General Municipal Litigation Update

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

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Notes:

General Municipal Litigation Update

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

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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.