2017 Annual Conference

City Attorneys' Department Track

Sacramento Convention Center
Sacramento, California

September 13 – 15, 2017

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City Attorneys' Department

2017 Annual Conference: City Attorneys' Track

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2017 ANNUAL CONFERENCE

Wednesday, September 13 - Friday, September 15
Sacramento Convention Center

CITY ATTORNEYS' DEPARTMENT TRACK

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2nd Vice President: Damien Brower, City Attorney, Brentwood
Director: Michele Bagneris, City Attorney/City Prosecutor, Pasadena

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Wednesday—September 13

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

1:30p – 3:30 p.m. **Opening General Session (Whole Conference; No City Attorneys' Programming)**

3:30 – 5:00 p.m. **General Session**
Room 202/203/204, 2nd Floor

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

Testing Automated Vehicles Collaboratively and Avoiding Legal Potholes
Speakers: Lauren Isaac, Director of Business Initiatives, EasyMile
Gregory Rodriguez, Best Best & Krieger

Body-Worn Cameras and Critical Incidents
Speakers: James E. "Jeb" Brown, Assistant County Counsel, Riverside County Counsel's Office
Jennifer L. Petrusis, Shareholder, Richards, Watson & Gershon
Mike Washburn, Chief of Police, Indio

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

Thursday—September 14

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

8:00 – 9:30 a.m. **General Session**
Room 202/203/204, 2nd Floor

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

Department Business Meeting
- *President's Report (Gregory W. Stepanicich)*
- *City Attorneys' Forum Survey Report (Patrick Whitnell)*
- *Director's Report (Michele Beal Bagneris)*
- *Nominating Committee Report (Christi Hogin)*
- *Election of Department Officers (Gregory W. Stepanicich)*

Welcoming Remarks
Speaker: Matthew D. Ruyak, Interim City Attorney, Sacramento

FPPC Update
Speaker: Rachel H. Richman, City Attorney, Rosemead, Assistant City Attorney, Alhambra and Santa Clarita, Partner, Burke, Williams & Sorensen, LLP

Municipal Tort and Civil Rights Litigation Update
Speaker: Timothy T. Coates, Managing Partner, Greines, Martin, Stein & Richland

9:45 – 11:45 a.m. **General Session (Whole Conference; No City Attorneys' Programming)**

11:30 a.m. – 1:00 p.m. **Attendee Lunch in Expo Hall (Whole Conference; No City Attorneys' Programming)**

1:00 – 2:30 p.m. **General Session**
Room 202/203/204, 2nd Floor

Moderator: Michele Bagneris, City Attorney/City Prosecutor, Pasadena

Land Use and CEQA Litigation Update
Speaker: James G. Moose, Senior Partner, Remy Moose Manley

How to Comply with and Fund Stormwater Programs
Speaker: Ryan Baron, Of Counsel, Best, Best & Krieger

Thursday—September 14

(Continued)

2:45 – 4:00 p.m.

General Session
Room 202/203/204, 2nd Floor

Moderator: Christine Dietrick, City Attorney, San Luis Obispo

Housing, Housing, Housing: Pitfalls and Problems in Reviewing Housing Projects
Speaker: Barbara E. Kautz, Partner, Goldfarb & Lipman

Americans With Disabilities Act: Proceed With Caution
Speakers: James S. Brown, Partner, Sedgwick LLP
Sean Patterson, Senior Associate, Sedgwick LLP

4:15 – 5:30 p.m.

General Session
Room 202/203/204, 2nd Floor

Moderator: Damien Brower, City Attorney, Brentwood

Labor and Employment Litigation Update
Speaker: Stacey N. Sheston, Partner, Best Best & Krieger

Understanding the Rapidly Shifting Landscape of Healthcare Obligations
Speaker: David W. Tyra, Shareholder, Kronick Moskovitz Tiedemann & Girard

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

Friday—September 15

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

8:00 – 10:00 a.m. **General Session**
Room 202/203/204, 2nd Floor

Moderator: Michele Bagneris, City Attorney/City Prosecutor, Pasadena

General Municipal Litigation Update
Speaker: Javan N. Rad, Chief Assistant City Attorney, Pasadena

***Reed's* Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?**
Speakers: Bart W. Brizzee, Principal Assistant County Counsel, San Bernardino County Counsel
Deborah J. Fox, Chair of First Amendment Practice Group and Trial and Litigation Practice Group, Meyers Nave

Business Improvement Districts: Potential for Public/Private Conflicts
Speaker: Mark E. Mandell, Mandell Municipal Consulting

10:15 a.m. – 12:15 p.m. **General Session**
Room 202/203/204, 2nd Floor

Moderator: Christine Dietrick, City Attorney, San Luis Obispo

The Transition From Citizen Activism to Elected Governance
Speakers: Christine Dietrick, City Attorney, San Luis Obispo
Heidi Harmon, Mayor, San Luis Obispo

Public Law Specialty Certification Committee Report
Speaker: Craig Labadie, Committee Chair, City Attorney, Albany

(MCLE Specialty Credit - ETHICS)
Ethical Preparedness Training: Rules of Conduct in Action
Speakers: Christi Hogin, City Attorney, Lomita, Malibu and Palos Verdes Estates, Partner, Jenkins & Hogin LLP
Michael Jenkins, City Attorney, Hermosa Beach, Rolling Hills and West Hollywood, Partner, Jenkins & Hogin LLP

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

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[1] *Provider No. 1985*

Testing Automated Vehicles Collaboratively and Avoiding Legal Potholes

Wednesday, September 13, 2017 General Session; 3:30 – 5:00 p.m.

Gregory Rodriguez, Best Best & Krieger
Lauren Isaac, Director of Business Initiatives, EasyMile

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Notes:

"Automated Vehicle Regulatory Challenges: Avoiding Legal Potholes through Collaboration"

By: Gregory Rodriguez, Of Counsel, Best Best & Krieger LLP

Almost all existing laws around the operation of vehicles on our roads were written at a time when there were only human drivers. In fact, the State of New York arguably prohibits automated vehicles from operating on its roads with a law that requires drivers to keep one hand on the wheel at all times[1]. We now face a world where a computer is the driver. (No, no need to call John Connor just yet[2].) Accordingly, lawmakers must consider how to modernize existing laws and regulations around the safe operation of self-driving vehicles on our roads. Whether this effort requires states or local governments to meticulously review and modify existing laws to prevent potential impediments to the deployment of automated vehicles[3], or the drafting and passing of new laws and regulations separately focused on these transformative transportation technologies is not yet clear.

As of the date of this publication, 20 states have passed legislation concerning the operation of automated vehicles on public roads and 4 states have issued Executive Orders related to automated vehicles[4]. As will be discussed in more detail herein, the California Department of Motors Vehicles ("DMV") is on its third version of proposed regulations to regulate automated vehicles[5]. With the number of state laws being enacted, which contain different definitions of "automated" or "autonomous" vehicle, and other varying requirements related to insurance, privacy, and user fees in some cases, the private industry, which is investing billions of dollars in

[1] A provision in section 1229 of the New York State Vehicle and Traffic Law enacted in 1971 expressly prohibits a motor vehicle from being operated without at least one hand of a driver being on the steering wheel at all times. However, the recent New York State budget for FY17-18 allows a one-year testing program of self-driving and self-parking vehicle technology on public roadways under direct supervision of the New York State Police.

[2] For those unfamiliar with the classic movie "The Terminator" starring the former Governor of California, it is another example of the vision of science fiction writers and directors to address issues around technology and the future.

[3] The Federal Automated Vehicles Policy ("Policy") recommends the evaluation of current laws and regulations to address unnecessary impediments to the safe testing, deployment, and operation of highly automated vehicles. (Policy p. 39.)

[4] National Conference of State Legislators, http://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx

[5] Pursuant to California Vehicles Code Section 38750(d)(1), the DMV was to have adopted regulations "no later than" January 1, 2015.

the development of automated technology, continues to strongly call for Congress to use its powers of preemption to overcome what is labeled as a "patchwork quilt" of regulations. This call is being answered with both the United States House and Senate introducing, or planning to introduce, legislation concerning the regulation of automated vehicles and the inclusion of language preempting states and local governments from regulating the performance of highly automated vehicles.[6]

The tensions between regulations and innovation are clear, and the law does not have the best track record for keeping up with technology, especially at the current pace that "smart city" technologies are speeding ahead and being deployed within cities. Although cases are still proceeding through the courts on privacy rights associated with the use of cell phones, we are now in an era where data is being collected by traffic signals, Fitbits, robot vacuums[7], thermostats, speakers[8] and apps on our smartphones. As if that were not enough to grapple with, we are now looking at the projected deployment of automated fleets as early as 2021[9]. For states and local governments, the challenge is accommodating innovation and the economic opportunities technology can bring with it, but not overlooking the many public safety concerns that arise with new technologies such as automated vehicles.

The opportunities associated with automated vehicles are great, including increased mobility for the disabled, seniors and those with lower incomes, but the challenges are also many in overcoming concerns related to increased congestion, privacy and cybersecurity, and gaining public trust in these transformative technologies. Without better and more efficient ways for the public and private sectors to contract for more testing and demonstration projects to understand the operational constraints and infrastructure needs of automated vehicles, the long-term success of automated vehicles and the realization of all the potential positive benefits for cities and their citizens may be not be realized.

[6] On July 27, 2017, the House Energy and Commerce Committee passed the SELF DRIVE Act (H.R. 3388) out of Committee by a vote of 54-0.
[7] https://www.nytimes.com/2017/07/25/technology/roomba-irobot-data-privacy.html
[8] Sonos recently issued a privacy update that included the following message: "Know that we will be transparent about what data we're collecting and why. We will protect your data as though it is sacred. And we will not sell your data. We've never sold it before, and we won't sell it in the future." (Emphasis added.)
[9] http://www.govtech.com/fs/Fords-Chief-Technology-Officer-Tauts-Autonomous-Tech-Progress.html

This paper seeks to offer an introduction to the regulatory landscape and challenges that come with automated vehicles, but acknowledges upfront that there are more questions than answers at this early stage of development and deployment. However, with the testing of automated vehicles going on and gaining momentum in cities, now appears to be an ideal time for a multi-discipline effort to ensure there is a framework focused on safety for the continued testing and forthcoming deployment of self-driving cars. The proactive role of public agency lawyers in this effort is essential to identify and mitigate risks early on[10].

Introduction to Legal Issues for Automated Vehicles

Automated vehicles do not fit neatly into existing laws or regulations. For example, the traditional vehicle codes of states do not cover complicated issues like data storage, privacy, and cybersecurity that now need to be considered with a computer operating a vehicle. Legal issues related to automated vehicles cross "legal borders." Generally, states and local governments should be contemplating potential revisions to laws in the following areas:

Land Use and Zoning: Automated vehicles present the potential need to develop pick-up and drop-off zones and to rethink requirements associated with parking and new development[11]. In new areas focused on transit oriented development, automated vehicles offer the opportunity to forgo car ownership through "First/Last Mile[12]" connections. However, the challenge with planning for automated vehicles is that there is still limited data on how self-driving cars will actually operate in city environments, not to mention how the public will use them – individual ownership or use through a subscription type model. Without more testing to produce such data, planners are essentially operating blind.

[10] The National League of Cities has released an Automated Vehicles Policy Preparation Guide to help start the policy conversation around planning for the automated vehicles. http://www.nlc.org/sites/default/files/2017-04/NLC%20AV%20Policy%20Prep%20Guide%20web.pdf

[11]

[12] The "last-mile" or "first and last-mile" connection describes the beginning or end of an individual trip made primarily by public transportation. The gap from public transit to destination is termed a last mile connection

Design Safety: Currently, municipalities enjoy the ability to take advantage of defenses like "design immunity[13]" when it comes to the potential liability related to accidents on city streets. However, as there is no accepted industry standard for the safe design of roads that will have automated vehicles operating on them, the concept of design immunity may be called into question until the infrastructure requirements for the safe operation of automated vehicles are determined. In the meantime, municipalities need to consider and mitigate the risks from a potential gap in the law as more automated vehicles operate on public roads. Understanding the infrastructure needs to support the safe operation of automated vehicles in cities can be accomplished through more testing.

Telecommunications: With the possibility of vehicles not only being automated, but also connected, cities may have the burden of ensuring they have broadband infrastructure in place that supports the safe operation of connected vehicles within municipalities. Even with such infrastructure in place, there are concerns that cities will be liable in the event the network has an outage and results in an accident on public roads. Moreover, increased broadband deployment places a tension on traditional local control of the right-of-way[14]. Such risks need to be considered and addressed sooner rather than later and coordination with the private sector is warranted and necessary, but such coordination need to be a two-way street.

Insurance Requirements: Insurance requirements remain a significant unknown at this early stage of development of automated vehicles. In the short-term, claims are expected to rise with a potential "mixed use" environment of traditional and automated vehicles operating on roads, but over time if the programming of automated vehicles lives up to safety expectations, then accidents should reduce dramatically. With an environment where car accidents become a rare event, the need for individual insurance requirements is called into question, especially if automated vehicles are operated via a fleet subscription model instead of individual ownership.

Privacy and Data Sharing: Automated vehicles analyze and store large amounts of data. Not only are there privacy and ownership questions arising with data and technology, but in the event

[13] California Govt. Code section 830.6.
[14] *See* https://www.fcc.gov/document/wireless-infrastructure-nprm-and-noi.

that data is collected from vehicles by the "smart" infrastructure of a city, the question of whether citizens should be giving informed consent for the collection of such data is raised. Accordingly, cities should ensure they have privacy and data use policies in place not only addressing privacy issues, but also informing the public how information is stored in compliance with any applicable laws, regulations, or accepted industry standards. The issue of data storage by municipalities also raises legal issues associated with the potential contracting for the storage of data, or fiscal concerns related to budgeting for the storage of data on its own servers.

Labor and Employment: With automation comes the strong likelihood of job losses. Just as we are discussing the legal and infrastructure issues associated with automated vehicles, we should also be considering the skills that city staff will need to support the safe operation of automated vehicles on public roads. For example, in a connected vehicle environment, cities will likely need the ability to monitor source code to ensure the connected infrastructure is operating normally and has not been compromised. There are opportunities for collaboration between the public and private sector to plan for the jobs of the future.

While separate papers can be written on each of these issues, the summary above hopefully provides an introduction to the interwoven legal issues and challenges this transformative technology presents, and why it is important for lawyers to be included in the planning discussions for automated vehicles to ensure an adequate foundation for laws and policies is in place. As suggested above, one important question is whether resources should be used to modify existing laws, or whether time and money would be better spent crafting new "innovation" codes.

The Federal Regulatory Environment Takes Shape

In September of 2016, the Department of Transportation ("DOT") through the National Highway Traffic Safety Administration ("NHTSA") released the groundbreaking Federal Automated Vehicles Policy ("Policy")[15]. It is important to note that the Policy is only guidance and not mandatory at this point.

[15] https://www.transportation.gov/AV

With an overarching focus on safety, the Policy is divided up into four sections: Vehicle Performance Guidance; Model State Policy; Regulatory Tools; and Potential New Tools and Authorities. There was a notice and comment period where over 1,100 comments were submitted[16]. It is anticipated that the Policy will be updated later this year based on these comments and the arrival of a new administration; however, that timeframe is contingent upon the many infrastructure and programming issues that new DOT leadership is confronting.

Of consideration for local governments is the guidance in the Model State Policy section which seeks to carve out traditional roles of states and local governments around the operation of vehicles on roads, but maintaining NHTSA's traditional oversight over the performance of vehicles. Through the Policy, NHTSA recommends that the hardware and software in "highly[17]" automated vehicles that will perform functions previously performed by a human driver be regulated by NHTSA. In addition to recommending that states and local governments evaluate existing laws and regulations to address any potential impediments to the testing and deployment of automated vehicles, the Policy recommends states work together to standardize and maintain road infrastructure including signs, traffic signals and lights, and pavement markings[18]. Unfortunately, there is no recommendation for how to pay for such infrastructure improvements.

Due to concerns around a "patchwork quilt," Congress is also becoming involved in the regulatory discussion. On July 27, 2017, the House Committee on Energy and Commerce unanimously voted out of Committee the "Safely Ensuring Lives Future Deployment and Research In Vehicle Evolution Act," also known as the "SELF DRIVE Act." H.R. 3388[19] contains express preemption language providing that:

> "No State or political subdivision of a State may maintain, enforce, prescribe, or continue in effect any law or regulation regarding the design, construction, or

[16] https://www.regulations.gov/docket?D=NHTSA-2016-0090
[17] The Policy adopts the 0-5 Levels established by SAE International; https://www.sae.org/news/3544/
[18] Policy p. 39.
[19] As of the date of publication, the SELF DRIVE Act was still pending consideration by the full House of Representatives.

> performance of highly automated vehicles, automated driving systems, or components of automated driving systems…" (Emphasis added.)

Such language aligns with the Policy seeking to prevent any regulation of the performance of automated driving systems by states or local governments. The SELF DRIVE Act goes on to state that:

> "Nothing…may be construed to prohibit a State or political subdivision of a State from maintaining, enforcing, prescribing, or continuing in effect any law or regulation regarding the registration, licensing, driver education, and training, insurance, law enforcement, crash investigations, safety and emissions inspections, congestion management of vehicles on the street within a State or political subdivision of a State, or traffic **unless the law or regulation is an unreasonable restriction** on the design, construction, or performance of highly automated vehicles, automated driving systems, or components of automated driving systems. (Emphasis added.)

For this discussion, it is very noteworthy that "unreasonable restriction" is not defined in the legislation, which leads to uncertainly around the effectiveness of such language seeking to preserve traditional oversight rights over the safe operation of vehicles on public roads by states and local governments. Such preemption language also does not address the tension between safety and performance due to highly automated vehicles being driven by a computer instead of a human. For example, when a citizen seeks to obtain a driving license for the first time, a person normally has to take a driving test administered by the applicable state agency. However, based on the language of the Policy and the SELF DRIVE Act, there is not a clear answer whether a state still has the ability to administer a driving test to a highly automated vehicle being driven by a computer for licensing and registration purposes.

Further, when implementing federal preemption, there must be a federal law or regulation that serves as the basis for the preemption. Here, there are no federal performance or safety standards around a highly automated vehicle. Thus, while the call for preemption is understandable to

avoid varying definitions and regulations around automated vehicles across the country, it appears that critical foundation for such preemption is missing, which will likely lead to further uncertainty and delay around the deployment of automated vehicles as time consuming and expensive litigation works its way through the courts.

The Senate Energy and Commerce Committee is also expected to mark-up similar legislation concerning the regulation of highly automated vehicles. Such legislation is anticipated to be based upon the bi-partisan principles released by Senators Thune (R – S.D.), Peters (D – Mich.) and Nelson (D – FL) focused on: prioritizing safety; promoting innovation and reducing roadblocks; remaining tech neutral; clarifying federal and state roles; strengthening cybersecurity; and, educating the public to encourage responsible adoption of self-driving vehicles.

To Legislate or Not to Legislate: The State Perspective

As noted above, 20 states have passed laws related to automated vehicles as of the date of publication. Generally, such laws seek to define what an "automated vehicle" is and address issues like testing and insurance. Some laws go farther and delve into issues associated with privacy, cybersecurity, and "user fees." States that have most recently passed legislation include Colorado, Georgia, Nevada, North Dakota, Tennessee and Texas.

In California, California Vehicle Code section 38750 currently governs the operation of automated vehicles on California roads. Pursuant to section 38750, an autonomous vehicle shall not be operated on public roads until the manufacturer submits an application to and that application is approved by the California Department of Motor Vehicles ("DMV"). Further, section 38750 requires that a driver be seated in the driver's seat to take back control of the vehicle in the event of disengagement, and there is a $5,000,000 insurance requirement.

However, section 38750 also requires that not later than January 1, 2015 (yes, things are a bit behind schedule), the DMV shall adopt regulations setting forth requirements for the submission of evidence of insurance and the submission and approval of an application to operate an

automated vehicle within California. For those that remember the "disagreement" between Uber, San Francisco and the State earlier this year, the fact that the DMV had yet to adopt such regulations was a part of Uber's argument that it was not required to submit an application to test and operate automated vehicles in California.

The DMV is currently on its third draft of regulations concerning the testing and deployment of automated vehicles on California roads[20]. The current draft moves far beyond the first draft's requirement for a driver to be in car at all times to contemplating vehicles being operated without drivers subject to certain requirements. Two provisions of the draft DMV regulations that local governments should be aware of with regard to testing are: 1) the manufacturer is required to coordinate with the local authorities where testing will occur; and 2) the manufacturer must provide a law enforcement interaction plan.[21] Additionally, the current draft of the proposed California regulations contemplates not only testing, but also post-testing deployment.[22]

The approach being taken by California and other states that have passed laws concerning the operation of self-driving cars on public roads is contrasted with the "hands off" regulatory approach that Arizona and Washington have taken by signing Executive Orders seeking to promote testing in collaboration with state universities. There are advantages and risks of each approach, but both have the common goal of promoting the increased operation of automated vehicles on roads. While one avenue provides more flexibility on the regulatory front, neither approach may be an option in the near future with the looming preemptive approach being considered by Congress. Accordingly, it is important to keep apprised of not only state developments, but also federal happenings in this fast moving space.

Setting a Vision through a Resolution: Where do Cities Fit In?

With the need for roads and other public infrastructure, in addition to adoption by the general public, for self-driving vehicles to be successful, cities arguably play a more critical role in the

[20] https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/auto
[21] See Section 227.38.
[22] See Section 228.06.

safe, effective and efficient deployment of automated vehicles than they are being credited for. However, given the many obligations placed on local government resources and staff, municipalities may not have the time and budget to adequately and proactively prepare for the looming deployment of automated vehicles. Not having local governments at the table during policy and regulatory discussions, in addition to failing to ensure local governments have the tools to make sure they have monetary resources to support the safe operation of automated vehicles on public roads, puts at risk the long-term success of automated vehicles. The promotion of federal and state policies to encourage collaborative testing projects to bridge the public and private gap around the deployment of automated vehicles may be a better focus than short-sighted preemption at this early stage of development. Moreover, increased testing provides the opportunity to develop laws and regulations based on actual data from testing, rather than prescribing laws early on when little information is known about the operational needs of highly automated vehicles.

For those cities already working on integrating advanced transportation technologies into long-range transportation planning documents, local officials have determined that setting a vision for the future operation of self-driving vehicles in their jurisdictions is necessary. Examples of City resolutions establishing a vision and framework for the operation of automated vehicles within their jurisdiction include the following:

City of Beverly Hills: In April of 2016, the City of Beverly Hills, California passed a resolution[23] laying the groundwork for the City to establish an automated vehicle program that includes a City owned fleet of self-driving vehicles to address "first and last mile" issues as it relates to the extension of the Metro Purple Line, increase mobility within the City, relieve traffic congestion, improve parking and create options for transporting senior citizens.

City of Austin: In March of 2017, the City of Austin, Texas passed a resolution directing the city manager to establish a "New Mobility Electric Vehicle/Autonomous Vehicle Solution." The stated goal of such a plan is to shift the city's transportation system to one that enables "Shared, Electric, and Autonomous Mobility Services." While establishing a vision around not only

[23] http://www.beverlyhills.org/cbhfiles/storage/files/675248721651248054/ResolutionDeclaringSupport.pdf

automated vehicles, but also ensuring such vehicles operated in a shared and electric capacity, the City was also seeking to promote a vision focused on the potential environmental benefits that automated vehicles offer. Unfortunately, the City's resolution appears to have been one of the factors that led to the state's passage of legislation preempting local regulation related to the operation of automated vehicles within the state[24].

City of Portland: In April of 2017, the City of Portland, Oregon adopted a "Smart Autonomous Vehicles Initiative[25]" to "do AV right." (Kudos to the City on the "SAVI" name for its balanced initiative.) In addition, the City also sent a letter[26] to legislators opposing any preemption and instead promoting the creation of a working group to develop legislative recommendations. The letter goes in to state that developing a legislative framework for automated vehicles that maximizes potential benefits like reducing congestion will take "time and collaboration."

Needless to say, there are tremendous economic opportunities with automated vehicles; however, it is important to balance such economic opportunities with the need to ensure the safety of residents. Without knowing how automated vehicles will operate in our cities, preempting local governments out of the discussion at this early stage may inhibit the safe and effective deployment of automated vehicles in cities. Not to mention, even the threat of preemption may hinder the investment in resources by local governments to engage in planning, outreach and the setting of goals and priorities for the operation of self-driving vehicles within their jurisdictions. All of this jeopardizes the full realization of the potential societal improving benefits that automated vehicles offer.

With requests for information (RFI's) and requests for proposals (RFP's) increasing from cities, cities will continue to have an important, if not critical, role in the safe, efficient and effective deployment of automated vehicles. The question is as cities are fighting their way to the table, will they have the seat pulled out from under them before the first course is served, or will they be allowed to contribute to important policy discussions that need to be occurring, including

[24] Texas Bill S. 2205.
[25] https://www.portlandoregon.gov/transportation/article/636498
[26] https://www.portlandoregon.gov/transportation/article/636497

around issues like privacy, wireless and broadband deployment, infrastructure funding and public safety.

Innovating Contracting

A challenge and potential solution to the suggestion that states and local governments cannot keep up with technology is finding ways to effectively "innovate" contracting. The continued integration of technology into cities offers an opportunity to focus on more collaborative procurements that seek to maximize the expertise and experience of cities and the private sector, rather than procurements that end at the negotiating table due to each side failing to understand the needs of their constituents. On the private side, those constituents tend to be investors. On the public side, the constituents are voting citizens. Ensuring collaboration early on in the contracting process can help ensure both sides understand each other's goals and needs. Here, the common unifying goal is hopefully the successful long-term deployment of automated vehicles.

