General Municipal Litigation Update

Friday, September 15, 2017 General Session; 8:00 – 10:00 a.m.

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Notes:

General Municipal Litigation Update

Cases Reported from May 5, 2017
Through August 18, 2017

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I. Civil Rights

***Lowry v. City of San Diego*, 858 F.3d 1248 (9th Cir. 2017)**

Holding: Use of police dog off-lead (off-leash) to investigate burglary call in commercial office building, resulting in dog biting Plaintiff sleeping in office suite, did not violate Plaintiff's Fourth Amendment rights.

Facts: A burglar alarm was triggered in an office building at 10:40 p.m., and three police officers responded with a police dog. At the second story of the building, the officers saw an open door, and the dog handler (officer) yelled loudly that the police and their dog were there, giving a verbal warning twice. There was no response. The officers suspected a burglary might be in progress, and the suspect might be still at the property. The police dog was released to start searching offices, with one officer (the dog handler) following closely behind. When the dog and officer got to the last office to be searched, the Plaintiff was under a blanket on the couch. The dog jumped onto the couch, bit the Plaintiff on the lip, and then backed off, returning to the dog handler. As it turns out, the Plaintiff was asleep on the couch because she works at that office suite, consumed five vodka drinks that evening, and returned to the office to sleep on the couch. When Plaintiff went to use the bathroom in a neighboring suite, by entering the suite, she triggered the burglar alarm. Plaintiff received three stitches as a result of the dog bite. Plaintiff filed a civil rights action, alleging the city's policy of training police dogs to "bite and hold" is a violation of the Fourth Amendment. The District Court granted the city's motion for summary judgment, and a three-judge panel of the Ninth Circuit reversed. The Ninth Circuit then granted *en banc* review.

Analysis: The *en banc* panel reversed, finding that summary judgment should have been entered in favor of the city. The court found that the use of force was moderate, especially because the dog released her bite very quickly after initial contact with the Plaintiff. The court then noted that burglary calls carry an inherent risk of violence for officers. Additionally, officers were reasonable in assuming that if there was a burglary, the person could be armed and pose an immediate threat to officers. The officers also gave verbal warnings before

entering the suite with the dog, and the court approved of the city's approach of allowing dogs to inspect off-lead – to protect officer safety. Balancing these interests, the court concluded the use of the police dog under these circumstances did not violate Plaintiff's Fourth Amendment rights.

***Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017)**

Holding: Vehicle Code provision requiring police, after impounding vehicle driven by unlicensed driver, to be stored for 30 days, violates the Fourth Amendment.

Facts: Plaintiff loaned her vehicle to her brother-in-law. The brother-in-law was stopped by police for a suspended driver's license, and the car was impounded. Such vehicles "shall be impounded for 30 days" pursuant to Vehicle Code Section 14602.6. Three days later, Plaintiff appeared at a hearing with police, providing proof of ownership and a driver's license, and Plaintiff offered to pay all towing and storage fees. The police department refused to release the vehicle before the end of the 30-day holding period. Plaintiff filed suit against the police department and others, alleging that the 30-day impound is a warrantless seizure in violation of the Fourth Amendment. The District Court granted the defendants' motion to dismiss, finding the impound is a valid administrative penalty, and Plaintiff appealed.

Analysis: The Ninth Circuit reversed, finding the 30-day impound to be a seizure that required compliance with the Fourth Amendment. The parties agreed that the vehicle was lawfully impounded (when Plaintiff's brother-in-law was driving) pursuant to the community caretaking exception to the Fourth Amendment. However, the exigency to seize the vehicle vanished when Plaintiff showed up to pick up his car. In other words, the court found the Fourth Amendment is implicated by the delay in returning Plaintiff's vehicle.

***County of Los Angeles v. Mendez*, ___ U.S. ___, 137 S.Ct. 1539 (2017)**

Holding: U.S. Supreme Court rejected the Ninth Circuit's "provocation rule," which required courts to consider officer's pre-shooting conduct in excessive force claims.

