

# **GENERAL MUNICIPAL LITIGATION UPDATE**

League of California Cities  
2016 Annual Conference

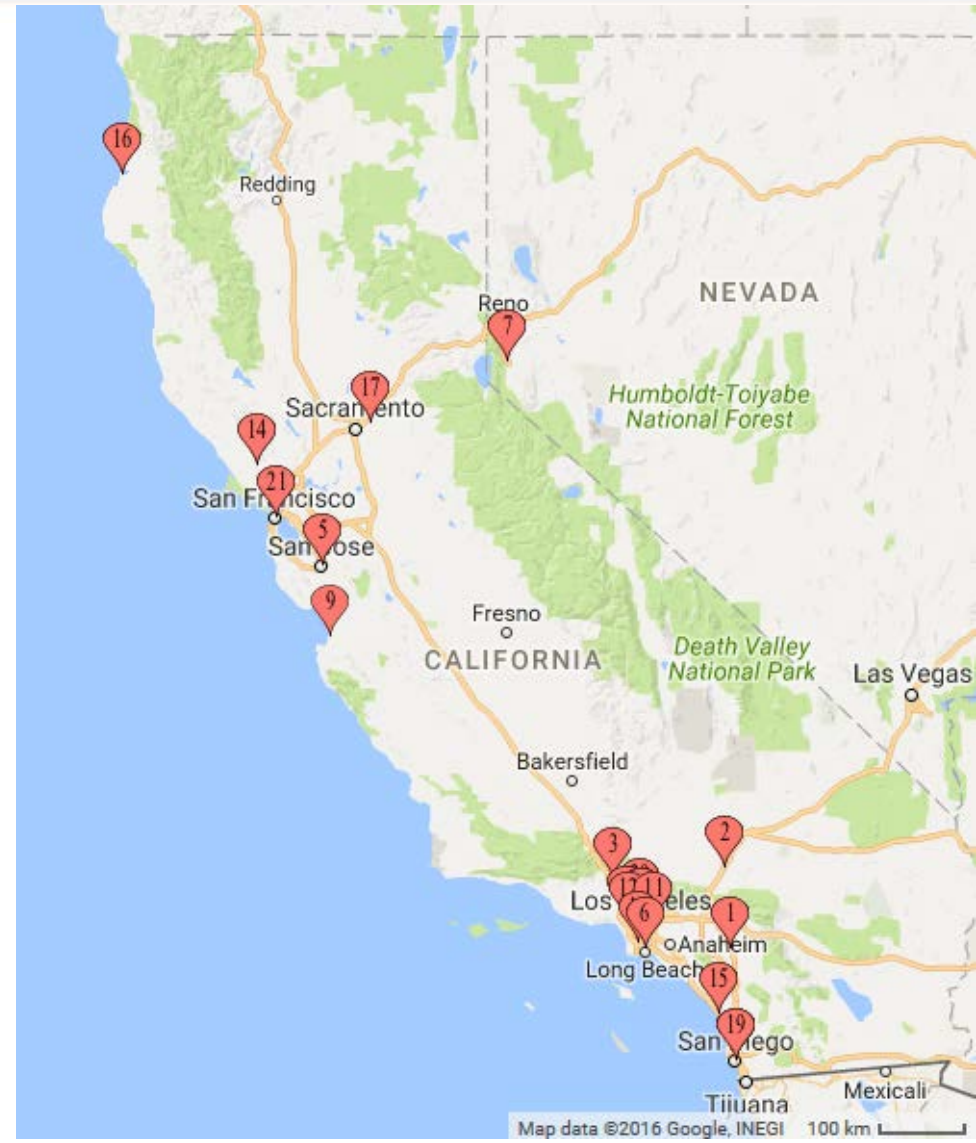
Javan N. Rad  
Chief Assistant City Attorney  
October 6, 2016



# General Themes

General Municipal Litigation Update – October 2016

- Medical marijuana opinions
- Courts declining to decide (or expressing reticence in deciding) important legal questions
  - > But in others, taking on matters that are arguably moot