Public contracting laws can often be rigid, prescriptive, and cumbersome in the eyes of the private sector. From the public perspective, local government officials can often forget that significant financial investments are being made into the development and deployment of advanced transportation technologies and delays do not sit well with investors. That being said, it is important to remember the very worthwhile goals of public contracting. In California, Public Contract Code sections 100 and 102 note the following benefits of public contracting:

- Protecting the public from **misuse of public funds**
- To provide all qualified bidders with a fair opportunity to enter the bidding process, thereby **stimulating competition** in a manner conducive to **sound fiscal practices**
- To **eliminate favoritism, fraud, and corruption** in the awarding of public contracts

The benefits of ensuring sound contracting with automated vehicle pilot projects ensure such goals are realized, but also promote transparency, which is important for promoting public adoption and trust. Further, ensuring a contract is in place when engaging in an automated vehicle testing project also helps ensure the following: (i) a local government has a vision for

the project which can be included in the proposed scope of work communicated to potential private sector partners in a request for proposals and (ii) clear expectations and responsibilities for both sides that can be enforced. Although often seen as a burden, a sound procurement process is a tool to not only ensure transparency, but also ensure willing partners on both sides which helps ensure a smoother pilot project.

With such foundational principles in mind, a focus on establishing more streamlined technology procurements promoting collaboration is warranted. One potential approach is being piloted by the Los Angeles County Metropolitan Transportation Authority ("LA Metro") through its Office of Extraordinary Innovation. LA Metro has established an "Unsolicited Proposal[27]" process focused on creating more opportunities for the private sector to do business with LA Metro within the framework and goals of public contracting laws. This is an innovative approach to promoting increased partnership and collaboration with the private sector, and to reach out to the private sector to better understand potential innovative projects that the private sector may be interested in partnering on. Such a process also provides the opportunity for the private sector to educate the public sector about new innovations on the horizon that it may not be aware of, which helps when considering long-range planning around future construction projects.

A recent procurement at the federal level also focused on collaboration with proposers. This grant was known as the Smart City Challenge[28] which was for forty million dollars ($40,000,000) in federal grant funding to develop a program focused on developing a framework for the adoption of advanced transportation technologies in cities. During the evaluation process, the seven semi-finalists collaborated and discussed their proposals with DOT to encourage the refinement of their final proposals.

A potential alternative to the preemption path is focusing on improving state and local procurement and contracting laws to promote more pilot and demonstration projects, and allowing laws and regulations for automated vehicles to develop with such pilots. However, two challenges that will need to be addressed in any such efforts are how to keep proprietary

[27] https://www.metro.net/projects/oei/partnerships-ups/
[28] https://www.transportation.gov/smartcity

information protected and harmonizing any collaborative preparation of scopes of work for a pilot project with conflict of interest rules and California Government Code section 1090. That being said, similar to the ongoing increased acceptance of alternative construction delivery methods such as design-build and construction manager / general contractor, there is the opportunity to modernize public contracting to promote more collaboration and trust between the public and private sector. Through increased trust and mutual understanding of goals and needs, more collaborative testing of new technologies like automated vehicles in cities can hopefully be promoted so that both sides have a better understanding of not only operational and infrastructure needs, but also the new laws and policies needed to support a framework focused on safety.

The Road Ahead

As noted above, the proactive role of public agency attorneys is important for helping clear the path for the successful near term deployment of automated vehicles, in addition to reducing the risks that technology brings to municipalities. As such, legal staff can be coordinating with policy staff to track national developments on technology issues like automated vehicles and ensuring opportunities to comment on proposed federal rules and regulations are taken advantage of. It is important for the voices of local governments to be heard on these complicated issues and submitting comments ensures the right to challenge any final rules and regulations.

Proactive engagement by lawyers can also be accomplished by "getting the right people to the table" and facilitating in-depth discussions with planning staff, public works staff, law enforcement, policy makers, procurement and information technology staff, and the private sector to lay the policy and legal foundations for ensuring advanced transportation technologies like automated vehicles operate safely and effectively in our cities. Such discussions also allow for important fact gathering that promotes the identification of legal issues and risk mitigation.

Public agency attorneys can also help make sure that opportunities for outreach and education on automated vehicles are being taken advantage of and completed without unnecessary legal risks. Tools for such outreach include the release of requests for information that can lead to request for proposals to conduct an automated vehicles pilot project. As discussed above, finding ways

to promote collaboration with the private sector within the framework of public contracting laws can help reduce the risks of speedbumps during such testing projects and ensure the important goals of transparency and the preventing misuse of public funds are realized.

Through the promotion of more collaborative testing of automated vehicles by the private sector and local governments at this early stage of development and deployment, opportunities to ensure the safety of citizens through the orderly deployment of automated vehicles can be realized. Further, by considering an alternative path to preemption and instead allowing laws and regulations to develop with such collaborative testing and learning, we can help ensure the transformative benefits, including enhanced access to mobility, is realized for all citizens through the long-term success of automated vehicles. Hopefully, we all get the opportunity to sit back and enjoy the ride.

Body-Worn Cameras and Critical Incidents

Wednesday, September 13, 2017 General Session; 3:30 – 5:00 p.m.

James E. "Jeb" Brown, Assistant County Counsel, Riverside County Counsel's Office
Jennifer L. Petrusis, Shareholder, Richards, Watson & Gershon
Mike Washburn, Chief of Police, Indio

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Notes:

Body-Worn Cameras and Critical Incidents

Prepared by Jennifer Petrusis
Richards, Watson & Gershon
jpetrusis@rwglaw.com
213.626.8484

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Body-Worn Cameras and Critical Incidents

By Jennifer Petrusis
Richards, Watson & Gershon

I. INTRODUCTION

A member of your city's Police Department has just been involved in an officer-involved shooting. Footage of the incident was recorded by the officer's body-worn camera and it depicts the moments leading up to the shooting and the shooting itself. Your city has several decisions to make regarding the footage. Does the city release the footage to the public? If so, when? How soon after the incident? Does the city wait until a lawsuit has been initiated before releasing the footage? Does the city consult with the District Attorney's Office or the agency conducting the investigation of the shooting before releasing the footage? Has your city already entered into a Memorandum of Understanding with the District Attorney's Office that affects when footage of an officer-involved shooting may be released and by whom?

In the wake of high profile officer-involved shootings that were captured by body-worn cameras, law enforcement agencies across the country are grappling with these questions. The answers depend on a mix of interpreting current legal requirements and making policy-based decisions that address rising demands for transparency and accountability. Records of a law enforcement investigation are exempt from disclosure under the Public Records Act[1], and many law enforcement agencies consider body-worn camera footage to be exempt from disclosure in

[1] Government Code § 6254(f).

response to a request for the footage from the public. But the law is going to change. The California Legislature has tried for the past two years to pass legislation regarding body-worn cameras and there is pending legislation that would require law enforcement agencies to disclose video footage that depicts an officer's use of force.

The purpose of this paper is to discuss the current state of the law, pending legislation that would affect disclosure requirements, and the need to have a comprehensive written policy as part of the agency's body-worn camera program that addresses various practical considerations.

II. CURRENT STATE OF THE LAW REGARDING DISCLOSURE OF BODY-WORN CAMERA FOOTAGE TO THE PUBLIC

Over the past two years, the Legislature has tried and failed to pass several bills that address various aspects of body-worn cameras, including who gets to see the footage. When it comes to the issues of whether and when to disclose camera footage to the public, lawmakers have been struggling with balancing privacy concerns and the public's demands for increased transparency and accountability. This legislative stalemate means that individual law enforcement agencies are left to develop their own policies on whether they will disclose the footage in response to a Public Records Act request from the public.

California's Public Records Act requires that government at all levels be open and accessible to the public. "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares access to information concerning

the conduct of the people's business is a fundamental and necessary right of every person in this state."[2]

Under the Public Records Act, every person has the right to inspect and to obtain a copy of any identifiable public record.[3] A local government agency must disclose public records unless the record falls under a statutory exemption or the need for confidentiality clearly outweighs the public's right to access to that record. The Public Records Act defines "public records" as follows:

> 'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

The term "writing" means:

> any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.[4]

Given the expansive definition of "writing", video footage is considered a writing subject to the Public Records Act. However, depending on what the footage depicts, the footage captured from body-worn cameras may be exempt from

[2] Government Code § 6250.

[3] Government Code § 6253(a), (b).

[4] Government Code § 6252(a).

disclosure pursuant to Government Code section 6254(f) because it is a record of a complaint to, or investigation conducted by, a local police agency.

Section 6254(f) is a "complicated provision that has undergone many revisions since its enactment in 1968."[5] According to Section 6254(f), the Public Records Act does not require the disclosure of:

> Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, the Office of Emergency Services and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes.[6]

Section 6254(f) then contains an exception to the exemption and requires disclosure of certain information to certain individuals:

> However, state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (b) of Section 13951, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation.

[5] *Williams v. Superior Court*, 5 Cal.4th 337, 348 (1993).

[6] Government Code § 6254(f).

Our California courts have not addressed yet whether video footage from body-worn cameras is a record of an investigation exempt from disclosure under the Public Records Act. The closest has been *Haynie v. Superior Court*, 26 Cal. 4th 1061 (2001), in which the Supreme Court considered, among other things, whether tape recordings of Haynie's conversations with deputies during a traffic stop, and recordings of radio broadcasts that deputies heard prior to the traffic stop, were required to be disclosed under the Public Records Act. The Supreme Court reminded that Section 6254(f) only requires disclosure of specified information contained in law enforcement records, rather than the disclosure of the records themselves. "The Legislature's effort to provide access to selected information from law enforcement investigatory records would have been a wasted one if . . . the recordings themselves were subject to disclosure." [7] Accordingly, the Sheriff's Department was not required to disclose the actual recordings.

By that same logic, the actual video and audio recordings from body-worn cameras are not subject to disclosure. Certainly, many law enforcement agencies take the position that body-worn camera footage depicting an aspect of law enforcement investigation is exempt from disclosure.[8]

However, as has often been said, the disclosure requirements of the Public Records Act are a floor, not a ceiling. "Except as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth" in

[7] *Haynie v. Superior Court*, 26 Cal.4th 1061, 1072 (2001).

[8] However, if the video footage captures a non-investigatory contact with a citizen, e.g. a citizen stopping an officer to ask for directions, the footage may be subject to disclosure. It is important to evaluate whether the non-investigatory contact could be a record of a complaint or is part of an investigation or security file to determine whether it could still be exempt from disclosure under Section 6254(f).

the Public Records Act.[9] Unless the body-worn camera footage contains information that is confidential or privileged[10], a law enforcement agency could make the policy decision to release the footage to the public.

III. PENDING LEGISLATION THAT WOULD AFFECT DISCLOSURE OF BODY-WORN CAMERA FOOTAGE

In 2017, two bills that would affect the disclosure of audio and video footage pursuant to the Public Records Act are making their way through the Legislature.

A. Assembly Bill No. 748 (Ting-D): Peace Officers: Video and Audio Recordings: Disclosure[11]

As amended in July 2017, AB 748 would dramatically expand public access to police body-worn camera videos in California. The bill would amend Section 6254(f) to add a provision requiring disclosure of video or audio recordings that relate to a matter of public concern, which is defined to be a video or audio recording that depicts an incident involving a peace officer's use of force, or is reasonably believed to involve a violation of law or agency policy by the peace officer.

[9] Government Code § 6253(e).

[10] There are several circumstances in which footage from body-worn cameras could be considered confidential or privileged. Some examples include footage of an investigation of a juvenile offender (Welfare & Institutions Code § 827), footage depicting the identity of a confidential informant (Evidence Code § 1041), and footage containing information regarding a suspected child abuse report (Penal Code § 11167.5).

[11] Assem. Bill No. 748 (2017-2018 Reg. Sess.) (available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB748). Referred to as "AB 748.

The bill would limit the circumstances in which this type of audio or video recording could be withheld from disclosure:

> (A) If the disclosure would endanger the successful completion of an investigation or related investigation, the agency shall articulate a factual basis as to why disclosure would substantially impede an active investigation, and the video or audio recording may be withheld by the agency for a maximum of 120 calendar days.
>
> (B) (i) If the agency demonstrates, on the facts of the particular case, that the public interest in withholding a video or audio recording clearly outweighs the public interest in disclosure because the release of the recording would, based on the facts and circumstances depicted in the recording, violate the reasonable expectation of privacy of a subject depicted in the recording, the agency shall articulate that interest and may use redaction technology to obscure those specific portions of the recording that protect that interest. However, the redaction shall not interfere with the viewer's ability to fully, completely, and accurately comprehend the events captured in the recording and the recording shall not otherwise be edited or altered.
>
> (ii) If the agency demonstrates that the reasonable expectation of privacy of a subject depicted in the recording cannot adequately be protected through redaction as described in clause (i) and that interest outweighs the public interest in disclosure, the agency may withhold the recording from the public, except that the recording, either redacted as provided in clause (i) or unredacted, shall be disclosed promptly, upon request, to any of the following, unless disclosure would endanger the successful completion of an investigation or related investigation, in which case the agency shall articulate a factual basis as to why disclosure would substantially impede an active investigation, and the video or audio recording may be withheld by the agency for a maximum of 120 calendar days:
>
> (I) To the subject of the recording or his or her authorized representative.
>
> (II) To the parent or legal guardian of the subject if the subject is a minor.

> (III) To a member of the subject's immediate family, as defined in paragraph (3) of subdivision (b) of Section 422.4 of the Penal Code, if the subject is deceased.

Additionally, this bill would prohibit an agency from disclosing any audio or video recording to a third-party contractor, except for the purpose of data storage. The bill would prohibit the sale of a recording for any purpose and would prohibit the use of any biometric scanning program (i.e. facial recognition software) or application in regard to a recording.

Finally, the bill would amend Section 6254(f) to explicitly state that an agency may provide greater public access to video or audio recordings than the minimum standards set forth in that section.

B. Assembly Bill No. 459 (Chau-D): Public records: Video or Audio Recordings: Crime[12]

AB 459 relates to video or audio recordings that were created during the commission or investigation of certain crimes, namely rape, incest, sexual assault, domestic violence, or child abuse that depicts the face, intimate body part, or voice of a victim of the incident depicted in the recording. The bill would add a section to the Government Code stating that the Public Records Act does not require the disclosure of these types of video or audio recordings unless the victim depicted in the record provides express written consent.

However, the bill would require agencies to justify withholding such video or audio recordings by demonstrating, pursuant to Section 6255, that on the facts of the particular case, the public interest served by not disclosing the recording clearly outweighs the public interest served by disclosure of the recording. The new

[12] Assem. Bill No. 459 (2017-2018 Reg. Sess.) (available at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB459). Referred to as "AB 459."

Government Code section would require the agency to consider the following factors when balancing the public interests: 1) the constitutional right to privacy of the person or persons depicted in the recording, and 2) whether the potential harm to the victim caused by disclosing the recording may be mitigated by redacting the recording to obscure images showing intimate body parts and personally identifying characteristics of the victim, or by distorting portions of the recording containing the victim's voice, provided that the redaction does not prevent a viewer from being able to fully and accurately perceive the events captured on the recording (the recording shall not otherwise be edited or altered). Victims of these crimes would be allowed to inspect and obtain an original copy of the recording.

C. Comparison of Pending Bills: AB 459 and AB 748

Overall, AB 748 significantly expands public access to certain recordings captured by law enforcement agencies relating to the public concern as defined by the bill, such as officer's use of force, while AB 459 instead provides that law enforcement agencies do not have to disclose recordings related to specific serious crimes implicating significant privacy concerns.

The bills are not likely to impact each other because they focus on different topics of recordings. AB 748 prevents agencies from withholding for more than 120 days recordings that capture matters of public concern, which include incidents involving a peace officer's use of force and incidents reasonably believed to involve a violation of law or public policy. AB 459, on the other hand allows agencies to withhold recordings for specific crimes, such as rape, incest, sexual assault, domestic violence or child abuse. The matters of public concern which would invoke the expansive disclosure requirements of AB 748 would likely not be triggered by the crimes of rape, incest, sexual assault, domestic violence or

child abuse. Further, AB 748 exempts from public disclosure requested recordings in which the privacy interest favors not publicly disclosing the recording and redaction technologies cannot alleviate this privacy concern. In these cases, AB 748 only requires that the video be disclosed if requested by the subject of the video or a specified connection to that suspect. This is consistent with the provision of AB 459 which allows the subject of a recording, the parent or legal guardian of a minor subject, a deceased subject's next of kin, or a subject's legally authorized designee permission to inspect and obtain a copy of such recording.

Additionally, the bills are premised on two different conclusions regarding the prevailing public interest concerning disclosing body-worn camera recordings. AB 459 creates enhanced protections for withholding from Public Records Act requests of certain recordings because the need to protect the privacy of victims of serious crimes from the public disclosure of images captured in video or audio recordings outweighs the interest in public disclosure of that information. AB 748, on the other hand, allows for a video or audio recording that relates to a matter of public concern to be accessible to the public because of the strong legislatively declared public interest in police uses of force.

A chart showing a side-by-side comparison of the two pending bills is found at the end of this paper.

IV. BODY-WORN CAMERA POLICIES

Having a comprehensive written policy is invaluable to an agency's body-worn camera program. This will be an important document in any litigation arising from a critical incident in which body-worn camera footage was captured.

For those agencies that are considering implementing a body-worn camera program and do not yet have a policy in place, there are several resources for guidance and model policies, including the Body Worn-Camera Toolkit created by the U.S. Department of Justice to serve as a resource for law enforcement agencies across the country.[13] Additionally, a chart comparing policies from the Los Angeles Police Department, Los Angeles Sheriff's Department, Seattle Police Department, and the ACLU's model policy can be found at the end of this paper.

Some of the fundamental issues that a body-worn camera policy should address are:

1. In what type of situations will the cameras be utilized? Every contact with a member of the public? Only certain types of contacts?
2. Will the officer have any discretion on when to turn the camera on or off?
3. Who will have access to the footage and is the officer permitted to review the footage before writing his/her report?
4. How long will the footage be retained?
5. Under what circumstances will the footage be disclosed?

These questions highlight the policy decisions and practical considerations that shape an agency's body-worn camera program. For example, each agency needs to decide whether it will release the footage in response to a Public Records Act Request or use the exemption set forth in Section 6254(f). Most agencies that utilize body-worn cameras have built in some flexibility into their policies and will consider publicly releasing footage if it would serve to quell unrest or protect public safety.

[13] *See* www.bja.gov/bwc

Additionally, decisions regarding when the cameras will be utilized and how long the footage will be retained have important financial impacts. Many law enforcement agencies cite storage costs as being a significant factor in the overall cost of a body-worn camera program. The cameras are relatively inexpensive, but the cost to store the footage and the personnel costs associated with managing the footage (e.g. responding to Public Records Act requests and various discovery requests) become cost prohibitive for some smaller agencies. Routine video monitoring, which includes in-car video systems, must be retained for one year.[14] However, body-worn camera footage may also be considered evidence depending on what it captures and depicts, which will also affect how long it should be retained for criminal prosecution purposes. The costs associated with retention will undoubtedly affect an agency's policy on when the camera must be utilized and how long the footage must be retained beyond the year required by law. Policing is 24/7 and video footage takes up a lot of space.

V. CONCLUSION

Although a fairly recent addition to law enforcement technology, the use of body-worn cameras is expanding and it is probably safe to say that most law enforcement agencies are heading in the direction of utilizing this technology. The law is evolving and we are waiting to see what legislation will be passed regulating body-worn cameras, including when footage must be publicly disclosed. In the meantime, each agency will need to develop its own policy, including when and under what circumstances the agency will disclose body-worn camera footage.

[14] Government Code § 34090.6.

Pending Bill Comparison Table

	AB 459	AB 748
Change to Current Law	Adds Section 6254.4.5 to the Government Code.	Amends Section 6254 of the Government Code and Section 832.18 of the Penal Code.
Overall Goal of Legislation	Exempts from the CPRA body-camera footage that depicts any victim(s) of rape, incest, domestic violence, or child abuse unless the victim(s) depicted provides express written consent.	Limits the ability of agencies to withhold video or audio recordings that relate to a "matter of public concern" ("depicts an incident involving a peace officer's use of force, or is reasonably believed to involve a violation of law or public policy") from the CPRA. Such recordings can only be withheld for a maximum of 120 days, if agencies show that disclosure would substantially impede an active investigation. If recordings violate the reasonable expectation of privacy such that this interest outweighs disclosure then the video need only be disclosed to the subject of the recording or a specified connection to the subject, if requested.
Specific Recording Content Requirements	Video or audio recording that was created during the commission or investigation of the **crime of rape, incest, sexual assault, domestic violence, or child abuse** that depicts the face, intimate body part, or voice of a victim of the incident depicted in the recording.	Video or audio recordings that relate to a "matter of public concern." Matters of public concern include a recording which "depicts an incident involving a **peace officer's use of force, or is reasonably believed to involve a violation of law or public policy**."
Impact on Public Access to Recordings	**Narrows ability to request** public records for certain crimes.	**Expands** members of the **public access** to recordings relating to matters of public concern.
Impact on Law Enforcement Agencies' Abilities to Withhold Recordings from CPRA	**Protects agency's ability to withhold such recordings**, if withholding can be justified by the agency based on specific factors which determine the privacy interest outweighs the public disclosure interest.	**Limits agency's ability to withhold such recordings** to 120 days. If disclosure, even with redaction, would weigh in favor of protecting individual privacy from public disclosure, then agencies must still disclose within 120 days to specified individuals connected to the subject of the recording.

	AB 459	AB 748
Duties Imposed on Agencies	**Requires an agency to justify withholding** such a video or audio recording by demonstrating that on the facts of the particular case, the public interest served by not disclosing the recording clearly outweighs the public interest served by disclosure of the recording. Requires the agency to consider specified factors when balancing the public interests.	**Requires an agency to provide audio or video recordings requested** under the CPRA if the requested recording "depicts an incident involving a peace officer's use of force, or is reasonably believed to involve a violation of law or public policy." The agency **must articulate a factual basis as to why disclosure would substantially impede an active investigation if the agency wishes to withhold** the video (for up to 120 days). The agency must articulate, based on the facts of the particular case, that the public interest in withholding a recording clearly outweighs the public interest in disclosure if the disclosure contains redactions to protect privacy or if the video is withheld from the public and only provided to the subject, or their family, if deceased.
Allows for the Use of Redaction Technology	**Yes**, may use redaction technology and shall consider the use of such technology when balancing the public interests to mitigate privacy concerns, provided that the redaction does **not prevent a viewer from being able to fully and accurately perceive the events captured on the recording**. The recording shall not otherwise be edited or altered.	**Yes**, may use redaction technology to obscure specific portions of the recording that protect privacy interests. However, the redaction **shall not interfere with the viewer's ability to fully, completely, and accurately comprehend the events captured in the recording** and the recording shall not otherwise be edited or altered. *Must still disclose, unless privacy interest cannot be protected with redaction, and privacy interest outweighs interest in public disclosure. Then, must disclose to subject or specified connection of the subject within 120 days.
How Long Must Recording be Retained	**Not addressed.**	**Not addressed**.

	AB 459	AB 748
To Whom Can the Recording be Released	Same as CPRA. Plus, a **subject of a recording**, the parent or legal guardian of a minor subject, a deceased subject's next of kin, or a subject's legally authorized designee **shall have permission to inspect and obtain a copy of such recordings.**	**Any member of the public** pursuant to the CPRA if the recording depicts an incident involving a peace officer's use of force, or is reasonably believed to involve a violation of law or public policy, within 120 days. **Only to the subject of recording**, subject's agent, parent or guardian (if subject is a minor), or to members of the immediate family (if subject is dead) **if 1) the subject's privacy cannot be protected, and 2) that interest outweighs public disclosure interest**. Must be requested. Agency must provide promptly in response to request, or may withhold for a maximum 120 days if disclosure would substantially impede investigation. **Not to third-party contractors**, except for data storage.

Selected Policies Comparison Table

	Los Angeles Police Department	Los Angeles County Sherriff	ACLU Model Policy
Source	Los Angeles Board of Police Commissioners Special Order No. 12[15]	Los Angeles County Sheriff's Department-Testing & Evaluation Guidelines[16]	ACLU Model Policy[17]
When Device Must be Activated to Record – General	**Prior to initiating any investigative or enforcement activity** involving a member of the public.	Must activate **for law enforcement purposes**.	Whenever a law enforcement officer is responding to a call for service or at the initiation of **any** other law enforcement or investigative **encounter between a law enforcement officer and a member of the public**.
When Device Must be Activated to Record – Enumerated Instances	1) Vehicle stops; 2) Pedestrian stops (including officer-initiated consensual encounters); 3) Calls for service; 4) Code 3 responses (including vehicle pursuits) regardless of whether the vehicle is equipped with In-Car Video equipment; 5) Foot pursuits; 6) Searches; 7) Arrests; 8) Uses of force; 9) In-custody transports; 10) Witness and victim interviews; 11) Crowd management and control involving enforcement or investigative contacts; and 12) Other investigative or enforcement activities where, in the officers judgment, a video recording would assist in the investigation or prosecution of a crime or when a	1) Pursuits; 2) Detentions; 3) Domestic violence calls; 4) Mental illness-related calls; and 5) Any other law enforcement action allowing officer discretion.	N/A

[15] L.A. BD. POLICE COMM'RS., SPECIAL ORDER NO. 12 (Apr. 28, 2015) (available at: http://clkrep.lacity.org/onlinedocs/2015/15-0479_rpt_LAPD_08-20-2015.pdf and http://clkrep.lacity.org/onlinedocs/2015/15-1471_misc_1_12-10-2015.pdf).

[16] Extracted from the report OFFICE OF INSPECTOR GENERAL COUNTY OF LOS ANGELES, BODY-WORN CAMERAS: POLICY RECOMMENDATIONS AND REVIEW OF LASD'S PILOT PROGRAM (Sep. 2015) (available at: https://oig.lacounty.gov/Portals/OIG/Reports/Body-Worn%20Cameras_OIG%20Report.pdf).

[17] ACLU, *A Model Act Regulating the Use of Wearable Body Cameras by Law Enforcement*, (Jan. 2017) (available at: https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement?redirect=model-act-regulating-use-wearable-body-cameras-law-enforcement).

