation measures" or otherwise "commit the County to a particular course of action that will cause an environmental impact." The court analogized the MOU to the facts presented in *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, where the appeals court concluded that a highly detailed term sheet setting forth the terms of a transaction to develop a football stadium was not a project as it only bound the parties to negotiate in good faith, and did not make any of its terms binding on the parties.

2. *California Building Industry Association v. Bay Area Air Quality Management District* (2016) 2 Cal.App.5th 485

- Air District's CEQA thresholds for toxic air contaminants and sensitive receptors held invalid to the extent they sought to mandate that lead agencies apply the thresholds to assess the effects of existing environmental conditions on future users or occupants of a project.

- The thresholds need not be invalidated in their entirety because there are legitimate circumstances where the thresholds could be used consistent with CEQA—e.g., voluntarily for informational purposes or to measure the extent a project might exacerbate existing conditions.

On remand from the California Supreme Court, the First Appellate District issued its second ruling in *California Building Industry Association v. Bay Area Air Quality Management District*. In this case, the California Building Industry Association (CBIA) challenged the Bay Area Air Quality Management District's (BAAQMD's) 2010 "CEQA Air Quality Guidelines"—specifically, the Guidelines' thresholds and methods for assessing the effects of siting new sensitive receptors (residences) near existing sources of toxic air contaminants and other harmful air emissions, such as freeways. In December 2013, the California Supreme Court held that CEQA "does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents" (so-called 'CEQA-in-Reverse'). Requiring analysis of the existing environment's effects on a project, the Supreme Court emphasized, would "impermissibly expand the scope of CEQA." The Supreme Court remanded

the case to the First Appellate District to apply its general ruling to the specific aspects of the BAAQMD Guidelines still in dispute.

BAAQMD argued on remand that despite the Supreme Court's ruling, the receptor thresholds adopted by BAAQMD did not need to be set aside "because there are legitimate circumstances in which they could be utilized during the CEQA process." The appeals court agreed, holding that:

- While the Supreme Court's ruling forecloses an agency from requiring private applicants or other agencies to apply the thresholds, "an agency may do so voluntarily on its own project and may use the Receptor Thresholds for guidance";

- Agencies can rely on the receptor thresholds to address the degree to which a project might worsen (or "exacerbate") environmental conditions;

- Agencies can rely on the receptor thresholds to "assess the health risks to students and employees at a proposed school site," a circumstance in which the CEQA statute specifically requires consideration of the environmental effects of locating new receptors at a proposed project site; and

- The thresholds may be used to "evaluate whether a housing project [is] exempt from CEQA review."

BAAQMD further argued that the threshold could be used to "determine whether a particular project is consistent with a general plan." The court declined to rely on this reasoning, as it was too speculative.

Ultimately, the court ruled that, "[b]ecause the Receptor Thresholds themselves may be used under certain circumstances consistent with CEQA, they . . . need not be set aside in their entirety." Nevertheless, because BAAQMD's Guidelines remained "misleading" in scope, the court instructed the trial court to partially grant the writ and invalidate those portions of the Guidelines "suggesting that lead agencies should apply the Receptor Thresholds to routinely assess the effect of existing environmental conditions on future users or occupants of a project."

Finally, with respect to an award of attorneys' fees, the court noted that CBIA had now "prevailed in part on one of the issues it raised in this proceeding" and that "[p]artially successful plaintiffs may recover attorney fees under Code of Civil Procedure section 1021.5." Therefore, on remand, the trial court would need to "determine CBIA's entitlement to attorney fees on appeal and the amount of any such fees (including fees for proceedings in the Supreme Court), in addition to the fees it awards, if any, for the litigation in the trial court."

B. Exemptions

1. *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809

- The Class 3 categorical exemption for "construction and location of limited numbers of new, small facilities or structures" can be applied to commercial projects that are similar to stores, motels, offices, and restaurants.

- General effects of an operating business, such as noise, parking and traffic, cannot serve as unusual circumstances in and of themselves.

Respondents and real parties in interest Redondo Auto Spa and Chris McKenna (collectively Auto Spa) filed an application with the City of Redondo Beach to build a 4,080 square-foot, full-service car wash and small coffee shop on a property that was zoned for commercial uses. The City issued Auto Spa a conditional use permit (CUP), found that the project was categorically exempt under CEQA Guidelines section 15303(c), and imposed several conditions concerning noise, operating hours, and a vehicle limit of 10,000 cars per month. Appellants, five homeowners of the parcels adjacent to the proposed car wash and coffee shop, filed a petition for writ of mandate challenging the City's CEQA determination and issuance of the CUP. The trial court denied the writ petition, upholding the City's use of an exemption for the project and the issuance of the CUP.

The Second Appellate District began its analysis by clarifying the standard of review. The court explained that where the argument turns only on the interpretation of language within the CEQA Guidelines, the issue is a question of law. Where the agency makes factual determinations as to whether the project fits within an exemption, the court instead determines whether the record contains substantial evidence to support that decision. The core dispute over application of the Class 3 exemption involved three issues: (1) whether the project generally fits within the definition of "commercial buildings" as it is used in Guidelines section 15303; (2) whether the exemption can be applied to a single commercial building in excess of 2,500 square feet; and (3) whether the car wash and coffee shop would be utilizing "hazardous chemicals."

As to the first issue, the appellants characterized the car wash operation as requiring the installation of industrial equipment such as blowers, vacuums, air nozzles, and waste treatment, which appellants believed removed the project from outside the purview of the exemption. Appellants also believed that the car wash use was not comparable to the example uses listed in Section 15303(c), which include stores, motels, offices, restaurants, or similar structures. The court rejected appellants' argument finding that the car wash and coffee shop combination qualified as a commercial use. The court also held that the equipment needed for the car wash was not substantially different from the types of equipment associated with other commercial uses.

As to the issue of square footage limitations, appellants argued that Section 15303(c) could not be applied to a single commercial building that exceeds 2,500 square feet. Citing previous case law, the court rejected that claim stating that the exemption covers projects involving the

construction of one to four buildings in an urbanized area where the total floor area does not exceed 10,000 square feet.

Finally, on the issue of the use of hazardous substances, appellants argued that the car wash would be using hazardous chemicals that would disqualify it from coverage under the exemption, which only covers uses "not involving the use of significant amounts of hazardous substances." The court pointed out that the appellants had presented no evidence suggesting that the soaps and detergents used by the car wash are hazardous or that any significant amount of hazardous substances would otherwise be used. Instead, the evidence showed that the soaps were biodegradable and verified as nonhazardous.

Appellants also claimed the presence of "unusual circumstances" under Guidelines section 15300.2(c). Under the first part of the two-part test announced in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086—whether any unusual circumstance is present—the court found that "there is nothing particularly unusual about the proposed car wash and coffee shop," that the evidence in the record established that there are many other car washes in the surrounding area, and that the site itself was a car wash and snack bar for nearly 40 years. The court also rejected appellants' claims that the "large air blowers and other outdoor activities" made the car wash qualitatively different from the other uses provided in the Class 3 exemption. Similarly, the court stated that the "general effects of an operating business, such as noise, parking and traffic, cannot serve as unusual circumstances in and of themselves."

Next, the court looked at appellants' arguments under the second prong of the test in *Berkeley Hillside,* to see whether appellants had presented "substantial evidence indicating (1) the project will actually have an effect on the environment and (2) that effect will be significant." Appellants raised concerns regarding noise and traffic, claiming that the operation of the car wash would violate the City's interior and exterior noise limits at the abutting property line and that the car wash would adversely impact local traffic and pose public safety concerns. The court rejected both claims. On the issue of noise, the court clarified that the finding of environmental impacts must be based on the project *as approved*, and that here the condition of approval imposed by the City mandated that the project not exceed the City's noise ordinance decibel levels. As to traffic, appellants argued that the car wash and coffee show was "inefficient" and would cause backups "within the project property." The court swiftly rejected appellants' argument, finding that the claim was speculative, contradicted by facts in the record, and that there was no authority that parking or traffic issues within the property qualified as "traffic" under CEQA, which instead addresses the flow of traffic in public spaces.

C. Negative Declarations

1. *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677

- A layperson's opinion that a project would lead to urban decay does not qualify as "substantial evidence."

- A project's inconsistencies with economic development policies and goals in a general plan do not implicate CEQA; as such, the abuse of discretion standard of review applies when reviewing a project's consistency with such policies and goals.

In this case, the County of San Bernardino approved a 9,100 square foot general retail store in the rural community of Joshua Tree, which was intended for occupancy by national chain Dollar General. In approving the project and granting the applicant a conditional use permit, the County prepared and adopted a mitigated negative declaration (MND). The Joshua Tree Downtown Business Alliance, an association of local business owners and residents, filed a petition for writ of mandate, challenging the County's decision on several grounds: (1) the County failed to adequately consider the project's potential to cause urban decay; (2) an EIR was required because substantial evidence supported a fair argument that the project would cause urban decay; (3) the project was inconsistent with the various policies and goals contained in the Joshua Tree Community Plan (Community Plan), which was a part of the County's general plan; and (4) the County improperly attempted to conceal the intended occupant's identity.

The lower court held that the County had adequately considered urban decay, but that lay opinions offered by a local business owner constituted substantial evidence of a "fair argument" that the project might cause significant urban decay. Consequently, the trial court directed the County to set aside its approval and prepare an EIR. On appeal, the Fourth Appellate District agreed that the County had adequately considered the issue of urban decay, but broke with the trial court on the impact of the lay opinion evidence.

One commenter during the MND process—a local business owner who was a former assistant attorney general in the Oregon Department of Justice—had commented extensively on the project's potential to cause urban decay. The Fourth Appellate District held that, although members of the public may provide opinion evidence where special expertise is not required, analysis of urban decay requires relevant expert opinion such as from an economist. Because the commenter—as a business owner and lawyer—lacked expertise in any relevant area, she was not qualified to opine on urban decay and her comments did not constitute substantial evidence. Moreover, the commenter "did not offer any particular factual basis" for her opinions. For example, she did not claim that any business in Joshua Tree had suffered due to competition from a national chain and she had not undertaken any surveys or studies. As such, "whether viewed as lay or expert opinions, her conclusions were speculative."

The appeals court also denied the Alliance's claim that the project was inconsistent with various policies and goals in the Community Plan. Rejecting the Alliance's argument that general plan consistency is reviewed under CEQA's "fair argument" standard, the appeals court applied the "abuse of discretion" standard of review that normally applies to general plan claims and found that the County could reasonably have concluded that the project was not inconsistent with the Community Plan's policies and goals.

2. *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457

- Where trial court grants petition for writ of mandate and requires lead agency to vacate approvals of an MND and prepare an EIR, appeal is not rendered moot just because an EIR for the project was certified if the lead agency has neither vacated the prior approvals nor evaluated the project in light of the EIR.

- Where a resource is neither deemed nor presumed to be a historical resource for purposes of CEQA, a lead agency's determination as to whether the resource is an historical resource is subject to "substantial evidence," not "fair argument" review even in the context of an MND.

In 2013, the City of San Jose proposed to demolish the Willow Glen Railroad Trestle—a wooden railroad bridge built in 1922 to service industry—and replace it with a pedestrian bridge that would be part of the City's trail system. The City issued an initial study and MND for the project that found no impact on historical resources. This finding relied on two documents obtained by the City in 2004, when it proposed a trail project that did not threaten the Trestle's existence: (1) a one-page letter from a State Historic Preservation Officer stating that the proposed project would not affect any "historic properties"; and (2) a one-page evaluation by a consulting architectural historian who opined that the Trestle's design was based on standard plans for wood trestle bridges, the trestles and superstructure were likely replaced during the previous 30 to 40 years, and the Trestle was "a typical example of a common type and has no known association with important events or persons in local history."

During the comment period on the MND, the City received numerous comments, including from a local historian, a historical architect, and an environmental architect. These comments described the uniqueness and historic importance of the Trestle, asserted that the Trestle qualified for listing in the state Register of Historical Resources and that the 2004 documentation was outdated and contradicted by more recent reports and documents. In January 2014, the City Council adopted the MND, finding that "the existing wood railroad trestle bridge is not a historic resource" because "the design is based on standard plans for wood trestle bridges and has no known association with important persons; the bridge materials were likely replace[d] during the last 30 or 40 years; the trestle is not unique and is unlikely to yield new, historically important information; and the trestle did not contribute to broad patterns of California's history and cultural heritage."

Petitioner Friends of the Willow Glen Trestle filed a petition for writ of mandate in Santa Clara County Superior Court, asserting that there was substantial evidence to support a "fair argument" that the Trestle was a historical resource, and therefore an EIR was required. In August 2014, the trial court determined that the fair argument standard applied and that the evidence presented by petitioner met that standard. As a result, the court granted the petition and ordered the City to set aside the approvals for the project and MND and to prepare an EIR. The City appealed.

On appeal, the City first argued that the case was moot because the City had already certified an EIR for the project. The appeals court disagreed. Even though an EIR had been certified, the City had neither vacated the original project approvals nor reconsidered the project in light of the

EIR's analysis. Because the City would not be required to take those actions if it succeeded on appeal, the appeal was not moot.

The appeals court then addressed the issue of whether the fair argument or substantial evidence standard applies to a lead agency's determination that a resource is an "historical resource" under CEQA section 21084.1. The court first rejected the City's claim that it was bound to adopt the Fifth Appellate District's holding in *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039—which held that the substantial evidence standard applies to this determination—simply because the California Supreme Court "allegedly approved of the holding on this issue" in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. Although *Berkeley Hillside* referenced *Valley Advocates* as support for the Supreme Court's interpretation of CEQA's categorical exemptions, it did not consider *Valley Advocates'* holding. As such, the Sixth Appellate District felt the need to resolve the issue itself in this case.

The court began by examining the language of Section 21084.1, which provides that: (1) a resource listed in (or determined to be eligible for listing in) the California Register of Historical Resources is deemed to be a historical resource; and (2) a resource included in a local register of historical resources, or deemed significant pursuant to statutory criteria, is presumed to be historically or culturally significant, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. Section 21084.1 further provides that the fact that a resource is neither deemed nor presumed to be a historical resource under these criteria—as was the case with the Trestle at issue here—"shall not preclude a lead agency from determining whether the resource may be an historical resource" for CEQA purposes.

The appeals court found the treatment of "presumed" historical resources in Section 21084.1 to be instructive. The fact that historical resources are only "presumed" historical based on a "preponderance of the evidence" supports the conclusion that such finding "would not be reviewed under the fair argument standard":

> It would make no sense for the statute to permit the lead agency to make a finding based on a preponderance of the evidence that a resource is not a historical resource if the fair argument review standard would generally result in the invalidation of that finding…. If the lead agency's standard for its decision is 'preponderance of the evidence,' the standard of judicial review logically must be whether substantial evidence supports the lead agency's decision, not whether a fair argument can be made to the contrary.

The appeals court noted that this interpretation was consistent with both CEQA Guidelines section 15064.5(a)(3)—which requires the lead agency's determination regarding a historical resource to be "supported by substantial evidence in light of the whole record"—and with the Fifth Appellate District's decision in *Valley Advocates*. On remand, the trial court was ordered to: (1) vacate its judgment granting the petition; and (2) determine whether the City's adoption of the MND was supported by substantial evidence that the Trestle is not a historical resource.

D. Environmental Impact Reports

1. *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326

- The public agency that is part of a public/private partnership that will be carrying out a project may serve as lead agency for the purposes of environmental review for that project, even when beyond its jurisdiction.

This case is one of six related actions before the Fourth Appellate District challenging the Cadiz Valley Water Conservation, Recovery, and Storage Project, which proposed to install new wells and pump groundwater from an underground aquifer located in eastern San Bernardino County through pumps located on private property owned by Cadiz Inc.[3] This case involves a challenge by the Center for Biological Diversity, San Bernardino Valley Audubon Society, and Sierra Club, San Gorgonio Chapter, and the National Parks Conservation Association (collectively Petitioners) against SMWD, the SMWD Board of Directors, and the County of San Bernardino. The Petitioners challenged SMWD's certification of the final EIR and approval of the project.

The project involves the construction of approximately 34 new wells on Cadiz's land in San Bernardino County to extract an average of 50,000 acre-feet[4] of groundwater annually for 50 years. The project was proposed to be managed and operated by Fenner Valley Mutual Water District, a private, nonprofit entity formed by Cadiz and was subject to the County's Desert Groundwater Management Ordinance (Ordinance). In June 2011, the County and SMWD executed a memorandum of understanding that provided that SMWD would act as the lead agency, and the County would act as a responsible agency (the 2011 Memorandum). In December 2011, SMWD released the draft EIR for public review and comment, and on July 31, 2012, SMWD certified the final EIR. Prior to certification of the EIR, the County, SMWD, Cadiz, and Fenner entered into a separate memorandum of understanding (2012 MOU) setting forth the terms of the parties' agreement concerning the application of the County's Ordinance to the project, and the use of the exclusion process under that Ordinance. Under the terms of the 2012 MOU, the project was required to obtain approval by the County of a Groundwater Monitoring, Management, and Mitigation Plan to satisfy the terms of the Ordinance. The County would consider whether to approve GMMMP after SMWD's certification of the EIR and approval of the project. At the time that Petitioners initiated this lawsuit, that approval had not yet been granted.

Petitioners' core contention was that the County—and not SMWD—should have acted as the lead agency for the project, and that the improper designation of SMWD as lead agency "so tainted the entire environmental review process" that a new EIR had to be prepared by the County. The trial court had agreed that the County should have acted as the lead agency, but ultimately found that no prejudice resulted from the designation of SMWD as lead agency. The

[3] The companion case, *Delaware Tetra Technologies, Inc. v. County of San Bernardino* (2016) 247 Cal.App.4th 352, is summarized in Section I.A.1, above.

[4] One acre-foot equals about 326,000 gallons, or enough water to cover an acre of land, about the size of a football field, one foot deep.

appeals court, however, concluded that there was no error in designating SMWD as lead agency, and thus no need to evaluate whether prejudice occurred.

Public Resources Code section 21067 defines the lead agency as "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." Section 15051 of the CEQA Guidelines further elaborates this requirement by setting forth the criteria for determining what agency should act as the lead agency, including: (a) if a public project, the agency that will carry out the project; (b) if a private project, the agency with the "greatest responsibility for supervising or approving the project as a whole"; or (c) if two agencies have an "equal claim," the agency that acts "first" on the project. And where these provisions leave two or more public agencies "with a substantial claim to be the lead agency," the agencies may designate one as the lead agency by agreement (Section 15051(d) of the CEQA Guidelines). The June 2011 MOU did just that.

The court concluded that SMWD was correctly designated as the lead agency under Section 15051(a), (b), and (d). The court's holding clarified for the first time that where a project will be carried out jointly between a public agency and a nongovernmental person or entity, the agency that will serve as the lead agency for purposes of the environmental review for the project may be: (1) the public agency that is a part of the public/private partnership; or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole. The court went on to hold that SMWD was correctly designated as the lead agency under either prong. The court listed in considerable detail all of SMWD's responsibilities over the project, noting that whereas the County has primary authority over the pumping of groundwater, that SMWD has far more authority over the project as a whole (which included conveyance and deliveries as well). Finally, the court clarified that Section 15051(d), which authorizes two or more agencies to enter into an agreement designating one as the lead agency so long as each agency has a "substantial claim," *does not* require that each agency have an "equal claim" to lead agency status (as is the case under Section 15051(c)).

Petitioners' second argument was that the EIR's project description was inaccurate and misleading because it stated that the "fundamental purpose of the project is to save substantial quantities of groundwater that are presently wasted and lost to evaporation by natural processes." Petitioners argued that the project could not satisfy this purpose because it would not "save" water from evaporation in an amount equal to the water being pumped from the aquifer. The court disagreed, concluding that the project was consistent with the EIR's purpose and objectives because it would conserve water that would otherwise be lost to evaporation and improve water supplies throughout Southern California.

Petitioners' third argument was that the EIR's description regarding the total duration of the project was unstable, not finite, and misleading, because as Petitioners contended the project could exceed its initial 50-year term. The court rejected Petitioners' argument, finding that the EIR set a definite length of time during which pumping may occur, and that any additional time permitted for pumping *would not* alter the total amount of water that may be withdrawn from the aquifer. Further, the EIR provided that any extensions of the project term would require further, separate environmental review. Finally, the court held that "the possibility of an extension of the term of the Project" is "far too speculative to require environmental analysis at this point."

Finally, Petitioners claimed that the project would pump more water from the aquifer than is contemplated by and evaluated in the EIR. The court also rejected this argument, finding that the EIR and its supporting documents do not permit withdrawal of water in excess of the amounts specified in the EIR.

2. *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91

- Where a greenhouse gas (GHG) impacts analysis asserts that those impacts are below the threshold of significance due to the project's exceeding of California's Title 24 Building Energy Efficiency Standards, record must include substantial evidence demonstrating the project's exceedance of those standards.

- Where a general plan requires that all new commercial development generate electricity on-site to the maximum extent feasible, a bald claim that on-site electricity generation is infeasible due only to cost considerations does not constitute substantial evidence supporting a finding of general plan consistency.

- Under the Subdivision Map Act, the legislative body of a city or county is required to make an affirmative finding for each of the items enumerated under Government Code section 66474(a)-(g) before approving a tentative map (or a parcel map for which a tentative map was not required).

A local association challenged the construction of an approximately 215,000 square foot commercial retail development in the City of Victorville, which included an approximately 185,000 square foot Wal-Mart store. The challenge included claims under CEQA, state Planning and Zoning Law provisions concerning general plan consistency, and the Subdivision Map Act.

The San Bernardino County Superior Court granted the petition in part, holding that (1) the EIR failed to adequately analyze both the project's impacts on GHG emissions and its consistency with the general plan's on-site electricity generation requirement, and (2) there was insufficient evidence to support a finding that the project's parcel map and zone change were consistent with the general plan's on-site electricity generation requirement. The lower court rejected the project opponent's other claims: that the City violated CEQA by failing to recirculate the EIR after revising the EIR's analysis of numerous project impacts; and that the City violated the Subdivision Map Act by not making all of the findings specified in Government Code section 66474. The project opponent and Wal-Mart Stores, Inc. (real party in interest) cross-appealed.

Wal-Mart sought reversal of the lower court judgment that found the EIR's GHG emissions impacts analysis inadequate, claiming there was substantial evidence in the record to demonstrate compliance with a general plan policy incorporating state energy efficiency standards. The EIR's GHG impacts analysis had relied on compliance with this policy to demonstrate that the project's GHG impacts were below the threshold of significance. However, the court rejected Wal-Mart's argument, finding several inconsistencies in the record regarding the project's actual capacity to meet the energy efficiency standards.

The EIR's air quality analysis discussed the project's GHG emissions impacts, consistent with CEQA Guidelines section 15064.5(b), and concluded that the project (1) did not substantially increase GHG emissions over baseline, (2) would support and not hinder the state's GHG reduction goals, and (3) that although there were no local or regional GHG reduction mitigation or reduction plans, the project's design features would likely comply with any future adopted plans. Notably, each of the City's conclusions was partially dependent on the project's compliance with a general plan policy that requires all new commercial construction in the City to attain a 15 percent efficiency increase over 2008 Title 24 (Cal. Code Regs.) Building Energy Efficiency Standards. The court found that the City's conclusions in this regard were not supported by the record. In two separate places, the EIR stated that the project would achieve only a minimum of 10 percent increased efficiency over the Title 24 Standards. In another, it stated the project would achieve a minimum of 14 percent increased efficiency. Finally, in response to a comment, the City acknowledged that the project was "currently not in conformity" with the general plan policy and that "several of the project's current energy efficient measures *likely* meet the 15% requirement" (emphasis added). The appeals court held that, at most, the record showed that the project may comply with the policy, not that it will comply, and therefore the City's determination that the project will have no significant GHG emissions impacts was not supported by substantial evidence.