Facts: Two sheriff's deputies were searching for a parolee-at-large, who had a felony arrest warrant, was believed to be armed and dangerous, and had previously evaded capture. The deputies learned at a briefing that the parolee-at-large was seen at a particular home, and a couple (the Plaintiffs – not the parolee-at-large) was living in the backyard of the home. The deputies searched the rear of the residence, which had debris, abandoned cars, and, among other things, a one-room shack. The shack had a doorway covered by a blanket. The deputies did not have a search warrant, and did not knock and announce when they approached the shack. One deputy opened the wooden door and pulled back the blanket. Plaintiff Mendez, who was napping on a futon in the shack, picked up a BB rifle so he could stand up. When the deputies entered, they saw Mendez holding the BB rifle, and they saw the rifle pointed toward one deputy. One deputy yelled "gun" and the two deputies discharged a total of 15 rounds, causing injuries to both Plaintiffs. Mendez' right leg was later amputated below the knee. The parolee-at-large was not found at the property. Plaintiffs filed suit, alleging, among other things, Fourth Amendment violations of (1) warrantless entry of the shack; (2) excessive force in the shooting of Plaintiffs. The District Court ruled largely in favor of Plaintiffs. As to the warrantless entry claim, the District Court found one of two deputies liable. As to the excessive force claim, the court found the force used was reasonable – but it constituted excessive force due to the Ninth Circuit's "provocation rule." The District Court found the deputies liable for $4 million. The Ninth Circuit found both officers liable for the warrantless entry claim, and affirmed the application of the provocation rule to the excessive force claim. The U.S. Supreme Court granted certiorari.

Analysis: In an 8-0 opinion, the Supreme Court vacated the Ninth Circuit's opinion, holding that the Ninth Circuit's provocation rule has "no basis" in the Fourth Amendment. A different violation (here, the warrantless entry) cannot transform a later, reasonable use of force (here, the shooting) into an unreasonable

seizure. The court noted that the "provocation rule permits excessive force claims that cannot succeed on their own terms," and it "distort[s] the excessive force inquiry."

Practice Pointer: Even if an officer were found not liable through a Fourth Amendment use of force claim, the officer may still face civil liability for negligence arising from the same incident. In California, negligence liability may arise from an officer's "tactical conduct and decisions preceding the use of deadly force." *Hayes v. County of San Diego*, 57 Cal.4th 622, 639 (2013) (noting negligence case law is "broader" than Fourth Amendment case law).

***Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017)**

Holding: Arrest of street performer on Las Vegas Strip, engaged in non-coercive solicitation for tips, for doing business without a business license may violate the First Amendment.

Facts: Plaintiff and her friend performed together as "sexy cops" on the Las Vegas Strip. Three plain clothes officers were patrolling the area, one officer asked how much a picture cost, and Plaintiff's friend said they pose for tips. The officer then got his picture taken with Plaintiff and her friend. The officer then made clear no tip was forthcoming, and either Plaintiff or her friend told the officer to delete the picture from his phone. Plaintiff and her friend were arrested for doing business without a license, and the charges against Plaintiff were ultimately dropped. Plaintiff filed suit, alleging, among other things, that the officers violated her First Amendment rights. As relevant here, the District Court granted the officers' motion for summary judgment. Plaintiff appealed.

Analysis: The Ninth Circuit reversed, finding the business license requirement for Plaintiff's activities on the sidewalks of the Strip is "indubitably invalid as applied to Santopietro's performance as a 'sexy cop.'" The court also noted that the solicitation of tips is protected by the First Amendment. Further, assuming Plaintiff's friend told the officer to delete the picture from his phone, Plaintiff was only associating with her friend for protected expressive activity alone. In other words, Plaintiff was not requiring quid pro quo payments during performances

with her friend. On these facts, the officers would not have a sufficient basis to justify the arrest of Plaintiff.

***Recycle for Change v. City of Oakland*, 856 F.3d 666 (9th Cir. 2017)**

Holding: Ordinance regulating collection bins is not content-based, and survives intermediate scrutiny under the First Amendment.

Facts: The city enacted an ordinance regulating collection bins, seeking to combat blight, illegal dumping, graffiti, and traffic impediments that endanger drivers and pedestrians. Plaintiff, a local non-profit, filed suit, alleging, among other things, that the ordinance violates the Free Speech Clause of the First Amendment. The District Court denied Plaintiff's motion for preliminary injunction, finding Plaintiff was unlikely to succeed on the merits. Plaintiff appealed.