	Los Angeles Police Department	Los Angeles County Sherriff	ACLU Model Policy
	recording of an encounter would assist in documenting the incident for later investigation or review		
When Recording May be Terminated / Stopped	Shall continue recording until the **investigative or enforcement activity involving a member of the public has ended**.	Continuous recording of an event should take place until **completion of the detention**; recordings should not be prematurely terminated. Officers should weigh factors, including "the good of the Department" when deciding to stop recording at an individual's request.	Shall not be deactivated until the **encounter has fully concluded and the law enforcement officer leaves the scene**.
Release of Recording	The LAPD **doesn't address** releasing video in written policies. Currently, the LAPD does not release videos of critical incidents except when used in trial or by order of a court.[18]	The LASD **doesn't address** releasing video in written policies. No guidelines are provided. LASD has not released any footage from the pilot project to the public.	*First*, it provides for **public release to any member of the public**, as set forth under the adopting jurisdiction's public records laws, provided the events recorded is identified with reasonable particularity. *Second*, notwithstanding the public release requirements of state public record laws, the model policy **prohibits public release, without express written permission** from the non-law enforcement subject(s) of the footage, if the video footage is *either not subject to a three (3) year retention period* (described below), *or* the footage is *subject to a three (3) year retention period because it captured an encounter which a complaint has been registered* by a subject of a video *or* because it was *voluntarily requested*.

[18] *See* Javiar Panzar, *Garcetti, Beck defend LAPD body camera policy*, L.A. TIMES (Sep. 4, 2015 2:45 PM), http://www.latimes.com/local/lanow/la-me-ln-garcetti-lapd-body-camera-policy-aclu-20150904-story.html.

	Los Angeles Police Department	Los Angeles County Sherriff	ACLU Model Policy
Retention of Recording	The LAPD policy **does not specify** the length of time recordings are retained.	The LASD policy **does not specify** the length of time recordings are retained.	Shall be retained **six (6) months** by the law enforcement agency that employs the officer whose camera captured the footage, or an authorized agent thereof, then permanently deleted. Shall be retained **three (3) years** if the video footage captures an interaction or event involving: 1) any *use of force*; or 2) an *encounter about which a complaint has been registered by a subject* of the video footage. Shall also be retained **three (3) years** if a longer retention period is **voluntarily requested** by certain peoples, such as law enforcement involved, subjects of the video, or next of kin to deceased video subjects.

FPPC Update

Thursday, September 14, 2017 General Session; 8:00 – 9:30 a.m.

Rachel H. Richman, City Attorney, Rosemead, Assistant City Attorney, Alhambra and Santa Clarita, Partner, Burke, Williams & Sorensen, LLP

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Notes:

FPPC UPDATE
FALL 2017

RACHEL H. RICHMAN, PARTNER
BURKE, WILLIAMS & SORENSEN, LLP

- FPPC REGULATIONS
- POLITICAL REFORM ACT LEGISLATION
- GOVERNMENT CODE 1090

burke
BURKE, WILLIAMS & SORENSEN, LLP

Municipal Tort and Civil Rights Litigation Update

Thursday, September 14, 2017 General Session; 8:00 – 9:30 a.m.

Timothy T. Coates, Managing Partner, Greines, Martin, Stein & Richland

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Notes:

MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

ANNUAL CONFERENCE

September 14, 2017

Presented By: Timothy T. Coates
Managing Partner
Greines, Martin, Stein & Richland LLP
Los Angeles California

I. POLICE LIABILITY—EXCESSIVE FORCE, SEARCH AND SEIZURE, QUALIFIED IMMUNITY.

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

- **Excessive force and liability for unlawful search.**

In *County of Los Angeles v. Mendez*, __ U.S. __, 137 S. Ct. 1539 (2017), the Supreme Court addressed the Ninth Circuit's long established "provocation rule." Under the "provocation rule," a police officer could be held liable for an otherwise reasonable use of force under *Graham v. Connor,* 490 U.S. 386 (1989) if the situation that spawned the use of force was the result of an independent, reckless violation of the Constitution by the police officer. *Mendez*, 137 S. Ct. at 1546. The rule was typically applied where police officers unlawfully entered premises in violation of the Fourth Amendment, and upon entry were confronted by an armed suspect, thus necessitating the use of force. Under the "provocation rule," even though the use of force might have been justified under *Graham*, nonetheless, the officers could be held liable because their earlier constitutional violation "provoked" the confrontation and subsequent use of force. *Id*.

In *Mendez*, officers received a tip from a confidential informant that an armed and dangerous individual for whom they had an arrest warrant was seen on a bicycle outside a residence. The officers went to the residence, asked for and were initially denied entrance by the owner, but eventually entered and searched the premises without finding the suspect. *Id*. at 1544. Other officers searched the grounds and came upon various outbuildings, including a one-room shack. *Id*. Unbeknownst to the officers, Mr. Mendez was sleeping on a futon with his wife, with a BB gun across his lap. *Id*. The officers entered without giving "knock notice." As a result, when the officers entered, Mr. Mendez thought it was the owner of the house and picked up the BB gun so he could stand up, which the officers perceived as a threat, thus causing them to shoot Mendez and his wife. *Id*. at 1544-45.

Following a bench trial, the district court found that the officers had reasonably perceived a threat to their safety and, therefore, the force employed was reasonable under *Graham*. *Id*. at 1545. However, the district court found that defendants could still be liable for excessive force under the "provocation rule" because the defendants' search of the shack independently violated the Fourth Amendment due to the absence of a warrant and the failure to give "knock notice." *Id*.

The Ninth Circuit affirmed, finding that although the officers were entitled to qualified immunity on the knock-and-announce claim, nonetheless, the warrantless entry of the shack violated clearly established law and under the "provocation rule" they could, therefore, be liable for excessive force. *Id*. at 1545-46.

In a unanimous opinion, the Supreme Court reversed, holding that the "provocation rule" improperly conflated two independent Fourth Amendment claims—an unreasonable seizure for purposes of excessive force, and unreasonable search. *Id*. at 1546-47. The court noted that the "provocation rule" "is an unwarranted and illogical expansion of *Graham*." *Id*. at 1548.

However, while the Court repudiated the "provocation rule" with its essentially automatic imposition of a liability on a defendant for a prior constitutional tort, nonetheless the Court expressly held that under some circumstances an earlier Fourth Amendment violation by a police officer could give rise to liability for injuries officers subsequently inflict as a result of the use of force in the course of a search. Thus, the Court observed that even "if the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused *by the warrantless entry*. The harm proximately caused by these two torts may overlap, but the two claims should not be confused." *Id*. at 1548 (emphasis in original).

Thus, although the Supreme Court eliminated the Ninth Circuit's "provocation rule," for the first time it has held that police officers might be held liable for injuries caused by the lawful use of force under *Graham*, so long as that use of force could be

said to be proximately caused by a prior Fourth Amendment violation. In *Mendez*, the Court remanded the matter to the Ninth Circuit for a clearer determination of precisely what Fourth Amendment violation proximately caused the officers' use of force. The Court observed that it was unclear from the Ninth Circuit's prior opinion whether it believed that the use of force was caused by the officers' violation of the "knock and announce" rule—for which the officers had been found qualifiedly immune—or whether the mere absence of the warrant itself could be said to have proximately caused the use of force and subsequent injury. *Id.* at 1548-49.

Although *Mendez* is in many respects a defense victory given its eradication of the "provocation rule," nonetheless, it expressly adopts a theory of liability that plaintiffs have been asserting for years—that an unlawful search may give rise to liability for a subsequent use of force. The debate in most cases will center on the issue of proximate cause, i.e., whether the particular Fourth Amendment violation is closely related to the subsequent use of force. In *Mendez*, much of the briefing concerned whether the mere absence of a warrant in and of itself could be said to have proximately caused the use of force, or whether it was merely a "but for" cause of the sort generally insufficient to support liability under basic tort principles. In some instances, the underlying Fourth Amendment violation will necessarily be closely related to the use of force, such as the knock notice violation for which the officers were found qualifiedly immune in *Mendez*. It is highly foreseeable that a surprise entrance by police officers might startle a homeowner who may be armed (especially given Supreme Court jurisprudence underscoring the right to carry a gun for self-protection in the home), thus prompting the use of force by police officers.

Similarly, one of the reasons police officers are required to seek a warrant is that judicial review assures that any search and entry is supported by probable cause. If officers fail to secure a warrant when appropriate and lack probable cause, a strong argument can be made by plaintiffs that the failure to secure a warrant resulted in the

subsequent use of force, because had officers sought judicial intervention, they would not have been allowed to enter in the first place. In contrast, purely technical defects in a warrant, such as failure to adequately describe what is to be seized, or the places to be searched, are probably not closely related to a subsequent use of force, as circumstances likely would have played out the same regardless of whether the warrant was technically defective.

Hopefully, the Ninth Circuit will clarify the causation standard in its decision in the *Mendez* case on remand.

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

- **Proper canine "Bite and Hold" policy does not result in excessive force.**

In *Lowry v. City of San Diego*, 858 F.3d 1248 (9th Cir. 2017), an en banc panel of the Ninth Circuit clarified that use of a canine in a "bite and hold" scenario did not constitute excessive force. In *Lowry*, the plaintiff was bitten on her lip after she had returned to her place of business shortly before 11:00 p.m. after an evening of drinking, and fell asleep on the couch. When she had entered the office she had triggered a burglar alarm to which police officers responded, accompanied by a police service dog. The officers inspected the building and found a door to a darkened office suite propped open. Unable to see inside, one of the police officers warned: "This is the San Diego Police Department! Come out now or I'm sending in a police dog! You may be bitten!" *Id*. at 1252. No one responded and the officers suspected that a burglary might be in progress and the perpetrator was still inside the suite. The officers repeated the warning and after receiving no response, one of the officers released the police dog from her leash and followed closely behind as they scanned each room. When they entered one room, the officer saw a figure—the plaintiff—lying down on a couch and the police dog leaped on the couch and bit her. The officer immediately pulled the dog off the plaintiff.

The plaintiff filed suit against the City of San Diego, asserting a claim under *Monell v. Department of Social Services of New York,* 436 U.S. 658 (1978), alleging that the City's policy of "bite and hold" constituted excessive force and violated the Fourth Amendment. *Id*. at 1253. The district court granted the City's motion for summary judgment, finding that the force used was reasonable. A divided three judge panel of the Ninth Circuit reversed the summary judgment and remanded. However, the Ninth Circuit granted rehearing en banc, reversed the panel decision and affirmed the grant of summary judgment to the City.

The en banc panel found that under the circumstances, the use of force was reasonable. The court concluded that the amount of force was relatively minor, as the police dog had only bitten the plaintiff once. The court contrasted that to several cases where the court had held that use of a canine could constitute excessive force where the animal bit a suspect severely and repeatedly. *See id*. at 1257 (citing *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005) (en banc); *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994)). The court noted that the presence of the officer closely behind the police dog was a significant factor in making certain that the dog did not inflict more serious injuries. *Id*.

The court also noted that the crime potentially confronting the officers was severe—a burglary at night in a commercial building. The officers could reasonably believe that someone engaging in such conduct at night posed a potential hazard, especially given the lack of response to the officer's commands. *Id*. at 1258.

The court also noted that the absence of a response indicated that whoever was there might be resisting the officer's authority, thus warranting use of force in order to ensure compliance with the officer's commands. *Id*. at 1258-59. Moreover and significantly, the officers repeatedly gave warnings of what was about to occur, and could therefore reasonably assume that the lack of response indicated that any suspect was going to resist arrest. *Id*. at 1258-59.

The Ninth Circuit also noted that while less intrusive means might have been used to examine the suite, that nonetheless, under the Fourth Amendment, the officers were not required to employ such tactics. *Id*. at 1259 ("In assessing alternatives, however, we must not forget that 'officers "are not required to use the least intrusive degree of force possible."'"). The court also found that use of the dog without a leash was reasonable because having an officer follow the animal on a short leash would expose the officer to potential danger. *Id*. at 1259-60.

Although highly factually specific, nonetheless *Lowry* provides strong guidance for those cities with police departments that employ a "bite and hold" policy for canines, as opposed to "find and bark." Based on *Lowry*, a "bite and hold" policy will likely withstand constitutional attack, so long as specific guidelines are in place. For example, use of the canine should be limited to those circumstances where, given the nature of the crime, officers face a potential threat of physical harm, for example, a burglary such as in *Lowry*, or when confronted with an armed suspect. In addition, an off-the-leash canine under a "bite and hold" policy should only be deployed after a warning is given and a reasonable time for response has elapsed. Moreover, an officer should follow closely, consistent with safety concerns, to assure that ultimate use of force by the canine is appropriate and terminated when necessary.

Although "bite and hold" policies have been under attack for several years, nonetheless *Lowry* provides strong support for such policies when implemented with appropriate guidelines.

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

- **Fourth Amendment applies to administrative seizures of property and forecloses automatic 30-day impoundment of a vehicle driven by an unlicensed driver under Cal. Veh. Code § 14602.6(a)(1).**

In *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017), the plaintiff's car was impounded for 30 days pursuant to California Vehicle Code section 14602.6(a)(1). She had loaned her car to a driver with a suspended license who was stopped by the police, who then impounded the vehicle in accordance with the Vehicle Code provision which authorizes a 30-day impoundment of any car driven by an unlicensed driver, subject to a hearing within two business days. *Id.* at 1195-96.

Plaintiff sued the City, various police officers and the Chief of Police, arguing that the automatic 30-day impoundment violated the Fourth Amendment in that a seizure for that lengthy period could not be deemed reasonable. The District Court granted summary judgment to the defendants, finding that the 30-day impoundment period was a valid administrative penalty. The Ninth Circuit, however, reversed. The court noted that even if the initial seizure was justified by probable cause, that a detention can become unreasonable under the Fourth Amendment where the duration of the seizure is unreasonable. *Id*. at 1196-97. The court acknowledged that it was departing from the Seventh Circuit, which had found such impoundments valid under the Fourth Amendment. *Id.* at 1197 (citing *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003)). The court emphasized that Vehicle Code section 14602.6(a) ran afoul of the Fourth Amendment because of the mandatory 30-day impoundment period, noting that a seizure under Vehicle Code section 22651(p) would not necessarily run afoul of the Fourth Amendment because the latter provision did not have a mandatory impoundment period. *Id*. at 1197-98.

Brewster clearly has a direct impact on city policies with respect to seizing and impounding vehicles driven by unlicensed drivers or those driving on a suspended license. In order to avoid potential liability under *Brewster*, a city may well want to implement a policy whereby impounded vehicles are not held for a mandatory 30-day period, but made available to the owner on a shorter time frame. Alternatively, the hearing required under the statute could be expanded to make a particularized determination as to how long a specific vehicle should be held.

D. *Hernandez v. Mesa*, __ U.S. __, 137 S. Ct. 2003 (2017).

- **Qualified immunity must be determined based upon facts known to the officer at the time the incident occurred.**

In *Hernandez v. Mesa*, __ U.S. __, 137 S. Ct. 2003 (2017), a Border Patrol officer was sued for shooting a 15-year-old Mexican national across the U.S.-Mexican border. The boy's parents alleged that the shooting violated the Fourth Amendment and that they had a right to bring a direct action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The district court granted the Border Patrol officer's motion to dismiss, and after a panel of the Fifth Circuit affirmed in part and reversed in part, an en banc panel unanimously affirmed the district court's dismissal of the claim. The en banc panel found that plaintiffs could not assert a Fourth Amendment violation because the decedent was a Mexican citizen who had no significant voluntary connection to the United States, and that even assuming the existence of a possible Fifth Amendment claim, the officer was entitled to qualified immunity because there was no clearly established law concerning an excessive force claim arising from use of force by a United States official on United States soil, against a foreign national on foreign soil. *Id.* at 2006.

The Supreme Court reversed the Fifth Circuit en banc panel, declining to reach the Fourth Amendment issue and directing the circuit court to address the question of whether plaintiffs could state a *Bivens* action at all, given the Court's recent decision in

Ziglar v. Abbasi, ___ U.S. ___, 137 S. Ct. 1843 (2017) which had noted that such claims must be rigorously restricted. *Id*. at 2006-07. The Court reversed the Fifth Circuit's decision with respect to qualified immunity on the Fifth Amendment claim because it was premised on the notion that no clearly established law would have put the officer on notice that he could be potentially liable for using force across the border against a foreign national. However, the Court noted that, at the time the officer shot the youth, the officer was unaware that the boy was, in fact, an alien who had no significant voluntary connection to the United States. *Id.* at 2007. The Court found that qualified immunity was therefore inappropriate:

"The qualified immunity analysis thus is limited to 'the facts that were knowable to the defendant officers' at the time they engaged in the conduct in question. [Citation omitted.] Facts an officer learns after the incident ends—whether those facts would support granting immunity or denying it—are not relevant."

Id. at 2007.

Hernandez reaffirms the general principle that in evaluating a police officer's conduct, including entitlement to qualified immunity, the focus must be on the facts known or knowable to the officer at the time of the incident in question. After-acquired evidence is simply irrelevant to the qualified immunity issue.

E. *S.B. v. County of San Diego,* No. 15-56848, 2017 WL 1959984 (9th Cir. May 12, 2017).

- **Defendant police officer entitled to qualified immunity where plaintiff could not identify clearly established law in the form of appellate decisions addressing a directly analogous factual situation.**

In *S.B. v. County of San Diego*, No. 15-56848, 2017 WL 1959984 (9th Cir. May 12, 2017), the court applied an extremely stringent standard for determining clearly

established law for purposes of qualified immunity. In *S.B.*, the plaintiff's father (Brown) was shot by a police officer who perceived he was about to draw a knife and attack another officer. Relatives had been concerned about Brown's behavior all day and eventually went to a fire station to report that he was intoxicated, acting aggressively, and apparently suffering from bipolar disorder, among other complications. Officers eventually went to Brown's house, where they found him in his kitchen, with several knives on his person, although he did not have knives in his hands. Brown eventually complied with the officers' demands that he get on his knees, and while one officer was covering him with a Taser, and the others with guns drawn, Brown made some movement to touch one of the knives, which one officer perceived as an attempt to attack other officers with the knife, thus prompting him to shoot.

The district court denied summary judgment, finding numerous issues of fact concerning the officers' account of how the shooting transpired. The Ninth Circuit reversed, finding that the officer was entitled to qualified immunity. Significantly, the court noted that there were numerous issues of fact as to whether the officer's use of force was reasonable. However, it concluded that the officer was entitled to summary judgment because plaintiffs could not identify any appellate opinion with directly analogous facts. It rejected the plaintiffs' contention that the court's decision in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), constituted clearly established law concerning an officer's potential liability for shooting a mentally ill person armed with a knife because there the suspect had only threatened himself, and not others. Of particular note, the court cited the Supreme Court's recent decision in *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548 (2017), as underscoring the need to identify specific case law with analogous facts in order to find that the law is clearly established for purposes of analyzing a qualified immunity claim. As the Ninth Circuit noted in *S.B.*, "We hear the Supreme Court loud and clear. Before a court can impose liability on [the officer], we must identify precedent as of August 24, 2013—the night of the shooting—that put [the officer] on clear notice that using deadly force in these particular circumstances would be

excessive." *S.B.*, 2017 WL 1959984 at *6. The court emphasized, "[W]e must 'identify a case where an officer acting under similar circumstances as [the officer] was held to have violated the Fourth Amendment.' [Citation omitted.] We cannot locate any such precedent." *Id*.

Significantly, the court also emphasized that district court opinions would be insufficient to constitute clearly established law for purposes of qualified immunity. *Id*. ("However, 'district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity.'").

S.B. is significant because it applies the Supreme Court's decision in *White* very stringently, and it provides strong support for the qualified immunity defense on behalf of police officers.

II. FIRST AMENDMENT CLAIMS.

A. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, ___ U.S. ___, 137 S. Ct. 2012 (2017).

- **Free Exercise Clause of First Amendment prohibits governmental entities from denying generally available public benefits to religious organizations.**

Trinity Lutheran Church of Columbia, Inc. v. Comer, ___ U.S. ___, 137 S. Ct. 2012 (2017), arose from a program by the State of Missouri designed to recycle scrap tires for use as playground surfaces. Under the state program, any organization with a playground could request the state to provide them with rubber mats made from the recycled tires. However, because the Missouri Constitution had a strict provision prohibiting economic support of any religion, the state barred religious organizations from participating in the program. Thus, although the Trinity Lutheran Church of Columbia would otherwise qualify for the benefit, the State of Missouri rejected its

application. The church sued, arguing that withholding the otherwise generally available benefit constituted a burden on the church's free exercise of religion under the First Amendment. The district court rejected the contention, citing the Supreme Court's earlier decision in *Locke v. Davey*, 540 U.S. 712 (2004), which held that the State of Washington could properly withhold state scholarships for university studies from students majoring in divinity, noting that withholding the scholarship money did not burden a student's free exercise of religion.

The Eighth Circuit affirmed. It held that although the state probably could allow religious organizations to participate in the Scrap Tire Program without running afoul of the Establishment Clause, nonetheless the stricter provisions of the Missouri Constitution prohibiting state aid to religion, prevented the state from extending the program to religious organizations. It also found that the state's action did not violate the Free Exercise Clause of the First Amendment. *Id*. at 2018-19.

In a 7-2 decision, the Supreme Court reversed, holding that the Missouri program violated the Free Exercise Clause by denying the Church an otherwise available public benefit on account of its religious status. *Id*. at 2021-22. The Court noted that in *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion), the Court had struck down under the Free Exercise Clause a Tennessee statute that disqualified ministers from serving as delegates to the state's constitutional convention. The plurality opinion noted that the statute effectively discriminated against the plaintiff based upon his religion—he was denied a benefit solely because of his status as a minister. *See* 137 S. Ct. at 2020 (citing 435 U.S. at 627). Analogizing to *McDaniel*, the Court observed that the Missouri statute itself denied a generally available benefit based solely on the church's status as a religious organization. As a result, it put the church to an improper choice—it could participate in an otherwise available benefit program or it could remain a religious institution. *Id*. at 2021-22.

The Court distinguished *Locke* on the ground that the Washington scholarship statute was extremely limited in scope, in that it solely prohibited use of funds to study for the ministry. In contrast, the Missouri statute involved a public benefit that had little or nothing to do with supporting religious doctrine. *Id*. at 2023-24.

In this regard, it is critical to note that four of the seven justices in the majority refused to join in a footnote which attempted to limit the scope of the court's holding to the specific program at issue, i.e., the Scrap Tire Program. *See id*. at 2024 n.3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."). Thus, at least four justices believed the case should be given broader application and indeed Justice Gorsuch, joined by Justice Thomas, wrote a concurring opinion broadly construing the prohibition against the free exercise of religion and suggesting that *Locke* should be overruled. *Id*. at 2025-26.

As a result, despite the purportedly limiting language of footnote 3, *Trinity Lutheran Church* will likely have a broad impact with respect to the participation of religious organizations in public programs. To be sure, it has long been established that where the government makes public facilities available to community organizations, it cannot exclude religious organizations from using the facilities, even for religious teachings, without running afoul of the Free Speech Clause of the First Amendment, or the Equal Protection Clause of the Fourteenth Amendment. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001). However, *Trinity Lutheran Church* now expands those principles under the rubric of the Free Exercise Clause to include benefits provided to the general public under various programs. Under *Trinity Lutheran Church*, cities and other public entities will have to review any public subsidy or in-kind benefit programs to make certain that religious organizations are not improperly excluded. For example, a local policy by which offenders perform community service in the form of cleaning up

private property, such as mall parking lots, might have to be extended to playgrounds or facilities owned by religious organizations.

Moreover, *Trinity Lutheran Church* could have a particularly profound impact in California, where the California Constitution's No Preference and, more particularly, No Aid provisions have been given a very stringent interpretation. The No Aid Clause hasbeen viewed as prohibiting virtually any direct financial support of a religious organization. Many cases interpreting the No Preference and No Aid Clauses of the California Constitution would likely come down differently if the Free Exercise principles of *Trinity Lutheran Church* are rigorously applied. *See*, *e.g.*, *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154 (1963) (First Amendment, No Aid Provision and No Preference Provision of the California Constitution bar county from subsidizing religious parade that will be filmed as part of a promotional film for the county showing various parades). Based on *Trinity Lutheran Church*, it is anticipated that all public entities will see an uptick in litigation, faced with the ultimate Hobson's choice—a lawsuit based on an Establishment Clause claim on one hand, or a Free Exercise Clause-based lawsuit on the other.

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

- **Posing for photographs in public and non-coercive solicitation of tips for doing so, constitute creative expression protected by the First Amendment.**

In *Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017), the plaintiff, along with her colleague Ms. Patrick, traveled to the Las Vegas Strip for purposes of posing as "sexy cops," and soliciting tips from tourists who wished to photograph them. The county and its police force had earlier entered into a Memorandum of Understanding ("MOU") whereby it acknowledged that its business licensing scheme did not apply to street performers who solicited tips in a non-coercive fashion. The MOU had acknowledged

that street performance was a protected activity, as was non-coercive solicitation of payment for such street performances. *Id.* at 985.

Three undercover police officers approached the plaintiff and Ms. Patrick and asked how much a picture cost and plaintiff replied that it didn't cost anything, that they were just asking for a tip. *Id*. at 984. One of the officers then posed with the two women and made a motion to leave without tipping them. *Id*. Ms. Patrick then reminded one of the officers about the tip, who then replied that no tip would be forthcoming. *Id*. Ms. Patrick then asked the officers to delete the photo from the camera. *Id*. One of the officers then asked the plaintiff what she would do if they did not leave a tip, and she indicated that she would not do anything and would not demand a tip, only that she believed that he had promised one. *Id*. When Ms. Patrick indicated that she thought they had a verbal agreement, both she and the plaintiff were arrested for engaging in a business without a license in violation of the county ordinance. *Id*.

The district court granted summary judgment to the officers, concluding that Ms. Patrick and the plaintiff, "by association," were conducting a business without a license in violation of the county municipal code. *Id.* at 986.

The Ninth Circuit reversed. The court reaffirmed that engaging in street performances constituted protected First Amendment activity. *Id.* at 987-88. The court also noted that solicitation of tips was also entitled to the same constitutional protection as traditional speech, and that solicitation of a tip in a non-coercive matter was protected activity. *Id.* at 988.