The appeals court also affirmed the trial court's ruling that there was no substantial evidence to support the City's finding of consistency with another general plan requirement—that all new commercial or industrial development generate electricity on-site to the maximum extent feasible. The EIR explained that the project was being developed as "solar ready," but concluded that it was infeasible for the City to require rooftop solar panel installation due to uncertainties concerning the availability of tax credits and other financial incentives. The court of appeal held this was insufficient, noting that the EIR also stated that "there are many factors to be considered in determining the feasibility of solar power generation," but failed to state what those factors might be or to discuss their application to this project. The EIR also did not include any discussion of the feasibility of other types of on-site electricity generation, such as wind power. For these reasons, the City could not demonstrate general plan consistency and therefore failed to comply with both CEQA and the Planning and Zoning Law requiring consistency (CEQA Guidelines section 15125(d); Govt. Code sections 65860(a), 66473.5).

Lastly, the appeals court partially reversed the trial court's ruling on recirculation of the EIR, holding that certain revisions to the EIR constituted "significant new information" within the meaning of Section 21092.1 of CEQA. The appeals court held that revisions to the air quality impacts analysis added analysis of the project's consistency with several general plan policies and implementation measures and—without recirculation—deprived the public of a meaningful opportunity to comment on that information. Similarly, recirculation was required for revisions to the hydrology and water quality impacts analysis that included a "complete redesign" of the project's stormwater management plan and essentially replaced 26 pages of the EIR's text with 350 pages of technical reports.

The appeals court also held that the City violated the Subdivision Map Act by failing to make all of the findings specified in Government Code section 66474 when it approved the parcel map for the project. On its face, Section 66474 requires only that a city *deny* approval of a parcel map

(or a tentative map) *if it makes* any one of seven findings enumerated at subsections (a)-(g), concerning consistency with general and specific plans, site suitability, conflicts with public access easements, and impacts on the environment, wildlife, or public health. The statute does not explicitly address whether a city must *affirmatively* make those findings before *approving* a map. However, the court concluded that affirmative findings are, in fact, required for each of Section 66474's enumerated subsections. In reaching this conclusion, the court relied on the requirements of a related Government Code section 66473.5 (which requires affirmative findings as to general and specific plan consistency), a 1975 Attorney General opinion stating that both sections require affirmative findings (58 Ops. Cal. Atty. Gen. 21, 28 (1975)), and case law and secondary source authority supporting the Attorney General's interpretation.

3. *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256

- Adoption of an addendum to address an approved EIR's inadequate analysis of energy impacts fails to comply with CEQA.

- EIR's analysis of energy use failed to include a separate section analyzing energy impacts and did not include a calculation of the energy use attributable to vehicle trips, operations, or construction, which is necessary to an adequate impacts analysis.

In 2011, Costco applied for a use permit and site rezone to allow construction of a 148,000-square-foot retail facility—including a warehouse store, over 600 parking stalls, and a 16-pump gas station—in the City of Ukiah. In December 2013 and January 2014, the City adopted the necessary rezoning legislation, certified the EIR, and adopted a statement of overriding considerations. Ukiah Citizens for Safety First, a local citizens group, filed suit to challenge the EIR in the Mendocino County Superior Court. Shortly after the suit was filed, the Third Appellate District issued its opinion in *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173 (CCEC). The City concluded that the *CCEC* decision required "a more detailed discussion of energy use than was previously understood at the time the EIR was certified," and thereafter prepared an addendum and lodged the addendum with the trial court, in an effort to satisfy the more exacting standard articulated in *CCEC*.

Petitioner argued at trial that the EIR did not properly identify and analyze the project's potentially significant energy impacts, and that the addendum prepared by the City – following certification of the EIR and approval of the project—was not properly a part of the administrative record concerning the EIR's adequacy. The trial court, however, considered the addendum, found the energy impacts analysis to be adequate, and denied the petition in its entirety. Petitioner appealed.

The First Appellate District reversed, holding that the EIR did not adequately analyze the potential energy impacts of the project. The court noted the requirements contained in Public Resources Code section 21100(b)(3) (an EIR must include a statement concerning mitigation measures "to reduce the wasteful, inefficient, and unnecessary consumption of energy") and in Section 15126.4 and Appendix F of the CEQA Guidelines (requiring EIR to consider "potentially significant energy implications of a project"). Here, the EIR did not contain a separate section analyzing energy impacts, but instead mentioned them throughout the EIR.

Notably, the EIR did not include a calculation of the energy use attributable to vehicle trips generated by the project nor of the operational and construction energy use of the project, which the *CCEC* opinion found necessary to an adequate energy impacts analysis. The court concluded that the EIR held deficient in *CCEC* was "in all material respects the same" as the EIR for the Costco project.

The addendum prepared by the City to address the *CCEC* decision did not solve the problem. First, the addendum was prepared after the EIR was certified by the City. As such, the addendum was not a part of the administrative record concerning that certification and could not be considered by the court in evaluating the adequacy of the EIR. Second, subsequent approval of the addendum—even if it contained the necessary analysis of energy impacts—"does not cure the prior approval of an inadequate EIR." Guidelines section 15164, which authorizes preparation of an addendum in certain circumstances, "assumes that the EIR previously certified was properly certified. The section does not authorize the retroactive correction of an inadequate EIR based upon the consideration of which the project was approved, by providing the additional necessary information about the environmental effects of the project after the project has been approved."

4. *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966

- Establishes the authority of CARB and MPOs to mandate GHG reduction measures at the regional level, independent of any statewide GHG reduction mandates.

In this case, the First Appellate District rejected a challenge to the regional GHG reduction mandates of "Plan Bay Area," the sustainable communities strategy developed by the Metropolitan Transportation Commission (MTC) and Association of Bay Area Governments (ABAG) to comply with the requirements of SB 375. In particular, the court rejected petitioner's argument that the EIR for the Plan should have taken into account reductions in GHGs that will occur under statewide GHG reduction mandates.

Prior to SB 375 becoming effective in 2009, California promulgated a number of mandates for the reduction of GHG emissions, including regulations issued pursuant to AB 1493 (the "Pavley" legislation, setting statewide emissions reduction targets for passenger vehicles and light-duty trucks), AB 32 (requiring reduction of GHG emissions to 1990 levels by 2020), and Executive Order S-01-07 (the Low Carbon Fuel Standard, requiring reduction of the carbon density of transportation fuel by at least 10 percent by 2020).

SB 375 requires that each metropolitan planning organization (MPO) adopt, as part of its regional transportation plan, a "sustainable communities strategy" that sets forth plans to meet regional GHG reduction targets set by the California Air Resources Board (CARB). In 2010, CARB established the requisite GHG reduction targets for the Bay Area region. MTC and ABAG, acting collectively as the MPO for the Bay Area, then developed a sustainable communities strategy for the region called "Plan Bay Area." In 2013, following CEQA review, MTC and ABAG adopted the Plan. In 2014, CARB accepted the determination by MTC and ABAG that the Plan would meet the GHG reduction targets set by CARB under SB 375.

Petitioner Bay Area Citizens, a group represented by the Pacific Legal Foundation, filed a CEQA challenge to the adoption of Plan Bay Area in Alameda County Superior Court, arguing that the EIR failed to comply with CEQA in five ways: (1) not adequately identifying the Plan's basic objectives; (2) not adequately assessing a "no project" alternative; (3) relying on an outdated baseline; (4) not including a reasonable, feasible alternative; and (5) not responding to petitioner's alternative proposed plan. All five claims relied on the same premise: that the EIR should have taken into account existing statewide GHG reduction mandates that would result in CARB's GHG reduction targets under SB 375 being met without the need for the Plan's "draconian, high-density land-use regime." Petitioner argued that this alleged omission resulted in the EIR failing to satisfy CEQA's "core purpose of informed public decision-making." The trial court rejected this argument and upheld the EIR.

The First Appellate District affirmed, holding that "[t]he only legally tenable interpretation of SB 375 is that it requires [CARB] to set targets for, and [MTC and ABAG] to strive to meet these targets by, emissions reductions resulting from regionally developed land use and transportation strategies, and that it requires these reductions be in addition to those expected from the statewide mandates." The appeals court based this holding on the language of SB 375, the accompanying legislative declarations and findings, and the interpretation of SB 375 by CARB, which is the administrative agency charged with implementing the statute.

The appeals court also rejected Petitioner's arguments on two independent grounds. First, even if the Legislature did not intend for MPOs to develop regional GHG reduction goals that are in addition to existing statewide mandates, CARB—as the agency charged with implementing and meeting the goals of SB 375—had the discretion to require MTC and ABAG to do so. Second, because the lawsuit essentially argued that MTC and ABAG violated CEQA by "adopting a plan that did more than the minimum necessary to meet their SB 375 targets," it amounted to a "substantive attack on the wisdom of Plan Bay Area itself." However, "an objection to the substantive choice a lead agency makes in approving a project is not a legitimate basis for a CEQA lawsuit."

5. *Bay Area Clean Environment, Inc. v. Santa Clara County* (2016) __ Cal.App.5th __

- County did not engage in improper "segmentation" by not analyzing impacts of potential future mining project, where application for that project had been withdrawn and current project was not the first phase in a "larger development."

- Conclusion by Department of Conservation that a reclamation plan complies with SMARA constitutes substantial evidence supporting County's conclusion that project complies with SMARA.

- Neither certification findings nor statement of overriding considerations need address impacts determined to be less than significant.

In *Bay Area Clean Environment, Inc. v. Santa Clara County*, the Sixth Appellate District rejected a challenge to the County's 2012 approval of an amendment to a Reclamation Plan ("Plan") for a

century-old 3,510-acre limestone and aggregate surface mine. The County prepared an EIR for the Plan, which was designed to reclaim all of the property impacted by the mining operation over a 20-year period. In its challenge, Petitioner Bay Area Clean Environment, Inc. ("Bay Area") claimed that that the County had failed to comply with both the Surface Mining and Reclamation Act ("SMARA") and CEQA. The trial court upheld the County's approvals and the Sixth Appellate District affirmed.

As to CEQA, Bay Area argued that the EIR was inadequate because it failed to address the cumulative impact of a new South Quarry pit that had previously been proposed to replace the reclaimed pit. According to Bay Area, the project proponent had intentionally omitted the new pit from the environmental document in order to achieve quick approval of the Plan. Bay Area said this was improper "segmentation" or "piecemealing" of environmental review. The court rejected this argument, finding that the application for the new pit, previously submitted by the project proponent, had been withdrawn before the EIR process began. Further, the new pit—if subsequently built—"would not change the scope of the nature of the reclamation of the North Quarry pit or the reclamation's environmental effects." Consequently, the court emphasized, the Plan was a "stand-alone project and does not require approval of a future project, such as the South Quarry pit for reclamation for the North Quarry to occur." Distinguishing *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325—an early case holding that separate treatment of phased development was improper piecemealing—the court here emphasized that the Plan was not a "first phase in a larger development."

Bay Area also claimed that the County's certification findings and statement of overriding consideration were insufficient to support approval of the Plan and EIR in that they did not adequately address impacts on the California red-legged frog. The EIR, however, had concluded that direct impacts to the frog were less than significant because no frogs had been identified in the project area. Because the impact was found to be less than significant, the court concluded that no additional findings were required. Further, the EIR concluded that indirect impacts to aquatic life—not necessary the frog—were significant and unavoidable. According to Bay Area, the statement of overriding considerations should have expressly addressed the red-legged frog. The court rejected this argument. In upholding long-standing CEQA precedent, the court held that because direct impacts to the frog were determined to be less than significant, the statement of overriding considerations was not required to discuss it.

Finally with regard to CEQA, Bay Area argued that the trial court erred in augmenting the record to include an email exchange between an expert biologist and the California Department of Fish & Wildlife. In a 2007 report, the consultant had documented a frog in a pond at the site, but in the 2009 email the consultant clarified that the earlier entry was a mistake. The court found that the document was properly part of the administrative record under Public Resources Code section 21167.6(e)(10), which includes "any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits . . ." The court noted that the email was sent before the EIR was certified by the same firm that prepared the biological assessment for the Plan EIR. The EIR, in turn, relied on the biological assessment for its conclusion that no protected frogs were present in the project area. Consequently, the consultant's email was properly part of the administrative record of the proceedings.

Separately, the court addressed Bay Area's several challenges to the Plan under SMARA. First, the court rejected a claim by Bay Area that the Plan failed to satisfy SMARA water quality standards because placement of overburden during reclamation would increases selenium in a nearby creek. Under the plain language of the SMARA regulations, 14 C.C.R. § 3706(b), it was within the County's discretion to allow temporary water quality impacts if necessary to implement the Plan. Second, the court rejected a claim by Bay Area that the Plan violated SMARA's provisions governing wildlife habitat by failing to specifically mention and provide for the red-legged frog. While SMARA requires that a reclamation plan return the disturbed area to prior (or better) habitat conditions except under certain conditions, the biological assessment attached to the Plan analyzed the frog and its habitat and provided measures for avoiding and minimizing impacts. Third, Bay Area had argued that statements by the Office of Mining Reclamation that the Plan complied with SMARA did not constitute substantial evidence to support the County's determination of SMARA compliance. The court rejected this claim as well, finding that the County properly relied on the Department of Conservation's determination of compliance, which was based in part on the statements of the Office of Mining Reclamation.

E. Subsequent Review

1. *Coastal Hills Rural Preservation v. County of Sonoma* (2016) __ Cal.App.5th __

- Even though project originally proceeded under an MND, subsequent project changes are properly reviewed under CEQA section 21166 and Guidelines section 15162 and the substantial evidence standard of review (rather than fair argument).

- The updated project changes fell within the scope of the earlier-approved project and did not have significant impacts with respect to fire or wildlife hazards, and thus did not require a subsequent EIR.

- Undisputed evidence established that the facility operated as a nonprofit, and therefore qualified for the County's general plan and zoning ordinance designations for rural development and noncommercial clubs and lodges.

This case centered on the applicable standards and appropriateness of proceeding on a Subsequent Mitigated Negative Declaration (SMND), rather than an EIR, where changes had been incorporated in a religious facility approved earlier based on an MND. In 2004, the Tibetan Nyingma Meditation Center (TNMC) purchased a resort located in an area of Sonoma County designated as Resources and Rural Development in the County's general plan. TNMC renamed the resort the Ratna Ling Retreat Center and submitted an application for a master use permit (MUP) to construct 19 additional cabins, a library, a healing center, a therapeutic pool, and a new 18,750 square foot printing press facility for the printing of sacred Buddhist texts in the Tibetan language. The application also proposed expansion of the existing lodge into a meditation hall with a kitchen and dining facilities, and a maximum occupancy of 60 persons. The County adopted an MND (2004 MND) and approved the MUP, subject to 58 conditions of approval. Those conditions designated the printing press operation a noncommercial "ancillary use" and set the maximum occupancy for that operation at 27 persons, with hours of operation 7:00 a.m.

to 10:00 p.m., seven days a week. The accompanying staff report indicated that the printing press operation was intended to be based on the use of one printing press.

In 2006, TNMC installed five additional printing presses at the Ratna Ling facility. Then, in 2008, Ratna Ling received a temporary zoning permit for four steel-frame storage tents to house a "Sacred Text Treasury." Combined, the four tents covered 39,270 square feet—over twice the size of the 18,750 square foot printing press facility. Also in 2008, the County adopted an MND (2008 MND) and approved a use permit allowing construction of a reservoir for Ratna Ling's water system and to modify the size and location of the healing center.

In 2010, a citizens group filed a complaint with the County (2010 Complaint), alleging that Ratna Ling was operating in violation of the conditions of the 2004 MUP—in particular, that the printing press operation was no longer an ancillary function, given that (1) the combined square footage of the printing press operation and the four temporary storage tents was equal to the square footage of Ratna Ling's retreat-related facilities, (2) the six printing presses were operating around-the-clock, with up to 40 workers present each day, and (3) truck traffic related to the operation had increased by 12 to 16 times over Ratna Ling's 2004 estimate. TNMC responded that the sacred text production was "a central religious practice and provides essential support to the primary purpose" of Ratna Ling as a Buddhist retreat.

In 2011, Ratna Ling submitted an application for an MUP that would (among other things) secure permanent status for the four temporary storage tents, allow for a storage use not to exceed the combined square footage of those tents, and raise the occupancy limit to 98 persons (2011 Project). In 2012, the County Board of Zoning Adjustments approved the permit and adopted an MND for the project (2012 MND). These approvals were appealed to the County Board of Supervisors by a project opponent. In 2013, Ratna Ling submitted an updated proposal for the 2011 Project, and Coastal Hills Rural Preservation (CHRP) subsequently refiled its 2010 Complaint. In 2014, the County released a 46-page subsequent MND (SMND) to the 2004 and 2008 MNDs, which superseded the 2012 MND.

The County Board adopted the SMND, denied the project's opponent's appeal, and approved the 2011 Project subject to 96 conditions of approval. CHRP then filed a petition for writ of mandate and complaint in Sonoma County Superior Court, challenging the actions of the Board. In April 2015, the trial court denied the writ, and CHRP appealed. The court of appeal affirmed, rejecting CHRP's claims.

First, CHRP argued that the 2011 Project was a new project under CEQA, as opposed to a modification of Ratna Ling's prior MUPs, and therefore the fair argument test should apply regarding the County's decision to proceed with the SMND rather than an EIR. The court rejected this claim, holding that the County appropriately viewed the 2011 Project as falling within the scope of CEQA section 21166 and Guidelines section 15162, as (1) the printing press operation was evaluated in the 2004 MND and authorized by the MUP issued at that time, and (2) although the storage tents were not evaluated in the 2004 or 2008 MNDs, it was "undisputed that these structures are integral to Ratna Ling's existing printing press operation." As such, the 2011 Project was not a new project for CEQA purposes, and the County's decision not to require

an EIR would be reviewed under the substantial evidence standard.[5] The appeals court then rejected CHRP's claim that the record did not include substantial evidence demonstrating that the 2011 Project would not have a significant impact with respect to wildland fires or wildlife hazards. The court also ruled against CHRP with respect to the County's inclusion of the storage tents as part of the baseline conditions for the impacts analysis, finding that the tents were, in fact, part of the existing physical conditions at the site, and, in any event, the County fully evaluated the impacts of the tents. Finally, the court held that the County did not improperly defer study of fire impacts until after the adoption of the SMND by incorporating a condition requiring that the applicant coordinate with the Fire Marshal to review existing fire-fighting infrastructure and install any additional onsite infrastructure that the Fire Marshal deemed appropriate.

Second, CHRP argued that the 2011 Project involved "rampant commercial activity" associated with the production, storage, and sale of printed materials, and therefore was inconsistent with the General Plan's Resources and Rural Development (RRD) designation covering the Ratna Ling property, which permits "visitor serving uses," and the related zoning ordinance, which includes "noncommercial clubs and lodges" as an allowable use, along with "accessory" buildings and uses that are appurtenant to the operation of allowable uses. The appeals court rejected this claim, finding no evidence in the record that Ratna Ling's printing activities were undertaken for profit. Rather, the undisputed evidence showed that 98 percent of its total printing output was given away for free, only 11 percent of its total revenue came from printing operations, and proceeds from those operations were used to support the production of more religious texts. The court held that these operations were not inconsistent with Ratna Ling's primary function as a religious retreat "merely because some of its output enters the stream of commerce." The court also rejected CHRP's claim that the printing operations should be deemed "industrial" uses inconsistent with the RRD designation. Though the printing operations intensified over time, the County did not abuse its discretion in categorizing those operations as ancillary to the retreat center use. Finally, the court found that the Board "fully considered the County's land use policies and the extent to which the 2011 Project conforms to those policies" and, given the deferential standard of review, the court would not reweigh conflicting evidence or substitute its judgment for that of the Board.

Third, the court found that (1) CHRP failed to exhaust its administrative remedies with respect to its argument that adoption of the SMND violated California Constitution provisions relating to the establishment of religion, and (2) CHRP failed to exhaust its administrative remedies with respect to its claim that the County engaged in impermissible spot zoning when it approved the 2011 Project. Even if it had exhausted this claim, nothing in the record or the relevant zoning regulations suggested that the County had violated Government Code section 65852 by authorizing a use at Ratna Ling that was prohibited at all other parcels in the same zone.

[5] This ruling comprises issues that are currently pending before the California Supreme Court in *Friends of the College of San Mateo Gardens v. San Mateo County Community College District*—the standards of review governing project modifications and whether CEQA Guidelines section 15162 appropriately extends to projects initially approved by a negative declaration (see case summary at Section III.A.1, below).

F. Litigation Procedures

1. *Center for Biological Diversity v. California Department of Fish & Wildlife* (2016) 1 Cal.App.5th 452

- Absent specific legislation granting original jurisdiction, appeals courts in California do not have the power to issue and supervise writs of mandate in CEQA cases—that power is reserved to trail courts on remand.

The California Supreme Court in *Center for Biological Diversity v. California Department of Fish & Wildlife* (2015) 62 Cal.4th 204, invalidated the greenhouse gas analysis and mitigation for the fully-protected unarmored stickleback on review of an EIR prepared for the Newhall Ranch development in northern Los Angeles County. In its ruling, the Supreme Court remanded the case to the lower appeals court to determine two issues left undecided—the project's impacts on tribal cultural resources and the endangered steelhead trout.

On July 11, 2016, the Second Appellate District issued its ruling after remand from the Supreme Court. In unpublished sections of its opinion, the court provided further direction to the trial court and lead agency on the greenhouse gas analysis and species issues, and reiterated its earlier ruling—that the EIR's evaluation of tribal cultural resources and steelhead trout was supported by substantial evidence. In the only published portion of the opinion, the court grappled with a procedural issue that only a CEQA aficionado could love—whether the appeals court itself can retain jurisdiction to supervise directly the agency's compliance with its ruling. Appeals court jurisdiction in CEQA cases has witnessed some interesting turns in recent years, as the Legislature has added targeted streamlining provisions and original jurisdiction in the appellate courts in some instances. (*See, e.g.*, Pub. Resources Code, §§ 21168.6 (CPUC challenges), 21185 (environmental leadership projects).) The court here, however, found that it did not have the authority to step into the shoes of the trial court.

After remand from the Supreme Court—and to avoid facing delays in further proceedings before the trial court—the developer and Department urged that the Supreme Court's opinion and certain remedy and timing provisions under CEQA together permitted the appeals court to retain jurisdiction to "supervise the completion of the environmental review process." The Petitioner Center for Biological Diversity (CBD) protested, arguing that appeals courts have no jurisdiction to retain supervision, and that the only available procedure is to remit the case to the trial court for further proceedings. The appeals court agreed with CBD, finding that unlike specific provisions that grant original jurisdiction to the appeals courts—e.g., Section 21168.6 for actions against the Public Utilities Commission—nowhere does CEQA or the Code of Civil Procedure offer such a procedural device.

While appeals courts may not have the power to issue and supervise writs of mandate directly, the court's opinion did recite the significant flexibility that trial courts have to fashion alternative remedies in CEQA cases. This discussion may be the most important element of the opinion, as the scope of available remedies is a common issue in any case where a writ of mandate has been granted.

2. *Communities for a Better Environment v. Bay Area Air Quality Management District* (2016) 1 Cal.App.5th 715

- Where no notice has been issued under CEQA, the 180-day statute of limitations begins to accrue when there is an "approval" of a permit for the project, even if there is no public notice of that approval.

- The "discovery rule," which postpones accrual of an action until the date the plaintiff has actual or constructive notice of the facts constituting the injury, does not apply in CEQA cases where one of the statutory triggering dates occurs (notice, approval, or commencement); however, if there is no statutory triggering date, an action may accrue "on the date a plaintiff knew *or reasonably should have known* of the project" (*Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929).

In this case, Communities for a Better Environment (CBE) and a host of other environmental groups sought to challenge a rail-to-truck facility for the transloading of crude oil permitted by the Bay Area Air Quality Management District (BAAQMD). The trial and appeals courts held that CBE's petition was time barred under Section 21167(d) of the Public Resources Code for failure to bring the claim within 180 days of BAAQMD's approval of an Authority to Construct (ATC) that authorized certain air emissions from the transloading of Bakken Crude. In doing so, the courts rejected the argument by CBE that the "discovery rule" should apply in CEQA cases where, as here, there is no public notice of the approval.