Analysis: The Ninth Circuit affirmed the denial of Plaintiff's motion for preliminary injunction. The court found the ordinance to be content neutral, because an officer enforcing the ordinance need only determine whether an unattended structure accepts personal items, and whether the items will be distributed, resold, or recycled. Also, the ordinance regulates collection bins "without regard to the charitable or business purpose for doing so." The court then concluded the ordinance survived intermediate scrutiny, as the purposes of the ordinance (above) are all matters of substantial governmental interest, and unrelated to a collection bin operator's free speech rights. The court noted the ordinance is narrowly tailored, as its 1,000-foot distance requirement is not substantially broader than necessary.

II. Torts

***Toeppe v. City of San Diego*, ___ Cal.App.5th ___, 2017 WL 3187391 (2017)**

Holding: City not entitled to recreational trail immunity when tree branch fell on pedestrian walking through city park.

Facts: Plaintiff, who was walking through a city park, was injured when a eucalyptus tree branch fell on her. The trees at the park were either planted when the park was constructed, or are the offspring of the original planted trees. Plaintiff sued the city for maintaining a dangerous condition of public property. The trial court granted the city's motion for summary judgment, finding recreational trail immunity barred Plaintiff's claim. The court later denied Plaintiff's motion for new trial. Plaintiff appealed.

Analysis: The Court of Appeal reversed, finding "this is not a case about trails. It is about trees." The court declined to apply recreational trail immunity, and finding that Plaintiff's claim of a dangerous condition "does not involve the trail whatsoever." The Plaintiff did not have to use the trail to place herself near a eucalyptus tree. For example, a park visitor could be injured by a tree (or tree branch) whether they walked along the trail or, separately, walked across the grass. Further, even if recreational trail immunity applied, the court found a disputed issue of material fact as to whether Plaintiff was on the paved trail – or whether she was on the grass – when the tree branch struck her.

***County of San Mateo v. Superior Court (Rowe)*, ___ Cal.App.5th ___, 2017 WL 3141190 (2017)**

Holding: Triable issues of fact defeated county's claim of natural condition immunity where tree fell on Plaintiff at campground area of county park.

Facts: Plaintiff and his family were camping in a county park, and a 72-foot diseased tanoak tree fell on Plaintiff's tent, injuring Plaintiff and crushing a nearby picnic table. The county park consists of 499 wooded acres, and the campground area has campsites and related amenities, including roads, telephones, and restrooms. Plaintiff filed suit against the county, alleging, among other things, a dangerous condition of public property. The county moved for summary judgment, arguing it was entitled to natural condition immunity. The trial court denied the city's motion, concluding there was a triable issue of fact as to whether the property is unimproved. The county filed a petition for writ of mandate.

Analysis: The Court of Appeal denied the county's petition for writ of mandate. The court noted the tree presented a "migratory danger," finding triable issues of fact in several areas. First, the court found triable issues as to whether the tree was growing in (a) the same general location as the accident site; and (b) an improved area by virtue of artificial physical changes in the immediate vicinity of the tree. Next, the court found triable issues as to whether Plaintiff's campsite area is "unimproved" as a matter of law. The court rejected the county's argument that primitive amenities around the campsites do not render the area improved. Finally, the court found a triable issue of fact as to whether man-made physical changes in the area of the accident site contributed to the tree's dangerousness.

***City of Pasadena v. Superior Court (Reyes Jauregui)*, 12 Cal.App.5th 1340 (2017)**

Holding: Claim for damages for asbestos-related injuries must be presented to city not later than six months of when the claim becomes actionable.

Facts: Plaintiff's father worked as a mechanic for the city in the 1980's. Plaintiff was diagnosed with mesothelioma, allegedly through airborne asbestos that her father was exposed to and tracked into the family's home and vehicles. One month later, Plaintiff filed suit against numerous defendants – but not the city. Over ten months after her mesothelioma diagnosis, Plaintiff presented a claim for damages to the city. Plaintiff did not file a late claim application, and Plaintiff took the position that "there was no time limit" to present a claim for damages for asbestos-related actions, where Plaintiff is not "disabled." Under CCP Section 340.2, the limitation period for asbestos-related injuries commences upon disability – which means for retirees and the unemployed, the limitation period never commences. Plaintiff amended her complaint to add the city to the lawsuit shortly thereafter. The city demurred, and the trial court overruled the demurrer. The city then filed a petition for writ of mandate.