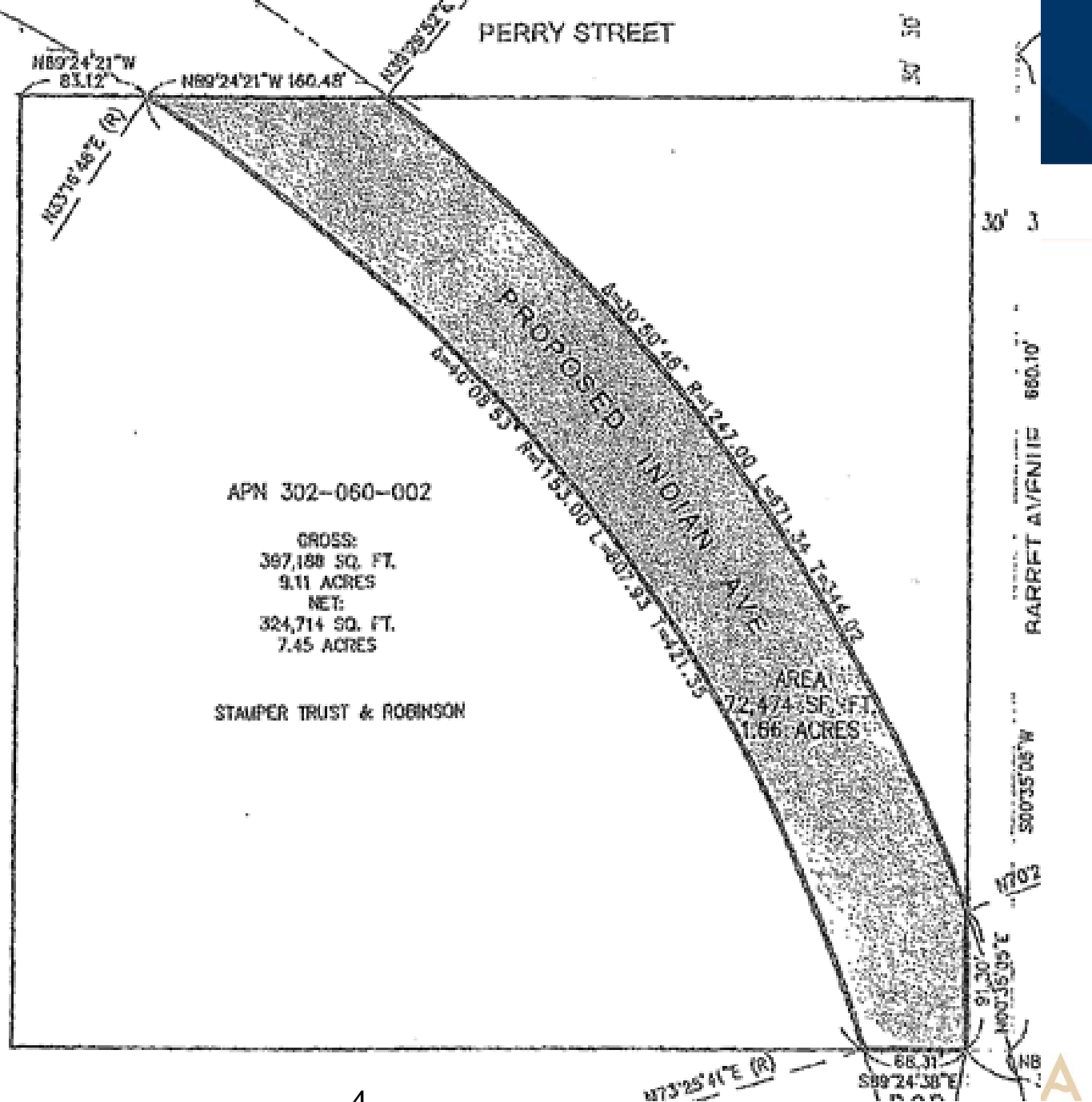




# Land Use cases

General Municipal Litigation Update – October 2016

- Eminent domain case (*Stamper*)
- Subdivision Map Act findings (*Spring Valley Lake Assn.*)
- Appellate authority to supervise CEQA writs (*Center for Biological Diversity*)
- Mobile billboards (*Lone Star Security & Video*)
- Cell phone antennas (*T-Mobile*)