The rail-to-truck facility had been transloading ethanol through Richmond since 2009. In February 2013, however, the operator (Kinder Morgan) applied to BAAQMD for approval to alter the facility and begin transloading Bakken crude oil, a form of crude that CBE alleged was "highly volatile and explosive" (among other environmental risks). Without any public notice, BAAQMD in July 2013 found the approval "ministerial" (not subject to CEQA) and issued an ATC for transloading Bakken crude. The facility began transloading Bakken crude in September 2013 and BAAQMD later modified two conditions of the ATC in October and December 2013. BAAQMD in February 2014 finally issued Kinder Morgan a Permit to Operate (PTO)—a follow-on permit to the ATC's that incorporated the modified conditions. BAAQMD exercised its discretion and declined to file a Notice of Exemption, which it could have done under Section 15062 of the CEQA Guidelines.

CBE filed suit in March 2014 to challenge the transloading of Bakken Crude, which was within 180 days of the PTO but long after BAAQMD's approval of the original ATC authorizing the switch to Bakken crude. CBE argued that its petition was timely because its first discovery (i.e., "notice") of the approval of Bakken crude did not occur until January 2014, "when one of CBE's staff members received an email disclosing that the Richmond facility had begun transloading crude oil." Citing *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, CBE argued that:

> [I]t could not with reasonable diligence have learned, of the project any earlier, because BAAQMD 'gave the public no notice of Kinder Morgan's switch to ...

> Bakken crude oil' and 'Kinder Morgan's transloading operation is entirely enclosed, making the transported commodity, and any change to it, invisible.'

In *Costa Mesa*, the Supreme Court had held that when the project under construction differs from the project originally approved by the agency, "an action challenging the agency's noncompliance with CEQA may be filed within 180 days of the time the plaintiff *knew or reasonably should have known* that the project under way differs substantially from the one described in the EIR." (*Id.*, at 939–940.) But in that case, there was no formal "approval" and the project opponents were not aware of substantial changes in an amphitheater project until the venue held its first concert. The court reasoned that this interpretation of the statute of limitations was appropriate because the opponents "could not with reasonable diligence have discovered" the changes earlier.

The First Appellate District declined to apply *Costa Mesa*, citing an important distinction—here, BAAQMD had issued its approval of the switch to Bakken crude in July 2013, which served as one of three alternative dates specified in Section 21167(d) that starts the limitations period (from "notice," "approval," or "commencement" of the project). At that point—and despite no public notice of the approval—the public is deemed to have "constructive notice" of the project under CEQA.

The court further emphasized that the "discovery rule" has never been applied in CEQA cases to postpone accrual of the statute of limitations. The discovery rule, which has been applied in non-CEQA cases, "postpones the accrual of an action . . . until the date the plaintiff has actual or constructive notice of the facts constituting the injury." The Supreme Court in *Concerned Citizens*, however, "specifically rejected 'as contrary to the Legislature's intent' the plaintiffs' position 'that their action was timely because it was filed a few days before the expiration of 180 days after the first concert was held at the theater." Rather, the Supreme Court held that "an action accrues on the date a plaintiff *knew or reasonably should have known* of the project *only if no statutory triggering date has occurred*." In *Costa Mesa*, there was no "notice" and no formal "approval" of the changed amphitheater project, and thus no earlier "triggering date" for accrual of the limitations period.

In the end, the First Appellate District acknowledged that while public participation plays an important role in CEQA, "arguments about the proper balance between the interests of public participation and of timely litigation are better directed at the Legislature."

II. PUBLISHED LAND USE CASES[6]

1. *Stewart Enterprises, Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410

- Under city permit-vesting ordinance, which shielded the holder of a lawfully issued building permit from having to comply with any subsequently adopted zoning regulations, landowner's building permit provided a vested right to construct a crematorium, even if subsequent emergency ordinance requiring a CUP was lawfully passed and the city council intended it to override the permit-vesting ordinance.

- Application of emergency ordinance requiring a conditional use permit to operate new crematoria constituted an impairment of landowner's vested right because it "prohibited" landowner's crematorium project, for which landowner had acquired a building permit.

- Evidence did not establish a sufficient threat to the public welfare justifying impairment of landowner's vested right.

Plaintiffs obtained a building permit to construct a crematorium on a site in East Oakland. Five days later, the Oakland City Council passed an emergency ordinance requiring a conditional use permit (CUP) to operate new crematoria. Plaintiffs administratively appealed a determination that the emergency ordinance applied to its proposed crematorium, but Oakland's Planning Commission denied the appeal. Plaintiffs then filed a complaint, which included administrative mandamus claims, against the City of Oakland, the City Council, and the Planning Commission.

The trial court granted one of Plaintiffs' claims, ruling that Plaintiffs had a vested right in the building permit based on a preexisting local ordinance and that the emergency ordinance was not sufficiently necessary to the public welfare to justify an impairment of that right. On appeal, the City argued that: (1) Plaintiffs had no vested right; (2) even if Plaintiffs had a vested right, it was not impaired; and (3) even if Plaintiffs had a vested right that was impaired, the impairment was supported by substantial evidence.

The appeals court affirmed the trial court's decision, holding that although governmental agencies may generally apply new laws retroactively where such an intent is apparent, that retrospective application may be unconstitutional if it deprives a person of a vested right without due process of law. In so holding, the First Appellate District relied on *Davidson v. County of San Diego*, resolving the following issues: (1) whether Plaintiffs had a vested right in the building permit under the permit-vesting ordinance; (2) if so, whether the emergency ordinance impaired that right; and (3) if there was a vested right that was impaired, whether the impairment was justified because it was sufficiently necessary to the public welfare.

[6] Three cases that included published rulings on both CEQA and land use claims—*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677 (community planning), *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91 (subdivisions), and *Coastal Hills Rural Preservation v. County of Sonoma* (2016) __ Cal.App.5th __ (general plan and zoning)—are covered in Sections I.C, I.D, and I.E, above.

The appeals court found that: (1) the plain terms of the City's permit-vesting ordinance shielded the holder of a lawfully issued building permit from having to comply with any subsequently adopted zoning regulations if such would prohibit the construction authorized by the permit; (2) the emergency ordnance impaired Plaintiffs' vested right because the ordinance prohibited the construction of a crematorium as authorized by Plaintiffs' building permit; (3) there was insufficient evidence of a danger or nuisance to the public that justified the City's application of the emergency ordinance to Plaintiffs' project—the City's evidence showed that there were concerns only over the impact the crematorium *might* have on the public and local businesses.

2. *Naraghi Lakes Neighborhood Preservation Association v. City of Modesto* (2016) 1 Cal.App.5th 9

- Judicial review of lead agency's determination of general plan consistency is highly deferential and will only be reversed if no reasonable person could have reached the same conclusion.

- Evidence was sufficient to support city's determination that shopping center project adjacent to residential neighborhood was consistent with general plan, including neighborhood plan prototype policies; based on language of the policies and city's past practices; acreage and square footage descriptions were reasonably construed as flexible guides to development rather than rigid development limitations.

A shopping center was proposed to be built on vacant land in Modesto adjacent to a residential neighborhood. In January 2014, the Modesto City Council approved the entitlements for the project—including a general plan amendment and zoning change—and certified the project EIR. A neighborhood group filed a challenge with the Stanislaus County Superior Court, alleging that the City's actions violated a number of policies in the City's general plan, including "neighborhood plan prototype" (NPP) policies, and that the EIR failed to comply with CEQA for that reason and on several other grounds (involving traffic mitigation, urban decay, and the statement of overriding considerations). The trial court denied the petition on all grounds.

The appeals court affirmed. In the published portion of the opinion, the court addressed the project's consistency with the general plan NPP policies. First, the court set forth a comprehensive summary of the applicable law and standard of review, which confirms the broad discretion enjoyed by local agencies when making general plan consistency determinations. In addition to citing and quoting numerous prior decisions, the court stated:

- "Where, as here, a governing body has determined that a particular project is consistent with the relevant general plan, that conclusion carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion";

- "Moreover, judicial review of consistency findings is highly deferential to the local agency"; and

- "In applying the substantial evidence standard, we resolve reasonable doubts in favor of the City's finding and decision. . . . The essential inquiry is whether the City's finding of

> consistency with the General Plan was 'reasonable based on the evidence in the record' . . . . Generally speaking, the determination that a project is consistent with a city's general plan will be reversed only if the evidence was such that no reasonable person could have reached the same conclusion."

With these principles in mind, the court upheld the City's determination that the project was consistent with the NPP policies. One of those policies stated that a 7 to 9-acre neighborhood shopping center, "containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood." Here, the project at issue consisted of approximately 170,000 square feet of commercial space in an 18-acre shopping center. The City argued that the plain language of the policies demonstrated that they were intended as "guidance," not "mandatory limitations," and that the City's past practice in approving shopping centers exceeding the NPP policy size specifications demonstrated its consistent interpretation of the policies as flexible. Petitioner disagreed, taking the position that each of the NPP policies should be treated as a mandatory development standard.

The court ruled for the City, concluding that "the wording of the NPP [policies] is reasonably consistent with the interpretation given to it by the City." The court also found substantial evidence in the record to support the City's claim that it had "a consistent practice" of treating "the acreage and square footage description in the NPP policy as a flexible guide to neighborhood development, rather than a strict limitation on the size of shopping centers."

3. *City of Selma v. Fresno County Local Agency Formation Commission* (2016) 1 Cal.App.5th 573

- When a LAFCo sets a public hearing on a reorganization proposal and thereafter continues the hearing date beyond the 70–day limitation for continuances under Government Code section 56666, subdivision (a), it violates the 70–day limitation; however, the 70–day limitation is a directory rather than a mandatory provision, and as such, does not invalidate LAFCo's determinations.

On October 22, 2012, the City of Kingsburg submitted to the Fresno County Local Area Formation Commission (LAFCo) application materials for the annexation of approximately 430 acres of land in Fresno County. The annexation territory included 350 acres that had been developed with industrial/commercial uses, 52 undeveloped acres, and approximately 28 acres of street rights-of-way. After having initially rejected Kingsburg's application as incomplete, on March 18, 2013, LAFCo's executive officer sent a letter to Kingsburg certifying that its application was accepted for filling, and on the same date published a notice of public hearing. The notice indicated that on April 10, 2013, LAFCo would be considering Kingsburg's requested annexation. On that date, however, LAFCo continued the hearing on the reorganization "to a date uncertain" to allow time for Kingsburg and the Fresno County Fire Protection District (FCFPD) to negotiate a transition agreement consistent with LAFCo policy. By June 5, 2013, Kingsburg and the FCFPD were still in negotiations regarding a transition agreement. On June 24, 2013, LAFCo republished a notice of a public hearing on the annexation for July 17, 2013.

On July 15, 2013, the City of Selma sent a letter to LAFCo, objecting to the notice of hearing for the July 17, 2013 meeting. Selma asserted that under Section 56666 (a), LAFCo could not

continue the hearing to July 17, 2013, because it was more than 70 days after the originally noticed date of April 10, 2013. LAFCo's counsel responded that the 70–day limitation in section 56666(a) was, pursuant to section 56106, 'directory' rather than 'mandatory.'

After the public hearing, LAFCo then determined the CEQA documents prepared by Kingsburg were legally adequate, and the annexation was consistent with LAFCo's standards and the Reorganization Act. LAFCo approved the annexation, subject to several conditions, and on July 24, 2013, LAFCo filed a notice of determination. Selma filed a writ of mandate challenging LAFCo's approval of the annexation. The trial court denied the writ and Selma appealed.

The appeals court agreed with LAFCo that the 70-day limitation in Section 56666(a) is directory rather than mandatory, and as such, did not warrant invalidating the LAFCo's determination. Initially, the Appellate court discussed Section 56106, which provides: "Any provisions in this division governing the time within which an official or the commission is to act shall in all instances, except for notice requirements and the requirements of subdivision (h) of Section 56658 and subdivision (b) of Section 56895, be deemed directory, rather than mandatory."

The appeals court then elaborated that the 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates. Because Section 56666(a) permits continuation of a hearing "not to exceed 70 days from the date specified in the original notice," the court held that it constitutes a scheduling requirement for continued hearings, not a notice requirement. Therefore, although LAFCo violated the 70-day limitation, this violation did not invalidate LAFCo's decision regarding the annexation.

4. *The Kind and Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116

- Ordinances banning medical marijuana dispensaries within city did not discriminate against medical marijuana users in violation of state or federal law; the Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMPA) do not expressly or impliedly preempt a city's zoning provisions declaring a medical marijuana dispensary to be a prohibited use, and a public nuisance, within city limits.

- Enforcement of medical marijuana ban by allegedly issuing threats and citations to landlords and members did not violate the Bane Act; the enforcement of the ordinances did not interfere with any federal or state law granting any right to lease property to operate marijuana collectives.

Plaintiffs, two medical cannabis "collectives/dispensaries," and three medical cannabis patients who are members of one of the collectives, sued the City of Long Beach and its staff, with claims that all stemmed from the City's enforcement of municipal ordinances that first regulated and then entirely prohibited city-wide operation of medical marijuana dispensaries. Specifically, the City's Code chapter 5.89 imposed a complete ban on medical marijuana collectives within the City.

In their complaint, Plaintiffs principally claimed that the City discriminated against them by enacting and enforcing ordinances, which Plaintiffs asserted were facially discriminatory and had a disparate and adverse impact on persons with disabilities. Plaintiffs' complaint alleged that the enforcement of the ban violated six statutes: (1) the Disabled Persons Act; (2) Unruh Civil Rights Act; (3) the ADA; (4) Rehabilitation Act of 1973; (5) the Bane Act; and (6) the Federal Civil Rights Act (Section 1983). The trial court sustained the City's demurrer to these claims, with leave to amend, but the Plaintiffs did not file an amended complaint. After the court entered a judgment of dismissal, Plaintiffs appealed.

Regarding the discrimination claims, the appeals court held that although the CUA and MMPA remove state-level criminal and civil sanctions from specified medical marijuana activities, they do not establish a comprehensive state system of legalized medical marijuana; grant a 'right' of convenient access to marijuana for medicinal use; override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries. Therefore, municipal regulation of, and bans on, medical marijuana dispensaries could not operate to discriminate against persons with disabilities, because those persons have no right of convenient access to medicinal marijuana in the first place.

Regarding the Plaintiffs' Bane Act challenge, the court held that City's enforcement of ordinances banning medical marijuana dispensaries within the City, by allegedly issuing threats and citations to landlords and members of the dispensaries, did not violate the Act, since the enforcement of the ordinances did not interfere with any federal or state law granting any right to lease property to operate a marijuana collective—therefore, defendants could not have interfered with any such right.

Regarding Plaintiffs' Section 1983 claim, the court held that the City's enforcement of ordinances banning medical marijuana dispensaries within the City did not interfere with any vested property right of medical marijuana dispensary operators and members, and thus did not support a claim under Section 1983; the City never issued a permit for them to operate a medical marijuana dispensary in the City.

Lastly, the appeals court held that the Plaintiff's state law tort claims related to tortious interference with business relations, intentional infliction of emotional distress, and civil conspiracy, all failed to state facts sufficient to support a valid complaint.

III. PENDING CALIFORNIA SUPREME COURT CASES

A. Pending CEQA Cases

1. *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (Review granted January 1, 2014)

The San Mateo Community College District approved a change to a previously-approved campus master plan, which change involved demolition of a building that had originally been slated to be preserved. The District relied on a previous EIR, finding that the "change" did not require major revisions to the EIR under CEQA or its Guidelines. In an unpublished opinion, the

First Appellate District invalidated the College District's approval, holding that the agency could not rely on the previous EIR because the demolition constituted a "new" project with new and potentially significant impacts. The Supreme Court accepted review and will address the following issues:

> (1) When a lead agency performs a subsequent environmental review is the agency's decision reviewed under a substantial evidence standard of review (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency's decision subject to a threshold determination whether the modification of the project constitutes a "new project altogether," as a matter of law (*Save our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?
>
> (2) Under Guidelines section 15162, what standard of judicial review applies to an agency's determination that no EIR is required as a result of proposed modifications to a project that was initially approved by negative declaration or mitigated negative declaration? (*See generally Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1479–1482.)
>
> (3) Does CEQA Guidelines section 15162, as applied to projects initially approved by negative declaration or mitigated negative declaration rather than EIR, constitute a valid interpretation of the governing statute? (Compare *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073–1074 with *Benton* at 1479–1480.)

Oral argument occurred on May 4, 2016, and a ruling is expected by September 21, 2016.

2. *Sierra Club v. County of Fresno* (Review granted October 1, 2014)

This case presents issues concerning the standard and scope of judicial review of an EIR under CEQA for the Friant Ranch Project, an active adult community in Fresno County. After an adverse ruling in the appellate district below, the County petitioned for review to address the applicable standard of judicial review when evaluating claims that an EIR provides insufficient information on an issue and to clarify when mitigation measures are adopted to reduce but not eliminate an unavoidable impact. Without providing any deference to the County's methodology, the Fifth Appellate District had concluded that, as a matter of law, the EIR had failed to include sufficient information regarding air quality impacts. The case was fully briefed in March 2015.

3. *Friends of the Eel River v. North Coast Railroad Authority* (Review granted December 10, 2014)

This case includes the following issues: (1) Does the Interstate Commerce Commission Termination Act (ICCTA) preempt the application of CEQA to a state agency's proprietary acts with respect to a state-owned and funded rail line, or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)? (2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds

for a state-owned rail line and/or leasing state-owned property? The appeals court held that CEQA's requirement to prepare an EIR was preempted and that a petition for writ of mandate was not an appropriate method to enforce an agency's voluntary agreement to prepare an EIR. The case was fully briefed in April 2015.

4. *Cleveland National Forest Foundation v. San Diego Association of Governments* (Review granted March 11, 2015)

The Court limited review to a single issue—whether an EIR for a regional transportation plan must include an analysis of the plan's consistency with the GHG emission reduction goals reflected in Executive Order No. S–3–05 (80% below 1990 levels by the year 2050) in order to comply with CEQA. The appeals court held that the EIR failed to adequately disclose, analyze, and mitigate GHG emissions and air quality impacts by, among other things, failing to analyze the plan's consistency with the targets set forth in Executive Order S-3-05. The case was fully briefed in August 2015.

5. *Banning Ranch Conservancy v. City of Newport Beach* (Review granted August 19, 2015)

This appeal pertains to a challenge brought to review an EIR for a residential and commercial development in the coastal zone. The Fourth Appellate District upheld the EIR, finding that the City complied with its general plan policy requiring it to coordinate with appropriate state and federal agencies in connection with the approval, and that the City could defer the identification of environmentally sensitive habitat areas to the California Coastal Commission so long as the EIR evaluated the project's potential inconsistencies with the Coastal Act. The Supreme Court granted review on the following issues: (1) Did the City's approval comport with the directives in its general plan to "coordinate with" and "work with" the California Coastal Commission to identify habitats for preservation, restoration, or development prior to project approval? (2) What standard of review should apply to a city's interpretation of its general plan? (3) Was the City required to identify environmentally sensitive habitat areas—a legal determination under the Coastal Act—in the EIR? The case was fully briefed in April 2016.

B. Pending Land Use Cases

1. *Orange Citizens for Parks and Recreation v. Superior Court* (Review granted October 30, 2013)

This case presents the issue of whether a proposed development project of low density housing was consistent with the city's general plan. The appeals court held that the city council acted reasonably in concluding that a project was consistent with the city's general plan because there was substantial support for the finding that the general plan allowed low-density residential development at the property. This case was fully briefed in April 2014 and is scheduled for oral argument on September 29, 2016.

2. *Lynch v. California Coastal Commission* **(Review granted December 10, 2014)**

In a matter under the Coastal Act, this case addresses the following issues: (1) Did plaintiffs, who objected in writing and orally to certain conditions contained within a coastal development permit approved by defendant California Coastal Commission, waive their right to challenge the conditions by subsequently executing and recording deed restrictions recognizing the existence of the conditions and constructing the project as approved? (2) Did the permit condition allowing plaintiffs to construct a seawall on their property, but requiring them to apply for a new permit in 20 years or to remove the seawall violate Public Resources Code section 30235 or the federal Constitution? (3) Were plaintiffs required to obtain a permit to reconstruct the bottom portion of a bluff-to-beach staircase that had been destroyed by a series of winter storms, or was that portion of the project exempt from permitting requirements pursuant to Public Resources Code section 30610(g)(1)? This case was fully briefed in June 2014.

Legal and Practical Considerations Regarding Cultural Resources and AB 52

Friday, October 7, 2016 General Session; 8:00 – 10:15 a.m.

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Legal and Practical Considerations Regarding Cultural Resources and AB 52

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Introduction

This paper examines the legal requirements for consideration of cultural resources issues under federal and state law for public projects. Both federal and state laws (especially in California) require consideration of impacts on cultural resources, and these laws and regulations can overlap or even contradict each other, particularly now that Assembly Bill 52 (AB 52) has modified CEQA to include both consultation and substantive impact review requirements for projects subject to CEQA review. The authors give an overview of federal and state legal requirements and offer practical tips on approaching these issues both before and during project construction.

National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) of 1969 (P.L. 91-190; 83 Stat. 852; 42 U.S.C. 4321, as amended) was passed in December 1969 and signed into law on January 1, 1970. In the most basic sense, NEPA required Federal officials to "stop, look, and listen" before making decisions about taking "major federal actions" (40 CFR § 1508.18) that impact the human environment, including the cultural environment. As it relates to cultural resources, federal agencies must, through the preparation of either an Environmental Assessment or Environmental Impact Statement, consider, in advance, "the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources" (40 CFR § 1508.27[b][8]). Should an agency's actions be reasonably expected to have a significant effect on these resources, the agency must take reasonable and appropriate measures to avoid, minimize, or mitigate such impact.

Sometimes overlooked is the fact that there is a much broader scope of resources that NEPA must consider, in comparison to NEPA's companion law, Section 106 of the National Historic Preservation Act (NHPA), which will be discussed further below.

Cultural Resources Under NEPA

Under NEPA, the types of resources in the cultural environment can be classified into two groups. First are those that are listed in or eligible for listing in the National Register of Historic Places (NRHP). Eligibility for listing on the NRHP is defined by a set of four criteria (36 CFR § 60.4) and possess integrity:

"The quality of significance in American history, architecture, archaeology, and culture is present in districts, sites, buildings, structures, and objects of state and local importance that possess aspects of integrity of location, design, setting, materials, workmanship, feeling, association, and

a) is associated with events that have made a significant contribution to the broad patterns of our history; or
b) is associated with the lives of a person or persons significance in our past; or
c) embodies the distinctive characteristics of a type, period or method of construction, or represents the work of a master, or possesses high artistic value, or represents a significant and distinguishable entity whose components may lack individual distinction; or
d) has yielded or may be likely to yield information important in prehistory or history.

In addition, the resource must be at least 50 years old, except in exceptional circumstances (36 CFR 60.4). Any resource that meets at least one of the four criteria and possesses sufficient integrity to express that significance is also considered a "historic property" (36 CFR § 800.16[l][1]).

Second are those that are considered "significant scientific, cultural, or historical resources," which may not rise to the level of significance that would warrant inclusion in the NRHP. The term "cultural resources" covers a wider range of resources than just "historic properties." It includes resources like sacred sites, archaeological sites, and artifact collections that are not otherwise eligible for inclusion in the NRHP (CEQ and ACHP 2013). Accordingly, the NEPA process must take into account potential effects to both significant and non-significant resources in the cultural environment prior to making a decision on a major federal action, including new

and continuing activities, projects, and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies (40 CFR § 1508.18).