The court also held that plaintiff had been improperly arrested based upon statements made by her colleague Ms. Patrick. The court emphasized that the plaintiff had been arrested solely because of her association with Ms. Patrick—an association undertaken for the purpose of engaging in First Amendment protected activity, i.e., posing as "sexy cops." The court held that this "expressive association" was protected by

the First Amendment, and therefore the arrest was unlawful. *Id.* at 989-90. The court observed:

> "Here, the record indicates the Officers had no evidence before them when they decided to arrest Santopietro that suggested that the 'sexy cops' *association* had any purpose that could have fallen outside the protection of the First Amendment . . . . Nor was there evidence of Santopietro's intent to engage with Patrick in anything other than clearly constitutionally protected expressive activity (which, again, includes active solicitation of voluntary tips). Both 'sexy cop' performers were engaging largely, if not entirely, in activity that was not only legitimate but also constitutionally protected."

Id. at 990.

The court also observed that "the sale of a snapshot of a performer's protected street performance is likely protected in itself" by the First Amendment. *Id*. at 993. The court emphasized that "[a]lthough the 'customer' is involved in the process of creating the work at issue here" there is "no dispute that Santopietro and Patrick 'applie[d] their creative talents' [citation omitted], to help create the picture." *Id.*

The Ninth Circuit's decision in *Santopietro* again underscores the great care that must be taken in attempting to enforce local regulations regulating commercial transactions in public spaces. It makes it clear that posing for "character photos" is a protected activity, as is soliciting tips for engaging in that activity. Thus, any attempts to regulate such "creative expression," must adhere rigorously to general First Amendment standards, i.e. time, place, manner restrictions.

C. *First Resort, Inc. v. Herrera,* 860 F.3d 1263 (9th Cir. 2017).

- **Permissible regulation of commercial speech concerning pregnancy clinical services.**

First Resort, Inc. v. Herrera, 860 F.3d 1263 (9th Cir. 2017), addresses the ability of a local public entity to regulate commercial speech, most specifically commercial speech concerning pregnancy consultation services. The Ninth Circuit found that so long as such ordinances are drawn narrowly to address only commercial speech, they do not

run afoul of the First Amendment, nor are they preempted by the state False Advertising Law, California Business and Professions Code section 17500.

The City of San Francisco passed an ordinance aimed at preventing limited services pregnancy centers (LSPCs), which neither provided abortion services nor referred patients to facilities that did, from engaging in misleading advertising. The court noted that such centers often engaged in misleading practices, which caused pregnant women who might be considering an abortion to come to the centers, where they were counseled against terminating the pregnancy. The ordinance specifically prohibited any statement, including over the internet, concerning pregnancy-related services "which is untrue or misleading, whether by statement or omission, that the (LSPC) knows or which it by the exercise of reasonable care should know to be untrue or misleading." S.F. Admin. Code, ch. 93 § 93.4.

The plaintiff, an LSPC, filed suit for injunctive and declaratory relief, asserting that the ordinance violated the First Amendment in various respects, including that it was vague and overbroad, discriminated based upon viewpoint, and regulated protected speech. The district court granted summary judgment to the city, and the Ninth Circuit affirmed.

The Ninth Circuit noted that the ordinance was concerned with regulating only commercial speech, i.e. speech by the LSPCs that was attempting to solicit customers to use its services. *First Resort*, 860 F.3d at 1271-74. That the centers did not charge for such services in all instances did not matter, as patient stories were used in fundraising efforts, and hence had a commercial component to them. *Id*. at 1272.

The Ninth Circuit also noted that the statute was not overbroad in that it only prohibited false or misleading speech, which were terms of common understanding. *Id*. at 1271. It also concluded that the statute did not engage in viewpoint discrimination, as it only applied to centers that did not offer abortion services, and a center might choose not to offer abortion services for purposes entirely unrelated to whether the operator

believed such procedures were proper; for example, logistic limitations might prevent an operator from offering the services. *Id*. at 1277-79.

The court also found that the local ordinance was not preempted by state law regulating false advertising. *Id*. at 1279-81. The court observed that the local ordinance was a civil regulatory statute, and did not impose any criminal penalties. *Id*. at 1280. In addition, the local ordinance was actually broader than the state false advertising law, in that the latter only regulated express statements, whereas the local ordinance also covered implied misrepresentation, i.e. omission of pertinent information which left a false impression on the public. *Id*. at 1280-81.

The *First Resort* case provides a very clear template for local ordinances attempting to regulate false and misleading statements by LSPCs. It also narrowly construes state preemption law as granting local entities greater leeway in regulating activities that might also be subject to regulation under state consumer protection statutes, such as the false advertising law.

III. HOUSING DISCRIMINATION.

A. *Bank of America Corp. v. City of Miami*, ___ U.S. ___, 137 S. Ct. 1296 (2017).

- **City may be able to assert a Fair Housing Act ("FHA") claim against lenders engaging in discriminatory mortgage practices if it can establish proximate cause, i.e., a close relationship between the discriminatory conduct and a direct economic injury to the city.**

In *Bank of America Corp. v. City of Miami*, ___ U.S. ___, 137 S. Ct. 1296 (2017), the Supreme Court held that public entities could assert claims against lenders under the FHA, although it left open the question of whether cities could ultimately succeed on such claims. In *Bank of America*, the City of Miami sued various lenders asserting that

their discriminatory lending practices resulted in an extremely high rate of defaults on mortgages of minority citizens, thus causing economic damage to the city in the form of having to abate the nuisance of abandoned properties, provide heightened police and fire protection for economically ravaged areas and loss of tax revenue. The district court dismissed the claim, finding that the city's economic claims were outside the zone of interest protected by the FHA and that, in any event, the city could not show a causal connection between the bank's discriminatory conduct and any economic injury. The Eleventh Circuit reversed, holding that the city's injuries fell within the zone of interest protected by the FHA and that the complaint adequately alleged a proximate cause of injuries to the city.

The Supreme Court affirmed in part and reversed in part. It agreed with the Eleventh Circuit that the injuries alleged by the city did indeed fall within the zone of interests addressed by the FHA. However, it remanded to the lower courts to examine the proximate cause issue more closely. It emphasized that there had to be a direct link between the discriminatory conduct of the lenders and the specific injury suffered by the city. The Court stated that it would not be enough that the type of injuries suffered by the city, i.e., a loss in tax revenue from defaulted properties and an increased burden of providing law enforcement and other community services, were generally foreseeable as a result of the bank's discriminatory lending practices. *Id.* at 1305-06. The Court noted:

> "In the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires. The housing market is interconnected with economic and social life. A violation of the FHA may, therefore, '"be expected to cause ripples of harm to flow'" far beyond the defendant's misconduct. [Citation omitted.] Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel. And entertaining suits to recover damages for any foreseeable result of an FHA violation would risk 'massive and complex damages litigation. [Citation omitted.]'"

Id. at 1306.

The Court emphasized that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Id*. It analogized to other tort actions, and noted "we have repeatedly applied directness [sic] principles to statutes with 'common-law foundations.'" *Id*. Thus, it suggested that damages should not go beyond any "first step" of liability, although the Court declined to address what that "first step" might be in the first instance. *Id*.

Thus, although the Supreme Court in *Bank of America* clarified that public entities could assert damage claims under the FHA, nonetheless, its failure to specifically address and clarify what constitutes proximate cause for purposes of recovery leaves such claims up in the air. Nonetheless, in the wake of the financial market meltdown in 2008 and resulting foreclosure crises that caused many cities to face urban and suburban blight, the court's decision provides a basis for cities to possibly recoup attendant expenses and revenue losses in the form of an FHA action, though ultimate success on such claims remains highly uncertain.

Land Use and CEQA Litigation Update

Thursday, September 14, 2017 General Session; 1:00 – 2:30 p.m.

James G. Moose, Senior Partner, Remy Moose Manley

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Notes:

CEQA AND LAND USE LAW UPDATE: April – July 2017

Prepared by Jim Moose

Remy Moose Manley LLP

Sacramento, California

September 14, 2017

[Current as of August 8, 2017]

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OPINIONS ON ISSUES UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Scope of CEQA

- ***Friends of the Eel River v. North Coast Railroad Authority* (2017) ___Cal.App.5th ___ (No. S222472).**

The California Supreme Court held that the Interstate Commerce Commission Termination Act (ICCTA) does *not* preempt CEQA when a California public agency decides to undertake a new railroad project, even if the state agency later authorizes a private entity to operate the new rail line. The Court therefore concluded that the North Coast Railroad Authority (NCRA) was required to comply with CEQA prior to taking steps to reinitiate rail service on a segment of an interstate rail line that had gone out of operation for many years. The Court declined, however, to enjoin the ongoing operations of the railroad by NWPCo, the private operator. Because these operations had been occurring during the course of the litigation against NCRA, any such injunction would intrude into an area of activity that *is* preempted by the ICCTA, namely, private railroad operations.

The NCRA is a state agency created in 1989 for the purpose of resuming railroad freight service along a previously-abandoned route through Napa and Humboldt Counties. The northern portion of the line runs along the Eel River, while the southern portion, at issue in the case, runs along the Russian River. In 2000, the Legislature authorized funding for NCRA's program, with the express condition of CEQA compliance. NCRA subsequently contracted with NWPCo, a private company, to run the railroad. As part of the lease agreement between the two entities, NWPCo agreed that CEQA compliance by NCRA was a precondition to resumed operation. Accordingly, in 2007, NCRA issued a notice of preparation, and in June 2011, it certified a Final EIR. In July 2011, petitioners sued, challenging the adequacy of the EIR on a number of grounds. Concurrently, NWPCo commenced limited freight service along the Russian River. In 2013, NCRA took the unusual step of rescinding its certification of the Final EIR, asserting in explanation as follows: that ICCTA preempted California environmental laws; that the reinitiation of rail service was not a "project" under CEQA; and that the EIR NCRA had prepared had not been legally required. Although NCRA successfully removed the case to federal court, the case subsequently sent back to state court for a resolution of both the state CEQA claims and NCRA's ICCTA preemption defense. The Court of Appeal sided with NCRA, finding that ICCTA was broadly preemptive of CEQA. The Supreme Court granted review.

Federal preemption is based on the Supremacy Clause of the United States Constitution, which provides that federal law is the supreme law of the land. Preemption can occur expressly, through the plain words of a federal statute, or can be implied, as when a court discerns that Congress intends to occupy an entire field of regulation, or when a court concludes that a state law conflicts with a federal purpose or the means of achieving that purpose. A federal statute can be preemptive on its face or as applied. There is a presumption against preemption, particularly in areas traditionally regulated by the states, which can only be overcome by a clear expression of intent (the *Nixon/Gregory* rule). The market participant doctrine is a related concept and holds that a public agency has all the freedoms and restrictions of a private party when it engages in the

market (provided that the state does not use tools that are unavailable to private actors). The courts presume that Congress did not intend to reach into and preempt such proprietary marketplace arrangements, absent clear evidence of such expansive intent.

The Court began by recognizing that ICCTA *does* preempt state environmental laws, including CEQA, that interfere with private railroad operations authorized by the federal government. ICCTA contains an express preemption clause giving the federal Surface Transportation Board (STB) jurisdiction over railroad transportation (including operation, construction, acquisition, and abandonment). ICCTA's purpose was both unifying (to create national standards) and deregulatory (to minimize state and federal barriers). Although ICCTA is a form of economic regulation, state environmental laws are also economic in nature when they facially, or as applied, dictate where or how a railroad can operate in light of environmental concerns. Such state laws act impermissibly as "environmental preclearance statutes." These legal principles, however, did not extend to the actions of NCRA in this case. Just as a private railroad company may make operational decisions based on internal policies and procedures, and may even modify its operations voluntarily in order to reduce environmental risks and effects, so too may a state, in determining whether to create a new railroad line, subject itself to its own internal requirements aimed at environmental concerns. In the latter context, though, a state operates through laws and regulations, as opposed to purely private policies. When a state acts in such a manner, its laws and regulations are a form of self-governance, and are not regulatory in character. CEQA is an example of such an internal guideline that governs the process by which a state, through its subdivisions, may develop and approve projects that affect the environment. Viewed in this context, CEQA is part of state self-governance, and is not a regulation of private activity.

Although the market participant doctrine does not directly apply, being mainly applicable in Commerce Clause jurisprudence, the doctrine supports by analogy the view that that California was not acting in a regulatory capacity in this case. CEQA is analogous to private company bylaws and guidance to which corporations voluntarily subject themselves. By imposing CEQA requirements on the NCRA, the state was not "regulating" any private entity, but rather was simply requiring that NCRA, as one of its subdivisions, conduct environmental review prior to making a policy decision to recommence the operation of an abandoned rail line. If Congress had intended to preempt the ability of states to govern themselves in such a fashion, any such intention should have been clear and unequivocal. The Court found no such intent in the ICCTA.

The Court's remedy, however, was cognizant of the narrowness of its holding. The Court concluded that, because NWPCo is currently operating the line, the California Judiciary could not enjoin that private entity's operations even if, on remand, the lower state courts found problems with NCRA's CEQA documentation. An injunction under CEQA against NWPCo *would* act as a regulation, by having the state dictate the actions to private railroad operator. Such action would go beyond the state controlling its own operations.

Statutory Exemptions

❖ ***Sierra Club v. County of Sonoma* (2017) 11 Cal.5th 11**

The First District Court of Appeal held that issuing an erosion-control permit to establish a vineyard was a ministerial act and exempt from CEQA. Thus, the permit application submitted by Ohlson Ranch was not subject to CEQA review by the County of Sonoma.

As of 2000, Sonoma County requires issuance of an erosion-control permit by the County Agricultural Commissioner for the development or replanting of commercial vineyards. Prior to 2000, no governmental review or permission was required for planting or re-planting a vineyard. In December 2013, the commissioner issued a permit to Ohlson Ranch for a 108-acre vineyard, followed by a notice of exemption indicating that issuance of the permit was ministerial and therefore required no environmental review. (Pub. Resources Code, § 21080, subd. (b)(1).) The Sierra Club and Center for Biological Diversity filed suit challenging the commissioner's determination; the lower court denied the petition.

The Court of Appeal upheld the lower court's decision by applying the "functional distinction" test from *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259. Per *Friends of Westwood*, an action is ministerial under CEQA when the agency does not have the power to deny or condition the permit, or otherwise modify the project, in ways which can mitigate the environmental impacts that would be identified in an EIR. Petitioners' key argument—that the ordinance's terms were "general enough to confer discretion" to the County—did not persuade the Court. In reaching this decision, the Court emphasized that CEQA analysis is project-specific and should focus on the particular provisions of an ordinance that govern the particular proposed project at issue. A project might fall solely under ministerial provisions of a complex, multi-part ordinance, and not implicate at all other provisions that might give an agency discretionary authority. Here, many of the terms and conditions in the ordinance that may have conferred discretion to the County did not apply to the Ohlson Ranch permit application because they were either (i) factually inapplicable; (ii) expressly excluded from consideration by the commissioner with regard to this project; or (iii) involved ongoing vineyard operations, and there was no evidence in the record to suggest that they played any role in issuing the permit.

Second, even where some of the applicable provisions could have conferred discretion on the Commissioner, under the functional distinction test, the County could not have modified the project or "mitigate[d] potential environmental impacts to any meaningful degree." Rather, County decision-making was guided by nearly 50 pages of technical guidance documents. A required wetland setback conferred discretion only to the extent that the distance of the setback would be determined by the biologist's report, but did not allow the agency to modify the biologist's recommendations. A requirement to divert storm water to the nearest "practicable" disposal location was similarly ministerial, in that the permit application provided a means of water diversion, and petitioner failed to establish that other diversion methods were even available. If other methods had been available, the ordinance may have granted discretion to the commissioner to select an option or otherwise mitigate impacts. Petitioners' reliance on a provision to incorporate natural drainage features "whenever possible" was flawed for the same

reasons, as petitioners failed to identify the types of features present on the site and the commissioner's ability to choose the least environmentally significant option.

Third, the Court declined to hold that issuing a permit, an otherwise ministerial act, becomes discretionary because the applicant "offers" to mitigate potential impacts. If the ordinance does not require mitigation measures, then the Commissioner has no authority to condition granting the permit application on them. Similarly, the Commissioner's request for corrections and clarifications on the permit application did not demonstrate discretion, but rather was a simple request for information in order to complete an otherwise non-discretionary act. These corrections and clarifications were not significant enough to have alleviated "adverse environmental consequences."

Environmental Impact Reports

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

In a 6/1 split, the California Supreme Court held that the San Diego Association of Governments (SANDAG) did not abuse its discretion by failing to present, in its 2010 regional transportation plan (RTP) EIR, an analysis of the RTP's consistency with 2050 greenhouse gas (GHG) emissions reduction goals set forth in Executive Order (EO) S-3-05. The Court reasoned that, despite the lack of an express analysis of that issue, SANDAG had adequately informed the public, using information available at the time, of the RTP's inconsistencies with overall long-term state climate goals. The Court cautioned, however, that SANDAG's approach would not "necessarily be sufficient going forward."

In 2011, SANDAG issued its RTP pursuant to Government Code section 65020, subdivision (b), as a 40-year blueprint for a regional transportation system. As required by Senate Bill 375 (SB 375), the RTP included a "sustainable communities strategy" (SCS) informed by a regional GHG emissions budget, as determined by the Air Resources Board. (See Gov. Code, § 65080, subd. (b)(2).) The RTP was accompanied by an EIR that employed three thresholds of significance to assess GHG impacts. Compared to existing (2010) conditions, the EIR found the Plan's GHG-related impacts to be "not significant" in 2020 but significant in both 2035 and 2050. The EIR also analyzed GHG emissions against statutory goals for the years 2020 and 2035, but did not compare emissions against the long-term (2050) goal set forth in EO S-3-5 (80 percent below 1990 levels by 2050). In response to comments that were critical of the GHG analysis, SANDAG maintained it had no obligation to analyze projected GHG emissions against the goals of the EO. Several groups filed suits challenging EIR and Attorney General later joined petitioners. The lower court found the EIR inadequate and issued a writ of mandate. The Court of Appeal affirmed, holding that, among other flaws, the EIR violated CEQA by failing to measure GHG impacts against the 2050 GHG emissions target set forth in the EO.

Despite SANDAG's inclusion of this consistency analysis in its 2015 RTP update, which had been prepared in response to the Court of Appeal opinion, the Supreme Court undertook this "important question of law" because of its likelihood to recur with future RTPs and their successor plans. In making its decision, the Court balanced the need for an EIR to include sufficient detail (*Laurel Heights Improvement Assn. v. Regent of the University of California*

(1988) 47 Cal.3d 376) with an agency's discretion to evaluate environmental impacts in a reasonably feasible manner (CEQA Guidelines, §§ 15151, 15204, subd. (a)). Cleveland et al. argued that the EIR inadequately described the RTP's GHG emission impacts in that it obscured the issue and misled the public by not placing emission in a "meaningful context."

First, the Court responded by emphasizing that labeling an effect significant does not "excuse" a failure to "reasonably describe the nature and magnitude of the adverse effect." Second, the Court found problematic SANDAG's "conclusory" statement that its role in achieving statewide reduction targets is "likely small." Although individual projects in and of themselves are "unlikely" to contribute significantly to statewide GHG emissions, their emissions can be "cumulatively considerable" and therefore must be discussed in the context of statewide reduction goals. (Pub. Resources Code § 21083, subd. (b)(2); Guidelines § 15064, Subd. (h)(1).) Third, the Court maintained that a lead agency's discretion must be based on science and factual data regardless of legal requirements for any specific threshold of significance.

The Court disagreed, however, with the contention that the EIR obscured the relevant statutory framework or statewide goals, although the Court conceded that SANDAG could have presented the information in "clearer or more graphic" ways. Overall, the Court found that, to the extent that members of the public wanted to see a consistency analysis, the relevant information was "not difficult" to obtain. The Court stressed that inclusion of this information in responses to comments instead of the EIR itself "is not an infirmity" because it would be expected that members of the public "interested in the contents of an EIR will not neglect this section." The Court also acknowledged the parties' understanding that an EO does not carry the "force of a legal mandate" binding on SANDAG, but did not itself address this issue in any detail. Nor did the Court prescribe this specific outcome for other agencies, but instead repeatedly asserted the "narrowness" of its ruling and that planning agencies must ensure their analysis keeps up with "evolving scientific knowledge and state regulatory schemes." In reversing the Court of Appeal's judgment, the Court ruled only that the 2011 analysis of RTP GHGs emissions did not render the EIR inadequate; it declined to express opinion on other issues determined by the Court of Appeal, such as other deficiencies in the EIR and the writ of mandate setting aside the EIR's certification.

In a comprehensive dissent that included a detailed discussion of the legislative framework and history of California legislation addressing climate change and CEQA's purpose to provide "long-term protection of the environment," Justice Cuéllar challenged SANDAG's "good faith reasoned analysis" by its perceived obscuration of important GHG information within the EIR. Justice Cuéllar points to the "relative clarity of statewide statutory goals" as reasoning why SANDAG "does not have the discretion to downplay" the GHG consequences of its RTP. Further, he expressed concern that the majority's ruling will allow other regional planning agencies to "shirk their responsibilities."

❖ ***POET, LLC et al. v. State Air Resources Board* (2017) 12 Cal.App.5th 52 ("*POET II*")**

The Fifth District held that the California Air Resources Board (CARB) failed to comply with the terms of the writ of mandate issued by the same court in *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681 ("*POET I*"). The Court invalidated the lower court's discharge of the writ, modified the existing writ, and ordered CARB to correct its defective CEQA Environmental Analysis, and asserted that CARB had not acted in "good faith in its selection of improper baseline."

CARB promulgated low carbon fuel standards (LCFS) in 2009 as required by the 2006 California Global Warming Solutions Act ("AB 32"). In its promulgation process, CARB prepared an Environmental Analysis (EA), the functional equivalent of an EIR, pursuant to CEQA. The 2009 LCFS and EA were the subject of litigation in *POET I*, where the Fifth District found that the EA violated CEQA by impermissibly deferring analysis of the nitrous oxide (NOx) emissions from the combustion of biodiesel fuels that would be used to help meet the LCFS. The appellate court, however, took the acknowledged "unusual" step of allowing the 2009 regulations to remain in effect pending satisfaction of a writ of mandate. In 2015, in response to the Court's ruling in *POET I*, CARB produced an updated Environmental Analysis, updated LCFS regulations (2015 regulations), and alternative diesel fuel regulations (ADF regulations). The new EA analyzed the project using a 2014 baseline and determined that the regulations would not have significant impacts related to NOx emissions. On the return to the writ, the lower court agreed with CARB and discharged the 2014 writ. This appeal followed.

First, the Court applied the abuse of discretion standard and concluded that CARB continued to violate CEQA and the 2014 writ by selecting a 2014 project baseline. The Court explained that a normal existing-conditions baseline reflects conditions when the project commences, and impact analysis must include all related project activities. In addition, a regulatory scheme is a "project" under CEQA and includes all associated enactment, implementation, and enforcement activities. Here, the original regulations, 2015 regulations, and ADF regulations were related activities making up a single project because they concerned the same subject matter, had a shared objective, covered the same geographic area, and were temporally connected.

Second, the Court determined that by using a 2014 baseline the new EA failed to consider how the original regulations, which remained in effect during and after *POET I*, encouraged and increased the use of biodiesel fuel and its effect on NOx emissions. According to the Court, selecting such a limited baseline was not even "objectively reasonable" from the point of view of an attorney familiar with CEQA. In addition, the Court found that the flawed CEQA analysis was prejudicial because it deprived the public of a meaningful opportunity to review the effect of the agency's actions on the environment.

On remand, the Court instructed CARB to review its project baseline and select a "normal" baseline consistent with its analysis—not a baseline date of 2010 or after. While the Court declined to set a specific baseline date, it implied that it could even have begun in calendar year 2006, consistent with then-Governor Schwarzenegger's 2007 mandate to the agency to review fuel GHG emissions. The parties agreed that the ADF regulations were both severable and independently enforceable from the 2015 regulations. The Court found that the 2015

regulations were also severable from the remainder of the LCFS regulations because, though more effective in their entirety, the remaining regulations would be complete and retain utility. Ultimately though, as in *POET I*, the Court concluded that, on balance, suspending the regulations would cause more environmental harm than allowing them to remain in place.

In its reversal of the order discharging the writ, the Court ordered the lower court to modify the writ to compel CARB to amend its analysis of NOx emissions and freeze the existing regulations as they relate to diesel fuel and its substitutes. In addition, the Court ordered the lower court to retain jurisdiction and to require CARB to "proceed diligently, reasonably and in subjective good faith." Finally, the Court ordered that if CARB fails to proceed in this manner, the lower court shall immediately vacate the portion of the writ preserving the existing regulations, and may impose additional sanctions.

Supplemental Review

- ***Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2017) 11 Cal.App.5th 596**

The First District held that substantial evidence supported a "fair argument" that the demolition of a building and garden complex within a community college campus might have a new significant aesthetic effect not previously addressed in the mitigated negative declaration (MND) previously approved for a campus-wide renovation plan. The Court therefore invalidated the respondent community college district's addendum to that earlier MND, as prepared for the renovation plan changes necessitating the demolition.

In 2006, the San Mateo Community College District adopted a facilities master plan that proposed "nearly $1 billion in new construction and facilities renovation at the District's three college campuses." To comply with CEQA with respect to its vision for the College of San Mateo campus, the District prepared and published an MND before the Board of Directors approved a campus-wide renovation plan in 2007. In 2011, as a result of funding difficulties associated with a proposal to retain an on-campus garden area, the District abandoned that effort and instead added one building to its demolition list while taking two other buildings off the list. The changes would require the removal of several trees and other landscape features in the garden area. The District prepared an addendum to its earlier MND. The District Board then approved the modified project despite vocal criticism by certain members of the public, including students and faculty members. Petitioner filed suit challenging the approval, after which the District rescinded its actions, revised its addendum with bolstered analysis, and re-approved the project. Petitioners dropped their original suit but subsequently filed a new petition for mandate seeking an order directing the District to set aside its reapproval and to prepare an EIR.