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

General Municipal Litigation Update – October 2016

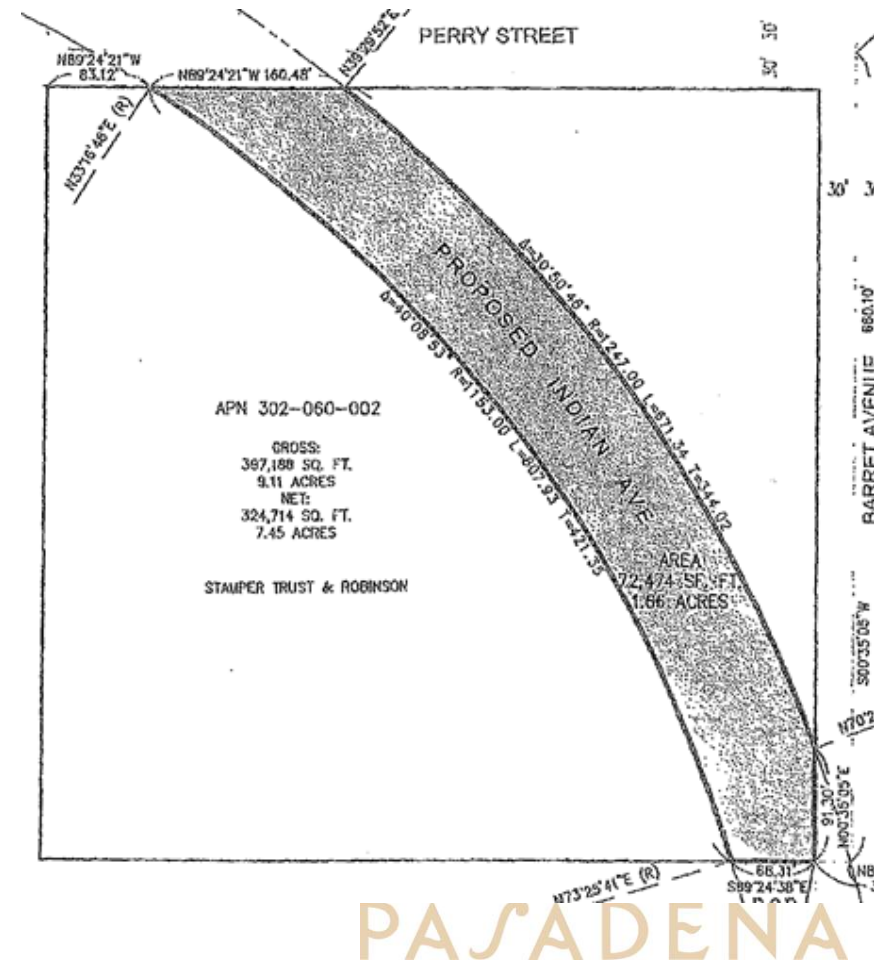
- *Nollan* – requires “essential nexus” between permit condition and requirement for an exaction
- *Dolan* – exaction must be “roughly proportional” to the impact of the proposed development
- Judge (not jury) decides *Nollan* and *Dolan* issues, even on mixed issues of law and fact where legal issues predominate