National Historic Preservation Act, Section 106

The approval of a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency, those carried out with Federal financial assistance, and those requiring a Federal permit, license, or approval (36 CFR § 800.16[y]), have another independent statutory obligation to consider the effects that such an undertaking has on historic properties. This second requirement is compliance with Section 106 of the NHPA (P.L. 89-665, P.L. 96-515; 54 U.S.C. § 300101 et seq., as amended), which requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment (36 CFR § 800.1[a]).

Historic properties are defined as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria" (36 CFR § 800.16[l][1]). This requires consultation with federally-recognized tribes, which may result in the identification of a Traditional Cultural Property, which is eligible for inclusion in the NRHP because of its association with cultural practices or beliefs of a living community that are a) rooted in that community's history, and b) are important in maintaining the cultural identity of the community (National Register Bulletin 38). Eligibility for listing on the NRHP is defined by the same criteria as required by NEPA (36 CFR § 60.4).

At a high level, the process for determining impacts to resources is somewhat comparable between NEPA and Section 106: both procedures must, though a combination of technical research and consultation with federally-recognized tribes, other agencies, and consulting parties, include reasonable and good faith efforts to identify resources within the Area of Potential Effects (APE), evaluate their significance, determine effect, and take reasonable and feasible

measures to avoid, minimize, or mitigate any adverse effects, if present. One key difference, however, is that Section 106 consultation requires consideration of a subset of resources that is covered by NEPA: only those that are eligible for inclusion in the NRHP. Should a resource be found through the Section 106 process to not be considered a historic property (and, accordingly, not requiring further management), that resource still requires consideration under NEPA.

For this reason, coordination between NEPA and Section 106 is critical. Federal agencies have independent statutory obligations under NEPA and NHPA that can only be waived by an Act of Congress. The Council on Environmental Quality (CEQ) and Advisory Council on Historic Preservation (ACHP) jointly address NEPA and Section 106 coordination. In their handbook for integration (CEQ and ACHP 2013), this need is made clear: “unless a waiver has been authorized in legislation, the administrative record for each Federal project or program should document compliance with NEPA and NHPA” (CEQ and ACHP 2013). However, in certain circumstances, a federal agency can carry out NEPA in-lieu of Section 106 NHPA using the provisions in 36 CFR § 800.8(c) that allow for substitution, only if the agency official has notified the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO) and the ACHP in advance and only if the review of impacts to historic properties is at least as stringent as that which would have otherwise been carried out under Section 106. This substitution can be beneficial in many ways, including streamlining certain steps, reducing conflicts between NEPA documents and Section 106 agreement documents, and eliminating some duplicity. However, because the NEPA process cannot be concluded until the consultation to satisfy Section 106 requirements is concluded, using NEPA in lieu of Section 106 may delay issuance of a Record of Decision (ROD) on the NEPA document. Therefore, using NEPA in lieu of Section 106 may be beneficial to some projects. However, and conversely, because NEPA considers a broader field of resources in the cultural environment than does Section 106, the latter cannot be used in lieu of NEPA review.

California Environmental Quality Act (CEQA)

The aforementioned coordination between NEPA and Section 106 is critical to ensuring that federal agencies are compliant with federal law. However, all public and private projects require compliance with the California Environmental Quality Act (CEQA) as well. As discussed earlier,

CEQA similarly requires that local and state agencies consider, in advance, the effects their projects will have on the environment, including but not limited to historical resources and tribal cultural resources. Particularly when agencies are preparing joint documents under NEPA and CEQA, and especially when they are not, it is important to be cognizant of the different types of resources, and definitions thereof, between state and federal law, and within state law.

Under CEQA, a cultural resource that requires management is defined differently than under federal laws and regulations. CEQA requires consideration of impacts to (1) historical resources, (2) unique archaeological resources, and (3) tribal cultural resources[1].

Historical Resources

First, a "historical resource" is a cultural resource that 1) is listed in or has been determined eligible for listing in the California Register of Historical Resources (CRHR) by the State Historical Resources Commission; 2) is included in a local register of historical resources, as defined in Public Resources Code 5020.1(k); 3) has been identified as significant in an historical resources survey, as defined in Public Resources Code 5024.1(g); or 4) is determined to be historically significant by the CEQA lead agency [CCR Title 14, Section 15064.5(a)].

The eligibility criteria for the CRHR are similar to those of the NRHP, with one important exception: they address historical significance at a state or local level, in addition to that at the national level. The criteria for inclusion in the CRHR are as follows [CCR Title 14, Section 4852(b) and (c)]:

1. It is associated with events that have made a significant contribution to the broad patterns of local or regional history, or the cultural heritage of California or the United States;
2. It is associated with the lives of persons important to local, California, or national history.
3. It embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of a master or possesses high artistic values; or

[1] Paleontological resources, although included with cultural resources in Appendix G to the CEQA guidelines, are not cultural resources by any definition and therefore, are not discussed further herein.

4. It has yielded, or has the potential to yield, information important to the prehistory or history of the local area, California, or the nation.

Accordingly, a cultural resource may be found to be eligible for the CRHR because it is significant relative to state or local history, but that resource need not be significant at a national level, which would similarly make it eligible for inclusion in the NRHP. Therefore, typically, any resource that is associated with California and eligible for, or included in, the NRHP is automatically considered eligible for inclusion in the CRHR, but resources found eligible for the CRHR may or may not be similarly eligible for the NRHP.

Unique Archaeological Resources

The second type of resource to be examined under CEQA, "unique archaeological resource," is a rarely utilized form of cultural resource considered under CEQA, established in 1981 by the Deddeh Act (AB 952), representing Section 21083.2 of the PRC, and prior to the establishment of the CRHR criteria (AB 2881, 1992)[2]. The CEQA Guidelines require that lead agencies *first* determine whether or not a site is an historical resource as defined above and in CCR Title 14, Section 15064.5(a). Only if the site does not meet those definitions, then the lead agency must consider whether or not it represents a unique archaeological resource, which is defined in Section 15064.5(g) of the CEQA statute as:

"an archaeological artifact, object, or site about which it can be clearly demonstrated that, without merely adding to the current body of knowledge, there is a high probability that it meets any of the following criteria:

1) Contains information needed to answer important scientific research questions and that there is a demonstrable public interest in that information.
2) Has a special and particular quality such as being the oldest of its type or the best available example of its type.

[2] It is believed that the amendments to CEQA that instituted the CRHR were intended to replace the Deddeh Act provisions for unique archaeological sites and mitigation cost capping, but that the legislature neglected to remove the obsolete language.

3) Is directly associated with a scientifically recognized important prehistoric or historic event or person."

Noteworthy is that the definition of unique archaeological resource mirrors the eligibility criteria for inclusion in the CRHR. As a practical matter, any resource that meets the definition of a unique archaeological resource will meet the comparable criteria for inclusion in the CRHR and vice versa, thereby triggering the requirement to avoid, minimize, or mitigate impacts. The monetary caps on data recovery mitigation associated with unique archaeological resources, established by the Deddeh Act, are rarely invoked for two primary reasons. First, doing so requires that developers disclose into the public record their confidential financial data. Second, the caps established decades ago were intended to minimize the cost of mitigation, but are not likely to provide sufficient funding to carry out data recovery mitigation, particularly in the event that the resource contains human burials. For the reasons stated above, the concept of unique archaeological resources does not factor into most, if not all, CEQA projects.

Tribal Cultural Resources

The final type of cultural resource subject to CEQA is a "tribal cultural resource." Effective July 1, 2015, Assembly Bill 52 (AB 52) amended CEQA to mandate consultation with California Native American tribes during the CEQA process to determine whether or not the proposed project may have a significant impact on a Tribal Cultural Resource. Section 21073 of the Public Resources Code defines California Native American tribes as "a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004." Section 21074(a) of the Public Resource Code defines Tribal Cultural Resources for the purpose of CEQA as:

> Sites, features, places, cultural landscapes (geographically defined in terms of the size and scope), sacred places, and objects with cultural value to a California Native American tribe that are either of the following:
>
> a. included or determined to be eligible for inclusion in the California Register of Historical Resources; and/or

b. included in a local register of historical resources as defined in subdivision (k) of Section 5020.1; and/or
c. a resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the lead agency shall consider the significance of the resource to a California Native American tribe.

Because criteria (a) and (b) also meet the definition of a Historical Resource under CEQA, a Tribal Cultural Resource may also require additional (and separate) consideration as a Historical Resource. Moreover, a tribal cultural resource may or may not also meet the definition of a Traditional Cultural Property under federal law.

Recognizing that California tribes are experts in their Tribal Cultural Resources and heritage, AB 52 requires that CEQA lead agencies carry out consultation with tribes at the commencement of the CEQA process to identify Tribal Cultural Resources. Furthermore, because a significant effect on a Tribal Cultural Resource is considered a significant impact on the environment under CEQA, consultation is required to develop appropriate avoidance, impact minimization, and mitigation measures. Consultation is concluded when either the lead agency and tribes agree to appropriate mitigation measures to mitigate or avoid a significant effect, if a significant effect exists, or when a party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached (21080.3.2[b], whereby the lead agency uses its best judgement in requiring mitigation measures that avoid or minimize impact to the greatest extent feasible.

Coordination of Federal and State Requirements

Two important clarifications are germane to this paper. First is that under CEQA, pursuant to AB 52, the lead agency consults with California Native American Tribes, which are not necessarily federally-recognized. In the case of either a joint document or separate CEQA and NEPA/Section 106 processes, agencies are likely to be consulting with different sets of tribes for different purposes. Table 1 compares and contrasts the tribal consultation mechanisms in California. This does not include separate obligations of federal agencies to engage in

government-to-government consultation under presidential executive orders, or as set forth in the Constitution of the United States, or by treaties, statutes and court decisions.

Table 1. Comparison of Mandatory Federal and State Tribal Consultation Mechanisms in California

Regulatory Context	Agency	Tribes	When Applies	Party Initiating Contact	Reaction	Timing	Schedule
Section 106 NHPA	Federal	Federally-recognized	Prior to issuance of a permit, license, or funding	Federal Agency	Proactive	Tends to be later in the process, post-CEQA	No timeframes
Senate Bill 18	Local (Cities/ Counties)	California Native American Tribes	Prior to General Plan and Specific Plan adoptions or amendments	Local Agency	Proactive	Tends to be earlier in the process, in conjunction with CEQA	90 day window to initiate, followed by CC/BOS noticing (45 and 10 days)
Public Comment: CEQA	State/Local	Any member of the public	CEQA	Tribes	Reactive	Near the end of CEQA, after the draft environmental document has been released to the public	Initial Study: 30 calendar days EIR: 45 calendar days
Public Comment: NEPA	Federal	Any member of the public	NEPA (note, this often occurs in conjunction with Section 106)	Tribes	Reactive	Near the end of NEPA, after the draft environmental document has been released to the public	EA: 30 calendar days EIS: 45 calendar days
Assembly Bill 52	State/Local	California Native American Tribes	CEQA	Tribes	Proactive	Earliest point in the process, at the start of CEQA	14 days from start; 30 day response window; 30 day initiation window; then no time frames

Unlike the scientifically-based archaeological and historical technical studies carried out under CEQA, NEPA, and Section 106, tribal consultation is inherently emotional, lengthy, and esoteric, particularly with respect to the discussion of burials, cemeteries, human remains, and associated grave goods. Indeed, the very definitions of these features varies according to state and federal law, and even between tribes. Common to most tribes – and to most cultures worldwide – is the raw, human emotion that emerges when burials are unearthed.

Possession of Human Remains

In California, the illegal possession of human remains is a felony, punishable by imprisonment (California Penal Code Section 1170[h]; Public Resources Code 5097.99[a] and [b]), and therefore, understanding what does or does not constitute human remains is critical. State law (California Public Resources Code Section 5097.98[d]) states, "human remains of a Native American may be an inhumation or cremation, and in any state of decomposition or skeletal completeness. Any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains, but do not by themselves constitute human remains." Because some prehistoric cultures in California, at various points in time, utilized cremation, and because cremations, by definition, lack definitive boundaries (unlike discrete burials or inhumations, like those in cemeteries), delineating where cremations end and where non-cultural soil begins can be problematic in the field.

Federal law, through the Native American Graves Protection and Repatriation Act (25 USC 3001[1]) defines human remains as: "the physical remains of the body of a person of Native American ancestry. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony must be considered as part of that item" (43 CFR 10.2 [d][1]). It further defines burials as "any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as part of the death rite or ceremony of a culture, individual human remains are deposited."

The conflict in state and federal definitions relates primarily to the scope of what is considered part of the burial. Under state law, the legal definition includes cremations in any state of decomposition or skeletal completeness. Those qualities are noticeably absent from federal definitions and guidance, which characterize human remains as in the form of bones or bone fragments with grave goods. In practice, many federal agencies have further defined human remains on a project-by-project basis as those in archaeologically discernable burial pits. A complicating factor is that many tribes, including the descendants of those represented by human

remains discovered on projects, do not acknowledge the archaeological or federal definitions of human remains, favoring, instead, the view that human remains exist in a continuum of natural and cultural environments, with the surrounding soil matrix being just as important. Thus, disturbance of "non-cultural" soils near human remains presents as much of a problem for tribes as disturbances of the human remains themselves. This results in some tribes defining the extent of "human remains" and "burials" much larger, geographically, than what would otherwise be defined under state or federal law. This affects decisions on effects, ability to avoid, and scope of mitigation, and as such, is yet another reason for clear and timely coordination between CEQA, NEPA, and Section 106.

Confidentiality

Under existing law, environmental documents must not include information about the location of an archeological site or sacred lands or any other information that is exempt from public disclosure pursuant to the Public Records Act. (Cal. Code Regs. § 15120(d)). Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects are also exempt from disclosure. (Pub. Resources Code, §§ 5097.9, 5097.993.) The Public Records Act contains an exemption from disclosure for the items listed in these sections. Lead agencies under CEQA should maintain the confidentiality of cultural resource inventories or reports generated for environmental documents.

Recently enacted sections of CEQA govern confidentiality during tribal consultation. (Pub. Resources Code, §21082.3(c).) First, information submitted by a California Native American tribe during the environmental review process may not be included in the environmental document or disclosed to the public without the prior written consent of the tribe (however, consistent with current practice, confidential information may be included in a confidential appendix). A lead agency may also exchange information confidentially with other public agencies that have jurisdiction over the environmental document. (Pub. Resources Code, § 21082.3 (c)(1).)

When it comes to a public agency acting as lead agency under CEQA, the lead agency and the tribe may share confidential information regarding tribal cultural resources with the project applicant. The project applicant should keep the information confidential, unless the tribe

consents to disclosure in writing, in order to prevent looting, vandalism, or damage to the cultural resource. Additionally, information that is already publicly available, developed by the project applicant, or lawfully obtained from a third party that is not the tribe, lead agency, or another public agency may be disclosed during the environmental review process. (Pub. Resources Code, § 21082.3(c)(2).)

Best Practices

As described above, there are a number of aspects of various state and federal laws that overlap, compliment, and conflict with one another. With these in mind, there are a number of best practices that can be followed to minimize conflicts.

First and foremost, it is important to acknowledge that no amount of pre-field analysis will completely identify or "clear" a property of cultural resources issues, because many resources cannot be detected until ground disturbances occur. This does not preclude the requirement to use reasonable and good-faith measures to identify resources during the environmental review process. More importantly, the CEQ and ACHP (2013) remind the regulated community and agencies to never assume that previous disturbance in a project area means that no resources are present: "the Federal agency should never proceed on the assumption that the potential to affect historic properties is absent based on location, previous disturbance, or because no historic properties are believed to be present in the area. Such findings should be subject to the Section 106 notification and consultation provisions."

Next, although the CEQA and NEPA process include discrete timelines for public review and comment, tribal consultation does not enjoy the same specificity, once tribal consultation begins. Tribes have complex hierarchies and group decision-making processes, as well as different modes of communication. Initiating that consultation early is key to identifying potential conflicts during construction.

Lead agencies under CEQA should clearly document all steps taken to address consultation as well as analysis of tribal cultural resources in an environmental document. This includes keeping all correspondence (including envelopes with postage information) from and to Native

American tribes, taking detailed notes of all consultation meetings with Native American tribes, and carefully documenting the start and end of consultation.

References Cited and Other Sources of Information

Council on Environmental Quality (CEQ) and Advisory Council on Historic Preservation (ACHP)
2013 NEPA and NHPA: A Handbook for Integrating NEPA and Section 106.

Office of Planning and Research, Discussion Draft Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA (May 2015), available at https://www.opr.ca.gov/docs/DRAFT_AB_52_Technical_Advisory.pdf

Not Just Density Bonuses: Dealing with Demands Beyond the Bonus

Friday, October 7, 2016 General Session; 8:00 – 10:15 a.m.

Lynn E. Hutchins, Goldfarb & Lipman
Karen M. Tiedemann, Goldfarb & Lipman

A GUIDE TO CALIFORNIA DENSITY BONUS LAW (*AT LEAST UNTIL THE NEXT LEGISLATIVE SESSION*)

Lynn Hutchins & Karen M. Tiedemann

GOLDFARB & LIPMAN LLP

League of California Cities
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A GUIDE TO CALIFORNIA DENSITY BONUS LAW

The State's density bonus law (Government Code Section 65915 – 65918) has over the course of the last several legislative sessions been the subject of bills modifying the statute and once again is the subject of three bills currently poised for adoption by the California legislature. Although the goal of several past bills was to clarify the statutory language, the results have often been to create even more confusion for cities attempting to implement this poorly drafted law. The overall intent of the law is to create incentives for developers to include affordable housing within their projects by granting increased density and other regulatory incentives. The reality of the law is that developers who include only small amounts of affordable housing in their projects – as little as 5 percent – are entitled to receive large incentives: density bonuses of 20 to 35 percent, depending on the amount and type of affordable housing provided; parking reductions; up to three "concessions and incentives," and unlimited "waivers" from development standards.

This paper will discuss the background and current provisions of the state density bonus law, including calculation of the density bonus, incentives and concessions, waivers of development standards and reduced parking mandates; the relationship of state density bonus law to other planning documents; and some strategies to consider in the context of a city's overall regulatory planning scheme. We anticipate providing an addendum to this paper at the conference to address any new statutory provisions if the pending legislation is enacted.

A. Background of the State Density Bonus Law.

The State's density bonus law, prior to amendments adopted in 2004, provided a 25 percent increase in density in exchange for 10 to 20 percent affordable housing. Anecdotal reports indicated that few developers took advantage of the legislation because of the relatively high percentage of affordable housing required to receive a bonus.

In 2004, a coalition of housing advocates and the California Association of Realtors (CAR) achieved the passage of SB1818, which made significant changes in the law. The changes reduced the proportion of affordable units needed to obtain a density bonus, increased the maximum bonus from 25 to 35 percent, required local governments to grant additional concessions, and added a bonus for land donation. The Legislature has since amended the law six times.

Most recently, the density bonus law was amended in 2014 to increase the duration of affordability restrictions required for rental units, to require equity-sharing for all for-sale units, and to add replacement housing requirements for units occupied by or affordable to low and very low income households. In 2015 the statute was amended again to reduce parking requirements for certain projects located near transit stops. In the current legislative session there are three bills being considered to further amend the law. Regardless of the statute's ambiguity and complexity, all cities and counties must adopt an ordinance specifying how they will comply with the legislation.[1] The law is applicable to charter cities.[2]

[1] Government Code §65915(a). All further references are to the Government Code unless otherwise indicated. In addition, all references are to the statute as amended by SB744, Chapter 699, Statutes of 2015 (effective January 1, 2016.)

B. Basic Provisions.

Density bonuses must be given for affordable housing, senior housing (whether or not affordable), donations of land for affordable housing, condominium conversions that include affordable housing, and child care facilities. In addition to density bonuses, applicants who provide the required amount of affordable housing qualify for various zoning modifications (defined as "incentives and concessions" or "waivers") and for reduced parking standards. If a development provides the required affordable housing, the applicable density bonus and reduced parking standards must be provided. There are no grounds in the statute to deny a developer's request. The density bonus law does contain specific findings by which incentives, concessions and waivers may be denied.

1. Projects Eligible for Density Bonuses. Density bonuses are available to five categories of residential projects:

a. Affordable Housing. Housing developments for at least five dwelling units or unimproved lots[3] are eligible for density bonuses if *either:*

- **Five percent** of the units are affordable to *very low income* households earning **50 percent** of median income or less;[4] *or*

- **Ten percent** are affordable to *lower income* households earning **80 percent** of median income or less;[5] *or*

- **Ten percent** are affordable to *moderate income* households earning **120 percent** of median income or less, but only if the project is a common interest development[6] where *all* of the units, including the moderate-income units, are available for sale to the public.[7] Rental units affordable to moderate-income households are not eligible for a density bonus.

These required percentages of affordable housing apply only to the project *without* any density bonus, not the entire project.[8] For instance, assume that a 100-unit project is

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[2] §65918.

[3] §65915(i) (which states that the bonuses apply to housing developments consisting of five or more dwelling units but also defines "housing development" as including residential units, subdivisions, conversion of commercial buildings to residences, and rehabilitation of apartments that creates additional dwelling units). The definitions are poorly written and could be interpreted to allow a density bonus for an existing affordable development. However, §65915(b)(1) states that a bonus is available when an applicant "agrees to *construct*" a housing development, implying that the bill does not apply to existing developments.

[4] §65915(b)(1)(B) (referring to Health & Safety Code §50105 for definition of very low income households; *see also* 25 CCR §6926). Income levels for all categories are adjusted by household size and published annually for each county by the California Department of Housing and Community Development. *See* 25 CCR § 6932.

[5] §65915(b)(1)(A) (referring to Health & Safety Code §50079.5 for definition of lower income households; see also 25 CCR §6928).

[6] As defined by Civil Code §4100.

[7] §65915(b)(1)(D) (referring to Health & Safety Code §50093 for definition of moderate income households; see also 25 CCR §6930).

[8] §65915(b)(3).

entitled to a 20 percent density bonus, resulting in a total of 120 units. To qualify for the 20 percent bonus, the project need only provide:

- five very low income units (five percent of 100); *or*
- ten lower income units (ten percent of 100).

Continued Affordability. To be eligible for a density bonus, the affordable units must be sold or rented at affordable prices or rents and rental units must remain affordable for a specified period.

- **Rental Units:** All very low income and lower income rental units must remain affordable for **55 years** (unless a subsidy program requires a longer period of affordability).[9] Housing costs for very low income units cannot exceed 30 percent of 50 percent of median income. For lower income units, rents cannot exceed 30 percent of 60 percent of median income.[10]

- **Ownership Units:** For-sale units are *only* required to be affordable to the initial occupants of the units, who must be very low income, lower income or moderate income, as applicable. The for-sale unit must be sold to the initial occupant at an affordable housing cost as defined in Health and Safety Code Section 50052.5.[11] At resale, the local government must enforce an equity-sharing agreement (involving sale of the home at fair market value and sharing of the profits with the city) unless an equity sharing agreement conflicts with another public funding source or "law."[12] This latter provision is significant because it allows counties and cities to adopt their own laws imposing stricter resale controls on for-sale units, if desired. However, the requirement should be adopted by ordinance.

Any equity sharing agreement must provide for the local government to recapture the difference between the fair market value of the home at time of sale and the actual sales price to the initial occupants plus any other assistance provided by the city or county, as well as a proportionate share of the appreciation.[13] Any amounts recovered by the city or county must be used within five years to promote homeownership opportunities in the community.[14] In housing markets with rapidly increasing costs, the equity sharing formula mandated by the statute will rarely provide enough funds for the city to acquire another affordable unit at the same income level, with the result that the developer will have received permanent zoning concessions without the city's receiving long-term affordable housing.

[9] §65915(c)(1).
[10] §65915(c)(1) (referring to Health & Safety Code §50053). Agencies should use HCD's published income charts for each county to determine applicable very low, low, and moderate-income limits. These are available on HCD's web site.
[11] §65915(c)(2) (referring to Health & Safety Code §§50093 & 50052.5).
[12] §65915(c)(2).
[13] §65915(c)(2).
[14] §65915(c)(2)(A) requires that the funds be spent for the purposes described in subdivision (e) of §33334.2 of the Health and Safety Code, the statute that governed the expenditure of low and moderate income housing funds held by redevelopment agencies.