Analysis: The Court of Appeal granted the city's writ petition. Under the Government Claims Act, Plaintiff was required to present her claim to the city not later than six months after the accrual of the cause of action – i.e., when she was diagnosed with mesothelioma. The court concluded that, for purposes of the

Government Claims Act, an action accrues when it becomes actionable. In reaching this result, the court noted that CCP Section 340.2 has "cumbersome and confusing" language, and if the court accepted Plaintiff's arguments (to postpone the bringing of suit, under the facts), that would lead to an anomalous result. Here, the Plaintiff's cause of action against the city accrued no later than when Plaintiff was diagnosed with mesothelioma. Since Plaintiff failed to present a claim within the six-month deadline, the trial court should have sustained the city's demurrer.

III. Land Use / Environmental

***Lynch v. California Coastal Commission*, 3 Cal.5th 470 (2017)**

Holding: Property owners forfeited objections to conditions of coastal development permit (CDP) by constructing seawall project.

Facts: Plaintiffs (two adjacent homeowners) have homes that sit on a coastal bluff overlooking the Pacific Ocean, protected by a seawall. Heavy winter storms destroyed part of the seawall, among other things. Plaintiffs applied for a CDP to demolish the old seawall, and construct a new tied-back seawall across both properties. The Coastal Commission approved a CDP for the seawall demolition and reconstruction, with conditions that (a) a private access stairway not be reconstructed; (b) the seawall permit will expire in 20 years; and (c) before the expiration of the 20-year period, Plaintiffs must apply to remove the seawall, alter it, or extend the authorization period. Plaintiffs filed suit, challenging the conditions. The trial court entered judgment for the Plaintiffs. The Court of Appeal reversed, finding Plaintiffs forfeited their claims, and, in any event, the conditions were valid. The Supreme Court granted review. As to the seawall, itself, while litigation has been pending, the Plaintiffs constructed the seawall as authorized by the CDP.

Analysis: The Supreme Court affirmed in a unanimous opinion. In the land use context, challenges to unlawful conditions must be litigated in administrative mandate proceedings. Here, Plaintiffs forfeited their right to challenge the conditions "[b]y accepting the benefits of a permit and building the seawall." The

court also held that property owners cannot accept the benefits of a permit under protest, where "the challenged restrictions [would] be severed from the project's construction." Here, Plaintiffs could have sought an emergency permit for a temporary seawall to protect their properties during litigation – without waiving their challenge to the CDP. By failing to do so, Plaintiffs forfeited their objections by constructing the seawall.

***Cleveland National Forest Foundation v. San Diego Association of Governments,* 3 Cal.5th 497 (2017)**

Holding: Regional planning agency not required to include analysis of consistency with greenhouse gas (GHG) emission reduction goals set forth in Governor's Executive Order.

Facts: In 2005, Governor Schwarzenegger signed an Executive Order setting overall GHG emissions reduction targets for California. The benchmarks included a target to reduce emissions 80 percent below 1990 levels by 2050. In 2011, SANDAG certified an environmental impact report for a regional transportation plan/sustainable communities strategy (Plan). In the final EIR, SANDAG contended it had no obligation to analyze projected emissions under the Executive Order, as it has the discretion to select GHG emission reduction goals and not others. Several groups filed two separate actions against SANDAG, challenging the EIR. The trial court struck down the EIR because, among other things, it did not consider the Executive Order's emission reduction targets. The Court of Appeal affirmed, largely agreeing with the Petitioners. The California Supreme Court granted review to address the question of whether the EIR should have analyzed the Plan's consistency with GHG emissions reduction targets in the Executive Order.

Analysis: The Supreme Court reversed, finding SANDAG did not abuse its discretion in declining to adopt the Executive Order's 2050 target, as it "does not specify any plan or implementation measures to achieve its goal." The EIR conveyed the general point that the upward trajectory of emissions under the Plan may conflict with the 2050 emissions reduction target. In the end, the court held that the EIR adequately discussed potential impacts of GHG emissions.

***City of Morgan Hill v. Bushey*, 12 Cal.App.5th 34 (2017)**

Holding: Voters could validly utilize the power of referendum to reject city ordinance, even if successful referendum would make a parcel's zoning inconsistent with the general plan.