# City of Perris v. Stamper (cont.)

## General Municipal Litigation Update – October 2016

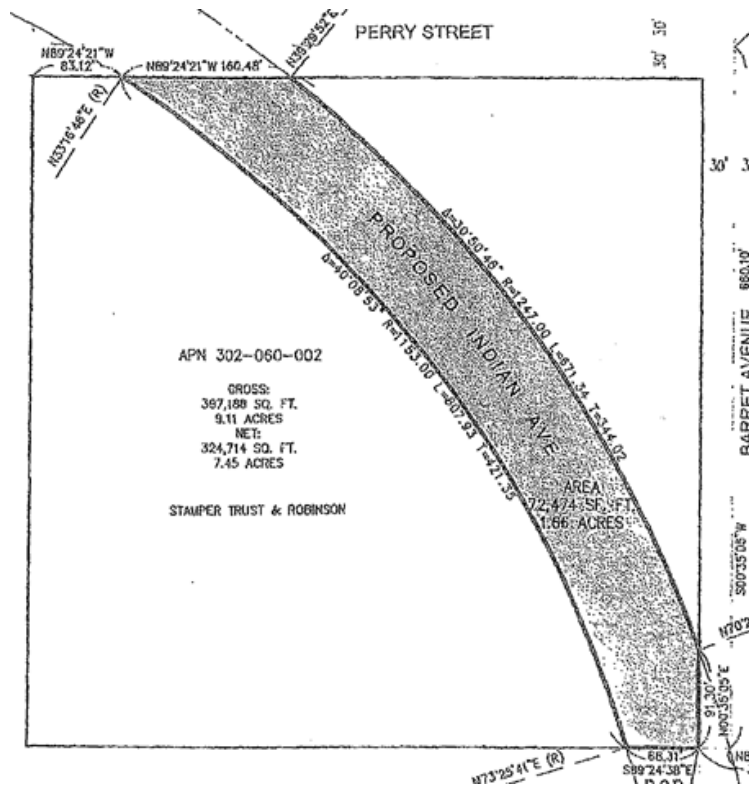
- **Porterville doctrine** –  
condemned property valued  
at current use where  
property owner could not  
realize any “higher” use of  
larger parcel without  
dedicating condemned  
portion of property
- **Project effect rule** –  
compensation may not be  
altered based on the effects  
of the project for which the  
condemnation occurs





# City of Perris v. Stamper (cont.)

General Municipal Litigation Update – October 2016



- Project effect rule applies, and *Porterville* does not apply, when it is probable at the time the dedication requirement is put in place that property will be included in a project





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

General Municipal Litigation Update – October 2016

- Government Code Section 66474 – city “shall deny approval” of a map if it makes any of several findings
- Government Code Section 66473.5 – sets forth findings city must make before approving parcel map
- 1975 Attorney General opinion on prior statutes noting both sections “require affirmative findings”





## *Center for Biological Diversity v. Cal. DFW* 1 Cal.App.5th 452 (2016)

General Municipal Litigation Update – October 2016

- Newhall Ranch litigation remanded by Supreme Court
- Developer and DFW requested Court of Appeal supervise environmental review
- Court declined to issue writ and supervise review



# *Lone Star Security & Video, Inc. v. City of Los Angeles, 827 F.3d 1192 (9th Cir. 2016)*

General Municipal Litigation Update – October 2016

- 2008 – California Court of Appeal rejected challenge to West Hollywood mobile billboard regulations
- 2010/2012 - Vehicle Code amended to allow for local regulation of mobile billboards
- Challenges to four 2011-2013 ordinances
- District Court – ordinances do not violate the First Amendment
- Ninth Circuit affirmed





# *Lone Star Security & Video v. City of LA (cont.)*

General Municipal Litigation Update – October 2016

- Content neutral
- Narrowly tailored
- Leaves open alternative channels of communication





## *T-Mobile West LLC v. City & County of San Francisco* \_\_\_Cal.App.5th \_\_\_, 2016 WL 4917173 (2016)

General Municipal Litigation Update – October 2016

- Three wireless carriers asserted facial challenge to city's aesthetic-based compatibility standards for wireless facilities
- Public Utilities Code Section 7901
  - Telephone corporations to install facilities in public right-of-way so long as the lines do not "incommode the public use of the road or highway"
- Trial court found Section 7901 did not preempt city's ordinance
- Court of Appeal affirmed



# Medical Marijuana Cases

General Municipal Litigation Update – October 2016

- Fifth Amendment privilege against self-incrimination as applied to disclosing dispensary revenues (*MediMarts*)
- ADA as applied to city's enforcement of zoning ban of medical marijuana dispensaries (*The Kind and Compassionate*)
- Second Amendment challenge to denial of firearm purchase by medical marijuana cardholder (*Wilson*)





# City of San Jose v. MediMarts, Inc.

## 1 Cal.App.5th 842 (2016)

General Municipal Litigation Update – October 2016

- Dispensary owed ~\$767,000 in marijuana taxes, penalties, and interest, and city filed suit
- Dispensary and president sought injunction, and asserted Fifth Amendment privilege against self-incrimination
- Trial court denied motion
- Court of Appeal affirmed denial