Affordable rents and sales prices for the affordable units must be determined by using the methodology included in the California Code of Regulations.[15] Total housing costs for rentals include rent, utilities, and any fees and service charges levied by the landlord. Total housing costs for ownership units must include principal, interest, property taxes, insurance, private mortgage insurance (if any), utilities, homeowners' association fees, and an allowance for maintenance costs. These formulas tend to result in lower sales prices than would be typical in the private market. Banks would generally be willing to loan more money to these buyers than is the case when the statutory formulas are used.

b. Senior Housing. A senior citizen housing development, as defined by Civil Code Sections 51.3 and 51.12,[16] or a mobile home park that limits residency to seniors in accordance with Civil Code Sections 798.76 or 799.5, is eligible for a density bonus even if none of the units are affordable. Senior housing projects eligible under Civil Code Section 51.3 must contain at least 35 units.[17] A developer of senior affordable housing may elect either the low income or senior bonus, although the low income bonus is much more advantageous (as discussed below).

c. Replacement Units. The 2014 amendments to the density bonus law added replacement housing requirements for developments that result in the demolition or removal of rental units affordable to or occupied by very low or low income households. The language of the replacement housing sections of the statute is particularly confusing and difficult to implement. Under the statute, a density bonus is not allowed for a development proposed on property on which occupied rental dwellings exist at the time of application, or rental dwellings were vacated or demolished in the five year period preceding the application, if the dwelling unit was:

- Subject to a recorded covenant, ordinance or law that restricts rents to levels affordable to very low or lower income households;
- Subject to rent control; or
- Occupied by households with very low or lower incomes;[18]

unless the proposed development is 100 percent affordable (other than the manager's unit) to lower or very low income households or the proposed development replaces the units and provides enough total affordable units, which may include any replacement units, to be eligible for a density bonus. Projects with applications submitted before January 1, 2015, are exempt from this provision.

Many of the replacement housing requirements contained in the 2014 amendments are either ambiguous or cannot be ascertained from the statute. It appears that AB2556 will be enacted in the 2016 legislative session to clarify these requirements but at the time of this paper the bill is still pending.

[15] 25 CCR §§6910, 6918 & 6920.
[16] This code Section is applicable only to Riverside County.
[17] Civil Code §51.3(b)(4).
[18] §65915(c)(3).

d. Donations of Land. A land donation can qualify a project for a density bonus if the parcel donated is large enough to accommodate at least ten percent of the market-rate units at densities suitable for very low income housing.[19] In other words, a 500-unit market-rate project can receive a density bonus by donating land zoned at densities that can accommodate, and are suitable for, a 50-unit very low income project.

Land donations must meet strict criteria. In particular, the land donation must satisfy all of the following requirements:[20]

- Land must have the appropriate general plan designation, zoning, and development standards to permit the feasible development of units affordable to very low income households in an amount equal to at least ten percent of the units in the residential development;

- Be at least one acre in size or large enough to permit development of at least 40 units;

- Be served by adequate public facilities and infrastructure;

- Be located within the boundary of the residential development or within one-fourth mile of it (if approved by the local agency);

- Have all necessary approvals except building permits needed to develop the very low income housing, unless the local government chooses to permit design review approval at a later date;

- Be subject to a deed restriction to ensure continued affordability;

- Be transferred to either the local agency or a housing developer approved by the local agency; and

- Be transferred no later than the date of approval of the final map, parcel map, or discretionary approval of the housing development receiving the bonus.

- Proposed source of funds for the construction of the very low income units must be identified.

These criteria in effect make land donation an option only for larger projects which can donate sites of at least one acre. This option can be quite favorable for large developers, however, because a site large enough to accommodate ten percent very low income units will normally include much less than ten percent of the projects land area. That is because very low income projects are usually built at densities of at least 20 units per acre, greater than the density of most market-rate projects in "greenfield" areas. If a county or city is willing to allow higher densities, this can be an effective way to create significant affordable housing.

[19] §65915(g).
[20] §65915(g)(2)(A – H).

e. Condominium Conversions. A condominium conversion is eligible for a density bonus if either 33 percent of units are affordable to *moderate-income* households or 15 percent are affordable to *lower income* households.[21] *The bonus units must be located entirely within the structures proposed for conversion*.[22]

f. Child Care Facilities. A housing development is eligible for an *additional* bonus if it includes a child care facility *and* either qualifies as a senior citizens housing development or includes enough affordable housing to be eligible for a density bonus.[23] The statute requires counties and cities to place strict operating requirements on the child care facilities. The child care centers must:

- Remain in operation for the period of time that affordable units must remain affordable (55 years in the case of rental units affordable to very low and lower income households, the affordability duration on ownership units is not specified so it is unclear how long the child care facility would be required to operate in an ownership development); and

- Ensure that the children attending the facility come from households with the same or greater proportion of very low, lower, or moderate incomes as qualified the project for the density bonus.[24] In other words, if the housing development qualified for a density bonus because ten percent of the units were affordable to moderate-income households, then ten percent of the children at the child care center must come from moderate-income households.

These conditions are in a practical sense virtually impossible to enforce over time, although they must be imposed as conditions of approval.

2. Density Bonuses Available.

a. Affordable Housing. The density bonus law gives higher bonuses for lower income housing and lower bonuses for moderate-income housing. Housing developments are eligible for a **20 percent density bonus** if they contain:

- Five percent of units affordable to very low income households;[25]

or

- Ten percent of units affordable to lower income households.[26]

Housing developments qualify for only a **five percent density bonus** if **ten percent** of the units are affordable to **moderate-income families**.[27]

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[21] §65915.5(a) (referring to Health & Safety Code §50093 for definition of moderate income households and to Health & Safety Code §50079.5 for definition of lower income households).
[22] §65915.5(b). Given how unusual it would be for existing rental apartments to accommodate a 25 percent increase in density, this Section must have been intended for one particular project.
[23] §65915(h). §65917.5 also allows a city or county to provide a density bonus for a commercial or industrial project that includes a child care facility.
[24] §65915(h)(2).
[25] §65915(f)(2).
[26] §65915(f)(1).

In addition, there is a sliding scale that requires:

- An additional **2.5 percent density bonus** for each additional one percent increase in very low income units;[28]

- An additional **1.5 percent density bonus** for each additional one percent increase in lower income units;[29] and

- An additional **one percent density bonus** for each one percent increase in moderate income units.[30]

No total density bonus can be greater than **35 percent** unless the city or county by local ordinance allows for a higher density bonus.[31] The maximum density bonus is reached when a project provides *either* 11 percent very low income units, 20 percent lower income units, or 40 percent moderate income units. The table on page 8 shows these calculations.[32]

A developer must choose a density bonus from ***only one affordability*** **category** and cannot combine categories.[33] Thus a project that includes, say, ten percent moderate-income units and ten percent lower income units must choose the bonus from *either* the moderate-income category or the lower income category. Since the project would be entitled to a 20 percent bonus based on the lower income units, but only a five percent bonus based on the moderate-income units, the developer would presumably select the density bonus based on the lower income category and would get no additional bonus for the moderate-income units. The effect is to encourage developers to concentrate units in either the lower or very low income categories.

b. Senior Housing. A project qualifying only as a senior citizen housing development is entitled to a **20 percent density bonus of additional senior units only**.[34] The bonus *cannot* be combined with the bonuses granted for affordable housing, but the developer of an affordable senior project can elect to use the very low or lower income bonus.[35] Because this bonus is so limited, it is typically used only by market-rate senior projects.

c. Donations of Land. *Additional* density, which may be combined with the density bonuses given for affordable and senior housing, is available for projects that donate land for very low income housing. However, in no case can the total bonus granted exceed 35 percent.[36]

[27] §65915(f)(4).
[28] §65915(f)(2).
[29] §65915(f)(1).
[30] §65915(f)(4).
[31] §65915(n).
[32] SB435 (2005) amended the law to include tables for each category showing the specific bonus granted for varying percentages of affordability.
[33] §65915(b)(2).
[34] §65915(f)(3).
[35] §65915(b)(2).
[36] §65915(g)(2).

A **density bonus of 15 percent** is available for a land donation that can accommodate ten **percent of the market-rate units** in the development. An additional **one percent density bonus** is available for each **one percent increase** in the number of units that can be accommodated on the donated land, up to a maximum of 35 percent.[37]

d. Condominium Conversions. A condominium conversion is entitled to a flat density bonus of 25 percent when either 33 percent of the units are moderate-income units or 15 percent of the units are lower income units.[38] Here, however, the local agency can instead choose to provide an alternative incentive of "equivalent financial value" if it does not choose to grant the density bonus.[39] Note that a conversion is ineligible for a bonus if the apartments to be converted received a density bonus when they were originally built.[40]

e. Child Care Facilities. A child care facility meeting the operational requirements of the statute and constructed in association with an affordable or senior project is entitled to either an *additional* density bonus equal to the amount of square footage in the child care center; or an alternative incentive that "contributes significantly to the economic feasibility" of the center.[41] Since a "density bonus" is usually interpreted to refer to the number of dwelling units permitted on a site, it is unclear how this requirement for additional *square feet* relates to the otherwise permissible residential density.

The following table summarizes the available density bonuses.

Affordable Units or Category	Minimum Percent Units in Category	Bonus Granted	Additional Bonus for Each One Percent Increase in Units in Category	Percent Units in Category Required for Maximum 35 percent Bonus
Very-low income	5%	20%	2.5%	11%
Lower-income	10%	20%	1.5%	20%
Moderate-income (ownership units only)	10%	5%	1%	40%
Senior housing (35 units or more; no affordable units required) or Senior Mobile Home Parks	100% senior	20% (senior units only)	--	--
Condominium conversion – moderate-income	33%	25%[(a)]	--	--
Condominium conversion – lower-income	15%	25%[(a)]	--	--
A density bonus may be selected from only one category above, except that bonuses for land				

[37] §65915(g)(1).
[38] §65915.5(a) & (b).
[39] §65915.5(a).
[40] §65915.5(f).
[41] §65915(h)(1).

Affordable Units or Category	Minimum Percent Units in Category	Bonus Granted	Additional Bonus for Each One Percent Increase in Units in Category	Percent Units in Category Required for Maximum 35 percent Bonus
donation may be combined with others, up to a maximum of 35%, and an additional sq. ft. bonus may be granted for a child care center.				
Land donation for very-low income housing	10% of market-rate units	15%	1%	30%
Child care center	--	Sq. ft. in day care center[(a)]	--	--
Notes: [(a)] Or an incentive of equal value, at the city's option.				

f. Calculating the Density Bonus.

- **Bonus over Zoning Maximum or General Plan Maximum?**

The density bonus is to be calculated over the "maximum allowable residential density." Section 65915(o)(2) defines "maximum allowable residential density" as that allowed under the zoning ordinance and the land use element of the general plan, or, if a range of density is specified, the maximum allowed. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density will prevail.

Effectively, this provision means that the bonus is calculated over that shown in the land use element of the general plan. In some cases the maximum density allowed by the zoning ordinance is considerably less than the maximum density range shown in the land use element. Cities should attempt to make these consistent to avoid a surprise request for a density bonus substantially greater than allowed by zoning.

Alternatively, developers may desire a bonus over the zoning maximum but have no interest in a bonus over a higher land use element maximum. While strict construction of the statutory language suggests this is not a request for a "density bonus," local agencies typically ignore this problem and treat the application as a density bonus request.

- **What If There's NO Maximum Density in the Zoning Ordinance?**

A few communities do not place *any* limit on the number of dwelling units that can be constructed on a site, but instead allow as many units as can be constructed given limitations on height, setbacks, floor area, and other zoning regulations. How is a density bonus calculated in that case?

In at least one court decision, the fact that the city did not have a maximum density standard in its zoning ordinance meant that the bonus was calculated over the density standards in the land use element. In *Wollmer v. City of Berkeley ("Wollmer II"),*[42] the petitioner argued that the city misapplied the density calculation by using the density standards of the zoning ordinance rather than the general plan. The city's zoning ordinance did not have a maximum density for the applicable zoning classification but rather relied upon the land use element of the general plan to determine density, which limited density by area rather than a particular property. The density bonus was based on the general plan densities and was upheld by the Court.

- **Rounding Up.**

Any density bonus calculation resulting in a fraction entitles the developer to another bonus unit.[43] For instance, a project with 102 units, ten percent of which are affordable to lower income households, is entitled to 21 bonus units (20% x 102 = 20.4, or 21 bonus units). The number of affordable units to be provided must also be rounded up. Thus, in a 102-unit project, a developer would need to provide 11 units to meet the ten percent requirement (10% x 102 = 10.2, or 11 affordable units). With only ten affordable units, the developer would not reach the ten percent threshold.

3. Concessions, Incentives, Waivers and Reductions.

Of greatest concern to cities are the requirements in the statute that give applicants the right to modifications in local development standards: zoning, subdivision controls, and design review requirements. As developers have become more familiar with the density bonus laws, they have frequently proposed projects with large height and setback exceptions, creating substantial public opposition. Unfortunately, if faced with requests for even large variations from local ordinances, cities' discretion may be limited.

Applicants can have standards relaxed in two ways: by requesting "concessions and incentives;" and by asking for "waivers and reductions." In addition, applicants can request the reduced parking standards contained in the statute even if the applicant is not requesting a density bonus, as discussed in Section 4 below.

a. Concessions and Incentives. An applicant who: (1) applies for a density bonus; and (2) bases the request on the provision of affordable housing may also apply for one to three "concessions or incentives." "Concessions and incentives" are defined as:

[42] 193 Cal. App. 4th 1329 (2011).
[43] §65915(f)(5) & (g)(2).

- **Reductions in site development standards or modifications of zoning and architectural design requirements**, including reduced setbacks, increase in height limits, and square footage required, that result in "identifiable, financially sufficient, and actual cost reductions."[44]

- **Mixed used zoning** that will reduce the cost of the housing, if the non-residential uses are compatible with the housing development and other development in the area.[45]

- **Other regulatory incentives or concessions** that result in "identifiable, financially sufficient, and actual cost reductions."[46]

One to three incentives or concessions may be requested on a sliding scale, depending on the amount of affordable housing provided, as shown in the table below.

Target Units or Category	**Percent of Target Units**		
Very-low income	5%	10%	15%
Lower-income	10%	20%	30%
Moderate-income (ownership units only)	10%	20%	30%
Condominium conversion – 33% moderate-income	(d)[47]		
Condominium conversion – 15% lower-income	(d)[48]		
Day care center	(d)[49]		
Maximum Incentive(s)/Concession(s) [(a)(b)(c)]	1	2	3

Notes:
(a) A concession or incentive may be requested only if an application is also made for a density bonus.
(b) Concessions or incentives may be selected from only one category (very-low, lower, or moderate).
(c) No concessions or incentives are available for land donation or market-rate senior housing.
(d) Condominium conversions and day care centers may have one concession or a density bonus at the city's option, but not both.

The developer has the right to select the incentives, although a city or county may of course encourage the developer to select other incentives on a voluntary basis. Many jurisdictions offer a menu of incentives that the city will approve without further evidence from the developer. However, to deny the specific incentives proposed, the local government must either find that they do not meet the threshold requirements set in the statute—in particular, that they do not result in "identifiable, financially sufficient, and actual cost reductions"—or make the findings required to deny a request for an incentive, discussed below. Many communities

[44] §65915(k)(1).
[45] §65915(k)(2).
[46] §65915(k)(3).
[47] §65915.5(a).
[48] §65915.5(a).
[49] §65915(h).

require a pro forma to justify an incentive. As a consequence, developers have increasingly requested waivers rather than incentives. No published case evaluates incentives.

Note that there is *no* requirement that local government provide any "direct financial incentives" for a project. "Direct financial incentives" include provision of publicly owned land and waivers of fees and dedication requirements.[50]

b. "Waivers and Modifications" of "Development Standards."

Localities may not enforce any "development standard" that would physically preclude the construction of a project with the density bonus and the incentives or concessions to which the developer is entitled.[51] In addition to requesting "incentives and concessions," applicants may request the waiver of an unlimited number of "development standards" that would physically preclude the construction of a project with the density bonus and the incentives or concessions to which the developer is entitled. These waivers and modification do not change the number of incentives or concessions available to the developer. Waivers and modifications are not limited to projects containing affordable housing and may be requested by any applicant requesting a density bonus, including bonuses for senior housing, condominium conversions, and child care centers.

The statute defines a "development standard" as "a site or construction condition, including, but not limited to, a height limitation, setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter or other local condition, law, policy, resolution or regulation."[52] "Site and construction conditions" appear to be confined to conditions affecting the *physical* location or type of construction and do not include use restrictions, procedural requirements, affordable housing requirements, and impact fees. Given the overlap of the use of "development standard" in both the "concession or incentive" context and the "waiver" context, developers typically request any number of waivers of development standards and focus their limited requests for incentives or concessions on standards they could not justify as a waiver.

It is not clear how to determine that a development standard "physically precludes" a project with a density bonus. It means something less than "physically impossible." In *Wollmer II*, the plaintiff argued that height and setback waivers were not needed because ceiling heights could be reduced below nine feet, and amenities including an interior courtyard and community plaza could be eliminated. The court explicitly rejected this contention, stating: "Standards may be waived that physically preclude construction of a housing development meeting the requirements for a density bonus, period. The statute does not say that what must be precluded is a project with no amenities, or that amenities may not be the reason a waiver is needed."[53] No case examines what changes a city *can* require to be made in a project when a waiver is requested, or what evidence is required to deny a waiver.

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[50] § 65915(l).
[51] § 65915(e).
[52] § 65915(o)(1).
[53] 193 Cal. App. 4th 1329, 1346-47 (2011) (citation omitted).

4. Reduced Parking Requirements.

The density bonus law entitles a developer who qualifies for a density bonus to parking reductions as a separate entitlement. A developer could request even lower parking ratios as a concession or waiver under the density bonus law.[54]

a. Basic Parking Standards. If a project qualifies for a density bonus because it is a senior project or provides affordable housing, a city or county, at the request of the developer, must reduce the required parking for the entire project—including the market-rate units—to the following:

- zero to one bedroom – one on-site parking space;
- two to three bedrooms – two on-site parking spaces; and
- four or more bedrooms – two and one-half on-site parking spaces.[55]

These numbers include guest parking and handicapped parking. The spaces may be in tandem or uncovered, but cannot be on-street. The standards are uniform throughout the state, with no ability to vary them for local conditions.

b. Parking Standards Near Transit Stops

AB744, effective January 1, 2016, mandates additional parking reductions for affordable housing and housing located within one-half mile of major transit stops if requested by the developer, as shown in the table on the next page.[56]

A "major transit stop" is a site containing a rail station, a ferry terminal served by bus or rail, or the intersection of two or more bus routes that provide service every 15 minutes, or more frequently during the morning and afternoon peak commute periods, or a major transit stop identified in a regional transportation plan.[57] This definition permits lower parking requirements even where a major transit stop included in a regional transportation plan has not yet been constructed.

A site has "unobstructed access" if a resident can "access" the stop "without encountering natural or constructed impediments."[58] It is not clear how access must be obtained (on foot? by car?), but it is possible that some sites that appear to be within a one-half mile radius of a major transit stop may be excluded if the street network does not allow a driver or pedestrian to reach the stop in one-half mile.

[54] §65915(p)(5) & (6).
[55] §65915(p)(1).
[56] §65915(p)(2).
[57] Public Resources Code § 21155(b).
[58] §65915(p)(2).

Type of Development	**Maximum Ratio of Required Off-Street Parking Spaces**
Rental or ownership housing development with: 1. At least 11% very low income or 20% low income units; **and** 2. Within one-half mile of a major transit stop; **and** 3. Unobstructed access to the major transit stop.	0.5 per bedroom
Rental housing development with: 1. All units affordable to lower income households except manager's unit(s); **and** 2. Within one-half mile of a major transit stop; **and** 3. Unobstructed access to the major transit stop.	0.5 per unit
Rental housing development with: 1. All units affordable to lower income households except manager's unit(s); **and** 2. A senior citizen housing development; **and either** 3. Has paratransit service; **or** 4. Is within one-half mile of fixed bus route service that operates 8 times per day, with unobstructed access to that service.	0.5 per unit
Rental housing development with: 1. All units affordable to lower income households except manager's unit(s); **and** 2. A special needs housing development[(a)]; **and either** 3. Has paratransit service; **or** 4. Is within one-half mile of fixed bus route service that operates 8 times per day, with unobstructed access to that service.	0.3 per unit
Notes: [(a)] "Special needs" housing is any housing designed to serve persons with needs related to mental health, physical or developmental disabilities, or risk of homelessness.[59]	

c. Local Parking Studies. Communities may require higher parking ratios than those mandated for the housing types located near transit stops described in subsection 4(b) of this paper if a community adopts findings supporting the need for higher parking ratios, which are **based on a study,** paid for by the community and conducted in the last seven years, that includes: (1) an analysis of available parking; (2) differing levels of transit access; (3) walkability to transit; (4) potential for shared parking; (5) effect of parking requirements on housing costs; and (6) car ownership rates for lower income households, seniors, and residents

[59] Health & Safety Code §51312.

with special needs. However, the *maximum* parking ratios that may be required by a city are those set forth in subsection 4.a above.[60]

d. Relationship to Density Bonuses. Although the new parking provisions are incorporated into state density bonus law, a developer need not request a density bonus nor any other regulatory incentive to take advantage of the lower parking requirements. However, any development that is eligible to use the AB744 parking standards will also be eligible for a 35 percent density bonus and incentives and concessions under state density bonus law. It is possible that the lower parking standards allowed for a project containing only 11 percent affordable housing may induce some market-rate developers to provide the affordable units and then seek a density bonus and other incentives.

5. Local Agency Discretion.

Can counties and cities deny requests for density bonuses, incentives, concessions, waivers, and reduced parking? Only with difficulty: either by making specified findings, supported by substantial evidence; or, by finding that the request does not meet the threshold requirements laid out in the statute.

a. Threshold Requirements. Projects do not qualify for a density bonus – and hence the local agency may disapprove a request – if they do not meet the standards set in the statute. Local agencies can require that applicants show that they have met these threshold requirements. Some of the most important are these:

- **For affordable housing:** Initial sales prices and rents must meet the requirements of the Health and Safety Code and California Code of Regulations. The applicant and local government must enter into appropriate restrictions to ensure affordability for rental units and equity sharing documents for ownership units.

- **For projects involving the demolition of residential rental units affordable to or occupied by lower income households:** The project must comply with the replacement housing requirements set forth in Section B.1.c. above.

- **For senior housing:** The project must meet the requirements of a senior housing development or mobile home park set forth in the Civil Code.

- **For land donations:** The project must comply with the long list of conditions included in Section 65915(g)(2).

- **For incentives and concessions:** The regulatory concessions requested must result in "identifiable, financially sufficient, and actual cost reductions."[61] Local agencies can encourage applicants to apply for certain concessions and incentives by making a finding in their ordinances that certain concessions do result in actual cost reductions, and the developer need not provide his or her own economic analysis.

[60] §65915(p)(7).
[61] §65915(k)(1) & (3).

- **For waivers and reductions:** The applicant must show that the development standard being waived will preclude the physical construction of the project with the density bonus, incentives and concessions to which the project is entitled.[62]

- **For additional reduction of parking requirements near transit stops:** The applicant must show that the project meets one of the three requirements set forth in Section 4.b. above.

Because projects are eligible for a density bonus, incentives, waivers and additional reduced parking ratios only if they meet the threshold requirements contained in the statute, local agencies should be able to deny these requests if the application fails to meet these requirements.

b. Findings for Disapproval. The statute lists findings required to deny incentives, concessions, waivers and reductions, however, no findings are listed for the denial of a density bonus or the mandated reduction in parking requirements.[63]

Findings that may be used to deny incentives/concessions or waivers are listed in the table below.