The lower court granted petitioner's request for a writ and concluded that the proposed campus renovation plan changes constituted a "new project" that required brand new CEQA review – as opposed to more limited "supplemental review." The District appealed, but the Court of Appeal affirmed in an unpublished decision, citing an earlier Third District Court of Appeal decision entitled, *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 ("*Lishman*"). That latter decision took a narrow view of the universe of agency actions subject to

supplemental review. The District then sought and obtained review in the California Supreme Court on the ground that the reasoning set forth in *Lishman* was wrong. The high court agreed, wrote an opinion rejecting *Lishman*, and remanded the matter to the Court of Appeal for further proceedings. In doing so, the Court advocated judicial deference with respect to agency decisions to continue to rely on previously-prepared EIRs, but announced a new, much less deferential (and some would say confusing) approach to judicial review of agency decisions to continue to rely on previously-prepared MNDs or negative declarations (NDs). (*Friends of the College of San Mateo Gardens v. San Mateo Community College District et al.* (2016) 1 Cal.5th 937.)

On remand, the Court of Appeal applied the substantial evidence standard to find that the District's original MND continued to be relevant to the demolition of the garden area. Thus, the District had correctly concluded that it was legitimately operating within the world of supplemental review. The Court went on, however, to apply the fair argument standard to the question of whether the proposed demolition might cause new significant environmental effects. In doing so, the Court rejected the District's interpretation of that portion of the Supreme Court's decision involving judicial review of agency actions relying on addenda to MNDs and NDs. The District had argued that the applicable standard was more subtle and complex than the more straightforward "fair argument" standard that applies outside the context of supplemental environmental review. The District advocated substantial deference with respect to agency determinations on the subjects of the continuing vitality and relevance of a prior MND or ND, and whether project changes would truly result in any "new" environmental effects. The Court of Appeal disagreed:

> [W]here, as here, an agency originally prepares a negative declaration, we must assess whether there is "substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved." [Citation.] If there is such evidence, we cannot uphold the agency's determination that no major revisions were required. It is of no consequence whether the District believed that the prior MND remained "wholly relevant" or whether the District independently identified a new potentially significant environmental impact.

Applying this standard, the Court found a "fair argument." Individuals familiar with the garden area described it as "beautiful" and called such things as a "sanctuary," the "single surviving semi-natural asylum" on the campus, and "the only place left on campus where students, faculty, and staff can go to get away from the concrete and rigid plots of monoculture plantings that have taken over the campus." The Court mentioned a redwood tree that students described as "tall and majestic" and "irreplaceable." Although the tree would be preserved, the demolition "may cause future health or structural problems" for it, and "steps must be taken to protect the tree to reduce future problems." This evidence was enough to make reliance on an addendum improper, though the Court stopped short of ordering the preparation of an EIR.

CEQA Litigation

- ***Friends of Outlet Creek v. Mendocino County Air Quality Management District* (2017) 11 Cal.App.5th 1235**

This decision is one in a series of environmental and administrative challenges arising from approvals for an asphalt production facility in Mendocino County.

Here, **the First District Court of Appeal held that an air quality management district, acting as a CEQA responsible agency in approving an Authority to Construct (ATC) permit, may be sued under CEQA, and such suit a must be brought as an administrative mandamus proceeding under Code of Civil Procedure section 1094.5.**

In 2014, the applicant initiated with Mendocino County the process for resuming aggregate and asphalt production at an existing aggregate operation after years of reduced and, ultimately, halted operations due to market conditions. The site had been used for aggregate and asphalt production under County land use approvals originally granted in 1972. In 2002, the County prepared and adopted a mitigated negative declaration (MND) for a 10-year use permit for the site. At the time, the General Plan and zoning designations for the site were "rangeland." The County "strongly encouraged" the owner to seek a General Plan amendment and rezone before the use permit expired in 2012. In 2009, the County updated its General Plan and certified an EIR to, among other things, change the land use designation at the site from "rangeland" to "industrial." In 2010, the County rezoned the site to conform to the updated land use designations. No legal challenges were brought against the County's actions at that time.

In response to the applicant's request to resume aggregate and asphalt production, the County Board of Supervisors issued a March 2015 resolution declaring that the resumption of asphalt production was neither a new, nor a changed, industrial use, and therefore it was allowed under the previously-issued permit. The County issued a notice of exemption and plaintiffs filed suit challenging the County's determination. Applicant then applied to Mendocino County Air Quality Management District for an ATC, which the District issued in June of 2015 based on the County's previous actions as the CEQA lead agency. Petitioners filed an administrative appeal to the District, which was denied. Petitioners then filed the suit at issue herein, alleging that the District failed to comply with CEQA because it did not conduct a separate environmental analysis, and alleging the District did not follow its own regulations. The District and applicant filed demurrers asserting that Petitioners cannot sue the District directly under CEQA, and instead can only sue under Health and Safety Code section 40864. The lower court sustained the demurrers.

In its decision overturning the trial court's decision and concluding that the District could be sued under CEQA, the Court of Appeal cited several cases, including those specific to "individual permit decisions." The Court seemingly relied on *Orange County Air Pollution Control Dist. v. Public Utilities Com.* (1971) 4 Cal.3d 945 to determine that an administrative mandamus action under Code of Civil Procedure section 1094.5 is appropriate in the instant case. The Court rejected the contention that Health and Safety Code section 40864 is the "only" statute that "can be invoked in challenging an action by an air quality management district, whether it be quasi-legislative or quasi-adjudicative in nature." Indeed, CEQA case law is replete with major precedents in which air districts were respondents. (See, e.g., *California Building Industry Assn.*

v. Bay Area Air Quality Management Dist. (2015) 62 Cal.4th 369, 378, 380; *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 458; *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1017–1018; *Alliance of Small Emitters/Metals Industry v. South Coast Air Quality Management Dist.* (1997) 60 Cal.App.4th 55, 60.) The Court also observed that the District's own regulations clearly contemplated that, depending on the situation, the District could be required to act as either a lead agency or a responsible agency under CEQA.

II. CIVIL PROCEDURE

❖ ***Grist Creek Aggregates, LLC v. Superior Court* (2017) 12 Cal.App.5th 979**

The First District Court of Appeal held that a county air district board's tie vote on petitioner's administrative appeal of an asphalt production facility's construction permit effectively resulted in the appeal's denial. Thus, the denial was rendered subject to judicial review.

In November 2015, the Mendocino County Air Quality Management District issued an authority to construct permit (ATC) to the applicant (petitioner) to build a facility for aggregate and asphalt production (heating and blending rubber). Friends of Outlet Creek, petitioner in related suits, appealed the ATC decision to the District's Hearing Board. After recusal of one of the Board's members, the remaining four members were locked in a tie vote. Because it was unable to reach a decision, the Board determined not to hold any further hearings on the appeal. Thus, the ATC remained in place. Friends of Outlet Creek filed suit, alleging that the District and the Hearing Board violated the California Environmental Quality Act (CEQA) in not conducting environmental review for the ATC and violated the District's own regulations (see *Friends of Outlet Creek* case described above). The Hearing Board demurred on the ground that, because the tie vote was tantamount to no action, there was no agency decision for the court to review. Petitioner also demurred, arguing that Friends of Outlet Creek could not sue directly under CEQA and had failed to exhaust its administrative remedies. The lower court sustained the Board's demurrer with leave to amend and overruled petitioner's demurrer, both on the basis that the tie vote was not a Board "decision," and therefore, there was nothing for the court to review. In the interim, the Board added a fifth member. The lower court noted this fact, but failed to order that the new Board rehear the ATC permit appeal. Petitioner filed a petition for writ of mandate to require the lower court to vacate all of its demurrer rulings.

First, the Court noted that the lower court's decision was internally inconsistent. The Board was under no obligation to hold another hearing on the appeal, and in fact indicated that they would not do so. Coupled with the lower court's conclusion that the tie vote meant that Friends of Outlet Creek did not have a cause of action, it was unclear how the lower court envisioned that Friend's writ petition could be cured by amendment. Second, as the purpose and meaning of a tie vote, the Court explained there are two criteria necessary for the Board to reach a decision: a quorum of voting members; and a majority decision by those voting members. The Board had a quorum (four voting members out of five), but the participating members failed to reach a majority decision. It did not follow from this result, the Court explained, that there was nothing for a lower court to review, since the gravamen of Friends of Outlet Creek's petition was a challenge to the District's underlying approval of the ATC and the Board's failure to revoke it.

Third, the Court emphasized that the meaning of the votes in administrative proceedings must be viewed in context. The lower court erroneously oversimplified precedent in its finding that a tie vote of an administrative action agency always results in no action. A deeper analysis of the relevant case law demonstrated that a tie vote can mean that petitioner is entitled to a different remedy—a return to status quo ante, a new hearing, or setting aside the agency decision—not that the agency has not acted. Viewing the tie vote in context, the Board's action here was the equivalent of allowing the ATC to stand, which was deemed effectively a decision not to revoke it. Thus, that decision was ripe for judicial review under the prejudicial abuse of discretion standard of Code of Civil Procedure section 1094.5.

❖ ***The Urban Wildlands Group, Inc. v. City of Los Angeles* (2017) 10 Cal.App.5th 993**

The Second District held that the mandatory relief provisions of Code of Civil Procedure section 473, subdivision (b), do not apply where counsel for petitioner fails to lodge the administrative record in a CEQA proceeding and receives a judgment denying the petition for writ of mandate.

In 2014, petitioner alleged the City of Los Angeles improperly exempted from environmental review a project approving the use of light emitting diode replacement lights. Despite agreeing by stipulation, counsel for petitioner did not lodge the record with the lower court prior to trial. After a hearing on the merits of the matter, the lower court ruled that because petitioner had failed to lodge the administrative record, the petitioner could not support its arguments. Judgment therefore was entered in the respondent agency's favor. Subsequently, petitioner filed a motion for discretionary and mandatory relief pursuant to Code of Civil Procedure section 473, subdivision (b). The lower court denied petitioner's motion for discretionary relief, ruling that counsel's failure to lodge the administrative record did not rise to the level of "excusable neglect." Nevertheless, the lower court granted petitioner mandatory relief, finding that counsel's error had deprived petitioner of its day in court.

In its ruling, the Court of Appeal disagreed, holding that Code of Civil Procedure section 473, subdivision (b), does not apply where, as here, there has been a trial on the merits. Thus, the counsel's error had not served to deny petitioner its day in court. Rather, the error resulted in a failure to present sufficient evidence to support petitioner's claims. The mandatory relief provisions in subdivision therefore did not apply. The Court reinstated the lower court's original judgment denying the petition and complaint, and allowed the City recovery of appellate costs from petitioner.

❖ ***Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202**

The Fifth District held that *res judicata* (or claim preclusion) does not apply where the prior judgment at issue was not a judgment on the merits but was based on mootness. Thus, petitioners' CEQA action in this case may proceed.

In 2011 and 2012, the California Department of Conservation, Division of Oil, Gas and Geothermal Resources (DOGGR) issued multiple oil and gas well permits to Aera Energy, LLC.

DOGGR had deemed the permits to be either exempt from CEQA or covered under prior NDs. Several environmental organizations filed suit in Alameda County for declaratory and injunctive relief (aka, the "Alameda Action"). Invoking concerns about the environmental effects of hydraulic fracturing ("fracking"), the organizations alleged that DOGGR had a "pattern practice" of bypassing CEQA when issuing well permits. In 2013, while the Alameda Action was pending, Governor Brown signed into law Senate Bill No. 4 (Stats 2013, ch. 313, §§ 3–5, 7), which took effect January 1, 2014. Among other things, SB 4 enacted new statutory provisions requiring environmental review for "well stimulation treatments" that, as of July 1, 2015, would be required for hydraulic fracturing and other methods of "well stimulation." After SB 4 became law, DOGGR filed a motion to dismiss the Alameda Action on the ground that "issues raised in the complaint were rendered moot by the passage of [SB No. 4]." DOGGR urged that any alleged "pattern and practice" of forgoing CEQA analysis must come to an end as "a result of the Legislature's passage of [SB No. 4]." Citing mootness, the court agreed and granted the motion.

Petitioners filed a petition for writ of mandate in Kern County in 2014 for 214 other well permits, alleging grounds similar to those in the Alameda Action—that each DOGGR permit action is required to comply with CEQA prior to approval. Both parties demurred and the lower court, invoking the outcome in the Alameda Action, sustained DOGGR's demurrer on the ground of *res judicata* with leave to amend and overruled all other grounds asserted for demurrers. Petitioners filed an amended petition for writ of mandate in the lower court seeking to plead additional facts to, among other things, counter the ruling on *res judicata*, including the argument that the Alameda Action was not a ruling on the merits. DOGGR again demurred on the same grounds as before and the case was dismissed based on the prior demurrer ruling.

In a *de novo* review, the Court found that *res judicata* was not applicable because, of the three elements required for its application, the first one—that the "prior preceding is final and on the merits"—was not met. Because the Alameda Action was based on mootness and not the merits, subsequent claims are not precluded. The Court further clarified that "a judgment entered on the grounds of mootness and/or lack of ripeness is the issues is likewise *not* on the merits." By using several case examples and referencing the Alameda court's sufficient clarity that its ruling "was on the grounds of mootness and lack of ripeness," the Court reversed the lower court's ruling and remanded with instructions to overrule DOGGR's *res judicata* demurrer. The Court also ruled on DOGGR's supplemental motion to dismiss on grounds of collateral estoppel based on a similar case (*Sierra Club v. California Department of Conservation, et al*. (Kern County Superior Court, Case No. BCV-15-101300-RST)). Collateral estoppel was not applicable because of "factually different circumstances" and a lack of privity.

III. LAND USE OPINIONS

Takings – U.S. Supreme Court

❖ ***Murr v. Wisconsin* (2017) 137 S.Ct. 1933**

In a 5/3 split (Justice Kennedy delivering the opinion and Justice Gorsuch abstaining), **the U.S. Supreme Court held that the enforcement of a county ordinance in Wisconsin requiring the merging of contiguous, privately owned lots into one as a precondition of sale**

did not effect a regulatory taking in this case. In reaching this result, the Court treated the two original lots as a single parcel for the purposes of its takings inquiry.

The Murr family purchased two adjacent lots in St. Croix County, Wisconsin, in 1960, approximating 0.98 acre total, maintaining each lot under separate ownership. In 1994 and 1995, the Murr parents transferred the lots jointly to their children. Upon joint ownership, the two lots were merged by operation of law pursuant to St. Croix County's Code of Ordinances, Land Use and Development, subchapter III.V, Lower St. Croix Riverway Overlay District, section 17.36, I.4.a, which prohibits the individual development or sale of adjacent lots under common ownership in Lower St. Croix Riverway Overlay District unless one of the individual lots is at least one acre. The ordinance was enacted pursuant to the Wild and Scenic Rivers Act of 1972 and the State rules promulgated in response to "guarantee the protection of the wild, scenic and recreational qualities of the river."

In 2004, in an attempt to sell the vacant lot (but maintain the other lot upon which a family cabin exists), the Murrs applied for a variance to the ordinance, which can be allowed in order to avoid "unnecessary hardship." However, the St. Croix County Board of Adjustment denied their variance application. The Murrs sued the State of Wisconsin and St. Croix County, arguing that, because they could not sell either one of the two original lots separately, the ordinance caused an uncompensated taking of their property and deprived them of "all, or practically all" of the use of one of the two lots. Using the balancing test promulgated by *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, the County Circuit Court granted summary judgment against the Murrs and in favor of the defendants, holding that, considering both parcels as a whole, the Murrs had not been deprived of the "economical value of their property." The Court of Appeals of Wisconsin affirmed and held that the County regulations "did not effect a taking."

In its own analysis, the United States Supreme Court first quoted the takings clause of the Fifth Amendment and described the Court's regulatory takings jurisprudence, which had applied that Amendment to the States through the Fourteenth Amendment. The Court explained that "flexibility" is the "central dynamic" when balancing individual property rights against governmental interests reflecting pursuit of the public good. In general, there are two types of regulatory takings: categorical takings whereby landowners are denied "all economically beneficial or productive use of land"; and takings identified based on the case-specific application of complex factors, such as "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Here, the Court plowed new ground in further explicating the factors to consider in assessing "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." These factors "include [1] the treatment of the land under state and local law; [2] the physical characteristics of the land; and [3] the prospective value of the regulated land." Notably, the test adopted by the Court "*considers* state law but in addition weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property." (Italics added.) For that reason, the Court rejected an approach that would have defined the parcel relevant to a takings analysis solely by reference to any applicable state law definition. After balancing these factors on its own, the Court ultimately concluded that the merger provision of the Wisconsin ordinance was a

"legitimate exercise of governmental power," that it had been correctly applied, and that petitioners "have not suffered a taking."

In dissent, Justice Roberts stated his preference for a more "traditional approach" bright-line rule whereby courts would rely on state law definitions of property.

Planning and Zoning

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

In a unanimous opinion**, the California Supreme Court held that homeowners forfeited any objections to seawall construction permit conditions by proceeding with construction of the seawall after they had filed an administrative mandamus petition objecting to such conditions.**

After winter storm damage to their bluff-top properties, petitioners sought a permit from the California Coastal Commission to demolish old structures and build a new seawall and repair their beach access stairway. They were granted the permit subject to several mitigation conditions, two of which they objected to (prohibition of stairway reconstruction and a 20-year permit expiration). Although the homeowners filed a petition for administrative mandate seeking relief from these conditions, they nevertheless proceeded with construction of the seawall. A year later, the Commission moved for a court judgment on the mandate petition, arguing that petitioners had waived their objections by constructing the project. The trial court denied the petition. Petitioners then moved for judgment on constitutional grounds, asserting that the Commission exceeded its authority because the measures did not mitigate the impacts of their particular project. This time, the trial court agreed and issued a writ directing the Commission to remove the challenged measures. The Court of Appeal reversed in a split decision, with the majority contending that petitioners had waived their claims and that "in any event, both conditions were valid."

The Supreme Court agreed with the Commission and cited a myriad of case law to invoke the established rule that, just as "the benefits of a permit run with the land, so too do its restrictions." To preserve their claims, petitioners should have delayed construction and filed a petition for a writ of mandate. Petitioners argued that the construction of the seawall was essential "to protect their homes," and that they should not have had to "await the outcome of litigation before taking action." The Court disagreed and noted that with this logic, petitioners were asking for the creation of a new exception to an established rule, which, as they explained, is not authorized by the Legislature and would "swallow the general rule." The Court also refused to sever mitigation conditions from the act of construction, noting that if the Commission had agreed to waive one or more of the conditions, the Commission could have required the homeowners to modify the project design to better suit the objectives of the conditions. The Court noted that the landowners could have obtained an emergency permit to "address imminent dangers" if they believed such dangers to exist.

❖ ***Kutzke v. City of San Diego* (2017) 11 Cal.App.5th 1034**

The Fourth District held that evidence on the record was sufficient to support the City of San Diego's finding that a proposed subdivision was inconsistent with the applicable community plan and that it would be detrimental to public health, safety, and welfare. The Court also upheld the City's conclusion that its mitigated negative declaration (MND) for the project was inadequate with regard to geology and public safety. The Court thus upheld the City's decision to deem the MND inadequate and deny project approval.

Petitioners applied to the City to subdivide two hillside lots and to build three residences on 1.45 acres of hilltop property of the La Playa neighborhood in the Point Loma peninsula. Existing structures, some dating to 1929, would have been razed and replaced with new houses. All new residences would have shared a private, steep driveway. Initially, the project was approved by the planning commission based on an initial study (IS) and MND that found only one potentially significant impact (to paleontological resources during grading). The commission's decision was counter to the local community planning board's recommendation to deny the project based on safety concerns and was appealed by concerned citizens. After a public hearing, the City Council reversed the approval and found that the MND "was inadequate." Petitioners filed a complaint in lower court alleging various causes of action (violation of civil rights, inverse condemnation, mandamus, and nuisance). The court reversed the City Council's decision on the grounds of "insufficient evidence."

In upholding the City Council's decision deeming the MND inadequate and denying project approval, the Court emphasized that the applicable standard of review was deferential to the City, and was limited to determining whether the City's findings were "supported by substantial evidence." Thus, the petitioner could only prevail if she could demonstrate that no reasonable municipality could have reached the same decision as the City Council. Under this standard of review, the Court determined that substantial evidence existed in the record to support the City Council's finding that impacts to land use, geology, and public safety would be detrimental and inadequately mitigated. Flaws and omissions in the project's geotechnical report cast doubt on the report's conclusion that homes could be built safely on the steep sandstone hillside. Furthermore, the slope of the shared driveway would not permit access by fire trucks and, potentially, other emergency response vehicles. Proposed mitigation measures (sprinkler systems and standpipes) were found to be inadequate to mitigate all of these risks.

Regarding the project's consistency with the community plan, the City Council properly considered the opinions of neighbors, who stated that the project's dense development with minimal setbacks was incompatible with the large lot, single-family residential character of the area. Finally, the project was legitimately rejected under City ordinances, which provide for deviations from the development regulations for qualified sustainable building projects only if those deviations result in a more desirable project. Here the deviations requested (i.e., smaller setbacks, no frontage, and higher walls) would not make the project more desirable.

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

In response to claims against a voter-enacted initiative known as Measure R, the Second District held that the measure was an improper exercise of the local reserved

legislative power and illegally restricted transferability of conditional use permits (CUPs) in a manner that discriminated against chain retail establishments. Further, the invalid portions of the measure cannot be severed in a manner leaving any valid portions in effect.

Passed by voters in 2014, Measure R was intended to limit large developments and "formula retail establishments." It required the Malibu City Council to prepare a specific plan for every proposed commercial or mixed-use development exceeding 20,000 square feet, along with a report with full notice, a public hearing, and subsequent voter approval. The measure also restricted development of retail establishments that possess 10 or more other retail establishments anywhere in the world and maintain certain features consistent with chain stores. These limits would have applied to new chain stores and to existing ones that would relocate, expand, or increase their service area. Measure R also required these chain stores to obtain a non-transferrable CUP.

Petitioners own a property in Malibu where a 38,424 square-foot development was proposed. They filed a petition for a peremptory writ of mandate to have Measure R "declared facially invalid" on grounds that it subjected administrative acts to voters, created an illegal kind of CUP, and violated their due process rights. The lower court agreed with petitioners, declared Measure R invalid, and enjoined Malibu from enforcing it. Measure R proponents were denied a stay pending appeal by the lower court but granted one by the appellate court upon their petition for writ of supersedeas.

In a *de novo* review, the Court of Appeal was careful to afford "extraordinarily broad deference" to the power of the referendum by constraining its review to only the "text of the measure itself." In finding Measure R to be invalid, however, the Court agreed with the City's argument that, by directing the City to have to prepare specific plans and hold elections in circumstances in which they otherwise would not be required, the measure impermissibly negated the City's administrative discretion and was itself tantamount to an "adjudicative act." "The problem," the Court said, "is Measure R requires details to be in specific plans that are voter-approved but sets no substantive policy or standards for those plans." Proper legislative actions set policy in some manner, as opposed to merely proscribing procedures. The requirements to prepare specific plans and submit them to the voters also "limits Malibu's governing body from carrying out its duties pursuant to its police power."

The Court also rejected Measure R's provisions restricting the transfer of CUPs to properties already owned by the same chain. "A CUP is not a personal interest. It does not attach to the permittee; rather, a CUP creates a right that runs with the land. [Citations.] Otherwise, a condition regulates the person rather than the land, improperly turning a CUP into an 'ad hominem privilege rather than a decision regulating the use of property.' [Citations.] A condition which relates solely to the individual or applicant for the CUP does not relate to the property's use and zoning. [Citation.]"

Finally, the Court resolved the severability issue by applying the test of whether "the electorate's attention was sufficiently focused" on the valid parts to be severed, so that, had they been considered as such, the valid parts would have been adopted separately. Evidence on the record led the Court to "fail to see" that the electorate would have passed Measure R without the invalid provisions.

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

The Sixth District held that voters could use the referendum system ("the power of the electors to approve or reject statutes or parts of statutes") to reject a city zoning ordinance at issue.

After changing a vacant parcel's general plan designation change from "Industrial" to "Commercial," the City of Morgan Hill approved an ordinance in 2015 to change the parcel's zoning from "ML-Light Industrial" to "CG-General Commercial." This action brought the zoning into conformity with the general plan and allowed development of a hotel on the site. Petitioners challenged the ordinance through a timely referendum petition, which the City certified as sufficient. Shortly thereafter, however, the City "discontinued processing" the referendum, stating that it would have the practical effect of reestablishing industrial zoning in conflict with the industrial general plan designation. In 2016, the City switched course again and passed a resolution calling for a special election to submit the referendum to voters. At the same time, however, the City simultaneously authorized the filing of a court action to have the referendum "nullified as legally invalid and removed from the ballot." The lower court granted the City's petition on the grounds of general plan inconsistency.

The City argued that referendum power cannot be used to reject the ordinance because the City's discretion is preempted by Government Code section 65860, subdivision (a), which mandates that zoning must be consistent with a general plan. The Court countered, however, that section 65860 only prevents the City from enacting inconsistent zoning; it does not preclude it from using its discretion to rezone, generally. The Court explained that the referendum does not seek to enact zoning, but only to reject the City's discretionary choice of zoning for a particular parcel, of which "a number of available consistent zonings" could apply. The Court remanded with instructions for the trial court to enter a new order denying the City's petition.

Implied Dedication of Private Land for Public Use

❖ ***Scher v. Burke*** **(2017) 3 Cal.5th 136**

In a unanimous opinion, **the California Supreme Court held that Civil Code section 1009, subdivision (b), barred both recreational and non-recreational uses of private noncoastal property from "ripening" into implied dedications for public use absent an express irrevocable offer of dedication from a granting landowner; and the Court interpreted the statute to extend to roadways used for nonrecreational purposes, as well as for recreational purposes.** (See Civ. Code, § 1009, sub. (b).)

In order to more conveniently access their own property, Petitioners sued neighbors who had blocked their own private roadways with gates. Petitioners intended to secure access to these neighbors' private roadways. Petitioners argued with evidence on the record that the neighbors' predecessors had agreed to designate "the routes as public roadways." Respondents countered by arguing that Civil Code section 1009, subdivision (b), precluded such implied dedication. The lower court agreed with petitioners, concluding that section 1009 did not preclude this implied dedication in the instant case because the land at issue was not coastal property, and "and

because 'section 1009 does not restrict the implied dedication of public roads for nonrecreational uses.'" The Court of Appeal reversed and interpreted section 1009 to bar all uses, not just recreational uses, from "implied public dedication." The court then remand the matter to the lower court with instructions to enter a declaratory judgment for respondents. The California Supreme Court granted review.