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

General Municipal Litigation Update – October 2016

- Dispensaries and patients claimed that city ban on dispensaries discriminates against persons with disabilities, in violation of Disabled Persons Act, Unruh Act, ADA, and Rehabilitation Act
- Court of Appeal affirmed trial court's dismissal
  - > *City of Riverside* – neither Compassionate Use Act nor Medical Marijuana Program grant a “right” of convenient access to medical marijuana
  - > Municipal bans on dispensaries cannot operate to discriminate against persons with disabilities – those persons have no convenient right of access





## *Wilson v. Lynch*

\_\_\_ F.3d \_\_\_, 2016 WL 4537376 (9th Cir. 2016)

General Municipal Litigation Update – October 2016

- ATF issued open letter to firearms licensees giving guidance relating to purchasers who are unlawful users of a controlled substance

**U.S. Department of Justice**

Bureau of Alcohol, Tobacco,  
Firearms and Explosives

*Washington DC 20226*

September 21, 2011

[www.atf.gov](http://www.atf.gov)

Therefore, any person who uses or is addicted to marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition. Such persons should answer



# *Wilson v. Lynch (cont.)*

General Municipal Litigation Update – October 2016

- Plaintiff obtained marijuana registry card
- Firearms dealer declined to sell firearm to Plaintiff
- District Court dismissed suit, and Ninth Circuit affirmed
  - > ATF open letter does not affect past (legal) purchases
  - > Plaintiff could surrender marijuana card to acquire firearms and exercise her right to self-defense



# Conflict of Interest Cases

General Municipal Litigation Update – October 2016

- Breadth of misappropriation of public funds statute (*Hubbard*)
- Effect of validation statutes' 60-day limitation period on Section 1090 action (*California American Water*)



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

General Municipal Litigation Update – October 2016

- School superintendent (Hubbard) issued memos directing that salary and car allowance be increased for employee (Christiansen)
  - > Payments required Board approval
- Superintendent convicted for misappropriating public funds (Penal Code Section 424(a)(1))
- Court of Appeal reversed convictions
- Supreme Court granted review, and reinstated the convictions



# *People v. Hubbard (cont.)*

General Municipal Litigation Update – October 2016

## **Hubbard**

**Sept. 2005/Feb. 2006** – Memos re: salary/car allowance to then-employee Christiansen

**January 2012** – Convicted for misappropriation of public funds

**December 2013** – Court of Appeal reversed convictions

**June 2016** – Supreme Court reinstated convictions

## **Christansen**

**June 2006** – Signed consultant agreement

**November 2011** – Convicted for conflict of interest

**May 2013** – Court of Appeal reversed convictions (*People v. Christiansen*, 216 Cal.App.4th 1181 (2013)) (independent contractor not “employee” for Section 1090)

**August 2013** – Supreme Court denied review



# *People v. Hubbard (cont.)*

General Municipal Litigation Update – October 2016

- Section 424 applies only to public officers “charged with the receipt, safekeeping, transfer, or disbursement of public monies”
- Evidence sufficient to convict superintendent
  - > Actual and formal job responsibilities in dealing with public monies
  - > Superintendent exercised a “degree of material control over the funds’ disposition”



# *Cal. Am. Water Co. v. Marina Coast Water Dist.* 2 Cal.App.5th 748 (2016)

General Municipal Litigation Update – October 2016

- 2010 – California-American, City of Marina, and Monterey County Water Resources Agency entered into a series of agreements to pursue a desalination project
- December 2010 – CPUC approved project
- February 2011 – Monterey Board member disclosed potential conflict of interest
- April 2011 – Monterey Board member resigned







# California-American Water Co. *v. Marina Coast Water District (cont.)*

General Municipal Litigation Update – October 2016

- Validation statutes (CCP Section 860 *et seq.*)
  - > 60-day limitation period (generally)
- Government Code Section 1090
  - > Four-year limitation period (after date of discovery)
- Trial court found Section 1090's four-year limitation period applied, and that the Monterey Board member participated in the making of four of the five agreements



# *California-American Water Co. v. Marina Coast Water District (cont.)*

General Municipal Litigation Update – October 2016

- Court of Appeal affirmed, voiding the agreements
- 60-day limitation period to bring a validation action (CCP Section 869) applies to “interested persons” but not public agencies
- Agreements were not validated by operation of law after 60-day period, as it pertains to California-American’s action
- Monterey Board member had sufficient “financial interest” in agreements to violate Government Code Section 1090