Code Section	Applicable To:	Procedural Requirements	Finding
65915(d)(1)	Incentives & concessions	In writing, based on substantial evidence	(A) The concession or incentive is not required in order to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c); (B) The concession or incentive would have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5,[(a)] upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households; or (C) The concession or incentive is contrary to state or federal law.

[62] §65915(e)(1).
[63] §65915(p)(1) ("Upon the request of the developer, no city, county, or city and county shall require a vehicular parking ratio . . . that exceeds the following ratios . . .").

Code Section	Applicable To:	Procedural Requirements	Finding
65915(e)(1)	Waivers & modifications	Agency must adopt procedures for granting waivers[(b)]	1. Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5[(a)] upon health, safety, or the physical environment, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. 2. Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards that would have an adverse impact on any real property that is listed in the California Register of Historical Resources, or to grant any waiver or reduction that would be contrary to state or federal law.
Notes: [(a)] Paragraph (2) of subdivision (d) of §65589.5 states: "[A] 'specific, adverse impact' means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." [(b)]This requirement is in §65915(d)(3).			

c. Attorneys' Fees. An applicant is entitled to attorneys' fees and costs if a city or county denies a request for a density bonus, incentive, concession, waiver, or reduction in violation of Section 65915.[64]

6. Local Ordinances and Procedures.

The density bonus law requires all cities to adopt an ordinance that specifies how the city will implement compliance with the density bonus law. Failure to adopt an ordinance does not relieve a city from complying with the density bonus law.[65] Additionally, Section 65915(d)(3) mandates that communities establish procedures for dealing with incentive or concessions requests, which should be covered in the local ordinance or local guide to administering the density bonus law. Section D below discusses provisions that cities may want to consider including in their local ordinances.

In the past cities often prepared detailed density bonus ordinances that attempted to explain the requirements of the statute in more easily accessible language. Given the frequent amendments, cities may wish to confine their ordinances to procedural requirements and prepare informal guidance for the benefit of staff and applicants. Nonetheless, cities should consider updating their ordinances, procedures and application requirements in the near future to ensure that they are consistent with the recent amendments to the statute.

[64] §§65915(d)(3) & 65915(e)(1).
[65] §65915(a).

C. Issues.

1. Relationship to Local General and Specific Plans.

The density bonus law, at its heart, prioritizes the provision of incentives for affordable housing over local planning. By allowing 35 percent bonuses and unlimited waivers to accommodate density bonuses, the law assumes that the need for any amount of affordable housing is more important than any other local planning requirement. But the state Department of Housing and Community Development (HCD) gives no credit to communities that encourage density bonuses in its review of housing elements. In calculating zoning capacity (the number of dwellings that can be built given present zoning), HCD does not allow communities to increase their presumed site capacity based on developers' ability to obtain a density bonus.

The statute provides specifically that the granting of a density bonus, concession, or incentive by itself shall not require a general plan amendment, zoning change, local coastal plan amendment, *or any other discretionary approval*.[66] Consequently, cities cannot establish a "density bonus permit" or other special permit for projects that request density bonuses. Rather, the density bonus and any request for concessions or waivers should be heard as part of any other discretionary approval needed.

2. Relationship to Local Inclusionary Requirements.

a. <u>Inclusionary Units Count as Affordable Units for Density Bonus</u>. In *Latinos Unidos del Valle de Napa y Solano v. County of Napa*,67 the Court held that affordable units required by a local inclusionary ordinance could be used to make a project eligible for a density bonus. Napa County's ordinance had provided that the affordable units required under density bonus law were to be provided in addition to the affordable units required by the County's inclusionary ordinance. Although the County's ordinance resulted in the creation of more affordable units before a developer was entitled to a density bonus, the Court found that "[t]o the extent the ordinance requires a developer to dedicate a larger percentage of its units to affordable housing than required by Section 65915, the ordinance is void."68

However, any units proposed to meet the requirements of *both* a local inclusionary ordinance and to qualify the project for a density bonus must meet the requirements of *both* the local ordinance and state law. Similarly, if a local inclusionary ordinance requires more affordable units than required by density bonus law, nothing excuses the developer from compliance with the local inclusionary ordinance.

b. <u>Avoiding the Application of the Costa-Hawkins Act by Granting Density Bonuses</u>. The Costa-Hawkins Rental Housing Act (Civil Code Sections 1954.51 *et seq*.) regulates local rent control. It gives the owner of any rental unit the right to set both the initial rent and the rent when a tenant vacates the unit ("vacancy decontrol"). In *Palmer/Sixth*

[66] §§ 5915(f)(5) & 65915(j)(1).
[67] 217 Cal. App. 4th 1160 (2013).
[68] 217 Cal. App. 4th at 1169.

Street Properties L.P. v. City of Los Angeles,[69] the Court found that the regulation of rents through inclusionary ordinances violates the Costa-Hawkins Rental Housing Act.

However, Costa-Hawkins states that its provisions do not apply when the owner of rental apartments has agreed by contract with a public agency to control rents in consideration for "a direct financial contribution or any other form of assistance specified in . . . Section 65915."[70] Inclusionary rental units are therefore exempt from Costa-Hawkins when the project includes: (1) a contract with the local agency; and (2) any of the incentives listed in the density bonus law.

Consequently, giving density bonuses and the other development concessions for rental inclusionary units allows the provision of affordable rents in rental housing. To avoid the application of Costa-Hawkins, an agreement with the developer must recorded. It should recite that the developer has agreed to control rents in exchange for the incentives granted by the locality, consistent with Costa-Hawkins.

3. Relationship to Local Coastal Plans.

The statute provides that it shall not be construed to supersede or in any way alter the effect of the California Coastal Act.[71] However, it also provides that density bonuses, incentives, and concessions do not, in and of themselves, require an amendment to a local coastal plan.[72] Coastal communities should refer to their local coastal plan and Coastal Commission staff to coordinate implementation of density bonus law under their local ordinances with the local coastal plan requirements and process.

4. Application of CEQA to Density Bonus Projects.

Section 65915 does not establish an exemption from CEQA requirements. The regulatory concessions that must be offered to a qualifying project cannot include non-compliance with CEQA, which would violate state law. CEQA is not limited by the statute.

Under the state density bonus law, the granting of a density bonus and incentives or concessions, *in and of themselves*, are not discretionary approvals,[73] so those actions are not subject to CEQA as ministerial acts.[74] The new mandatory parking requirements also leave no discretion to the local government and should also be considered exempt from CEQA. The density bonus statute does not address whether waivers or reductions of development standards are discretionary or ministerial. Most typically, however, cities require that requests for bonuses and all other incentives requested under the statute be submitted with all other required discretionary applications, and the CEQA analysis is completed on the project as a whole, including any requests submitted under the density bonus law.

[69] 175 Cal. App. 4th 1396 (2009).
[70] *See* Civil Code §1954.52(b).
[71] §65915(m).
[72] §65915(f)(5) & §65915(j)(1).
[73] §65915(f)(5) & §65915(j)(1).
[74] Public Resources Code §21080(b)(1); 14 CCR §§15002(i)(1) & 15268.

Two recent appellate cases have discussed the density bonus statute relative to CEQA. In *Wollmer v. Berkeley* ("*Wollmer I*"),[75] the court found that appellant failed to demonstrate that the city's actions in interpreting and complying with the state density bonus law (including providing a larger density bonus than mandated under the state law) was a change in policy that constituted a project to which CEQA applied. In *Wollmer II*, the city waived a number of development standards and approved the CEQA categorical exemption for infill projects (CEQA Guideline Section 15332). That exemption requires compliance with *applicable* general plan and zoning code designations, policies and regulations. The Court noted that the density bonus law specifically states that a granting of a density bonus does not require any discretionary approval and that the city is prohibited by state density bonus law from applying any development standard that physically precludes the construction of a density bonus development. Accordingly, the court found that the waived development standards were not *applicable* general plan and zoning designations, policies, and regulations, and so the use of the infill exemption was not precluded by use of state density bonus law.

Because density bonus projects will exceed general plan and zoning densities and may include reduced development standards, they may not be within the scope of program EIRs and similar EIRs prepared for general plans, specific plans, and zoning ordinances; although, based on *Wollmer II*, a court could find that since the granting of a density bonus is not discretionary, no further environmental analysis may be required.

A local agency may deny a proposed incentive, concession, or waiver when there is substantial evidence that it would have a "specific adverse impact," as defined in Section 65589.5(d)(2), on "public health and safety" or the physical environment, and there is "no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households." Similarly, a local government may deny a proposed incentive, concession or waiver that would have an adverse impact on a property listed on the California Register of Historical Resources, or that is contrary to state or federal law. An EIR would likely provide the basis for such findings. The agency could deny a proposed incentive, concession, or waiver if an EIR or other study identified: (1) significant public health or safety impacts; (2) based on objective written standards; (3) that either cannot be avoided; or (4) that could be mitigated but the mitigation would make the project unaffordable.

D. Density Bonus Requirements in the Context of a Land Use Regulatory Scheme.

There are some strategies that localities can use in drafting their own density bonus ordinances to enable local plans to be implemented to the extent possible. A local ordinance with defined requirements can also better protect the agency from legal challenge. Some provisions to include are these:

1. Application requirements. Require detailed information to ensure that the project complies with the threshold requirements discussed earlier. These may include, for instance, calculations of affordability, evidence that incentives and concessions provide "identifiable, financially sufficient, and actual cost reductions," and analysis to show that any waivers are required to avoid physically precluding the construction of the project.

[75] 179 CA. App. 4th 933 (2009).

2. Enforceable written agreements. Require that the affordability requirements be enforced through a recorded written agreement. Some communities also require the developer to provide the documents to be recorded that will enforce the obligation, or to pay for ongoing public agency monitoring of affordability or public agency preparation of the documents. There is also no requirement to subordinate these agreements to project financing.

3. Findings required for approval and denial. Include as findings in the ordinance the threshold criteria needed for project approval (such as the need for incentives to result in "identifiable, financially sufficient, and actual cost reductions") and, for those projects that meet the threshold criteria, the statutory findings that could justify denial. This will help guide decision-makers' deliberations to those aspects of the project that justify approval or denial of the bonus, incentives, or waivers.

Note that the city or county retains full discretion to approve or deny the project for reasons unrelated to the density bonuses, incentives, or waivers.

4. Encouraging certain incentives and concessions. Although the developer, rather than the public agency, has the right to choose the incentive or concession, some ordinances attempt to encourage certain favored incentives by requiring less information from the developer when the favored incentives are proposed.

5. Limitations on certain incentives. If the local zoning ordinance already grants incentives for affordable projects, ensure that these incentives do not automatically apply to a density bonus project. This will prevent the project from requesting incentives *in addition to* those that the project is already entitled, but will allow the public agency to grant the normal incentives pursuant to density bonus law.

6. Conduct a parking study. If the community anticipates a higher need for parking within 1/2 mile of major transit stops than allowed by AB744, the community should conduct a transit study to permit it to require the maximum parking ratios rather than the parking requirements mandated by the statute for projects within 1/2 mile of a major transit stop.

7. Require long term affordability for ownership units. To avoid losing affordable ownership units with the first resale, adopt a requirement that requires long-term affordability for ownership units that make a project eligible for a density bonus.

CONCLUSION

California's density bonus law is a confusing, poorly drafted statute that allows major exceptions to local planning and zoning requirements. The law contains numerous protections for applicants, and communities that are unprepared may find themselves seemingly forced to approve an undesirable project. Preparing a local density bonus ordinance and procedures that clarify ambiguities and require detailed information from the applicant can give cities the tools they need to better evaluate these projects and achieve results similar to those intended by local planning.

Notes:

Gift of Public Funds
(Spoiler Alert: It's Illegal)

Friday, October 7, 2016 General Session; 10:30 – 11:45 a.m.

Brian P. Forbath, Stradling, Yocca, Carlson & Rauth, PC

CALIFORNIA PUBLIC FUNDS DOCTRINE

Presentation for the

LEAGUE OF CALIFORNIA CITIES ANNUAL CONFERENCE

OCTOBER 5-7, 2016

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CALIFORNIA PUBLIC FUNDS DOCTRINE

1. OVERVIEW
    a. Set forth in *Cal. Const., art. XVI, § 6*
    b. Prohibits the giving or lending public funds to any person or entity, public or private
        i. Prohibition includes aid, making of gift, pledging of credit, payment of liabilities
            1. Encompasses the giving of monetary funds and any "thing of value"
        ii. "Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever"
        iii. "and it shall not have power to authorize the State, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever"

2. EXCEPTIONS
    a. Expenditures/disbursements for public purpose. *County of Alameda v. Janssen* (1940) 16 Cal 2d 276, 281; *Redevelopment Agency of San Pablo v. Shepard* (1977, Cal App 1st Dist) 75 Cal. App 3d 453; *Schettler v. County of Santa Clara* (1977, Cal App 1st Dist) 74 Cal App 3d 990.
        i. The public purpose exception is liberally construed
            1. "Determination of public purpose is primarily a matter for the Legislature and will not be disturbed as long as it has a reasonable basis." *County of Alameda v. Janssen* (1940) 16 Cal 2d 276, 281.
                a. *County of Alameda* was decided when public funds doctrine was under Art IV § 31 but same standard still applied as seen in several of the examples below
            2. Courts may infer the public purpose from other legislation or the manner in which legislation enacted. *Scott v. State Board of Equalization* (1996, Cal App 3d Dist) 50 Cal App 4th 1597.
            3. Expenditure valid under public purpose exception even if there is an incidental private benefit *Redevelopment Agency of San Pablo v.*

Shepard (1977, Cal App 1st Dist) 75 Cal. App 3d 453 (citing *County of Alameda*).

ii. Redevelopment is public purpose. *Board of Supervisors v. Dolan* (1975, Cal App 1st Dist) 45 Cal App 3d 237, 245.

b. Aid granted pursuant to *Cal. Const., art. XVI, § 3*

i. *Cal. Const., art. XVI, § 6*: "nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; **provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI**;"

ii. *Cal. Const., art. XVI, § 3* provides: "No money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State, except that notwithstanding anything contained in this or any other section of the Constitution:"

1. can make state money obtained from federal government available or authorize its use for purpose of hospital construction by public agencies and nonprofits organized to construct/maintain such facilities
2. can grant aid to institutions for orphans or abandoned children
3. can aid "needy blind persons" who are not inmates in institution supported in whole/part by state or its political subdivisions
4. can aid "needy physically handicapped" individuals who are not inmates of an institution under supervision of Dept. of Mental Hygiene and supported in whole/part by state or any institution supported in whole/part by a political subdivision

c. Irrigation districts

i. can acquire stock of water corporation which has part of system located in foreign country

1. "provided, further, that irrigation districts for the purpose of acquiring the control of any entire international water system necessary for its use and purposes, a part of which is situated in the United States, and a part thereof in a foreign country, may in the manner authorized by law, acquire the stock of any foreign corporation which is the owner of, or which holds the title to the part of such system situated in a foreign country"

ii. can generally acquire stock of corporations or interests in rights as necessary for district's purposes

1. "provided, further, that irrigation districts for the purpose of acquiring water and water rights and other property necessary for their uses and purposes, may acquire and hold the stock of corporations, domestic or foreign, owning waters, water rights, canals, waterworks, franchises or concessions subject to the same obligations and liabilities as are imposed by law upon all other stockholders in such corporation"

d. Public entities can join with other agencies under insurance pooling or JPA agreement for purposes of providing insurance or other payment of various liabilities in tort, workers comp, etc.

i. "Provided, further, that this section shall not prohibit any county, city and county, city, township, or other political corporation or subdivision of the State from joining with other such agencies in providing for the payment of workers' compensation, unemployment compensation, tort liability, or public liability losses incurred by such agencies, by entry into an insurance pooling arrangement under a joint exercise of powers agreement, or by membership in such publicly-owned nonprofit corporation or other public agency as may be authorized by the Legislature;"

e. Public entities can aid veterans via money or credit in acquiring farms, homes, businesses or otherwise paying for them

i. "Provided, further, that nothing contained in this Constitution shall prohibit the use of State money or credit, in aiding veterans who served in the military or naval service of the United States during the time of was, in the acquisition of, or payments for, (1) farms or homes, or in projects of land settlement or in the development of such farms or homes or land settlement projects for the benefit of such veterans, or (2) any business, land or any interest therein, buildings, supplies, equipment, machinery, or tools, to be used by the veteran in pursuing a gainful occupation;"

f. If disaster or emergency declared by the President, the State or a subdivision thereof can aid/assist persons in clearing debris or wreckage from private land or waters if deemed to be in public interest

i. public entity must be indemnified by recipient against claims arising from such aid

ii. aid/assistance must be eligible for federal reimbursement

iii. "Provided, further, that nothing contained in this Constitution shall prohibit the State, or any county, city and county, city, township, or other political

corporation or subdivision of the State from providing aid or assistance to persons, if found to be in the public interest, for the purpose of clearing debris, natural materials, and wreckage from privately owned lands and waters deposited thereon or therein during a period of a major disaster or emergency, in either case declared by the President. In such case, the public entity shall be indemnified by the recipient from the award of any claim against the public entity arising from the rendering of such aid or assistance. Such aid or assistance must be eligible for federal reimbursement for the cost thereof."

g. Temporary transfers from treasurer of city/county to political subdivision for maintenance purposes when funds in custody and paid solely through treasurer's office

   i. only allowed when resolution adopted by city/county governing body directing it

   ii. cannot except 85% of anticipated revenues of the political subdivision

   iii. can't be made before first day of fiscal year or after the last Monday in April of current FY

   iv. must be replaced from revenues of political subdivision before any other obligation of political subdivision is met from such revenue

   v. "And provided, still further, that notwithstanding the restrictions contained in this Constitution, the treasurer of any city, county, or city and county shall have power and the duty to make such temporary transfers from the funds in custody as may be necessary to provide funds for meeting the obligations incurred for maintenance purposes by any city, county, city and county, district, or other political subdivision whose funds are in custody and are paid out solely through the treasurer's office. Such temporary transfer of funds to any political subdivision shall be made only upon resolution adopted by the governing body of the city, county, or city and county directing the treasurer of such city, county, or city and county to make such temporary transfer. Such temporary transfer of funds to any political subdivision shall not exceed 85 percent of the anticipated revenues accruing to such political subdivision, shall not be made prior to the first day of the fiscal year nor after the last Monday in April of the current fiscal year, and shall be replaced from the revenues accruing to such political subdivision before any other obligation of such political subdivision is met from such revenue."

3. EXAMPLES

   a. GENERAL

      i. *Auerbach v. Board of Supervisors* (1999, Cal App 2d Dist) 71 Cal App 4th 1427

         1. Background

a. County sued by taxpayers for transferring money from county funds (12 of 16 of the funds were characterized as trust or agency funds) to general fund to cover cash flow deficits

b. Transfers did not affect any amount budgeted by county or any other required appropriation

2. Court of Appeal affirmed lower court, finding that Supervisors had authority for transfers under Government Code § 25252. Court reasoned that contrary to Plaintiffs' assertion, Government Code § 25252 did not distinguish between county money and funds held in trust by county but not belonging to it

a. Government Code § 25252 allowed county funds to be used for general purpose unless irrevocably committed

3. Found that Plaintiffs did not show that debts paid with funds were illegitimate

4. Court noted that rule has no effect on transfers between funds of same public entity, only between one political subdivision and another

a. This was crux of Court's position that there was no violation of *Cal. Const., art. XVI, § 6*

b. Court rejected Plaintiffs' contention that the trust and agency funds were not county funds

i. Court said the fact that the funds were carried on county books under particular name which suggests plan for future expenditure reflected only a matter of "administrative or bookkeeping convenience"

5. Court found transfers valid where none of county funds involved in transfers were political subdivisions for purposes of the definition set forth in Government Code § 8557(c), so the transfers did not fall within *Cal. Const., art. XVI, § 6* prohibition

a. Political subdivision defined in Government Code 8557(c) as "any city, county, district or other local governmental agency or public agency authorized by law"

ii. *Jordan v. Dept. of Motor Vehicles* (2002, Cal App 3d Dist) 100 Cal App 4th 431

1. Background

a. In original action, Plaintiffs sued the State of California and DMV, seeking refund for $300 smog impact fee imposed on those moving to CA and registering out of state vehicles in CA

b. Trial court awarded Plaintiffs' counsel approx. $18 million, holding impact fee was unconstitutional under commerce clause of the U.S. Constitution and Article XIX of the California Constitution.

    i. Fee and expense award represented 5% of common fund to be established refunds of fee resulting from Plaintiffs' efforts

c. State's appeal of fee/expense award was dismissed pursuant to agreement between state and Plaintiffs to conduct arbitration, and in the ensuing arbitration Plaintiffs were awarded approximately $88 million in fees/expenses

    i. Arbitration award was vacated by Sacramento County Superior Court following petition by State

d. Plaintiffs then appealed the decision to vacate the arbitration award

2. Court of Appeal upheld the lower court's decision to vacate the $88 million arbitration award, finding a violation of public funds doctrine where the $88 million award was in settlement of a $18 million dispute

    a. Court explained that payment of claim exceeding maximum exposure is akin to payment of wholly invalid claim and constitutes invalid gift of public funds

    b. Court defined gift for purposes of *Cal. Const., art. XVI, § 6* as including "'all appropriations of public money for which there is no authority or enforceable claim' even if there is a moral or equitable obligation

    c. Court considered the settlement of the fee dispute to be a valid public purpose, but State could not be compelled to pay more than the maximum exposure

        i. Decision notes that this does not mean that "legally insupportable" arbitration award is per gift of public funds as long as award "within amount in dispute"

        ii. Decision notes that the case was unusual because max exposure determined by trial court prior to arbitration

3. Court affirmed trial court's vacating of arbitration award and directed that new arbitration conducted in which award limited to original $18 million trial court judgment plus interest

b. EMPLOYMENT

i. *Los Angeles Unified School Dist. v. Livingston* (1981, Cal App 2d Dist) 125 Cal App 3d 942

1. Background

a. LAUSD challenging order dissolving TRO and refusing to grant preliminary injunction

b. LAUSD had previously obtained TRO to stop director of California Employment Development Department from paying unemployment compensation to LAUSD teachers that administrative law judge had deemed eligible for those benefits

2. LAUSD argued that paying benefits while legal remedy pursued would cause irreparable harm because account would suffer a charge based on benefits paid even if LAUSD succeeds in court re eligibility

a. LAUSD tried to distinguish similar cases cited in which benefits had to be paid despite pending legal proceedings because those cases dealt with private employer

i. Court rejected LAUSD arguments, as there were different benefit financing alternatives made available by legislature for public employers, and the options all required the public employer to assume risk of overpayment

3. Court here did not examine eligibility determination, only order denying preliminary injunction

4. Court found that LAUSD benefit system presenting the risk of erroneous benefit payments did not violate *Cal. Const., art. XVI, § 6* where public purpose of prompt benefit payments served

a. Determined that it was better to have working system with small percentage of error than none at all

b. Noted that policy of California Unemployment Insurance Code §§ 1335(c) and 1338, as well as case law require balance of equities pending judicial review of unemployment benefits to be weighted in favor of unemployed worker

c. Noted paragraph 2 of *Cal. Const., art. XVI, § 6* implies that insurance involves risk and that being unlucky with insurance claims doesn't equate to gift of public funds.

ii. *Sturgeon v. County of Los Angeles* (2008, 4th Dist) 167 Cal App 4th 630

1. Background

    a. County paid judges same benefits as employees and local officers

        i. County added these benefits in late 1980s, which were in addition to compensation prescribed by legislature