The high court began by describing the common law history of the concept of implied dedications of property, which had allowed the ripening of interests in property by users even absent express offers of dedication. The Court then mentioned the scholarly criticisms of this approach, which seemed to penalize property owners for generously allowing their neighbors to cross their properties. The Court described Civil Code section 1009, enacted in 1971, as a legislative response to such criticism and as a way to overrule the common law approach. The legislation clearly requires express offers of dedication, but the breadth of the prohibition against implied dedications was at issue. After conducting an extensive statutory analysis, the Court concluded that section 1009 applies to noncoastal properties as well as coastal properties, and to non-recreational uses of roadways as well as purely recreational uses.

Designation of Historic Resources

- ***Young v. City of Coronado* (2017) 10 Cal.App.5th 408**

The Fourth District held that the Coronado Historic Resources Commission's resolution designating a cottage property as an historic resource was supported by findings on the record with sufficient evidence to sustain those findings.

In 2013, in an effort to demolish a residential cottage constructed in 1924, petitioners filed with the City of Coronado an application for removal of the property's historical designation. They desired to have the cottage deemed non-historic. After a public hearing and contrary to the wishes of the property owners, the Coronado Historic Resources Commission concluded that "the subject property qualified for historic designation." Petitioners appealed this decision to the City Council, which voted to uphold the Commission's determination, thus precluding the property owners' desire to raze the house. In 2014, petitioners filed for writ of administrative mandate to void the City's decisions. The lower court denied the writ on grounds that the City's findings were supported by "substantial evidence on the administrative record."

Petitioners appealed on both substantive and procedural grounds, asserting that the City did not have substantial evidence for its findings, which did not meet the standards required by *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. The Court of Appeal disagreed, however. In upholding the City's determination that "the subject property has value for future study of this period of architecture," the court was persuaded by substantial evidence on the record such as a staff report declaring that the dwelling "possesses the distinctive characteristics of the Spanish Bungalow style" and by the lack of exterior alterations to the structure. Further, the administrative record showed that the City had complied with its Historic Designation Criteria Guidelines despite the staff report not having mentioned the guidelines by name.

How to Comply with and Fund Stormwater Programs

Thursday, September 14, 2017 General Session; 1:00 – 2:30 p.m.

Ryan Baron, Of Counsel, Best, Best & Krieger

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League of California Cities

2017 Annual Conference

HOW TO COMPLY WITH AND FUND STORMWATER PROGRAMS

Presented by:

Ryan M. F. Baron

ryan.baron@bbklaw.com

I. Introduction: The Growing Area of Stormwater Compliance

Urban runoff has been cited as the number one cause of water pollution in the U.S. Stormwater falls onto urban hardscapes sweeping up various natural and non-anthropogenic pollutants, such as gasoline, copper and heavy metals, trash, fertilizers, toxins, bacteria and other constituents. Irrigation runoff from overwatering, agriculture and other watering during dry weather also picks up pollutants. These waters collect on city streets and in storm sewers and flood channels, and are discharged into natural waterbodies.

In recent years, stormwater requirements have significantly increased. Although federal law does not require a city operating a municipal separate storm sewer system ("MS4") to strictly

comply with numeric effluent limits or receiving water limitations, the State Water Resources Control Board has concluded as a matter of state law that MS4s must comply with such limits as part of their NPDES permit obligations. This has the effect of exposing a jurisdiction to third party lawsuits under the Clean Water Act, as most jurisdictions cannot comply with their permit limits and with the load allocations from the total maximum daily loads ("TMDLs")[1] that are incorporated into the permit. This is particularly the case for wet weather conditions where most jurisdictions cannot comply.

In light of these regulatory developments, MS4s are seeing third party citizen suits under the CWA increase in addition to permits becoming more stringent as they are reissued. This has caused higher compliance costs as well as increased challenges to funding stormwater programs.

This paper first discusses the federal and state laws as to whether MS4s need to comply with water quality standards. It then summarizes strategies for compliance and funding.

II. Federal Law Does Not Require MS4s to Strictly Comply with Water Quality Standards

With the passage and amendment of the federal Clean Water Act ("CWA") in the 1970s, Congress sought to protect so-called "waters of the United States"[2] by regulating the discharge of

[1]A TMDL is a regulatory document or a plan for restoring impaired waters that identifies the maximum amount of a pollutant that a body of water can receive while still meeting water quality standards.

[2]In 2015, the Army Corps of Engineers and US EPA adopted a new rule regarding the test for determining a water of the United States, which utilized the significant nexus test set forth by Justice Kennedy in his opinion in *Rapanos v. United States*, 547 U.S. 715 (2015) ("*Rapanos*"). The new presidential administration has proposed rescinding

pollutants into surface waters, including lakes, rivers, streams, wetlands and coastal areas. The goal of the CWA is to reduce pollution and "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] At the time of its enactment, however, the CWA was only designed to regulate point source[4] discharges from industrial facilities (*e.g.*, manufacturing, mining, shipping and oil and gas extraction), municipal facilities (*e.g.*, sewage treatment plants) and animal feedlots. Stormwater runoff from industrial sources and municipal storm drains and flood control channels was not specifically addressed by the CWA. Further, U.S. EPA declined to regulate stormwater discharges since runoff was considered diffuse and could not be efficiently controlled. In 1977, however, a federal appellate court ruled in favor of an environmental group that EPA lacked the authority to exempt any particular category of point source from the CWA holding that stormwater discharges were subject to regulation under the CWA.[5]

In 1987, Congress amended the Clean Water Act ("CWA") authorizing the regulation of stormwater discharges through the issuance of NPDES permits.[6] Section 402(p) of the CWA sets

this rule and replacing it with the test articulated by Justice Scalia in *Rapanos*. *See generally* https://www.epa.gov/wotus-rule.

[3]33 U.S.C. § 1251.

[4]The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. CWA § 502(14).

[5]*NRDC v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977); *see also Md. Dep't of the Env't v. Riverkeeper*, 222 Md. App. 153, 161(2015) ("*Costle*").

[6]33 U.S.C. § 1342(p).

forth the basic program for regulating municipal and industrial discharges and establishes priorities, deadlines, and application requirements. Congress established two different standards for stormwater discharges – one of industrial discharges, and one for MS4 discharges.[7] Industrial dischargers are required to strictly comply with numeric limits in their NPDES permits through technology-based standards.[8] That is, industrial dischargers must use the best available control technology to treat their stormwater discharges, and they are expressly prohibited from exceeding numeric limits in their permit. In contrast, MS4s are regulated by NPDES permits that:

[7]33. U.S.C. § 1342(p)(3).

[8]33. U.S.C. § 1311.

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the [EPA] Administrator or State determines appropriate for the control of such pollutants[9]

The reduction of pollutants to the maximum extent practicable is more commonly referred to as the "MEP" standard. MEP is a pollution control standard that is based on technically and economically feasible techniques and control practices.

The MEP standard is not defined by federal or state law, but historically has been interpreted by the courts as meaning that MS4s do not have to strictly comply with water quality standards and that numeric limits are not required in MS4 permits. In 1999, the 9th Circuit Court of Appeals issued a seminal decision that the CWA does not require MS4s to strictly comply with water quality standards.[10] In the case of *Defenders of Wildlife v. Browner*, environmental groups challenged the issuance by EPA to several Arizona municipalities of a MS4 permit that did not

[9]33 U.S.C. § 1342(p)(3)(B)(i)-(iii) (emphasis added).

[10]191 F.3d 1159 (1999) ("*Browner*").

contain numeric limits. The environmental groups argued that the CWA required municipal stormwater to be treated the same as industrial stormwater. The court rejected this argument and held that Congress only contemplated that MS4s meet the MEP standard and that MS4s were not subject to the same controls as industrial dischargers. Despite this favorable ruling, however, the court also held that EPA and the states had discretion whether or not to impose numeric limits in NPDES permits, and in this case, EPA exercised its discretion not to impose more stringent requirements.[11]

A California state appellate court has also held that Congress did not intend to require MS4s to comply with water quality standards. In *Divers' Environmental Conservation Org. v. State Water Resources Control Bd.*, environmental organizations challenged a NPDES permit issued to the U.S. Navy that did not contain numeric limits for the Navy's stormwater discharges, but required the permittee to limit its discharges by implementing BMPs.[12] In examining EPA regulations, the court found that NPDES permits can contain BMP requirements when meeting numeric limits is infeasible, or when BMP practices are reasonably necessary to achieve effluent limitations.[13] The court stated, "As the Regional Board points out and the EPA has repeatedly

[11]*Browner* at 1166-1177. "Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards. The EPA has adopted an interim approach, which "uses best management practices (BMPs) in first-round storm water permits . . . to provide for the attainment of water quality standards."

[12]145 Cal. App. 4th 246 (2006) ("*Divers*").

[13]*Id.* at 257.

noted, stormwater consists of a variable stew of pollutants, including toxic pollutants, from a variety of sources which impact a receiving body on a basis which is only as predictable as the weather."[14] The court reasoned that there was no legal requirement that effluent limitations be expressed numerically[15] and that the CWA only required municipalities to reduce "pollutants to the maximum extent practicable."[16] The court recognized, however, that EPA and the State Board had "wide discretion" in regulating stormwater runoff.[17]

Other courts outside California have reached the same conclusion as the *Browner* and *Divers'* courts.More recently, the Maryland Court of Appeals (what is equivalent to our California Supreme Court) concluded that TMDL compliance is subject to the MEP standard of the CWA. In examining state and federal cases on the application of MEP to stormwater discharges, the Maryland Court stated "MS4s are not, however, required to impose effluent limitations necessary to meet water quality standards . . . MS4s are subject to effluent limitations that are consistent with [wasteload allocations] of EPA-approved TMDLs.[18] Thus, the Court reiterated that federal law does not require MS4s to be in strict compliance with water quality standards or that permits need to contain numeric limits. It is the discretion of EPA and the States to do so.

[14]*Id.* at 258.

[15]*Id.* at 259 citing *Communities for a Better Environment v. State Water Resources Control Bd.*, 109 Cal. App. 4th 1089, 1104-1105 (2003).
[16]*Id.* at 261, fn 5.
[17]*Id.* at 261.

[18]*Md. Dep't of the Env't v. Riverkeeper*, 447 Md. 88, 104 (2016)

III. The State Board Requires MS4s to Comply With Water Quality Standards

Although various courts have held that numeric limits are not required in MS4 permits, those same courts have held or intimated that the State has discretion to require numeric limits if it (or a regional board) deems necessary. The MEP standard is not defined by federal or state law, but historically has been interpreted by US EPA and the State Board to include use of BMPs in a stormwater management program ("SWMP") to attain water quality standards and utilization of the iterative process should exceedances occur. Due to the variable nature of stormwater and the way in which flood control systems are designed and operated, MS4s have not been required to use best available control technologies or meet numeric limits. Instead of immediate compliance with water quality standards, the State Board has recognized that MS4s had flexibility to come into compliance through long-term compliance schedules that emphasized the development of BMPs before costly end-of-pipe treatment.[19] The State Board has also recognized that MS4s can comply with water quality standards through the iterative process through the implementation of BMPs over time.[20] In 1999, however, the State Board at the behest of US EPA issued an order including new receiving water limitations language for MS4 permits that still exists today. "The

[19]State Water Board Order WQ 91-03, pg. 36.

[20]State Water Board Orders WQ 96-13 and 98-01 (permittees "will not be in violation of receiving water limitations so long as they are in compliance with" an iterative process of successive BMPs). The State Board also held: "In fact, narrative effluent limitations requiring implementation of BMPs are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements, including reduction of pollutants to the maximum extent practicable, and water-quality based requirements of the CWA. Order 98-01 at pg. 5.

"SWMP shall be designed to achieve compliance with Receiving Water Limitations."[21] Despite this action requiring compliance with numeric receiving water limits, however, the State Board indicated that compliance would still be maintained through a BMP iterative approach. In 2001, the State Board clarified this position in a precedential order resolving an appeal of the County of San Diego's MS4 permit. In citing the *Browner* decision discussed above, the State Board indicated that its receiving water limitations language "does not require strict compliance with water quality standards. Our language requires that stormwater management plans be designed to achieve compliance with the water quality standards. Compliance is achieved over time, through an iterative approach requiring improved BMPs."[22]

In 2011, however, the 9th Circuit Court of Appeals issued a decision in the case of *Natural Resources Defense Council v. County of Los Angeles* that turned compliance with numeric limits through the iterative process on its head.[23] In this case, NRDC sued the County for exceedances at mass monitoring stations located in the middle of two MS4s that were also deemed to be receiving waters. The County argued that MS4s did not have to meet numeric limits and that the iterative process was the mechanism for compliance with the permit. The Court of Appeals disagreed and found that "no such 'safe harbor' is present in this Permit" and that the iterative

[21]State Water Board Order WQ 99-05, pg.1.

[22]State Water Board Order No. WQ 2001-15, pp. 11-12.

[23]673 F.3d 880 (2011).

process did not shield the County from liability for violations of permit terms prohibiting exceedances of water quality standards.[24]

The U.S. Supreme Court accepted review of the case on the limited issue of whether the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway qualifies as a "discharge" under the CWA. In a 9-0 decision, the Court found that a discharge had not occurred.[25] The Court did take up the receiving water limitations issue, and thus the 9th Circuit's decision on the effect of the iterative process on receiving water limits still remains and is binding in California. And, despite the Court's reversal on the discharge issue, the 9th Circuit ignored the Supreme Court's holding and found a discharge in the channel on the grounds that it had occurred upstream.[26] The County eventually settled the case for $3.3 million in attorney's fees and $4.5 million of funding toward a low impact development project in south Los Angeles.

In 2012, the Los Angeles Regional Water Quality Control Board ("LA Regional Board") adopted 33 new TMDLs into the LA MS4 permit, thus solidifying the enforceability of them against the MS4 permittees. The LA Regional Board, however, fashioned an "alternative compliance option" that allowed permittees to develop watershed management plans in lieu of

[24]*Id.* at 897.

[25]*Los Angeles County Flood Control Dist., v. National Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013).

[26]*NRDC v. County of LA*, 725 F.3d 1194 (2013).

immediate compliance with the permit. A watershed management plan is a long-term plan to attain water quality standards in waterbodies that are impaired for pollutants. Plans must have measurable and concrete goals, strategies and implementation plans to address pollutants of concern within the permittee's watershed. Upon approval of the watershed management plan by the Regional Board, and diligent and rigorous implementation efforts, a permittee is deemed to be in compliance with the permit even if exceedances continue to occur.

Upon the adoption of the Permit, the NRDC challenged the alternative compliance option. In its 2015 order on the Permit, the State Board declined to adopt the iterative process as the mechanism for attaining water quality standards and instead directed the regional boards to require compliance with receiving water limitations in MS4 permit.[27] In lieu of requiring immediate compliance, however, the State Board upheld the alternative compliance approach finding that MS4s could not achieve water quality standards in the near term. The State Board directed regional boards to adopt similar watershed management compliance approaches in their permits for those permittees that were willing to develop "well-defined" and "finite" paths to permit compliance.[28]

The NRDC challenged the State and Regional Board's alternative compliance approach in Los Angeles Superior Court. On January 24, 2017, Judge Hogue denied NRDC's petition for writ of mandamus finding that the Permit did not violate the CWA because MS4s were not required to

[27]State Board Order No. WQ 2015-075, pg. 76.

[28]*Id.*

meet effluent limits.[29] She reasoned that under *Browner*, the alternative compliance option was lawful as MS4s were not required by federal law to meet water quality standards and attain numeric effluent limitations. (It should be noted that the decision of a California superior court is not binding on other courts until it has been affirmed by a state appellate court.) NRDC has appealed the decision, and the outcome of the case is pending. The Cities of Gardena and Duarte have also filed separate petitions challenging the LA MS4 permit, including, among other things, the unlawfulness of alternative compliance option and the incorporation of numeric limits into the permit. The matters are set for trial in November 2017.

IV. Strategies for Stormwater Compliance

A. Historical Stormwater Management Program

The historical stormwater management program focused on street sweeping, educational outreach, monitoring and other non-structural best management practices ("BMPs") in order to meet the MEP standard. Although many jurisdictions continue to implement these programs, it is unlikely that implementation of such BMPs, by themselves, will satisfy regulatory permitting requirements. Jurisdictions preferring not to develop and implement watershed management plans will likely be implementing additional structural and offsite BMPs to comply with their TMDL requirements.

[29]*National Resources Defense Council, Inc. v. State Water Resources Control Board*, Case no. BS156962 (Jan. 24, 2017).

B. Watershed Management Plans (aka Alternative Compliance)

Many jurisdictions are developing or have developed watershed management plans designed to address water quality issues across municipal boundaries on a regional, watershed basis. Upon initiation of a plan, or in some cases, approval of the plan by the regional water board, the permittees developing the plan are deemed to be in compliance with the permit. The drawbacks to watershed management planning are the considerably high costs to develop and implement plan, in some cases costing a few hundred million dollars per jurisdiction in a 10-year period. Courts have yet to determine whether a permittee with a regional board approved watershed management plan precludes a third party citizen suit.

C. TMDLs

In many cases, older TMDLs are based on water quality standards that cannot be attained or wasteload allocations that contain exceptionally low pollution limits and arbitrary implementation schedules and compliance timelines. Those jurisdictions that face TMDL deadlines that are about to expire or have expired should consider seeking a time schedule order from the respective regional water board to allow more time to attain standards. Ultimately, jurisdictions should evaluate their current BMP practices and seek to offer further studies that support changing the water quality standard and obtaining a new compliance schedule.

The State Water Board is considering adopting a variance policy that would allow permittees facing pending TMDL deadlines to temporarily change the water quality standard

allowing more time for compliance. Unfortunately, variances have been approved infrequently by EPA and have been done mostly outside of California.

V. Strategies for Funding

Most jurisdictions have limited funding options for water quality compliance and are looking for options to supplement General Fund revenues.

A. Special Funds

Most city stormwater programs are funded through the agency's general funds. Additionally, some stormwater programs are funded through a combination of funding sources in addition to the General Fund using road funds, flood control district funds, and park funds. If such funds are to be considered for stormwater program requirements, a more thorough analysis of the fund's uses and limitations should be conducted as there may be limited situations where these funds can be used.

1. *Flood Control District Funds*

One of the primary sources of funding for countywide stormwater programs come from flood control districts. Flood control district funds are generated from property tax revenues and are primarily used for the control of flood and stormwaters throughout the flood control district's service area for the protection of life and property. Flood control districts generally have additional powers to expend funds to conserve water and for water quality purposes related to the district. A permissible flood control district expenditure is determined by a showing of a meaningful

relationship between the expenditure and the flood control facility or obligation. District funds can often be used district-wide even if the assessed land is outside of a particular area of benefit.[30]

2. *Gas Taxes*

In some cases, stormwater programs and projects are partially funded through an agency's Road Funds. Highway Users Tax revenue ("gas tax funds") is generated by State excise taxes on motor vehicle fuel for use on public streets and highways.[31] Gas taxes are collected by the State and are allocated to counties and cities pursuant to various statutory formulas, where they are required to be deposited into an agency's Road Fund. Cal. Sts. & Hwy Code §§ 2104-2122. Gas tax funds may be expended on stormwater projects if the expenditure is limited to the "research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for nonmotorized traffic), including the mitigation of their environmental effects, the payment for property taken or damaged for such purposes, and the administrative costs necessarily incurred in the foregoing purposes."[32] To determine whether gas tax funds may be used for a stormwater purpose related to public streets and highways, there must be a reasonable basis for the determination such that a meaningful relationship exists between the expenditure and the road purpose.[33]

[30]*Los Angeles v. Los Angeles County Flood Control Dist*., 11 Cal. 2d 395 (1938).
[31]Cal. Const. art. XIX; Cal. Sts. & Hwy Code § 2100 *et seq*.

[32]Cal. Const. art. XIX, § 1(a); Cal. Sts. & Hwy. Code § 2101(a).

[33]*City of Costa Mesa v. Connell,* 74 Cal. App. 4th 188, 193 (1999) (finding no reasonable relationship between a road project and the city's use of gas tax funds to make lease-back payments on two municipal golf courses); 58

3. *Park Funds*

Some agencies also use park funds for stormwater program expenditures. This again is a fact determinative analysis that is specific to the particular jurisdiction. Generally, the use of park funds is subject to the same determination of whether there is a meaningful relationship between the expenditure and park facility or obligation.

4. *Drainage Fees*

Since 1974, the California Legislature has authorized counties and cities to impose drainage fees through local ordinances that can be used for the construction of drainage and sewer facilities.[34] Currently, some agencies are examining the use of existing drainage fee programs as an analog for the development of an *in lieu* fee collection program for land development projects that are required to meet certain onsite stormwater retention requirements as part of their obligations for the low impact development under their MS4 permit. The legislative body of a city or county may adopt a fee structure based on the cost of the required facilities after the preparation and adoption of a Master Plan of Drainage for the local drainage area. Fees may then be collected from projects as a condition of approval of final subdivision maps, final parcel or tract maps or collected at the time of issuance of building permits. Many jurisdictions have established drainage fees, notable of which is the City of Anaheim, with fees ranging from $19,080 to $52,132 per net

Ops. Cal. Atty. Gen. 844 (1975) (opining that gas taxes may be used to purchase land for park purposes if the park would mitigate the environmental impact of a street construction project); *California State Controller, Guidelines Relating to Gas Tax Expenditures: For Cities and Counties* (Aug. 2015).

[34]Cal. Gov't Code § 66483.

acre of land development depending on the land use. Most jurisdictions with drainage fees address flood control infrastructure and capacity to manage 25 and 100-year storm events, and do not contain any water quality, low impact development or hydromodification facilities. Use of existing drainage fee programs to fund water supply augmentation projects would need to be further analyzed.

B. Stormwater Fee Programs & Stormwater Resource Plans

Several jurisdictions have stormwater fees that fund a city's stormwater program. Although each city prepares a somewhat different calculation for determining the fee, the general methodology is to use a parcel's estimated contribution of runoff, which can be determined by an estimate of the impervious area on that parcel. Impervious areas include such things as buildings and pavement that prevent or restrict stormwater from getting into the soil and increase runoff from a parcel. Most fee programs surveyed fund storm drain improvements, operations and maintenance and water quality compliance. A few cities include water supply considerations.

C. Unfunded State Mandates

A final funding consideration is the state mandates process. On August 29, 2016, the California Supreme Court rendered a favorable decision in *Dep't of Finance v. Commission on State Mandates*,[35] holding that MS4 permit requirements are "state" mandates if the requirements are not expressly required by federal law or regulations such that the State had made a "true choice"

[35] 1 Cal. 5th 749 (2016).

to impose them. Eleven test claims are currently pending before the Commission on State Mandates. Test claims by Orange County and Bay arear permittees will be the first to be heard in September 2017, and include reimbursement requests for several activities such as TMDLs, low impact development and hydromodification requirements, public educational efforts, and other activities. A state appellate court is also deciding a case out of the County of San Diego regarding the test for when MS4 permit requirements are "unfunded." The State has taken the position that MS4s have the ability to impose taxes to support stormwater management programs, and that a tax or fee should fail a vote of the electorate before it can be deemed to be "unfunded." The County is arguing that Prop 218 allows a municipality to "propose" a fee or tax, but not impose the requirement.

In order to be deemed eligible for an unfunded state mandates claim, the permit must impose a new requirement or increased activity. A jurisdiction is required to file a claim within one year of the requirement being adopted (*i.e.*, Permit) or in the fiscal year in which the costs were first incurred. Although some of these issues are currently being litigated, actions that are undertaken voluntarily are not considered "mandates." It is unclear at this time what the effect of voluntarily developing a watershed management plan is on a mandates claim since this issue has not yet been heard by the Commission, and may not until 2018 when the Commission hears the first permits with watershed management plan options in them.

Housing, Housing, Housing: Pitfalls and Problems in Reviewing Housing Projects

Thursday, September 14, 2017 General Session; 2:45 – 4:00 p.m.

Barbara E. Kautz, Goldfarb & Lipman

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Sacramento, California
September 14, 2017

Housing, Housing, Housing: Pitfalls and Problems in Reviewing Housing Projects

Presented by:

Barbara Kautz
Goldfarb & Lipman LLP
1300 Clay Street, Eleventh Floor
Oakland, CA 94612
510 836-6336
bkautz@goldfarblipman.com

I. Introduction

This paper was – and is – intended to bring city attorneys' attention to several lesser-known provisions of California Planning and Zoning Law that may require cities to make certain findings when approving, disapproving, reducing the density of, or attaching conditions to housing projects. The statutes reviewed here include:

- The so-called 'no net loss' provision (Gov't Code § 65863[1]), which requires that certain findings be made if a housing development is approved at a density lower than that shown in the city's housing element.
- 'By right' approval provisions for sites rezoned to achieve consistency with the housing element. (§ 65583.2(i).)
- The Housing Accountability Act (§ 65589.5), which requires that certain findings be made when housing projects are denied, reduced in density, or have conditions attached that make the project infeasible.

However, in the current session of the California Legislature, over 130 bills related to housing have been introduced. As has been extensively reported, part of the deal struck by Governor Jerry Brown to ensure the passage of his cap-and-trade bill was his agreement to work with the Legislature to adopt a package of bills intended to provide more funding of housing and require 'streamlining' of housing approvals by cities.[2]

The bills selected as part of the Governor's housing package would collectively amend **all** of the statutes reviewed below. (Note that there are no significant changes proposed in either CEQA or density bonus law.) As a consequence, while this paper reviews the current provisions and case law surrounding each of these statutes, below each section is a list of the key bills and the changes that are proposed in current versions of the bills. The Governor, Senate President Pro Tem Kevin de Leon, and Assembly Speaker Anthony Reardon have jointly issued a statement that an approved housing package will be presented when the Legislature reconvenes on August 21.[3] We hope to be able to explain the final version of these statutes when the League meets in September.

[1] Unless otherwise specified, all future references are to the Government Code.
[2] *See, e.g.,* Angela Hart, *"Climate change talks provide 'tension' for housing deal, California lawmaker says,"* Sacramento Bee (July 13, 2017); Josie Huang, *"CA affordable housing bills benefiting in political dealing over cap and trade,"* KPCC (July 13, 2017).
[3] Liam Dillon, *"Gov. Jerry Brown, California legislative leaders commit to push an affordable housing plan next month,* Los Angeles Times (July 17, 2017).