# Anti-SLAPP Motions

General Municipal Litigation Update – October 2016

- Identity of city's negotiator to bring NFL team to city (*Rand Resources*)
- Councilmembers' deliberations and votes (*Vasquez*)



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

General Municipal Litigation Update – October 2016

- September 2012 – City entered into two-year agreement with consultant to act “as its sole and exclusive agent” to negotiate with NFL to develop football stadium
- Consultant alleges to have spent hundreds of thousands of dollars to bring NFL team to city
- April 2013 – City began allowing Bloom defendants to begin acting as city’s agent
- After two-year agreement with consultant expired in 2014 (and was not extended), consultant filed suit



# *Rand Resources v. City of Carson (cont.)*

General Municipal Litigation Update – October 2016

- Trial court granted anti-SLAPP motion
  - > Property negotiations were a “matter of public interest”
  - > Consultant had not demonstrated probability of prevailing on the merits
- Court of Appeal reversed
  - > Identity of agent representing city in negotiations that might (potentially) lead to NFL team is not an issue of “public interest”
- Supreme Court granted review (Sept. 21, 2016), but denied depublication request

PASADENA



# *City of Montebello v. Vasquez*

## 1 Cal.5th 409 (2016)

General Municipal Litigation Update – October 2016

- City Council voted 3-to-2 to award exclusive commercial waste hauling contract to Athens
- Athens' subsequent campaign contributions:

<b>\$37,300</b> to defeat Mayor	re-elected
<b>\$45,000</b> to re-elect Councilmember who voted for contract	not re-elected
<b>\$352,913</b> to defeat recall of two other Councilmembers who voted for contract	recalled



# *City of Montebello v. Vasquez (cont.)*

General Municipal Litigation Update – October 2016

- In a separate action, trial court set aside Athens contract (later affirmed on appeal)
- Defendants brought anti-SLAPP motion, trial court denied, Court of Appeal affirmed denial
- Supreme Court reversed
  - > Public enforcement exemption does not apply
  - > Councilmembers' deliberations and votes were statements "made before a legislative . . . proceeding"
  - > Remanded to Court of Appeal for second-step analysis under anti-SLAPP statute

PASADENA





# Brown Act Cases

General Municipal Litigation Update – October 2016

- Colloquy on non-agenda item (*Cruz*)
- Demand to “cure and correct” ongoing or threatened future actions of legislative body (*Center for Local Government Accountability*)



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

General Municipal Litigation Update – October 2016

- Church sent letter to Councilmember, asking to address parking restrictions
- Councilmember mentioned receipt of correspondence during City Council meeting
- Six-minute colloquy with staff resulted in placing parking restrictions on agenda for next City Council meeting



# *Cruz v. City of Culver City (cont.)*

## General Municipal Litigation Update – October 2016

April 23, 2014	Received a letter from attorney Ilbert Phillips, in representation of his client, Grace Evangelical Lutheran Church, requesting information on how to proceed with a request to revisit the existing parking restrictions. His stated purpose for doing this is to change the existing parking restrictions.
May 27, 2014	A response letter was sent to attorney Phillips. The letter indicated that the Council-adopted program does not provide the availability to request a change by business entities.
June 8, 2014	Mr. Phillips writes to the City Council to appeal and petition for a change to the existing permit parking restrictions on the 10700 block of Farragut Drive
August 11, 2014	The City Council, by unanimous vote, directs Staff to agendize the church's request for their consideration.
September 8, 2014	The request is agendized for the City Council's consideration at their regular meeting of September 8, 2014.



# *Cruz v. City of Culver City (cont.)*

General Municipal Litigation Update – October 2016

- Court of Appeal affirmed granting of anti-SLAPP motion - Plaintiffs not likely to prevail on the merits
- Councilmember asked for clarification as to how to respond to the church's letter – City Engineer answered questions, and advised that matter could be placed on future agenda
  - > Briefly responding to statements from public
  - > Asking staff to clarify/report on their activities
  - > Asking staff for information, a later report, or for an item to be agendized for a future meeting