            1. Amounted to $46,436 in benefits in FY 2007 (approx. $21 million total), which was approximately 27% of judge salary

    b. Plaintiff taxpayer alleged gift of public funds and waste under CCP§ 526a

2. Court reversed trial court decision, finding no gift of public funds under *Cal. Const., art. XVI, § 6* because the benefits at issue promoted public interest of recruiting and retaining judges

    a. Court reiterated public purpose/reasonable basis analysis and definition of "gift" for purposes of public funds doctrine as "all appropriations of public money for which there is no authority or enforceable claim, even if there is a moral or equitable obligation"

    b. Notes that cases re bonuses for work already performed and benefits to employees are generally uniform in finding public purpose

        i. E.g. *Jarvis v. Cory* (1980) 28 Cal 3d 562 and *San Joaquin Employers' Assn., Inc. v. County of San Joaquin* (1974, Cal App 3d Dist) 39 Cal. App 3d 83

            1. Followed rationale of public entity's interest in recruiting and retaining employees

3. Also finds no waste under CCP § 526a

c. TAXATION

    i. *Community Television of So. Cal. v. County of Los Angeles* (1975, Cal App 2d Dist) 44 Cal App 3d 990

        1. Background

            a. Appeal by County from LA Superior Court order granting summary judgment in favor of Community Television of Southern California (KCET) in action to recover paid real property taxes pursuant to statutory exemption of Cal Rev & Tax Code § 214

i. Exception allowed certain organizations to avoid paying property tax in consideration for public benefit offered

1. Here it was public TV station

b. County claimed that statute under which KCET filed for exception, Cal Rev & Tax Code § 271.4 was unconstitutional as gift of public funds and violation of equal protection

c. KCET had acquired property in County on 7/23/70 and filed for property tax exemption on 1/28/71, but was denied as a late filing, which amounted to a waiver under the Cal Rev and Tax Code

i. But KCET hadn't acquired the property in time to meet the deadline for the exemption claim

1. Cal Rev & Tax Code § 271.4 allowed welfare exemption to apply retroactively in this circumstance

a. Consequently the County challenged the statute's constitutionality

i. County argued that its interest in taxes had vested so to allow the debt to be forgiven under Cal Rev & Tax Code § 271.4 would be a prohibited gift of public funds

2. Court of Appeal affirmed summary judgment for KCET

a. Court explained that need for exemption trumps the procedural requirements and Cal Rev & Tax Code § 271.4 expressed this

3. Court of Appeal finds that release of tax lien without consideration would violate Article XVI

a. But that was not the case here because court found public purpose expressed in Revenue and Tax Code § 214

4. Decision reiterates case law saying that public purpose determination primarily a legislative matter and isn't disturbed so long as there is reasonable basis

ii. *Edgemont Community Services Dist. v. City of Moreno Valley* (1995, Cal App 4th Dist) 36 Cal App 4th 1157

1. Background

a. District challenging Riverside Superior Court judgment barring the District from recovering the costs of collecting City's sewer utility user tax

2. Court of Appeal found that trial court erred in holding that District not entitled to reimbursement for cost of collecting City's utility user's tax on sewer services provided by District on its behalf

3. Court found that construing Government Code § 37100.5 as allowing this shift in cost of collection violates Art XVI § 6

    a. Court explained that allowing for such transfer is not per se invalid if purpose of money collected on one entity's behalf is used for benefit of donor agency

        i. Decision cites *Golden Gate Bridge & Highway Dist. v. Luehring* (1970) 4 Cal App 3d 204 as primary support for this assertion

    b. Court reached its decision after finding that there was no indication that all or any portion of the tax would be used by City for the exclusive benefit of District residents or purposes specified in resolution under which District was organized

    c. Court of Appeal ordered the trial court to enter judgment requiring the City to reimburse the District for costs incurred in collecting the City's user utility tax

4. Court found no support for City argument that cost of collection of tax should be borne by District because tax was incident to services and facilities furnished by District

iii. *White v. State of California* (2001, Cal App 4th Dist) 88 Cal App 4th 298

1. Background

    a. Recovery Laws enacted by State in wake of 1994 OC financial crisis allocated tax revenue to OC general fund when such revenue had previously been allotted to other County controlled funds and agencies

        i. Followed prior rejection by OC voters of ½ cent sales tax to help recovery in 1995 after OC filed bankruptcy in 1994

        ii. 4 recovery bills passed – SB 863, AB 200, SB 1276, AB 1664, among which:

            1. SB 863 reduced property allocation to an OC flood control district and a harbors, beaches

and parks fund by $4 million a year, allocated money to general fund of County

2. AB 1664 allowed OC to reduce revenue deposited in transportation fund over 15 year period by $38 million in order to keep in general fund
3. SB 1276 allocated some highway user tax funds to transportation fund which would have previously gone to County
    a. Related to legislative intent to minimize Recovery Laws' effect on agencies
4. AB 200 corrected technical issues

b. Plaintiff claimed Art IV § 16 of California Constitution violated, which provides that all laws of a general nature have uniform operation and that a local or special statute is invalid in any case where a general statute can be made applicable
    i. Trial court found no violation

c. Plaintiff claimed violation of public funds where transfers did not promote specific interests of the "donor agencies"
    i. Trial court found no violation

2. Court of Appeal upheld Legislative action under Art IV because the Court considered this a unique situation, where OC went bankrupt and taxpayers unwilling to raise taxes for recovery
    a. Court found legislative action valid, as necessary to protect OC and State where Recovery Laws were narrowly targeted and generally applicable laws wouldn't adequately address issue
    b. Purpose was clearly set forth in legislation
3. Court of Appeal affirmed trial court with respect to public funds doctrine challenge, finding no prohibited gift of public funds because no transfer of funds had been effectuated by the Recovery Laws. Court explained that even if there had been a transfer, legislative findings showed OC needed the money for its recovery and credit standing of public debt issuers constituted a valid public purpose
    a. Decision reiterates public purpose/reasonable basis analysis
    b. Court said prohibition regarding gift of public funds is not triggered merely because legislature allocated less tax dollars to

certain local agencies and instead determined that such funds be allocated to general fund to be used for public purpose.

i. As this did not constitute transfer of funds between public entities

c. Court noted that funds were not specifically raised for purpose of transferring agencies, but were levied as general property and sales taxes and then allocated

i. This rationale and the rationale reflected in item 4 below paralleled the primary reasoning relied on by the Court of Appeal in rejecting public fund doctrine violation in *California Redevelopment Assn. v. Matosantos* (2013, Cal App 4th Dist) 212 Cal App 4th 1457

1. Concerning state legislation that transferred tax increment funds from redevelopment agencies

4. Court explained that even assuming allocations could be viewed as transfers between agencies, funds were from sales and property taxes and same general group of taxpayers would benefit

a. Decision notes that under Art XVI § 6 "showing of public benefit to the transferor agency [per *Edgemont* and *Golden Gate*] is only necessary where there is not a substantial identity between the taxpayers who paid the taxes and those who will benefit"

d. OTHER APPLICATIONS

i. *County of Riverside v. Idyllwild County Water Dist.* (1978, Cal App 4th Dist) 84 Cal App 3d 655

1. Background

a. District adopted resolution requiring all tax exempt entities to agree to pay capital cost charge in addition to service charges based on rate schedule applicable to all users as a condition of sewer service

b. Trial court said County was not obligated to pay under Art XIII § 3 as it was exempt from property taxes and special assessments which is how capital cost charge was characterized

2. Court affirmed trial court, finding that County agreement to pay invalid special assessment charge to District by means of signing a user's agreement to pay charges amounted to prohibited gift of public funds

a. Consequently, the agreement did not function as a waiver of the County's right to contest charge, as County was not empowered to enter into the agreement

ii. *California Housing Finance Agency v. Elliott* (1976) 17 Cal 3d 575

1. Background

a. CHFA made loans to private housing sponsors and mortgage lenders at below-market rates, refinanced existing mortgages and created a supplemental bond security fund in connection with the construction/development/acquisition of low rent and mixed income housing

b. Loan funds were to come from bond proceeds which CHFA Chairperson refused to issue in part because he argued it was unconstitutional gift of public funds

c. Program was undertaken pursuant to Health and Safety Code § 41000 et seq.

2. Court found that legislature acted reasonably in concluding that such housing developments serve a public purpose and that CHFA used funds as provided by the legislation, which Court regarded as having been carefully designed to achieve the public purpose

3. Court noted that non-state entities benefitted only as incident to public purpose

Notes:

High-Tech Intimidation, Stress & the Public Official

(MCLE Specialty Credit – Legal Competence Issues)

Friday, October 7, 2016 General Session; 10:30 – 11:45 a.m.

Richard Carlton, MPH, Director, Lawyer Assistance Program
The State Bar of California

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HIGH-TECH INTIMIDATION, STRESS, & THE PUBLIC OFFICIAL
(An Introduction)

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*Christi's law firm, Jenkins & Hogin, LLP, specializes in representing public agencies. She currently serves as city attorney for Lomita, Malibu and Palos Verdes Estates and as assistant city attorney for West Hollywood. Christi serves this year as President of the City Attorneys Department for the League of California Cities.

HIGH-TECH INTIMIDATION, STRESS, & THE PUBLIC OFFICIAL (An Introduction)

If there were a City Attorneys' Department Credo, it would be this:

It is better to be right than to be City Attorney.[1]

Imbedded in this statement is an understanding of the human vulnerabilities we bring to our profession. Serving as city attorneys is not only our profession but these are our jobs. This is how we earn a living, feed and house ourselves and our families, maintain health insurance, and save for our retirement. While most of us are grateful to have found an interesting, meaningful way to make our living, few among us don't also have to work. Therein lays the vulnerability: we have jobs that we must be willing to lose in order to do them well.

Excellence in the city attorney profession demands that we be independent, even though we naturally depend on the living we make from our jobs. We work for elected officials who answer to the often fickle, sometimes short-sighted electorate. More than one city attorney has fallen into the trap of trying to please an upset neighborhood or a determined council majority by overemphasizing weak legal theories to justify outcomes that conflict with emerging case law. But far more often city attorneys have taken the heat for unpopular but accurate assessments of the law, sometimes leading to their dismissal as city attorney.

Political courage is a job requirement for a city attorney. The City Attorney Track for this conference started on Wednesday with an exploration of the city attorney's key relationships in city hall (with the city manager, with the city clerk, with the individual councilmembers). Through those relationships, the city attorney can create the bonds of trust that assist in effectively providing legal advice to the city. This final program of the City Attorney Track introduces skills and resources to hold true to the City Attorneys' Department Credo even in the face of mean tweets, social media attacks and other public shaming and cyberbulling.

[1]My gratitude to Natalie West, former city attorney for Navato and Brentwood and past President of the Department (1986-1987) for passing along to me this credo.

Haters Gonna Hate

Public shaming is older than the Scarlet Letter and, as a behavior modification tool, has a long and controversial history of successes and tragic failures. For our purposes here, the important aspect of public shaming is its powerful threat. No one – innocent or guilty – wants his or her reputation dragged through the mud in the public square. The Information Age[2] has turned out to also be the Disinformation Age. There is no truth filter on internet publication and the fact that material may be published anonymously decreases the "source's" accountability for the information. It is easy for disgruntled citizens – whether their gripes are legitimate or not – to publicize their grievances. And don't we city attorneys know it.

City attorneys know we are going to work in a fish bowl. Indeed, extending the analogy, our role may be to help keep the glass bowl clean so the public's view is unobstructed. We do this by offering Brown Act training and advice, Political Reform Act training and advice, Public Records Act training and advice, Ethics and AB1234 trainings, and through our daily interactions with city staff and the public toward open, transparent government. Operating in the public sphere is a key component of the city attorney role and, unlike private attorneys, we most often deliver our advice in public.

Practicing law in public comes with the job. The public has a right to question the city attorney's advice and even urge that it be ignored. But the Information Age has ushered in new platforms that allow detractors who attack the *city attorney* and not the advice an opportunity to intimidate or humiliate. It is the normal, natural desire not to be humiliated or subject to public scorn and unwanted public attention. That is was what supplies cyberbullies with ammunition.

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[2]"The Information Age (also known as the Computer Age, Digital Age, or New Media Age) is a period in human history characterized by the shift from traditional industry that the Industrial Revolution brought through industrialization, to an economy based on information computerization." See https://en.wikipedia.org/wiki/Information_Age

"The modern age regarded as a time in which information has become a commodity that is quickly and widely disseminated and easily available especially through the use of computer technology. Information has a unique quality as a resource and a commodity, the utility of which, in combination with its other values, is so pervasive as to result in the now common appellation given to the period of history ahead as 'the information age.'" — Encyclopedia of Library and Information Science

Again, practicing public law has always come with the public attention and the possibility of negative attention – deserved or undeserved. Let's take a quick tour through the ages of public meetings to see how the vulnerability has evolved.

Yesteryear: A meeting noticed by a mimeographed agenda tacked to a bulletin board outside city hall would convene in a room with folding chairs. Public microphones were often available and the entire audience was in the room. If you did not attend and you wanted to know what happened, you could read the written minutes approved at a subsequent meeting. Maybe, a newspaper reporter would be present to report the actions of the meeting. There was no playing to the camera but a crowd might use heckling or clapping to pressure public officials beyond the authorized methods of participation. After the meeting, a concerned citizen might write a letter to the editor of the local newspaper, which might get printed, or tell friends and neighbors impressions of the meeting and actions of public officials.

Innovations of the Digital Age: The Brown Act was amended a few years ago to require meetings to be noticed on a city's website. *See* Gov't Code §54954.2(a). In addition, most local newspapers in addition to publishing in print (typically weekly) now maintain a regularly updated website that will publicize agendas. Beyond that, many cities have their own Facebook, Twitter, iLegislate, YouTube, and other social media platforms through which meetings are publicized in advance. Plus, many individual councilmembers and community activists will republish on their own accounts a meeting agenda or about a specific agenda item (usually accurately). The meetings are often shown live and later rerun on local or cable TV. Cablecasts and broadcasts have been replaced or supplemented with live webstreaming and on-demand video which dates back many years now for most agencies. So participants can watch themselves and others over and over. Letters to the editor have been replaced or supplemented with post-meeting email blasts (sometimes to huge numbers of people), Facebook posts, Tweets (sometimes live, contemporaneous commentary), posts in comment sections of online "newspapers" and local Patch or other media sites, on blogs or dedicated websites.

Many members of the City Attorneys Department may remember that a particularly agitated community member went to the effort of preparing an email group consisting of every city attorney in the state and then bombarded their inboxes with lengthy recitations of events and alleged legal malpractice by his city attorney. Since then blast emails have become much more common and many of us have been the object of brutal and unfair comments published widely. Of course – and again for the purpose of this session – the possibility of such email blast looms ever presently.

And then there are the "Mean Tweets" often sent under pseudonyms, sometimes amusing, often inaccurate, occasionally downright slanderous, but always mean and hurtful. Some detractors have actually set up web sites to keep an ongoing criticism of a public official, complete with doctored pictures and inflammatory text.[3]

This virtual megaphone that allows unaccountable criticism to be levied at individuals (including public officials) is so prevalent that a catchphrase emerged to indicate a disregard for hostile remarks addressed towards the speaker: *Haters gonna hate.*

The Practice of Public Law Requires a Conscious Understanding of the Threat and a Purposeful Decision to Put the City's Interests Above All Else

We all face the possibility of being the object of a cyberbully or the subject of a social media drubbing. As city attorneys (or other public officials), we probably increase the odds a bit. But as lawyers, we owe our clients a duty of loyalty that requires us to face down our reticence to do our jobs under such stress. There are certainly remedies and strategies for dealing with actual instances of this type of harassment. For this particular session, we focus on being conscious of the threat as a source of stress in our profession and the tools for addressing the stress in order to perform our professional obligations competently (and be happier).

Ethical standards for California lawyers are derived mainly from the Rules of Professional Conduct of the State Bar of California. Public lawyers are governed by the Rules and the ethical standards of the profession. See e.g., *People ex. rel Deukemejian v. Brown* (1981) 29 Cal.3d 150 (Bar rule prohibiting taking of a position adverse to a client precludes Attorney General from suing client department on a matter on which he advised that department); accord *Santa Clara County Counsels Association v. Woodside* (1994) 7 Cal. 4th 525, 548 ("duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney's counterpart in private practice"). In addition to the Rules, California lawyers are subject to common law standards. *Santa Clara County Counsels Association, supra.*

Public lawyers have special ethical obligations to further justice. The heightened ethical responsibilities of government lawyers apply whether they are prosecuting

[3]The Internet is chock full of less harmful examples as well. For instance, check who got the upper hand in the rivalry between Harvard and Yale by typing this in your browser: safetyschool.org

criminal actions or representing the government in a civil action. *People ex. rel Clancy v. Superior Court* (1985) 39 Cal. 3d 740, 745. California courts have relied on the ABA Model Code's Ethical Considerations to define the city attorneys' duties, including EC 7-14, which provides, "[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." See, e.g., *People ex rel Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746 (contingent fee arrangement creates conflict for public lawyer); *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871 (city attorney may not argue parking not required where he knows the city determined there was a shortage).

We bring these high ethical standards to representation of the city. Rule 3-600 governs the ethical obligations of a lawyer who represents an entity rather than a natural person. The client in such a representation is the entity itself as embodied in the "highest authorized officer, employee, body or constituent overseeing the particular engagement." As we know, as city attorneys, if we are aware of the conduct of city official or employee which may be or is a violation of law "reasonably imputable to the organization" or "is likely to result in substantial injury to the organization," we may take the matter to the "highest internal authority within the organization" but may not disclose any confidential information beyond the organization. Our recourse if we cannot persuade those in command to change course? The city attorney retains the right to resign employment.

So all of this culminates in the City Attorneys' Department's Credo (*it is better to be right than to be city attorney)* and a lot of potential stressors. And with that, we turn to Richard P. Carlton, Director, Lawyer Assistance Program, of the State Bar of California.

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Frazzle or Focus: How to cope with the unique challenges of legal practice

By Richard Carlton, MPH

Acting Director, State Bar Lawyer Assistance Program

Ever wonder why do so many legal professionals struggle with anxiety or depression?

Though we have heard a great deal about the prevalence of substance abuse problems in the legal profession, depression may be even more common in the attorney population than substance abuse issues. A study of 12,000 adults by a team of researchers from Johns Hopkins University discovered that among all the occupational groups represented in that large sample, attorneys had the highest prevalence of signs and symptoms of clinical depression. The rate of depression among the attorneys studied was 3.6 times the norm for all occupations. [1] What accounts for such a high prevalence of mood disorders in the legal field? Can the answer be found in the challenges associated with legal practice alone, or is something else at play here?

Is it nurture or nature that determines which of us will struggle with disorders like anxiety, depression, and substance abuse? Scientists say it is a little bit of both. Some of us are born with a particularly brain chemistry to makes us more susceptible to these problems. Most of us face challenging circumstances from time to time, but only a small portion of us become anxious, depressed or turn to alcohol or drugs to cope; the factor that often determines how we react to these problems appears to be the particular brain chemistry we inherited. The brains of those of us who inherit a susceptibility to anxiety and/or depression react to challenges in life in a manner that produces or exacerbates these symptoms. It seems unlike therefore that the stress of legal practice alone accounts for the high incidence of anxiety and depression among legal professionals.

Those of us who work with legal professionals who struggle with anxiety, depression and substance abuse believe that self-selection contributes to the high incidence of mental health problems in the profession. For reasons that we don't yet fully understand, some individuals who are susceptible to experiencing substance use and mood problems are

also drawn to the practice of law. The same personality traits that are over-represented in the populations of adults recovering from substance-related disorders and mood disorders—high achievement orientation, perfectionism, obsessive-compulsive—are also common in the legal community.[2]

Law School Professor and Psychologist Susan Daicoff explains that the law school experience further exacerbates these tendencies, often producing increased aggression under stress, a preference for competition versus cooperation, and a failure to rely on natural sources of social support from one's peers.[3] Her study also revealed high rates of anxiety and depression symptoms in the cohort of students she followed for three years, and other studies of law school populations have produced similar results.

Lawyers are taught to anticipate and prepare for a whole range of problems that non-lawyers are generally blind to—even far-fetched outcomes need to be considered. When Professor Martin Seligman followed and repeated assessed the Virginia School of Law 1990 class for three years he discovered that the most pessimistic students in that class performed the best on all the standard measures of law school performance. These traits that help lawyers to be good at their profession may make many miserable when applied to their personal lives.[4] Professor Lawrence Krieger states in The Hidden Sources of Law School Stress, "thinking like a lawyer is a legal skill, not necessary a life skill."[5] Studies have shown that lawyers tend to be competitive and prefer analytical thinking over the expression of feelings (both their own and others). These traits are often effective when applied to professional practice but rarely produce positive results in personal relationships.

A closer look at depression

Depression associated with a significant personal loss or bereavement is normal, and not considered a clinical condition unless it lasts for a period of months. Of greater concern is the presence of the above symptoms in the absence of any obvious event or trigger, or symptoms that don't go away. Common forms of depression include a Major Depressive Episode, characterized by some or all of the above symptoms lasting two weeks or longer; and Dysthymia, characterized by less severe, but chronic symptoms lasting two years or longer. Dysthymia can be insidious. Many people cope with depressive symptoms for years before recognizing or acknowledging that they have a condition that isn't going to abate without help.

Depressed and potentially suicidal individuals often exhibit changes in their mood, appetite and energy level, which can be noticed by colleagues, friends and family members and should be a matter of concern. Common symptoms of depression include:

- feelings of hopelessness;
- restlessness and irritability;
- fatigue or weakness;
- inability to concentrate;
- loss of appetite; and
- diminished interest in sex and recreation.

Depression sufferers undergoing treatment typically experience a marked decline in the severity of symptoms. Treatment usually consists of psychotherapy, medication, or a combination of the two. People with depression often begin to see positive results within a month of beginning treatment.

How can attorneys cope with stress?

Absence of control over the outcome of one's efforts, inadequate time to complete work satisfactorily, constant pressures to produce faster, the adversarial nature of most legal work, the dire consequences of an error in judgment or oversight—all are common sources of considerable stress in legal practice. In a recent sample of North Carolina lawyers, 31 percent of the respondents strongly agreed or agreed with the statement "I often feel worried or anxious." [6] Still, the majority of attorneys learn to cope successfully with these challenges.

The human brain is hardwired to scan the environment for threats. This is a survival mechanism that stems from a time when predictors were plentiful. What was originally referred to as the "fight or flight" reaction in our nervous system is now referred to as the **Three Fs:** *fright*, fight or flight. We not only scan for very real threats, we also tend to worry about possible negative outcomes. When you add this evolutionary tendency to the training all legal professionals receive, namely to anticipate and prepare for all possible negative scenarios, you wind up with a lot of stress. No wonder most legal professionals complain about stress.

The tendency of our brains to constantly return attention to the scariest thoughts not only creates an unnecessary level of stress, it also distracts our attention from addressing the important matters at hand. The best anecdote I know of for this dysfunctional brain function is the mental discipline of "paying attention," which can be gained from devoting time to one of the many available ***mindfulness practices***.

Mindfulness is about learning to focus our attention on something that is right in front of us or happening in this very moment. Studies have shown that mindfulness practice can have a whole host of benefits including stress reduction, beneficial changes in the immune system, and enhanced memory/attention skills.

The Lawyer Assistance Program

Established by the California Legislature in 2001 (Business & Professions Code §§6140.9, 6230-6238), the Lawyer Assistance Program is a confidential service of the State Bar of California. Staffed by professionals with many years of experience assisting the legal community with personal issues, the LAP provides assistance to attorneys whose personal or professional life is being detrimentally impacted by substance abuse, other compulsive behaviors, and/or mental health concerns such as depression and anxiety.

The statute that created the program (SB 479, Burton) states that it is the "intent of the legislature that the State Bar of California seek ways and means to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety."

The LAP is a comprehensive program offering support and structure from the beginning stage of recovery through continuing care. It includes:

- individual counseling;
- expert assessment and consultation;
- assistance with arrangements for intensive treatment;
- monitored continuing care;
- random lab testing;
- professionally facilitated support groups; and
- peer support groups.