Facts: The city adopted a general plan amendment changing the land use designation for a vacant parcel from Industrial to Commercial. Six months later, the city adopted an ordinance that would have changed the parcel's zoning to Commercial. This would have permitted a hotel on the parcel. Residents submitted a timely referendum petition challenging the ordinance. The city took the position that the referendum was invalid, as it would enact zoning that was inconsistent with the general plan. The city later filed suit to have the referendum declared invalid. The trial court granted the city's petition, relying on *deBottari v. City Council*, 171 Cal.App.3d 1204 (1985) (approving of city's refusal to submit referendum on zoning ordinances to voters, where repeal would result in property zoned inconsistently with general plan). The resident group appealed.

Analysis: The Court of Appeal reversed, distinguishing a referendum from an initiative. Unlike an initiative, a referendum cannot "enact" an ordinance -- it merely maintains the status quo. Here, the city's zoning designation subject to referendum was "just one of a number of available consistent zonings." Therefore, the referendum was not invalidated by the State Planning and Zoning Law, which gives the city "a reasonable time" to amend the zoning code to conform to the general plan. The court disagreed with the Fourth District's decision in *deBottari*, setting up a split between appellate districts.

***The Park at Cross Creek, LLC v. City of Malibu*, 12 Cal.App.5th 1196 (2017)**

Holding: Voter-approved initiative limiting large developments and chain stores exceeded initiative power and violated CUP principles.

Facts: In 2014, the city's voters approved Measure R, which was designed to limit large developments and chain stores. The ballot measure imposed specific plan and voter approval requirements, and also required that chain stores obtain a

conditional use permit. In 2015, a developer, seeking to build a Whole Foods project, filed suit, alleging Measure R was invalid. Through cross-motions for judgment on the pleadings, the trial court declared Measure R invalid. The city and the proponents of Measure R appealed.

Analysis: The Court of Appeal affirmed. First, the court noted that the specific plan requirement is invalid because it exceeds the initiative power – which is generally coextensive with the local governing body's legislative power. The substance of Measure R "is not legislative policy," as it "requires details to be in specific plans that are voter-approved but sets no substantive policy or standards for those plans." Next, the court invalidated CUP provisions that restricted CUP transfers and were "establishment-specific," bearing no relation to the property's use and zoning. The court offered the following hypothetical to illustrate its rationale: "Starbucks is not a land use. . . 'Coffee shop' or restaurant is the land use." Finally, the court found the voter approval requirement and the CUP provisions were not severable from the remainder of Measure R.

IV. Taxpayer Actions

***Leider v. Lewis*, 2 Cal.5th 1121 (2017)**

Holding: Taxpayer action may not be used to seek an injunction enforcing a violation of the Penal Code.

Facts: Plaintiffs brought a taxpayer action under CCP Section 526a, alleging the city zoo was abusing its elephants, and claiming the city's treatment of elephants violated Penal Code Section 596.5 (elephant abuse by owner or manager). After a lengthy procedural history, the city demurred, arguing that a taxpayer action is not a proper vehicle to enjoin violations of the Penal Code. The trial court overruled the city's demurrer, and, after a bench trial, issued injunctions prohibiting the city from engaging in certain elephant husbandry practices. The Court of Appeal affirmed, and the Supreme Court granted review.

Analysis: The Supreme Court reversed in a unanimous opinion, finding that the law of the case did not bar the city from arguing that the Plaintiff's action is barred by Civil Code Section 3369, which provides that an injunction may not issue to enforce a Penal Code violation, except in the case of a nuisance. As to the merits, the court found that Section 3369's ban on injunctions enforcing Penal Code violations applies to taxpayer actions. The court also held that, if the Plaintiffs' requested relief were granted, they would be exercising the discretion reserved for the district attorney with regard to enforcement of Penal Code violations.

***Weatherford v. City of San Rafael*, 2 Cal.5th 1241 (2017)**

Holding: Plaintiff in taxpayer action can establish taxpayer standing by alleging payment (or assessment) of a tax. Property tax is not the sole basis to confer standing for a taxpayer action.

Facts: Plaintiff, who rents an apartment in the city, filed a taxpayer action against the city and county to challenge its practice of impounding cars without notice. Plaintiff was not personally subjected to the city's practice, but she claimed taxpayer standing under CCP Section 526a. While Plaintiff did not pay property tax, she asserted she paid sales tax, gasoline tax, water and sewer fees, and other taxes in the city and county. The trial court dismissed Plaintiff's action on the ground that she lacked taxpayer standing because she did not pay property tax. The Court of Appeal affirmed, and the California Supreme Court granted review.