## *Ctr. for Local Govt. Accountability v. City of San Diego* 247 Cal.App.4th 1146 (2016)

General Municipal Litigation Update – October 2016

- City Council allowed Tuesday non-agenda public comment period for Monday/Tuesday regular meeting
- Plaintiff challenged lack of Monday comment period
- City demurred, arguing
  - Plaintiff failed to send “cure and correct” letter
  - Lawsuit was moot – Monday comment period now allowed
- Trial court sustained city’s demurrer



# *Center for Local Govt. Accountability v. City of San Diego (cont.)*

General Municipal Litigation Update – October 2016

- Court of Appeal reversed, finding trial court should have granted Plaintiff leave to amend
- “Cure and correct” letter not required in this case
  - Letter only required for litigation challenging past actions
- Litigation not moot
  - Change in practice is not change in legal position
  - City continued to take the legal position that its prior practice did not violate the Brown Act



# Employment Cases

General Municipal Litigation Update – October 2016

- Attorney-client privilege of outside attorney's factual investigation report (*City of Petaluma*)
- Appealability of discovery/*Pitchess* ruling by hearing officer in advisory arbitration matter (*Scholtz*)
- Police vehicle video as personnel file? (*City of Eureka*)





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

General Municipal Litigation Update – October 2016

- Plaintiff filed charge with EEOC alleging sexual harassment and retaliation
- City attorney hired outside attorney to investigate EEOC charge, to assist in preparing city to defend in anticipated lawsuit
- Outside attorney prepared written report
- Trial court ordered disclosure of report
- Court of Appeal reversed, finding report privileged
  - Dominant purpose – provide professional legal services



# *City of Petaluma v. Superior Court (cont.)*

General Municipal Litigation Update – October 2016

- Distinguish legal work from routine fact-finding for Human Resources Department
  - > Written report contained attorney-client privilege marking on each page
  - > Language in retainer agreement stated it created “an attorney/client relationship”
  - > “As attorneys, we will use our employment law and investigation expertise to assist you in determining the issues to be investigated and conduct impartial fact-finding”



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

General Municipal Litigation Update – October 2016

- Police officer grieved termination to administrative appeal, and wished to argue that he was disciplined more harshly than other similarly situated officers
- Hearing officer granted employee's *Pitchess* motion
- City petitioned for writ relief, which trial court essentially denied summarily
- City appealed, and Court of Appeal dismissed appeal



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

General Municipal Litigation Update – October 2016

- Video of arrest captured by police car's mobile audio video (MAV) recording system is not a police officer personnel record



PASADENA



# Tort Cases

General Municipal Litigation Update – October 2016

- Abutting property owner's duty of care re: roadway between property and parking lot (*Vasilenko*)
- Public entity's duty to indemnify employees (*Chang*)
- Response to jail incident and design of sobering cell (*Castro*)



# *Vasilenko v. Grace Family Church* 248 Cal.App.4th 146 (2016) (rev. granted)

General Municipal Litigation Update – October 2016

- Church had agreement to use swim school parking lot as overflow parking
- Church members served as volunteer parking attendants at swim school lot
- Plaintiff parked in swim school lot, was injured by a car trying to get to the church, and sued the church
- Trial court granted summary judgment for church, but Court of Appeal reversed
- Supreme Court granted review (Sept. 21, 2016),

PASADENA





# *Vasilenko v. Grace Family Church (cont.)*

General Municipal Litigation Update – October 2016



DENA





# *Chang v. County of Los Angeles*

## 1 Cal.App.5th 25 (2016)

General Municipal Litigation Update – October 2016

- Sheriff's deputies sued in underlying action
- County defended under reservation of rights agreement, including ability to decline to pay judgment where county establishes that deputies “acted . . . [with] actual malice”
- Deputies found to have acted with malice – liable for
  - > **\$255,000** compensatory damages
  - > **\$189,332** attorney's fees
  - > **\$6,755** costs
  - > **\$150,000** punitive damages (\$50,000 per deputy)



## *Chang v. County of Los Angeles (cont.)*

General Municipal Litigation Update – October 2016

- Deputies later sued county for failure to indemnify them for judgment, excluding punitive damages
- Trial court granted deputies' MSJ
- Court of Appeal reversed, finding for the county
- Whether deputies acted with malice would (at least) be a triable issue of fact
- Reservation of rights agreement was a necessary implication that county reserved the right not to indemnify the deputies where they acted with actual malice