The program also works with family members, friends, colleagues, judges and other court staff who wish to obtain help for an impaired attorney. Attorneys may self-refer into this program or may be referred as the result of an investigation or disciplinary proceeding (B&P Code § 6232). In some cases, monitored participation may result in a lower level of disciplinary action. When requested by an attorney who is facing disciplinary charges and whose practice has been impaired by personal problems, the LAP can monitor the attorney's continuing recovery for the State Bar Court's alternative discipline program and for the probation unit.

One of the unique characteristics of this program is that the confidential nature of participation in the program is mandated in the statute that created the program. The fact that an attorney is participating in the LAP is confidential (B&P Code § 6234). No information concerning participation in the program will be released without the attorney's prior written consent.

In addition to providing with professional assistance, the LAP also offers free short-term consultations concerning any personal issue as well as consultations with career consultants who specialize in working with attorneys looking to kick-start or change the course of their legal career.

Getting Help

Attorneys may be less likely to take care of themselves than medical doctors and other professionals. Mental health professionals have observed that attorneys, who are trained to be impersonal and objective, often apply the same approach to their personal problems and are reluctant to focus on their inner emotional lives. Some attorneys believe they should be able to handle their personal problems just as effectively as they handle their clients' problems.

Emotional distress, if not managed or treated, can lead to adverse impacts on an attorney's professional practice, clients, colleagues and personal life. Concerned colleagues and friends, therefore, should encourage a depressed or substance abusing attorney to seek professional help from available resources such as the LAP.

Legal professionals need an assistance program specifically geared to the unique pressures of legal practice and to the unique recovery support needs of attorneys. The Lawyer Assistance Program is that resource for all legal professionals licensed by the State Bar. Call toll-free 877-LAP 4 HELP (877-527-4435) for confidential assistance for yourself, a friend, colleague or a family member. Check us out at www.calbar.ca.gov/lap

or watch our videos on *YouTube* by searching for California Lawyer Assistance Program.

• Richard Carlton is the Acting Director of the Lawyer Assistance Program at the State Bar of California.

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[1] Eaton, Anthony, Mandel & Garrison, "Occupations and the Prevalence of Major Depressive Disorder," Journal of Occupational Medicine, 32 (11), 1079-1086 (1990).
[2] S. Daicoff, Lawyer Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses, Law and Public Policy: Psychology and the Social Sciences (2004).
[3] Diacoff, note 4.
[4] M. Seligman, *Authentic Happiness*, Free Press (2002).
[5] Krieger, L., *The Hidden Sources of Law School Stress,* Lawrence Krieger (2014).
[6] National Institute to Enhance Leadership and Law Practice (Buies Creek, North Carolina), *North Carolina Chief Justice's Commission on Professionalism, State of the Profession and Quality of Life Survey* (2002-2003).

- **This self-study activity (this article and the associated self-assessment test) has been approved for Minimum Continuing Legal Education (MCLE) credit by the State Bar of California in the amount of one hour in Competence Issues.**

- **The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing MCLE.**

Speaker Biographies

Elizabeth Tom Arce

Liz is an accomplished advocate with experience litigating a wide array of labor and employment cases in state and federal trial and appellate courts. Liz has successfully represented employers in matters ranging from single plaintiff lawsuits to wage and hour class and collective actions. Her litigation experience includes numerous successful summary judgment motions, defeating class certification, and decertifying collective actions. Liz's litigation practice also includes handling matters in arbitration and before administrative agencies where she has been effective at obtaining favorable results for the firm's clients.

Ariel Pierre Calonne

(pronounced "R-E-L KA-LAWN") Mr. Calonne is a dual graduate of the University of California, receiving his law degree at Hastings College of the Law in San Francisco and his undergraduate degree in biology from the University of California at Riverside. Before coming to Santa Barbara in March 2014, Mr. Calonne spent 7 years as the city attorney of Ventura, 4 years as the city attorney of Boulder, Colorado and 13 years as the city attorney of Palo Alto. Mr. Calonne served as President of the City Attorneys' Department of the League of California Cities in 1998-1999 and was named Public Lawyer of the Year in 2003 by the Public Law Section of the State Bar of California. In 2006, the Colorado Metro City Attorneys Association honored him with the Outstanding City Attorney award. Mr. Calonne has authored numerous articles and amicus curiae briefs on public records, First Amendment governmental immunity, and open government issues. He was the founding chairperson of the League of California Cities' Public Records Act Committee from 1994 until January 1998. He was a member of the advisory committee to the Joint Senate-Assembly Task Force on Personal Information and Privacy chaired by California State Senator Steve Peace. In 1996 and 1997, Mr. Calonne participated on the Electronic Access to Public Records Task Force formed under the Senate Select Committee on Information Services in State Government. Before serving in Palo Alto, he was with the Los Angeles law firm of Richards, Watson & Gershon where he served as city attorney for the City of Rancho Palos Verdes, and principal assistant city attorney for Palmdale and Westlake Village. At one time or another in public and private practice he has served as deputy or assistant city attorney for the cities of Ventura, Corona, Redlands, Banning, Desert Hot Springs, Hidden Hills, Agoura Hills, Carson and Perris, California. He began his career as a water law associate with Best, Best & Krieger in Riverside, California.

Richard Carlton

Richard Carlton is the Director of the Lawyer Assistance Program of the State Bar of California. Additionally, he is a consultant to the US Courts for the Ninth Circuit, the National Conference of Bankruptcy Judges, and to the Idaho Judicial Branch on matters of judicial stress and wellness. Mr. Carlton regularly delivers continuing legal education presentations to local bar associations, specialty bars, State Bar sections, and law firms throughout California on addressing substance abuse and managing stress. His articles have appeared in Judicature, The Judges Journal of the ABA, California Bar Journal, and other legal publications. He has been addressing mental health and disability concerns in the legal profession for nearly thirty years. Richard holds a Masters Degree in Public Health from UC Berkeley, where his studies focused on treatment interventions and behavioral science research.

Kendra Carney

Ms. Carney practices in the areas of land use law, public law, and election law, and prepares legal opinions and transactional documents including ordinances and resolutions, administrative policies and regulations, leases, permits, affiliation agreements, and contracts. Ms. Carney provides transactional and advisory legal services to various cities, special districts, and commissions regarding all aspects of municipal and local government law, including the Political Reform Act and other conflict of interest issues, the California Public Records Act, the Ralph M. Brown Act, the Elections Code, land use and zoning, the California Environmental Quality Act, municipal code enforcement, and municipal contracting and procurement. Ms. Carney began her legal career in 2007. Prior to joining the firm in 2015, Ms. Carney served as a Deputy City Attorney for the City of Long Beach where she provided legal counsel to city departments and commissions. While in Long Beach, Ms. Carney advised the Police Department, Fire Department, Department of Parks, Recreation, and Marine, Innovation and Technology Department, and the Special Events and Filming Department and represented Long Beach in civil litigation matters and administrative hearings. Ms. Carney currently serves as a representative of the League of California Cities City Attorneys' Department on the Brown Act Committee and Environmental Quality Policy Committee. Ms. Carney received her undergraduate degree from the University of California, Los Angeles (B.A., 2004). She received her law degree and her Masters of Law in Taxation from the University of San Diego School of Law (J.D., 2007, LL.M. 2008).

Walter Chung

Mr. Chung is a Lead Deputy City Attorney for the City of San Diego. Mr. Chung handles complex litigation matters for the City of San Diego. Since 2006, Mr. Chung has handled the majority of the City's pension related litigation. Mr. Chung's practice also includes extensive appellate work. Mr. Chung has been counsel for the City in numerous published appellate opinions in cases involving pension rights, attorney's fees, the Brown Act and attorney sanctions. In 2011, Mr. Chung was named by the Los Angeles and San Francisco Daily Journal as one of the top twenty five municipal lawyers in the state. Before coming to work for the City of San Diego, Mr. Chung worked in both private law firms and as an in-house counsel.

Andrea Clark

Andrea Clark is a partner in Downey Brand's Water Group in Sacramento, California. She counsels public agencies on a wide variety of regulatory matters related to water rights and flood control. Ms. Clark's areas of expertise include water transfers, cultural resources, public agency law (including the Brown Act, Public Records Act, public bidding, financing, contracting, joint powers authorities and elections), flood control liability, financing and strategy for flood control improvements, and the California Environmental Quality Act. Ms. Clark is a Vice-Chair for Membership for the ABA Water Resources Committee. She received her JD from the University of Michigan and her BA in Environmental Sciences from the University of California, Berkeley.

Timothy Davis

Mr. Davis is chairman of the firm's Labor and Employment Law and a partner in our Trial and Advocacy Practice Groups. Mr. Davis has negotiated numerous labor agreements between cities and their employee groups, including police, fire, general employees, and management groups. Additionally, his practice includes internal investigations of employment complaints involving discrimination and harassment as well as the presentation of seminars on how to prevent discrimination and harassment and investigate allegations of discrimination and harassment. He also trains Human Resource professionals and managers regarding proper investigation techniques. His practice also includes development of personnel rules and policies including discipline and grievance procedures, and the investigation of grievances. Mr. Davis is also an experienced litigator who has tried to verdict several employment cases in federal and state courts and conducted over 60 employment arbitrations. Mr. Davis routinely defends employers in litigation matters in actions involving state and federal law, including but not limited to Title VII, California Fair Employment and Housing Act, Americans with Disability Act, Age Discrimination and Employment Act, Family and Medical Leave Act, California Family Rights Act, California Pregnancy Disability Act, Public Safety Officers Procedural Bill of Rights, and wage and hour issues. His practice also includes the representation of public employers before state, federal, and local administrative proceedings, including Department of Labor, local civil service commissions, PERB, EEOC, and OSHA. His litigation practice, with substantial emphasis and experience in labor and employment, encompasses all aspects of litigation, including trial, all phases of trial preparation, arguing law and motion matters, taking depositions, preparing and responding to pleadings, drafting and responding to written discovery, and research. Mr. Davis' reported decisions include *Alhambra Police Officers Association v. City of Alhambra*, (2003) 113 Cal.App.4th, 413. Mr. Davis received his B.A. degree *cum laude* in Integral Studies from Saint Mary's College of California in 1992 and his J.D. degree from the University of the Pacific, McGeorge School of Law in 1995. Mr. Davis' commitment and experience in public law began in law school, where he co-authored the article Does a Public Law Attorney Owe a Duty to Third Parties, which appeared in the summer 1994 issue of the Public Law Journal.

Brian Forbath

Brian Forbath is a shareholder in the law firm of Stradling Yocca Carlson & Rauth. Mr. Forbath works exclusively in the public finance area, serving as bond counsel, disclosure counsel and underwriter's counsel on a variety of financings. Mr. Forbath has extensive experience in general fund, redevelopment, public utility and land-secured financings and derivative transactions. Mr. Forbath is a 1998 graduate of Loyola Law School and attended the University of California, Santa Barbara as an undergraduate, where he also completed a semester abroad at the Universidad de Valencia, Spain. Mr. Forbath has been a lecturer on federal securities laws at the National Association of Bond Lawyers Workshop in Chicago and at the California Redevelopment Association Technical Institute in Anaheim. He is a frequent lecturer for the California Debt Investment Advisory Committee on a variety of topics. He was a member of the National Association of Bond Lawyers' task force on drafting Disclosure Roles of Counsel in State and Local Government Securities Offerings (3rd Edition, 2008). Mr. Forbath works out of Stradling's Newport Beach office, but represents clients throughout the State of California.

Michael Jenkins

Michael has devoted his career to the representation of cities and other public agencies. He currently services as City Attorney for the cities of Hermosa Beach, Rolling Hills and West Hollywood. Michael is a frequent presenter at League conferences. He is a partner, along with Christi Hogin, of the Jenkins & Hogin law firm in Manhattan Beach.

Richard Kite

Richard W. Kite has been a Palm Springs area resident for over 57 years. He graduated from Palm Springs High School in the early 1960s and then went on to the University of California at Berkley where he graduated with a Bachelor's degree in Civil Engineering. Upon returning to the desert, he entered the investment business and was later the Manager and Vice President of PaineWebber in Palm Desert for 22 years. In 2005, he joined the investment firm of UBS Financial where he is currently a Senior Vice President and Investment Advisor. Richard has served as President of the Board of Directors for both the Cove Communities Joslyn Center and the Family YMCA of the Desert. He was also elected as the Director of the Coachella Valley Parks and Recreation District. Because of his service to the community, the Palm Desert Post selected him as "Citizen of the Year." In April of 2000, Richard was elected to the Rancho Mirage City Council where he served as Mayor from April 2001 to April 2002. In April 2004, he was re-elected for another 4-year term on the City Council, running unopposed. He served again as Mayor for the City from April 2006 to April 2007. In April of 2008, he was re-elected again for another 4-year term on the City Council. On May 6, 2010, Richard was selected to be Mayor from May 2010 to April 2011. In 2012, he ran unopposed and appointed by City Council for another 4-year term. He was once again Mayor for the City from April 2013 to May 2014. In 2015, he was re-elected for another 4-year term on the City Council. In 2008, Richard served as Chairman of the Coachella Valley Association of Governments (CVAG) and is currently serving as the Chairman of the Coachella Valley Conservation Commission (CVCC). He serves on the Executive Committee of the League of California Cities Riverside County Division. In 2015 he was elected to serve as President of League of California Cities, Mayors and Council Members Department Executive Committee. He also serves on the Board of Directors for the Cove Communities/Anita B. Richmond Children's Discovery Museum of the Desert and the Board of Trustees for the McCallum Theatre. He was appointed as the City's representative on the Board of Directors for the Coachella Valley Economic partnership (CVEP).

Martin Koczanowicz

Mr. Koczanowicz is a principal in the firm of Koczanowicz & Hale and serves as the City Attorney for Grover Beach, Tulare and King City. Mr. Koczanowicz has practiced law for 29 years, and for most of his career has focused on serving public entities. Prior to opening his firm in 1999, Mr. Koczanowicz served as Deputy City Attorney for the City of Fresno where he litigated complex environmental coverage cases to fund cleanup of Superfund sites for the city, negotiated Consent Orders with the EPA and State regulatory entities and defended civil rights lawsuits against the city. Mr. Koczanowicz chaired the Section 1983 Civil Rights Committee at the City Attorney's office, served as a backup legal advisor for the city's police department and prosecuted municipal code violations on behalf of the city. Mr. Koczanowicz has lectured in the area of constitutional law at the California State University Fresno Criminology Department and has served on numerous League and department committees, most recently chairing the Legal Advocacy Committee.

Christian Marsh

Christian Marsh is a partner in the San Francisco office of Downey Brand LLP. He advises public and private clients, including cities and counties, on natural resource and land use matters involving water rights, the public trust doctrine, endangered species, wetlands, California planning and zoning law, and NEPA and CEQA review. Among a variety of projects, he has advised clients on residential, commercial, and mixed-use real estate developments, renewable and non-renewable energy projects, military base closures and reuse, port and waterfront developments, and water supply and other public infrastructure projects throughout California. Christian conducts trial and appellate-level litigation in each of these areas, and was an attorney of record for the prevailing parties in two CEQA cases before the California Supreme Court, *Save the Plastic Bag Coalition v. City of Manhattan Beach* and *Stockton Citizens for Sensible Planning v. City of Stockton*.

Charles Parkin

Mr. Parkin was elected Long Beach City Attorney on June 3, 2014. City Attorney Charles Parkin has extensive experience with the City of Long Beach. He began his career with the City in 1985 working for the Department of Oil Properties. In 1995, Mr. Parkin was hired as a Deputy City Attorney, in October of 2006 was promoted to Principal Deputy City Attorney, in January of 2012 was promoted to Assistant City Attorney, and in August of 2013 the City Council appointed Mr. Parkin City Attorney. Mr. Parkin's experience includes representing the City of Long Beach in general civil litigation matters, conducting jury trials, bench trials, mediations and arbitrations. Mr. Parkin has advised various City Departments including City Auditor, City Clerk, Water, Police, Fire, Gas and Oil, Parks, Recreation and Marine, Development Services, Health, Public Works, Financial Management, Human Resources, Library, Technology Services, Harbor and Airport. In addition to his administrative duties in the office, Mr. Parkin currently advises the City Council, City Clerk and also provides legal advice regarding Tidelands issues, open meeting laws and conflict of interest regulations. The City Attorney's office is comprised of five divisions: Departmental Counsel, Litigation, Harbor, Workers Compensation, and Administrative, and has an operating budget of approximately 10.8 million dollars for fiscal year 2016. The office is the sole and exclusive legal advisor of the City, City Council and all City commissions, committees, officers and employees. The City Attorney's office consists of 69 employees, including 23 attorneys. It is charged with municipal legal responsibilities as complex as any in the state. Professional Affiliations Mr. Parkin is admitted to practice in California and before the United States District Court for the Central District, the Ninth Circuit Court of Appeal and the United States Supreme Court. Mr. Parkin is a member of the California State Bar Association (Public Law Section), Long Beach Bar Association (Elected to the Board of Governors for the terms of 2003-2004 and 2012-2013), IMLA, CAALAC, and served as President of the Long Beach City Attorney's Association for the term of 2003-2004 and served as the Vice-President 2002-2003. Mr. Parkin served as an elected member of the Board of Directors of the Long Beach City Employees Federal Credit Union since 1998 and as Chairman from 2011-2014, and is a member of the Rotary Club of Long Beach. Education Mr. Parkin graduated *cum laude* from Pacific Coast University, School of Law and received his Bachelor of Science degree in Business Administration from California State University, Long Beach.

Lisa Pope

In 1995, after a career as a gymnastics coach, Lisa switched gears to start a new life in municipal government as Deputy City Clerk for the City of Malibu. She left Malibu in 1997 for a brief stint as Deputy City Clerk for the City of Moorpark. After the birth of her second child, Lisa started her own business, Minute by Minute Transcription, a company specializing in the preparation of City Council and Planning Commission minutes. In 2001, Lisa returned to Malibu as City Clerk. After a total of 21 years in Malibu, she recently headed down the coast to serve the City of Santa Monica as its Assistant Director of Records and Election Services. Lisa served on the Southern California City Clerk's Association Board as Corresponding Secretary and Director and on the State Board from 2005-2010 as Communications Director, Second Vice President, First Vice President and CCAC President from 2009- 2010. Lisa has worked on the planning committee and as vendor coordinator for the City Clerks Association of California's annual conference. Since 2005, Lisa has coordinated and presented at the California City Clerks Southern Division Nuts and Bolts workshop. In September 2002, Lisa obtained the designation of Certified Municipal Clerk (CMC) and the designation of Master Municipal Clerk (MMC) in March 2008. She was an Honored Recipient of the 2005 President's Award of Distinction for Elections Management. Lisa was award the City Clerks Association of California City Clerk of the Year award at the 2015 Annual Conference.

Steven Quintanilla

President of the Law Offices of Quintanilla & Associates. Serves as City Attorney for cities of Rancho Mirage, Desert Hot Springs and Moreno Valley. UCLA Masters in Urban Planning and JD from UCLA School of Law.

Javan Rad

Javan Rad is the Chief Assistant City Attorney for the City of Pasadena, and has been with Pasadena since 2005. Javan oversees the Civil Division of the City Attorney's office, and also handles a variety of litigation and advisory matters in the areas of constitutional, tort, and telecommunications law. Javan has been active in a variety of capacities for the League of California Cities' City Attorney's Department. Javan is also the immediate Past President of the City Attorney's Association of Los Angeles County, and is on the Board of Directors of SCAN NATOA (the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors). Javan graduated in from Purdue University with a bachelor's degree in Quantitative Agricultural Economics and from Pepperdine University School of Law.

Randy Riddle

Mr. Riddle advises and represents public agency clients on a wide range of government law issues. From 2008 to 2012, Mr. Riddle served as the City Attorney for the City of Richmond, where he advised elected and appointed city officials, attended City Council meetings, supervised litigation, and managed the City's legal staff. He currently serves as Town Counsel for the Town of Corte Madera, and General Counsel for the Kensington Police Protection and Community Services District. Mr. Riddle possesses a unique combination of government law and public ethics experience, having served as Chief Counsel to the California Secretary of State and counsel to San Francisco Ethics Commission. He is also the incoming Chairperson of the League of California Cities Committee on the Fair Political Practices Commission. Mr. Riddle has provided advice and litigation representation on matters related to constitutional issues, government ethics, open government requirements, initiative, referendum and recall petitions, administrative law and the legislative process. In 2012, he was named as one of California's Top 25 Municipal Attorneys by the Daily Journal. He was previously named a California Super Lawyer in the area of political law.

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James Sanchez

James Sanchez has served as the City Attorney for the City of Sacramento since December 2012. He received a B.A. from Pepperdine University in 1981 (*Magna Cum Laude*) and a law degree from the University of California Hastings College of Law in 1984. Mr. Sanchez has practiced municipal law for over thirty years holding various positions. His passion is aiding elected and appointed officials in resolving complex social and economic challenges facing their cities. His prior positions include City Attorney for the City of Fresno, City Attorney for the City of Salinas, and Deputy County Counsel for the County of Fresno. He was a Legal Extern to Justice Cruz Reynoso with the California Supreme Court. Mr. Sanchez has provided legal advice and services on the full range of municipal litigation and transactional legal issues, and supervised the City's environmental, litigation and economic development/finance units. One of his more recent endeavors has been the successful oversight and coordination of the multiple lawsuits, financing and transactions related to the half a billion dollar Golden One Center entertainment complex in downtown Sacramento. Mr. Sanchez has spoken on various municipal topics ranging from open meeting requirements to environmental liabilities. Mr. Sanchez has been active in several organizations and committees including: Rotary Club; La Raza Lawyers; Editorial Committee of League of California Cities Municipal Law Handbook; Monterey Bay representative to League of California Cities statewide Legal Advocacy Committee; and National League of Cities invitee to meet with US EPA in Washington D.C. to advocate equitable approaches to municipal environmental liabilities. He has also published articles on municipal environmental liabilities for the League of California Cities and the California State Bar. He has served as a board member for several community oriented nonprofit organizations, and is a past president of the Fresno La Raza Lawyers Association.

Brian Walter

Brian Walter represents clients in all aspects of employment and labor law, including litigation, counseling on employment and labor relations matters, training and presentations, employee discipline matters, administrative hearings, and investigations. Brian has handled class actions and collective actions in federal and state courts and is Chair of the firm's Litigation Practice Group. Brian has extensive experience handling FLSA issues and representing law enforcement agencies, including successfully defending employee discipline matters for sworn and civilian law enforcement personnel.

Lisa Westwood

Lisa Westwood, RPA is a Registered Professional Archaeologist with over 21 years of experience in cultural resources management. She serves as Director of Cultural Resources for ECORP Consulting, Inc. in Rocklin, designing and carrying out cultural resources investigations and programs to support Section 106 NHPA consultations and environmental review under CEQA. Building upon her expertise in archaeology and cultural resources law, and her experience in CEQA/NEPA, permitting, and tribal consultation, her professional focus is on cultural resources policy and the negotiation and development of cultural resources compliance strategy for large specific plans, residential developments, and public sector projects.

Anna Zappia

Anna Zappia is lead appellate counsel in the *County of Riverside v. PERB, SEIU*, the legal challenge to AB 646 factfinding case, now pending petition for review in the California Supreme Court. She earned her undergraduate degree from Stanford University, and graduated from Northwestern University School of Law, *magna cum laude*, where she also studied at the Kellogg Graduate School of Management. After graduating, Anna clerked for the Honorable David Nelson on the Sixth Circuit Court of Appeals, and proceeded to hone her appellate skills at Kirkland & Ellis. After rising to partnership in a Century City firm, Anna was rewarded with a two-year graduate scholarship to Oxford University.

Ed Zappia

Ed Zappia of THE ZAPPIA LAW FIRM has 22 years' experience defending public sector employers in all aspects of labor and employment law and litigation, including: workplace investigations, police-POBR/public employee discipline, labor/employment law trainings and presentations, FLSA-Wage/Hour advice and defense, defense of harassment, discrimination, retaliation and wrongful termination litigation, trial and appeals. Ed Zappia is lead counsel in *County of Riverside v. PERB, SEIU*, the pending legal challenge to AB 646 factfinding.

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