Analysis: The Supreme Court reversed, holding that Section 526a does not require individual plaintiffs to pay a property tax. The court, considering the section liberally, in light of its remedial purpose, held that it is sufficient for a plaintiff to allege they paid (or are liable to pay) a tax to the defendant local government.

V. Employment

***Merrick v. Hilton Worldwide, Inc.*, ___ F.3d ___, 2017 WL 3496030 (9th Cir. 2017)**

Holding: Plaintiff is unable to demonstrate pretext in age discrimination claim where employer had lost profits through the recession, had several rounds of layoffs, and Plaintiff survived those layoffs.

Facts: Plaintiff, 60, was a director of property operations for a hotel, and had worked there for 19 years. The hotel was ordered by its parent company to reduce payroll expenses through a reduction in workforce (RIF) in the next three months, with RIF "should be heavily weighted at the senior level." Plaintiff, the second-highest paid employee at the hotel, was laid off. Most of Plaintiff's duties were assumed by the assistant director of property operations, who was 15 years younger than Plaintiff. Plaintiff then filed suit, alleging age and disability discrimination claims. The trial court granted the hotel's motion for summary judgment. Plaintiff appealed the age discrimination claims.

Analysis: The Court of Appeal affirmed the dismissal in favor of the hotel. Plaintiff established a prima facie case of age discrimination, because his duties were still being performed by the assistant director of property operations. However, the hotel provided evidence that its layoff of Plaintiff was (1) to eliminate his salary; (2) because property operations was not a high guest contact or revenue generating department; and (3) other departments were already understaffed due to previous layoffs and unfilled positions. Finally, the court found that the Plaintiff was unable to show that the hotel's proffered reasons were pretext for termination. In age discrimination cases based on circumstantial evidence, the court noted that "context is key." Here, the court noted, among other things, that the hotel had lost profits during the recession, had several (prior) rounds of layoffs, and Plaintiff survived those layoffs despite then also being a member of a protected class.

VI. Finance

***Jacks v. City of Santa Barbara*, 3 Cal.5th 248 (2017)**

Holding: Franchise fees are not taxes under Proposition 218, so long as the fees reflect a reasonable estimate of the value of the franchise.

Facts: Beginning in 1959, the city and Southern California Edison (SCE) entered into a series of franchise agreements to allow SCE to construct electric lines throughout the city. A 1999 franchise agreement provided for a franchise fee of two percent of SCE's gross receipts. In 2005, SCE, with Public Utilities Commission approval, began placing a one percent surcharge on its bills to customers, to recover a portion of the franchise fee. Plaintiffs filed a class action lawsuit, alleging the surcharge was an illegal tax under Proposition 218. The trial court, through a series of orders, upheld the surcharge, finding it was a fee and not a tax under Proposition 218. The Court of Appeal reversed, finding the purpose of the surcharge was to raise revenue for the city. The California Supreme Court granted review.

Analysis: The Supreme Court reversed, finding that Proposition 218 did not change the historical characterization of franchise fees. Therefore, franchise fees are not taxes under Proposition 218, so long as the fees "reflect a reasonable estimate of the value of the franchise." While the court conceded the difficulty of determining the value of the franchise, value may be based on the parties' bona fide negotiations, or other means "addressed by expert opinion and subsequent case law."

***Russell City Energy Co. v. City of Hayward*, ___ Cal.App.5th ___, 2017 WL 3381692 (2017)**

Holding: Contract provision providing that city would not impose taxes on power plant violates Section 31 of the California Constitution. However, contractor has opportunity to amend complaint to allege a quasi-contractual restitution claim against city.

Facts: Plaintiff entered into an agreement with the city to construct a natural gas power plant. The agreement contained a payments clause that required Plaintiff to pay the city $10 million for design and construction of a new city library. The agreement provided that, in exchange for the payment, the city would not impose other taxes on Plaintiff. Four years after the city's agreement with Plaintiff, the voters approved a utility user tax ordinance which imposed a tax on, among other things, gas usage. The city then informed Plaintiff it would be required to pay the utility user tax. Plaintiff claimed the payments clause of the agreement prohibited the city from imposing utility user tax. Plaintiff then filed suit, asserting a series of breach of contract claims. The trial court sustained the city's demurrer without leave to amend. The trial court found that the payments clause violated the Section 31 of the California Constitution, which prohibits local governments from surrendering or suspending the power to tax.