- Plaintiff arrested for public drunkenness, placed in sobering cell
- Several hours later, Gonzalez placed in same cell
  - > Shattered glass door with fist at a nightclub
  - > Intake form described Gonzalez as combative
- Sobering cell
  - > Checked every 30 minutes by community volunteer
  - > Not audio-monitored



# *Castro v. County of Los Angeles (cont.)*

General Municipal Litigation Update – October 2016

- Plaintiff pounded on window in cell door for one minute
- Volunteer walked by ~20 minutes later
  - > Plaintiff asleep
  - > Gonzalez inappropriately touching Plaintiff's thigh
- Volunteer reported incident to supervisor
- Supervisor responded six minutes later, and observed Gonzalez making stomping motion
  - > Plaintiff suffered severe head injuries



## Castro v. County of Los Angeles (cont.)

General Municipal Litigation Update – October 2016

- Plaintiff filed suit and obtained jury verdict of ~\$2.6 million, plus \$840,000 in attorney's fees
- Ninth Circuit (three-judge panel) affirmed verdict against individual defendants, but reversed as to county/sheriff's department
- *En banc* panel affirmed verdict against all defendants

PASADENA



# *Castro v. County of Los Angeles (cont.)*

General Municipal Litigation Update – October 2016

- Four-factor test for pre-trial detainee's due process claim against individual defendants
  - > **Intentional decision** - Defendant made intentional decision with respect to conditions under which plaintiff confined
  - > **Substantial risk** - Conditions put plaintiff at substantial risk of suffering serious harm
  - > **Reasonable measures to abate the risk** – Defendant did not take reasonable available measures to abate that risk, even though a reasonable officer would have appreciated the high degree of risk
  - > **Causation**



# *Castro v. County of Los Angeles (cont.)*

General Municipal Litigation Update – October 2016

- *Monell* claim – County/sheriff's department had a policy/custom that deprived Plaintiff of the right to have reasonable measures taken to guarantee his safety when incarcerated
- Deliberate indifference
  - > County/sheriff's department made deliberate choices in the poor design/location of cell
  - > County adopted California Building Code provisions by ordinance

PASADENA





# Miscellaneous

General Municipal Litigation Update – October 2016

- Carrying concealed firearm in public (*Peruta*)
- Intersection of city monument installation and foreign affairs doctrine (*Gingery*)
- Initial reviews of parking ticket challenges (*Weiss*)



# *Peruta v. County of San Diego*

824 F.3d 919 (9th Cir. 2016) (*en banc*)

General Municipal Litigation Update – October 2016

- *En banc* panel (by a 7-to-4 vote) held that the Second Amendment does not permit a member of the general public to carry concealed firearms in public
- Court did not decide constitutionality of California's open carry laws
- *Flanagan v. Harris*
  - > Filed in Central District of California in August 2016
  - > California Rifle & Pistol Assn. challenge to California's open carry laws

PASADENA



- City installed public monument commemorating comfort women
- Plaintiffs argued the monument interfered with federal government's foreign affairs power
- District Court granted city's motion to dismiss
- Ninth Circuit affirmed
  - > Monument is not preempted by foreign affairs doctrine
  - > Monument is a “symbolic display” and its purposes are “entirely consistent with a local government's traditional function of communicating its views and values to its citizenry”



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

General Municipal Litigation Update – October 2016

- Three-step process for challenging parking citations – initial review, hearing, and *de novo* appeal to Superior Court
- City delegated initial reviews to Xerox
- Trial court found city violated Vehicle Code by contracting with Xerox to perform initial review



# *Weiss v. City of Los Angeles (cont.)*

General Municipal Litigation Update – October 2016

- Court of Appeal affirmed
  - > Vehicle Code imposes nondelegable duty on city to perform initial review
  - > Home rule doctrine does not apply
    - Processing of parking citations is core municipal function, but
    - City outsourced duty to perform initial reviews by way of contract – not ordinance, regulation, or charter provision



# *Weiss v. City of Los Angeles (cont.)*

General Municipal Litigation Update – October 2016

- Court affirmed ~\$721,000 attorney's fees award
  - > Plaintiff succeeded in ending Xerox's initial reviews
  - > Xerox conducted over 135,000 reviews in one year, when they lacked authority to do so