II. Related Provisions of Housing Element Law.

The statutory provisions reviewed in this paper apply to the review of applications for housing projects. However, each of the statutes relates back to the contents of each city's housing element. The key housing element provisions are these:

The City's Regional Housing Need Allocation. Before a housing element is drafted, the region's council of governments, or, for areas without a council of governments, the California Department of Housing and Community Development ("HCD"), assigns each city its share of the projected regional housing need for the next five or eight years (the regional housing need allocation, or "RHNA"). (Housing elements in the larger urban areas must be revised every eight years; those in other areas may elect a five- or eight-year period. § 65588(e)(2).)

The RHNA is assigned by income category. (§§ 65584 – 65584.09.) Typically approximately 40 percent of the need is for very low income and low income housing (collectively "lower income housing," for households generally earning 80 percent or less of median income); approximately 20 percent of the need is for moderate income housing, for households earning between 80 and 120 percent of median income; and the remaining 40 percent is for above-moderate income housing.[4] If a city's RHNA totaled 1000 units, the breakdown might be as follows:

Lower Income (Very Low and Low)	**Moderate Income**	**Above Moderate Income**	**TOTAL RHNA**
400 units	200 units	400 units	**1,000 units**

Providing Adequate Sites to Meet the RHNA. Each community must demonstrate in its housing element that it has enough sites properly zoned for housing to allow its total RHNA to be built in the next five to eight years. The housing element must contain an inventory of sites that permit housing development. For *each* site, the inventory must list the number of housing units that can be accommodated on the site, given the zoning and other constraints, and indicate whether the site is suitable for lower income, moderate income, or above moderate income housing. (§ 65583.2.)

The statute has specific requirements regarding which sites can "accommodate" the lower income housing need. In particular, certain densities (often called "default densities") are "deemed appropriate" to accommodate lower income housing. The default densities range from 10 units per acre in rural areas to 20 or 30 units per acre in urban areas. (§ 65583.2(c)(3)(B).) In

[4] *See, e.g.,* Association of Bay Area Governments, *Final Regional Housing Need Allocation (2014-2022).* "Lower income" is defined by Health & Safety Code § 50079.5; "moderate income" is defined by Health & Safety Code § 50093.

the above example, if the city's default density were 20 units per acre, at least 20 developable acres would need to be zoned at that density to accommodate the required 400 lower income units. A city may seek to demonstrate to HCD that a density below the default density could accommodate lower income housing (§ 65583.2(c)(3)(A)), and in a few instances HCD has approved lower default densities.[5] However, regardless of the required density, sites must be identified to accommodate the community's entire RHNA at all income levels.

Sites that Must be Rezoned to Provide Adequate Sites. If a city's inventory of sites shows it does not have enough areas zoned for housing at appropriate densities to meet its RHNA, its housing element must contain a rezoning program to be accomplished in three years (or a maximum of four years if certain findings can be made). (§§ 65583(c), (f).) In the above example, if the city had only 10 developable acres zoned at 20 units per acre or more, it would need to identify at least another 10 acres which it would promise to rezone within three years. Housing developments proposed on the rezoned sites must be approved 'by right,' as explained below. (§ 65583.2(h), (i).)

III. 'No Net Loss' Provisions.

The so-called 'no net loss' provisions apply when: (1) a site included in the housing element's inventory of sites; is (2) either rezoned to a *lower residential density*; or a project is approved at a *lower residential density* than shown in the housing element. (§ 65863(b).) At present the provision is inapplicable to charter cities (§ 65803), although this is likely to change (see discussion of SB 166 below). There are no published cases interpreting this provision.

"Lower residential density" usually means fewer units than were projected for the site in the city's housing element. (§ 65863(g)(1).) The provision applies to housing located on *any* site listed in the city's housing element, not only to sites designated as suitable for affordable housing. However, if either the city has not adopted a housing element within 90 days of the due date, or the housing element is not in substantial compliance with housing element law within 180 days of the due date, then "lower residential density" is defined as a density less than 80 percent of the maximum residential density permitted on the site. (§ 65863(g)(2).)

If the city downzones the site or approves a project at "lower residential density," it must make two findings:

1. "The reduction is consistent with the adopted general plan, including the housing element; and

[5] Personal communication.

2. "The remaining sites identified in the housing element are adequate to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584." (§ 65863(b).)

Even if the remaining sites are not adequate to accommodate the regional need, the city may reduce the density if it identifies "additional, adequate, and available sites" so that there is no net loss of "residential unit capacity." (§ 65863(c).) Finding the additional sites is solely the city's responsibility unless an applicant requests "in his or her initial application" a lower density that would result in the remaining housing sites being inadequate. (§ 65863(e).)

If a city then downzones a site identified in the housing element, or approves a project at a lower density than shown in the housing element, it would comply with this provision if one of the following is true:

- Other sites identified in the housing element show that the city's zoning remains adequate to meet its RHNA; or, the city has approved more units than shown in the housing element on some sites to make up the difference. For instance, if the city described above had identified sites that could accommodate 450 lower income units, but the density of one site was reduced by 20 units, the city would still be able to accommodate 430 lower income units, more than its RHNA of 400 units. Similarly, if the city had approved on another site 20 *more* units than shown in its housing element – say, through approval of a density bonus – there would be no net loss of capacity. In general, projects receiving density bonuses under Section 65915 are likely to provide extra capacity to make up for projects approved below the housing element density.

- Other sites zoned for housing, even if not identified in the housing element, show that the city's zoning remains adequate to meet its RHNA.

- The city upzones another site to meet its RHNA.

As currently in effect, Section 65863 has several ambiguities:

- Does the city's zoning need to accommodate the required number of units by income category (400 lower, 200 moderate, 400 above moderate), or only the total RHNA (1000 units)? When density is reduced, the city is required to find that sites are adequate to accommodate the regional need "pursuant to Section 65584." (§ 65863(b)(2).) Because Section 65584(a)(1) requires that each city's share be determined for "persons at all income levels" and defines those income

levels (§ 65583(e)), the better interpretation is that the required number of units must be maintained *by income level*.

- Are any changes to the housing element needed if the city identifies a site not shown in the housing element as an "additional, adequate and available site"? Nothing in Section 65863 discusses the need to modify the housing element when a new site is identified. It therefore appears to allow cities to substitute sites for those identified in the housing element without review by HCD. However, one finding required to be made is that the reduction in density is consistent with the housing element. (§ 65864(b)(1).) Projects that substantially reduce density are probably not consistent with the housing element. Cities therefore may wish to have language in their housing elements allowing this type of substitution.

- If a site needs to be rezoned to maintain adequate site capacity, when does this need to be accomplished? The city may approve the reduction in density if it identifies "adequate and available" sites so that there is no loss of capacity. (§ 65863(c).) This would seem to require that the new sites with the appropriate zoning be identified at the time of project approval; or the replacement site will not be "available" for housing. However, there is no definition regarding what is required for a site to be "adequate and available;" and the language is not consistent with that in the site identification statute (§ 65583.2), which requires a determination of whether a site can "accommodate" housing "during the planning period"[6] (§ 65583.2(c).)

Practice Tip: Cities should keep a log showing: (1) project approvals and rezonings applicable to all housing element sites; and (2) all residential approvals located on other sites, so that, if approving a project with lower density than shown in the housing element, the city will be able to demonstrate that it can still accommodate its RHNA; or will be aware that it must find another site, either by rezoning or by identifying an alternate, properly zoned site to make up the deficiency. If a site is rezoned or identified, but not in the housing element, it needs to be added to the log of housing element sites and monitored in the same way as housing element sites.

SB 166 (Skinner) (Included in Governor's housing package). As currently drafted, SB 166 would require not only that densities be maintained within each income category, but also that *sites be maintained for the actual production of units within that income category.* Under SB 166, of a market-rate project is built on a site designated for lower income or moderate income

[6] The "planning period" is the time period between the due date for one housing element and the due date of the next housing element. (§ 65888(f)(1)).

housing, the city must demonstrate that remaining sites could accommodate the unmet need for lower income or moderate income housing; or zone another site within 180 days. However, the bill provides that the city cannot deny a market-rate project because it does not contain lower income or moderate income units.

For example, under SB 166, if the city described above were to review an application for 100 market-rate units on a site designated for lower income housing, it would need to find that adequate sites zoned at 20 units per acre remain for all 400 lower income units (assuming no lower income units had been constructed). Unless the city had designated sites capable of accommodating 500 lower income units in its housing element, it would need to either identify a site not included in the housing element zoned to accommodate 100 units at 20 units per acre; or rezone another site within 180 days to accommodate 100 units at 20 units per acre.

Many cities have already approved market-rate projects on sites designated as suitable for lower income housing. If SB 166 as currently drafted becomes law, as soon as another market-rate project is proposed on a lower income site, some of these cities are likely to find that they have a significant rezoning obligation. The bill includes no exemptions for growth management provisions, agricultural preservation, or open space protection policies; and requires rezoning within 180 days regardless of CEQA requirements.

As noted above, lower income and moderate income housing account for 60 percent of a community's total RHNA. In two Bay Area affordable housing studies completed in 2015, the 'affordability gap' – the required subsidy per unit to construct lower income and moderate income units – ranged from $213,000 to $281,000 per unit for lower income units and from $123,000 to $187,000 for moderate income units.[7] Given that there are insufficient funds to subsidize 60 percent of the state's total housing need, if passed in its present form, SB 166 could force cities into large-scale rezonings in the face of tremendous public opposition.

SB 166 would apply to charter cities.

IV. <u>'By Right' Approval for Rezoned Sites</u>.

'By right' approval of a housing project is required when a housing development is proposed on: (1) a site included in the housing element's inventory of sites suitable for lower income housing; that was (2) rezoned *after* adoption of the housing element under a housing element program to accommodate lower income housing. (§ 65863.2(h).) The provision applies

[7] *See, e.g.,* Strategic Economics, *City of Belmont: Final Report, Residential Impact Fee Nexus Study* (November 2015), p. 48; Keyser Marston Associates, *City of Cupertino, Residential Below Market Rate (BMR) Housing Nexus Study* (March 2015), p. 35.

to charter cities (§ 65300). There are no published cases interpreting the 'by right' provisions as applied to the review of a housing development project.[8]

If a site must be rezoned to be suitable for lower income housing, the zoning must allow "owner-occupied and rental multifamily residential use by right." (§ 65863.2(h).) "Use by right" means that the city's review of a housing project on the site must not include any discretionary approval, such as a use permit, that would constitute a 'project' for purposes of the California Environmental Quality Act ("CEQA") – effectively requiring that any review of the project must be ministerial and based on fixed standards. *However:*

- If the project includes a subdivision, the subdivision is "subject to all laws," including the city's subdivision ordinance; and
- The project may be subject to design review, but that design review "shall not constitute a 'project' " under CEQA. (§65583.2(i).)

These provisions raise two issues. First, how should design review be structured to meet the 'by right' requirements? And second, if the project includes a subdivision, does project approval again become discretionary and subject to CEQA?

Design Review Approval. If a housing project consists only of rental housing with no subdivision, the project is exempt from any CEQA review as 'not a project,' and only design review approval can be required. In general, communities which have rezoned sites subject to the 'by right' provisions have developed detailed design guidelines for review of proposed projects.[9] Since the rezoning of the site to make it suitable for lower income housing does not need to be accomplished for three to four years (§ 65583(c)(1)(A), (f)), communities should theoretically have ample time to develop these guidelines; however, as described in the next section, the Housing Accountability Act does not allow an affordable project consistent with the housing element to be denied even if the rezoning has not yet been accomplished.

A further issue is what type of public review may be required for compliance with the design guidelines. Some communities are uncomfortable with staff review of compliance and provide for public hearings before the Planning Commission or City Council The statutory language that the design review approval "shall not constitute a project" under CEQA could be interpreted to mean that the design review approval must be ministerial; or could mean that even if the design review approval is discretionary, the legislature has exempted the approval from CEQA. In either case nothing prevents a city from allowing public comment on compliance or

[8] In *Fonseca v. City of Gilroy* (2007) 148 Cal. App. 4th 1174, 1180, the Court of Appeal held that the 'by right' provision, effective January 1 2005, did not apply to Gilroy's 2002 housing element.
[9] *See, e.g.,* Town of Los Gatos, *North 40 Specific Plan* (June 17, 2015), pp. 3-19 to 3-30.

having the decision made by the Commission or Council. The risk to the city is that conducting a public hearing can set up a false expectation among decisionmakers and members of the public who may demand the denial of a project that conforms with the design guidelines, setting up a challenge under the Housing Accountability Act (see below).

Subdivision Approval. If the project includes a subdivision, it is "subject to all laws." Presumably this phrase is intended at least to: 1) allow discretionary approval of the subdivision under the terms of the community's subdivision ordinance; and 2) subject the subdivision approval to CEQA. It is not clear what other "laws" are being referenced. Given the specific language limiting discretionary planning approvals, it should be assumed that the only permissible planning approval is design review and that that approval is exempt from CEQA; but it is unclear whether the project is now subject to other discretionary permits, such as tree permits or grading permits.

CEQA review should have been completed on the site rezoning required by the housing element but could have been completed in a limited, generalized fashion; as a program environmental impact report; or on a site-specific basis. Any additional CEQA review would be limited to a determination under Public Resources Code Section 21166 about whether a supplemental environmental document should be required. Nonetheless, a 'by right' project that includes a subdivision is clearly subject to discretionary review of the subdivision and potentially the need for additional CEQA analysis.

AB 1397 (Low) (Included in Governor's housing package). AB 1397 would limit the 'by right' provisions to projects containing 20 percent lower income housing.

V. The Housing Accountability Act.

The Housing Accountability Act (§ 65589.5; the "HAA") was originally adopted in 1982 and has been amended 16 times since. Formerly called the Anti-NIMBY Law, it is in part based on the Legislature's perception that local government bears major responsibility for the state's high housing costs, finding as follows:

> "The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.
>
> …

"Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing projects, reduction in density of housing projects, and excessive standards for housing projects." (§ 65589.5(a)(2), (4))

The HAA restricts cities' ability to deny, reduce the density of, or make infeasible *all* housing developments, whether affordable or market rate, and places the burden of proof on the city to justify one of these actions. (§ 65589.6.) It is applicable to charter cities. (§ 65589.5(g).) While different provisions apply to affordable and market-rate projects, cities should consider the possible applicability of the HAA whenever *any* housing project is proposed. Nonetheless, cities retain substantial leverage in reviewing these projects: the city must make all findings required by CEQA; and, regardless of the HAA, projects within the coastal zone must comply with the Coastal Act.

This section first reviews the provisions applicable to all housing projects and then the additional provisions applicable to affordable housing projects.

<u>Provisions Applicable to All Housing Development Projects</u>.

A proposed use qualifies as a "housing development project" under the HAA if it consists of:

- Residences only;
- Transitional or supportive housing;[10] or
- Mixed-use projects where the only nonresidential uses are "neighborhood commercial" uses limited to the first floor of buildings that have two or more stories. (§ 65589.5(h)(2).)

The HAA applies only when a local agency is considering a "specific construction proposal" and does not include the approval or disapproval of a specific plan or other legislative action. (*Chandis Sec. Co. v. City of Dana Point* (1996) 52 Cal. App. 4th 475, 486.) But the definition of a "housing development project" does not require that the project contain any affordable housing, and the courts have rejected contentions to the contrary.[11] In fact, all of the published cases except one interpreting the HAA have involved market-rate, not affordable, projects.

[10] Defined in Section 65582.
[11] *See Honchariw v. County of Stanislaus* (2011) 200 Cal. App. 4th 1066, 1077; *North Pacifica, LLC v. City of Pacifica* (N.D. Cal. 2002) 234 F.Supp.2d 1053, 1058.

Findings Required to Deny or Reduce the Density of a Housing Development Project. Under the HAA, if *any* housing development project – whether market-rate or affordable – complies with all "applicable, *objective* general plan and zoning standards and criteria, including design review standards," in effect when the project is deemed complete, but the city disapproves the project or reduces the density, the city must make written findings supported by substantial evidence that both of the following exist:

> "(1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.
>
> "(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." (§ 65589.5(j).)

In evaluating project compliance with the general plan and zoning, cities must apply their development standards and policies "to facilitate and accommodate development at the density permitted on the site and proposed by the development." (§ 65589.5(f)(1).) Although there is no definition of what constitutes an "objective" general plan or zoning standard, the Court of Appeal in *Honchariw v. County of Stanislaus* (2011) 200 Cal. App. 4th 1066 (*"Honchariw"),* noted that the term "objective" was added in 1999 amendments and was intended to "strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability')" to deny or reduce the density of a housing development project. (*Id.* at 1076-77.)[12]

In *Honchariw*, the Court of Appeal prescribed how findings should be made when a residential project is to be denied or to have its density reduced. The Court ordered the Stanislaus County Board of Supervisors to vacate its denial of Honchariw's vesting tentative map because nothing in the record supported the County's contention that the project did not comply with

[12] The 1999 amendments also added the requirement that a 'significant adverse impact' means "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards." (Stats. 1999 ch. 968 §6.) Two earlier cases decided before the adoption of those amendments provide more deference to local agency determinations. *See Toigo v. Town of Ross* (1998) 70 Cal. App. 4th 309, 319; *Mira Development Corp. v. City of San Diego* (1988) 205 Cal. App. 3d 1201, 1222-23.

A recent Superior Court decision (not appealed) found that findings made to deny a housing development were not based on "objective" criteria. *See Eden Housing, Inc. v. Town of Los Gatos,* County of Santa Clara Superior Court, Case No. 16CV300733, Decision and Judgment Granting Writ of Mandamus (June 14, 2017).

"applicable, objective" standards; in fact, the proposed conditions of approval required compliance with the standards at issue, and the applicant stated he would comply with the conditions. (*Id.* at 1080-81.) Although the County made findings denying the subdivision under Section 66474 of the Subdivision Map Act, finding that the site was "not physically suitable" for the proposed subdivision, the Court held that this did not relieve the County of making the findings required by the HAA. (*Id.* at 1079.)

The Court ordered the County to reconsider the application, and, if it determined again to deny the project [or reduce its density], to:

- Determine whether the project complied with "applicable, objective general plan and zoning standards and criteria" in effect when the application was deemed complete;
- Identify the specific standards with which the project failed to comply; or
- If the project did comply with all objective standards, to make the written findings of a "specific, adverse impact upon the public health and safety" required by Section 65589.5(j), supported by substantial evidence in the record. (*Id.* at1081-82.)

The lesson is that, if a city intends to deny or reduce the density of any "housing development project," it must first identify any specific "applicable, objective" standards with which the project does not comply. If none can be found, the city may deny or reduce the density of the project *only* if it can find a "specific, adverse impact upon the public health and safety," as specified in Section 65589.5(j). Otherwise, it cannot deny or reduce the density of the project. The only exception relates to projects in the coastal zone, as discussed below.

<u>Affordable Housing Development Projects</u>.

In addition to the findings required by Section 65589.5(j) to deny or reduce the density of a project, whenever a city reviews a housing development project for "very low, low-, or moderate-income households" or an emergency shelter, it must make one of five findings contained in Section 65589.5(d) to disapprove the project or "condition approval in a manner that renders the project infeasible." "Housing for very low, low-, or moderate-income households" includes:

- 20 percent of the units available for sale or rent to lower income households at a monthly housing cost that does not exceed 30 percent of 60 percent of median income;

- 100 percent of the units available for sale or rent to moderate income households at a monthly housing cost that does not exceed 30 percent of 100 percent of median income; or

- 100 percent of the units available for sale or rent to middle income households earning up to 150 percent of median income. No standards are included for monthly housing cost for middle income households. (§§ 65589.5(h)(3); 65008(c).)

Units affordable to lower income households must be deed-restricted for at least 30 years. (§ 65589.5(h)(4).) If the project is instead affordable to moderate- or middle-income households, the statute prescribes no period of affordability; the first buyer may sell at any price.

Findings Required to Deny Affordable Projects and Emergency Shelters. One of five findings must be made to deny an affordable project or emergency shelter or to adopt a condition rendering the project infeasible. Each of these findings in the statute is lengthy and should be read in its entirety; below is a summary.

1. The city has "met or exceeded its share of the regional housing need allocation" for all of the income categories included in the proposed project, as shown in its housing element annual report required by Section 65400. (§ 65589.5(d)(1).) In the housing element annual report, progress in meeting the regional need is based on building permit issuance. 25 CCR §§ 6200-6203. Therefore, to use this finding to deny a project that includes 20 percent lower income housing and 80 percent above moderate-income housing, the city would need to demonstrate that it had issued building permits at least equal to *both* the community's entire above moderate income RHNA *and* its entire lower income RHNA.

2. The project would have a "specific, adverse impact upon the public health and safety," and there is no way to mitigate the impact without rendering the project infeasible. A "specific, adverse impact" is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health and safety policies" as they existed when the application was deemed complete. Inconsistency with the general plan or zoning is not a "specific adverse impact." (§ 65589.5(d)(2).) (This is essentially the same finding required by Section 65589.5(j) described above.)

3. The denial or the conditions are required to comply with state or federal law, and there is no feasible way to comply without rendering the project infeasible. (§

65589.5(d)(3).) This finding should be used if the project does not comply with the local coastal plan; see discussion below.

4. Either: the site is zoned for agriculture or natural resource use *and* is surrounded on at least two sides by land actually used for agriculture or natural resource purposes; or water or sewer are inadequate to serve the project. (§ 65589.5(d)(4).)

5. The project is inconsistent with *both* the general plan and zoning as they existed on the date the application was deemed complete. However, this provision cannot be used to deny a project, or adopt a condition making the project infeasible, if any one of the following is true:

    a. The city has not adopted a housing element in substantial conformance with state law by the due date prescribed in Section 65888. This provision could theoretically require a city to approve an affordable project inconsistent with both the general plan and zoning if its housing element does not conform with state law, or if it has not adopted a housing element when due; or

    b. The project is located on a site designated for lower or moderate income housing in the housing element and is consistent with the density shown in the housing element; or

    c. The site inventory contained in the city's housing element does not provide adequate sites at all income levels. The burden of proof is on the city to demonstrate that the housing element provides adequate sites. Effectively, this provision allows an attack on the adequacy of the sites designated in the community's housing element long after it was adopted. (§ 65589.5(d)(5).)

All of these findings are difficult to make, and no published cases explore the adequacy of a local agency's findings denying an affordable project.

<u>Compliance with CEQA and the Coastal Act</u>. Despite these strict requirements, the HAA provides that "[n]othing in this section shall be construed to relieve the local agency from complying with … the California Coastal Act of 1976…Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required by [CEQA]." (§ 65589.5(e).)

While there is no case that decides whether the Coastal Act trumps the HAA, in *Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal. App. 5th 927, the Court of Appeal in dicta concluded that, based on the language of the HAA and the Court's reasoning regarding the relationship of state density bonus law to the Coastal Act, the HAA is likely subordinate to the Coastal Act: regardless of the HAA, no housing development project may be approved if it violates the Coastal Act. (*See id.* at 944 n.9.)

The requirement for compliance with CEQA allows thorough and extensive review of any housing development project. In *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal. App. 4th 1245, the developer spent six years trying to get a development plan approved, modifying the plan by repeatedly reducing the density and paying for various versions of an EIR that was never certified. He finally sought to have a court order the City to certify the EIR, citing, in part, the HAA. The Court of Appeal held that it could not order the City to certify the EIR; that the City had not unreasonably delayed the project because Schellinger kept modifying it; that the City had always continued to process the EIR; and that the HAA would have no applicability until the EIR was certified.

It is not entirely clear how cities should reconcile the HAA and CEQA if a required mitigation measure would make a project infeasible. In *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal. App. 4th 704, the Court of Appeal upheld the City of Oakland's determination that it was legally infeasible to approve a reduced density alternative because the City could not make the findings required by the HAA to reduce the density: none of the impacts that would be mitigated by the reduced density alternative rose to the level of "specific, adverse impacts on public health or safety." (*See id.* at 715-16.) But a city in this situation might be required to adopt a statement of overriding considerations under CEQA Guidelines Section 15093. Would its refusal to do so justify denial of the project? To be determined.

<u>SB 167/AB 678 (Included in Governor's housing package)</u>. These two bills would:

- Require that all city findings under the HAA be based on a preponderance of the evidence, rather than on the usual substantial evidence test;
- Prohibit cities from evaluating a project based on zoning or general plan changes made after a project is submitted but before it is deemed complete;
- Expand the definition of a "housing development project" to include any mixed-use development in which at least two-thirds of the square footage is designated for residential use;

- Clarify that projects are considered to be denied when any entitlement is denied that is necessary to obtain a building permit;

- Require cities to provide a list to developers of any inconsistencies with development standards within 30 to 60 days after the project is deemed complete;

- Allow market-rate developers, as well as affordable developers, to receive attorneys' fees for a violation of the section;

- Require fines of at least $10,000 per unit if a city ignores a court order to comply with the HAA.

AB 1515 (Included in Governor's housing package). This bill would provide that a housing development project or emergency shelter is "deemed consistent" with community plans "if there is substantial evidence that would allow a reasonable person to conclude" that the project is consistent. This would allow a project proponent to submit evidence into the record of consistency even when a city determines that a project is inconsistent. If a court found the developer's evidence to be "reasonable," the project would be found to be consistent, regardless of the city's determination.

VII. Putting It All Together: When Your City May Need to Make Additional Findings.

Here are the questions to ask to determine if any housing project may be subject to these statutes:

- **Does the project include housing or involve downzoning or other zoning changes that include residentially zoned sites?**

- **If so: is the project or city action located on a site designated for housing in the City's housing element?**

    - If on a housing element site: was the site rezoned as required by a housing element program *after* the housing element was adopted?

        - Then a housing development project must be approved 'by right' as described in Section 65583.2(i).

    - If on a housing element site: are the proposed units shown in the project application or possible after rezoning at least equal to the number of units shown in the housing element?