Analysis: The Court of Appeal affirmed in part, and reversed, in part. The Court of Appeal found that the payments clause violated the California Constitution. The city surrendered its power to tax through the payments clause in the agreement with Plaintiff, "insulating [Plaintiff] from virtually all revenue-raising assessments." Notwithstanding this finding, however, the court concluded the trial court should have allowed Plaintiff the opportunity to amend its complaint to assert a quasi-contractual restitution claim against the city. The court distinguished such a claim from instances where courts have disapproved of implied contracts with public entities, or oral modifications to a written contract with a public entity. Here, a contract exists, it was validly approved, and, although the payments clause violates the California Constitution, the Plaintiff is merely seeking to recover from the city, which "was unable to deliver its promised performance."

VII. Miscellaneous

***Sukumar v. City of San Diego*, ___ Cal.App.5th ___, 2017 WL 3483653 (2017)**

Holding: Plaintiff entitled to attorney's fees in Public Records Act lawsuit under catalyst theory, where lawsuit motivated city to produce responsive documents.

Facts: Since 1992, Plaintiff's residence has been the subject of complaints about parking issues and noise at his property. Plaintiff made a public records request seeking 54 categories of documents from the city, including all documents mentioning him from 1990 through 2015, and city investigations of the property. 24 days after the request, the city advised Plaintiff that "this letter constitutes the . . . final response" to the public records request. Several days later, after Plaintiff's attorney met with a city custodian of records, the city produced 292 pages of new documents for inspection. The custodian advised that more responsive documents might be produced later, because an email search was incomplete. Plaintiff then filed suit under the Public Records Act. Several months after suit was filed, the city produced several hundred pages of responsive emails. At a court hearing on a discovery motion brought by Plaintiff, the city's attorney advised the court that "we've produced everything," and the court ordered the city to provide staff to sit for depositions about whether the city produced responsive documents. Starting at around the time of the depositions, and over a one-month period, the city produced five additional photographs and over 100 emails that were not previously disclosed. At the hearing on the merits, the trial court denied the Plaintiff's writ petition, noting that the city had (by then) produced all responsive documents. The Plaintiff sought $93,695 in attorney's fees, under the premise that his lawsuit "motivated" the city to produce additional responsive documents. The trial court denied the fee motion, and Plaintiff appealed that determination.

Analysis: The Court of Appeal reversed, finding that, but for the court-ordered depositions, the city would not have searched for, nor produced any responsive documents provided after the deposition date. The city's delay in producing documents was not due to (1) uncertainty over the request; or (2) absence of key personnel to process the request. Rather, the city had contended it had (previously) produced everything – a position that the court notes was later proven to be "significantly mistaken."

***People v. Superior Court (Sahlolbei)*, 3 Cal.5th 230 (2017)**

Holding: Government Code Section 1090 applies to independent contractors when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf.

Facts: Defendant, an independent contractor surgeon at a hospital (a public entity), recruited an anesthesiologist to work at the hospital. The anesthesiologist agreed to receive $36,000 per month, among other things. Defendant then persuaded the hospital board to pay the anesthesiologist $48,000 per month. Defendant instructed the anesthesiologist to have the monthly payments deposited into Defendant's account, and Defendant remitted $36,000 to the anesthesiologist. On these facts, the District Attorney charged Defendant with grand theft and violation of Government Code Section 1090. The trial court dismissed the Section 1090 count, following *People v. Christiansen*, (2013) 216 Cal.App.4th 1181 (independent contractors cannot be criminally liable under Section 1090). The Court of Appeal affirmed, and the California Supreme Court granted review.

Analysis: The Supreme Court reversed, finding the Legislature did not intend to categorically exclude independent contractors from the scope of Section 1090, disapproving of *Christensen* in that regard. Rather, the legislative history of Section 1090 conveys an intent to include outside advisors with responsibilities for public contracting similar to employees. To that end, "today, with the expansion of government and public contracting, regular employees and even consultants can have control over the public purse."