        - If not: the findings required by Section 65863 need to be made. If the proposal is inconsistent with the housing element, the project cannot be approved without an amendment to the housing element. If the project is consistent with the housing element, but the remaining sites identified in the housing element are *not* adequate to accommodate the city's RHNA, then:
            - If a developer's initial application showed the reduced density, the developer must find the alternate site.
            - If the developer reduced the density below the housing element projection *after* submitting the application, or the city requires that the density be reduced, or the city is taking other action to reduce density, the city must find the alternate site.

- **If the project includes housing: Does the project meet the definition of a "housing development project" under the HAA?**
    - If a housing development project: does the city plan to deny or reduce the density of the project?
        - If city plans to deny or reduce density: does the project comply with "applicable, objective" general plan and zoning standards?
            - If does not comply: the city may specify the deficiencies and deny the project or reduce the density.
            - If does comply: the project may only be denied, or have its density reduced, if the city can find a "specific adverse impact upon the public health or safety;" *unless* the project is in the coastal zone, in which case it likely may be denied if it does not comply with the local coastal plan. (Section 65589.5(f).)
    - If a housing development project: does the project qualify as an affordable project or as an emergency shelter?
        - If affordable or a shelter: does the city plan to disapprove the project or impose a condition that will make the project infeasible

for development of affordable housing [probably as asserted by the applicant]:

- If so: in addition to the analysis and findings required by Section 65589.5(f), the city must make one of the findings required by Section 65589.5(d).

VII. Conclusion.

Housing advocates are convinced that local planning and zoning regulations and local opposition to housing account for the high cost, slow production, and lack of affordability of housing in much of California. Since projects have not been approved despite the designation of sites in housing elements, advocates are now looking to strengthen developers' hand when their projects are reviewed by local governments and to enhance enforcement of state law. Bills likely to pass the Legislature will make existing requirements even more onerous.

In attempting to comply, cities are buffeted by state demands on one hand and, on the other, by growing community opposition to the more intense infill housing required by housing element law, exacerbated by lack of funding to improve school overcrowding and traffic congestion. Nonetheless, cities need to ensure that the housing called for in their plans and policies can actually be built. City attorneys and managers will need to educate their decision-makers and the public on the demands posed by state law and the increasing limitations on local decision-making in reviewing housing projects.

Americans With Disabilities Act: Proceed With Caution

Thursday, September 14, 2017 General Session; 2:45 – 4:00 p.m.

James S. Brown, Partner, Sedgwick LLP
Sean Patterson, Senior Associate, Sedgwick LLP

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LEAGUE OF CITIES: PRESENTATION PAPER

Americans with Disabilities Act: Proceed With Caution

I. INTRODUCTION

The Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101, *et seq.*, (the "ADA") was enacted to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage. Unfortunately, it has also created an often misused avenue for litigation against state and local government. This paper is intended to provide the reader with a general overview of the legal standard for compliance, as well as give some examples of the potential for its abuse by misguided or unscrupulous individuals.

II. LEGAL STANDARD

A. Protected Individuals and Application to State & Local Government

The ADA applies to anyone who qualifies as an individual with a disability. An individual with a disability is a person who:

1. has a physical or mental impairment that substantially limits or more major life activities;

2. has a record of such an impairment; or

3. is regarded as having such an impairment.

A major life activity includes, but is not limited to, caring for oneself, performing manual tasks, seeing hearing, eating, sleeping, walking, standing, lifting, bending, speaking breathing, learning, reading, concentrating, thinking, communicating, and working. A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The ADA contains four sub-parts. The first three sections of the statute, Titles I, II and III, bar discrimination of the basis of disability in different areas of public life. Title II of the ADA prohibits discrimination on the basis of disability by "public entities," which results in the denial of access to programs, services and activities operated by state and local governments. 42 U.S.C. §§ 12131(1), 12132.[1] Title II is an outgrowth of the prohibition on discrimination established by section 504 of the Rehabilitation Act of 1973 ("RA"). However, the potential application of Title II is even broader than the RA, as it imposes federal mandates on the day-to-day operations of local

[1] Title I bars disability discrimination by an "employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. §§ 12111(2), 12112. Title III bars disability discrimination in public accommodations, defined to include places of education including post-graduate private schools, and bars disability discrimination by "any person who owns, leases (or leases to), or operates a place of public accommodation." §§ 12181(7)(J), 12182. Title IV forbids retaliation against anyone for opposing actions made unlawful under the ADA or for participating in a charge under the ADA. § 12203(a). It also forbids coercion or intimidation against anyone exercising his or her rights under the statute. § 12203(b).

governments, regardless of whether the entity is a recipient of federal funds, and regardless of the size of the entity.[2]

Title II requires that all programs, services and activities available through public entities are accessible to individuals with disabilities. Title II also outlines the requirements for self-evaluation and planning; making reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination; identifying architectural barriers; and communicating effectively with people with hearing, vision and speech disabilities. (*Id.*)[3] The regulation and enforcement of state and local government's compliance with Title II is overseen by the U.S. Department of Justice. Typically, an investigation by the DOJ is initiated after receipt of a discrimination complaint, which can be submitted by or on behalf of anyone alleging the discrimination within 180 days of the alleged violation. Upon receipt, the DOJ has broad latitude to investigate and resolve the claim, including through mediation and court order. However, a private citizen is also entitled to file suit in federal court for discrimination in violation of the ADA.

In California, a private citizen typically must first comply with the Government Tort Claims Act before filing a civil suit against a public agency (or public employees based on claims arising from the performance of their official duties).[4] All claims for money or damages against a public entity must be presented in writing to the public entity prior to filing suit. The procedure gives cities and other public entities an opportunity to investigate claims and to negotiate with those potential plaintiffs who have meritorious claims. Noncompliance with the procedural requirements for making a tort claim against a government entity is also a powerful defense against most claims for money damages. However, this procedural safeguard does not apply to claims that only seek other forms of relief, i.e., declaratory or prospective injunctive relief. Thus, the type of relief sought in a a civil suit alleging a violation of the ADA will determine whether the plaintiff must first comply with these procedural mechanisms.

Typically, civil suits filed by private citizens alleging discrimination that violates Title II of the ADA can be broken into three categories, denial of access, failure to provide reasonable accommodation, and retaliation. Most disability discrimination lawsuits typically allege denial of access. For example, a building has no wheelchair access or, more likely, the access is inadequate to allow use. However, access can take other forms, such as a person who is deaf is being denied access because no auxiliary hearing aids or other options are available to insure effective communication. A denial of access claim can also be created when a person is subjected to some type of additional requirement due solely to their disability, e.g., a charge by a government entity to recover costs associated with providing an interpreter to a deaf person. Other types of disability discrimination suits can be based on allegations that a public entity either (a) failed to provide a requested accommodation (e.g., a juror who asks for the use of a hearing aid while serving jury duty), and/or (b)

[2] "The ADA and the RA are "similar in substance" and, with the exception of the RA's federal funding requirement, "cases interpreting either are applicable and interchangeable." 42 U.S.C.§ 1211(5)(A); *see also Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999). The elements of ADA and RA claims do not differ in any material respect. (*See e.g., Zukle v. Regents of the University of California*, 166 F.3d 1041, 1045 n. 11(9th Cir. 1999).)

[3] Title I of the ADA applies to disability discrimination in employment, and Title III applies to commercial facilities and places of public accommodation.

[4] *See* Cal. Gov't Code § 905 (requiring presentation of a claim against a local public entity); § 915(c) § 950.2 (providing that "a cause of action against a public employee . . .for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 . . . of this division or under Chapter 2 . . . of Part 4 of this division").

acted in retaliation (e.g., a student who complains of disability discrimination on behalf of him/herself or another individual is subsequently expelled from a college).[5]

California has also enacted legislation that follows the ADA and provides additional avenues for civil suit by private citizens. For Example, California Civil Code § 54 states in part that individuals with disabilities have the same rights as the general public to the full and free use of the streets, sidewalks, walkways, public buildings and facilities, and other public places. Civil Code § 54.1 states in part that individuals with disabilities shall be entitled to full and equal access to accommodations, facilities, telephone facilities, places of public accommodation, and other places to which the general public is invited. Similarly, the Unruh Act states in part that all persons within the jurisdiction of the State of California are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[6] Each of these state laws are routinely relied upon by plaintiffs claiming discrimination or denial of access due to disability.

B. <u>The Standard Of Review Under The ADA</u>

Title II of the ADA, 42 U.S.C. §12132 provides that:

> ... No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

A "disability" under the ADA includes "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Under Title II, the the U.S. Court of Appeals, Ninth Circuit, which covers California, has explained that a plaintiff must prove the following:

> To prove a public program or service violates Title II of the ADA, a plaintiff must show: (1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.

Weinreich v. Los Angeles Cty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997). Applicable regulations require public entities to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (2012). "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the

[5] Unlawful retaliation includes any discrimination against a person with a disability because the person opposed any act or practice unlawful under the ADA or because the person made a complaint of discrimination, testified or assisted in any way in the investigation or trial regarding a complaint of discrimination. Individuals are typically immune from personal liability involving claims alleging retaliation. However, an individual can be sued in his or her official capacity for prospective injunctive relief (i.e., an order from the court that an official take actions in the future to provide the plaintiff with a specific relief). *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 413-414 (5th Cir. 2004).

[6] The Unruh Act also states in part that no business establishment of any kind shall discriminate against any person in California because of the disability of that person. The Unruh Act specifically incorporates by reference an individual's rights under the ADA. See also California Civil Code § 51, which provides that "[a] violation of the right of any individual under the federal Americans with Disabilities Act of 1990 (P.L. 101-336) shall also constitute a violation of this section." Cal. Civ. Code § 51(f).

basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (2011).

Because a plaintiff bears the burden of establishing an ADA violation, "she must establish the existence of specific reasonable accommodations that [the defendant] failed to provide." *Memmer v. Marin Cty. Courts*, 169 F.3d 630, 633 (9th Cir. 1999). Moreover, when a public agency offers an accommodation, the plaintiff "must show that the accommodations offered by the [defendant] were not reasonable, and that he was unable to participate equally in the proceedings at issue." *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1137 (9th Cir. 2001) (finding that hearing-impaired plaintiff presented a material issue of fact as to whether the refusal to provide videotext display prevented him from participating equally in court).

It is only after a plaintiff demonstrates that an accommodation offered by a defendant is unreasonable that the burden shifts to the defendant to show that a plaintiff's requested accommodation would fundamentally alter the nature of the program. If a plaintiff is able to meet this standard, the remedies available include injunctive and declaratory relief, e.g., an order from a state or federal court directing the public agency to take certain actions. A plaintiff is also entitled to recover the costs and attorneys' fees included in the civil suit. Additionally, money damages may also be available (but as noted above, a claim for money damages also raises the procedural requirement of compliance with the Government Tort Claims Act). Thankfully though, the money damages are limited to compensatory damages, and a plaintiff may not recover punitive damages for any claim based on Title II of the ADA. *Barnes v. Gorman*, 536 U.S. 181 (2002). Compensatory damages are awarded to make a person whole for a particular loss or injury. These damages require a concrete showing and are not intended to replace anything beyond what was lost by a plaintiff. That does not mean though that the damages cannot be significant. To recover money damages under Title II of the ADA, a plaintiff must prove intentional discrimination on the part of the defendant under a "deliberate indifference" standard. *Duvall v. Cty. of Kitsap*, *supra*, 260 F.3d at 1138. "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that the likelihood." *Id.* at 1139.

In application, a plaintiff may only need to establish that a public agency had knowledge that individuals with disabilities were being denied equal access/use of a public service or program. This bar of "deliberate indifference" means that a party need not show actual knowledge of the alleged discriminatory acts in order to recover money damages. Rather, the party merely needs to show that the public agency had "some form of notice . . . and the opportunity to conform to statutory dictates. . . " *City of Canton v. Harris* 489 U.S. 378, 389 (1988) In fact, some courts have found that as little as "benign neglect" of a city's statutory duty to monitor private contractors is sufficient to state an ADA claim. *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 895 (N.D. Ohio 1999). "When the plaintiff has alerted the . . . entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the . . . entity is on notice that an accommodation is required."). *Duvall*, 260 F.3d at 1139.

It is also important to note that a public entity that contracts with a private company to provide services to the public may still face legal liability if the private company is found to have violated the ADA. (*See Armstrong v. Schwarzenegger* (9th Cir. 2010) 622 F.3d 1058, 1065-66 [Holding that public entities may not contract away their liability by partnering with private entities to perform certain services.].) Indeed, as the current prevailing authority holds that a private contractor cannot be held liable under Title II of the ADA, it is almost certain that the saavy plaintiff will seek to recover from the contracting public agency for any alleged violations. Thus, it is critical that public entities are (a) proactive in the review of programs and services for compliance with Title II before making them

available to the general public, (b) continue to actively monitor these programs and services for compliance, and (c) have solid procedures in place to receive and respond to complaints and requests for accommodation.

C. Examples of The Potential Cost of Litigation

As set forth above, the intent of the AD (and similarly the Rehabilitation Act, and California's Unruh Act) is to create legal protection and recourse for persons denied access to public services due to their disability(ies). Through this discussion, it is not our intent to suggest that these legal protections are not necessary or proper. However, what we have seen is that like many landmark legislative acts, the wide-ranging application of these laws are often abused by unscrupulous litigants (or by attorneys seeking to take advantage of the fee shifting provisions in their favor). In particular, individuals – often serial or "vexatious" litigants – abuse these protections in an effort to extort improper accommodation and/or clear the initial procedural hurdles that would otherwise bar their frivolous lawsuits. The following are a few examples based on real-world litigation to highlight the dangers of same.

1. John Doe v. Superior Court

For the last three years, a self-represented plaintiff has attempted to sue multiple state and local agencies, and numerous employees and officers of same, in an attempt to challenge various adverse decisions issued in his underlying divorce and custody proceedings.[7] This individual's frivolous and harassing filings in the underlying proceedings led to him being declared a "vexatious litigant" subject to a pre-filing order.[8] Despite these sanctions, the plaintiff continued to attempt to file dozens of lawsuits against his former spouse, her attorneys, his former attorneys, and persons from nearly every local agency involved in his family law proceedings (e.g., judges, court employees, and various law enforcement personnel). During the course of these state court proceedings he also routinely requested accommodation for his claimed disabilities. His requests were often procedurally defective and almost always overreaching (i.e., requesting accommodation that went beyond his needs or that was impractical or impossible to provide). He also often failed to comply with the rules created by the local agencies for submitting these requests, and/or failed to respond to their requests for additional supporting documentation. Further, his requests were clearly intended to avoid certain procedural obstacles that would otherwise deter or impede his frivolous filings. As such, the responding state court agencies correctly denied these requests as improper and unnecessary. Their response was used by this plaintiff as fodder for a new lawsuit though, which he subsequently filed in federal court.

In a 300+ page complaint, the plaintiff sued numerous state and local agencies (and their employees) as defendants, alleging dozens of disparate legal theories. He alleged that the denial of his dozens of requested accommodations was unlawful discrimination under the ADA.[9] As the plaintiff was allowed to proceed with this claim, he was able to engage in discovery with the responding public entity. As you may guess by now, the plaintiff continued to engage in the same abusive filing practices

[7] In order to avoid disclosure of confidential information, all names of the relevant parties are omitted from this discussion.

[8] In California, the state court may find under certain explicit circumstances that self-represented individuals who file multiple frivolous lawsuits are "vexatious" and issue an order that limits their ability to file future lawsuits. *See* Code Civ. Proc. § 391(b). Federal courts can make similar findings and rulings as well. F.R.C.P. Rule 11.

[9] As the plaintiff was self-represented, the federal court was required to review and test each of his claims to see if they could meet the minimum standards. Despite multiple amendments, almost all of the plaintiff's claims were dismissed after this initial review. One of the few claims that did survive though, was his claim for disability discrimination.

that he had previously used in his state court matters. Eventually, the public entity and other defendants (other state agencies and employees) were all exonerated, and the plaintiff was subsequently declared a vexatious litigant by the federal court as well. However, this outcome was by no means certain, and the local agencies spent tens of thousands of dollars and hundreds of hours defending his claims. Indeed, even though the federal court ultimately dismissed his ADA claims as frivolous and unfounded, the public entity continues to incur costs from this lawsuit as the plaintiff has appealed this judgment. Further, the practical recourse for the public entity is limited, as the plaintiff claims to be insolvent and is effectively judgment-proof. Thus, even though the federal court awarded significant costs, there is little likelihood that the public entity will be able to recover them from this plaintiff.

2. Lessons learned and recommendations

The cost to our client in defending the single lawsuit described above was enormous. Further, that cost continues to grow as the plaintiff's appeal is an inherently expensive and time-consuming process. Further, there is always a risk – even if minimal – that the appellate court may find in his favor on some of the issues raised in his appeal. Such a ruling would necessarily lead to substantial additional costs in defending his claim. The following are helpful guidelines for agencies to minimize the risk of similar claims:

- Create written procedures for receiving and responding to requests for disability accommodation and/or complaints re denial of access;
- Prepare and publish guidelines for submitting complaints and/or requests for accommodation;
- Perform regular reviews of all services and facilities for compliance with access requirements, and independent review for new construction/renovation;
- Provide all employees who are in contact with the public with (at least) annual instruction on compliance with these written procedures, and maintain records documenting same;
- Designate and train an employee with responsibility for overseeing administration of these programs (i.e., an ADA Coordinator); and
- Insure that all applicable private contractors are complying with the ADA guidelines (and/or have an agreement in place through which the contractor expressly agrees to defend and indemnify the agency for any such alleged violations).

It is critical that the above policies and procedures are created and implemented in a fashion that insures compliance with all applicable state and federal policies. The failure to do so may open the responding agency up to review and corrective action as a result of an investigation by the Department of Justice. Also, compliance with all these points may not be enough to dissuade the determined litigant, especially with potential attorney fees available to attorneys who take on such litigation.. However, proactive, documented policies and good faith efforts at compliance are much better defenses to a lawsuit than a record of non-compliance and failure to take any affirmative steps towards compliance.

Labor and Employment Litigation Update

Thursday, September 14, 2017 General Session; 4:15 – 5:30 p.m.

Stacey N. Sheston, Best Best & Krieger

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Notes:

LABOR AND EMPLOYMENT LAW UPDATE

League of California Cities
September 2017
Sacramento, California

Stacey N. Sheston

BBK | BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

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WAGE & HOUR

FLSA RETALIATION PROHIBITION APPLIES TO "ANY PERSON" AND NOT JUST TO AN EMPLOYER

Arias v. Raimondo, 860 F.3d 1185 (9th Cir. 2017)

Plaintiff Arias began working as a milker for Angelo Dairy, a small, family owned and operated company, in 1995. When they hired plaintiff, they did not complete or file the required I-9 form regarding his employment eligibility in the U.S. Instead, the Angelos allegedly used the threat of reporting his non-compliant immigration status as a sort of "weapon" to cause him to forego other employment and stay with them. Plaintiff sued in 2006 for a variety of workplace violations, including failure to provide overtime pay, rest breaks or meal periods, as well as for unfair competition violations of Business & Professions Code section 17200. Following an extended period of procedural machinations, the case was set for trial in state court in August 2011. But on June 1, 2011, the Angelos attorney (Raimondo) "set in motion an underhanded plan to derail Arias' lawsuit." Emails with a Homeland Security Employee show that Raimondo contacted U.S. Immigration and Customs Enforcement to encourage them to take Arias into custody and deport him, and he sought to block California Rural Legal Assistance attorneys from representing Arias. The threat of deportation (his own and his family's) apparently motivated Arias to settle his claims against the Angelos a month prior to trial.

In May 2013, Arias sued Angelo Dairy, the Angelos, and Raimondo in federal court alleging violations of the Fair Labor Standards Act. His claim against Raimondo was framed as retaliation in violation of 29 U.S.C. 215(a)(3). The district court granted Raimondo's 12(b)6) motion to dismiss because there were no allegations that Raimondo exercised any control over Arias' employment relationship, and thus Raimondo was not an "employer" subject to the retaliation prohibition of the Fair Labor Standards Act (FLSA).

The Ninth Circuit reversed. The panel held that, unlike the FLSA's wage and hour provisions, its retaliation provisions apply to "any person" and do not require that a defendant be the plaintiff's employer. The panel remanded the case to the district court for further proceedings.

DISCRIMINATION/HARASSMENT

ADEA APPLIES TO SUBDIVISIONS OF A STATE EVEN IF THEY HAVE FEWER THAN 20 EMPLOYEES

Guido v. Mount Lemmon Fire Dist., 859 F.3d 1168 (9th Cir. 2017)

Two fire captains – Guido and Rankin – were the two oldest fulltime employees of the Mount Lemmon Fire District. Both were fired; they were 46 and 54, respectively, at the time of their terminations. Both received favorable rulings from the Equal Employment Opportunity Commission, which found reasonable cause to believe the district violated the Age Discrimination in Employment Act (ADEA). They sued for age discrimination, and the trial court granted the district's motion for summary judgment, concluding that the district was not an "employer" within the meaning of the ADEA because it did not have twenty or more employees.

On appeal, the Ninth Circuit reversed. It held, contrary to decisions of other circuits, that while a "person engaged in an industry affecting commerce" must have twenty or more employees to be subject to the ADEA (*see* 29 U.S.C. section 630), a political subdivision of a State does not. The panel remanded the case for further proceedings.

EXECUTIVE'S STEREOTYPICAL VIEW OF GAY MEN AND HIS STRONG GENDER IDENTITY EXPRESSION OPINIONS CREATED DISPUTED ISSUE OF FACT AS TO WHETHER PLAINTIFF WAS VIEWED AS "TOO GAY" AND THUS WHETHER DISCRIMINATORY BIAS WAS A SUBSTANTIAL MOTIVATING FACTOR IN HIS TERMINATION

Husman v. Toyota Motor Credit Corp., 12 Cal App. 5th 1168 (2017)

Husman was an out, gay male who was a 14-year employee of various Toyota divisions at its southern California Torrance campus. He ran the Company's diversity and inclusion program and reputedly excellent at the important components of the job (Toyota won a number of diversity awards), receiving "very good" ratings on his annual performance reviews from his supervisor, Borst. Borst promoted Husman to an executive-level position as the manager of corporate social responsibility, a position encompassing diversity and inclusion, as well as corporate philanthropy. His new supervisors – Bybee and Pelliccioni - had known him for over a decade, knew he identified as gay, and did not express any concern about his promotion into the new position with them. Bybee became concerned a few months later about Husman's frequent absences from the office and "lax management" of his team, and she counseled him to be in the office more. Soon after, Bybee learned of several complaints about comments Husman had allegedly made to his coworkers (touching on gender, pregnancy, and political affiliation issues).

An investigation corroborated the allegations, and Bybee informed Husman he would receive a written warning, certain reduced performance ratings, and (as a result) a slightly lower bonus. Husman reacted badly and became increasingly uncooperative with Bybee, as well as Pelliccioni when Pelliccioni stood by the discipline and offered him executive coaching to assist in meeting their expectations. Husman complained that other Toyota executives had not been disciplined for comments he believed were far worse, and he was particularly critical of what he viewed as Toyota's insufficient support of Lesbian, Gay, Bisexual, and Transgender (LGBT) employees and events. Bybee became increasingly frustrated with Husman's insubordination and lack of progress on assigned projects, as well as his continued frequent absences from the office and avoiding meetings with her. In September 2011, Husman failed to attend two one-on-one meeting with her and resisted attending an executive conference that month, and he made comments critical of other executives who scored lower than he on a cultural literacy assessment given by a consultant Toyota had engaged. Bybee and Borst viewed this as the last straw, and Borst asked Pelliccioni to prepare a generous separation package to allow Husman to leave with dignity. Bybee told Husman he was being terminated for "excluding the majority" and focusing too much on LGBT issues. His corporate philanthropy duties were subsequently assigned to a straight male employee, while the diversity/inclusion tasks were staffed by a gay male employee. Husman sued for sexual orientation discrimination and retaliation under the Fair Employment Housing Act, and Toyota successfully moved for summary judgment on all claims.

The appellate court affirmed summary judgment for Toyota on the retaliation claim, holding that Husman had not demonstrated protected conduct in the two instances he alleged: (1) his complaint that Pelliccioni had refused to include AIDS Walk LA on the list of automatic payroll deductions (rejected because only national organizations were on the list); and (2) his complaint to the Diversity Advisory Board that while "Toyota's LGBT employees had made some progress, there was still work to be done" (deemed a mere exhortation to strive for additional improvement). However, the court reversed summary judgment on the discrimination claims, holding that Husman had proffered evidence that discrimination was a substantial motivating factor for his discharge, and he had not waived his "mixed motive" theory by not arguing it in the motion for summary judgement papers below. The court rejected Toyota's reliance on the "same actor" defense (Borst being the same actor that promoted and later terminated Husman) in light of the "cat's paw" evidence of Pelliccioni's participation in the termination decision. Pelliccioni had stated Husman made "a very clear statement" about his sexual orientation and ridiculed him for wearing a scarf as an accessory when it was not cold outside. Husman argued this evidence created a triable issue of fact that Pelliccioni viewed him as "too gay" (even if a less obviously gay employee would be acceptable), and that anti-gay bias was at least a factor in the termination decision input Pelliccioni offered.

PUBLIC AGENCY

General

INDEPENDENT CONTRACTORS AND CONSULTANTS CAN BE CONSIDERED "EMPLOYEES" SUBJECT TO THE CONFLICT OF INTEREST PROVISIONS OF GOVERNMENT CODE 1090

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

Hossain Sahlolbei was retained as a surgeon on an independent contractor basis by Palo Verde Hospital in Blythe, Calif., a public hospital district. In addition, he served as co-director of surgery and on the hospital's medical executive committee, composed of members of the medical staff, which was independent of the hospital, but advised the board on operations and physician hiring. He also served as chief and assistant chief of staff with considerable influence over board decisions in those roles.

Sahlolbei recruited an anesthesiologist (Barth) and negotiated a contract with Barth for Barth to receive $36,000 per month from the hospital and a one-time payment of $10,000 for relocation expenses. Sahlolbei pressured the board to approve the contract, but told the board the rate of pay was $48,000 per month, with a one-time payment of $40,000 for relocation expenses. It was alleged that Sahlolbei threatened to have the medical staff stop admitting patients if the board did not approve the contract. Sahlolbei convinced Barth to have all payments from the hospital deposited into Sahlolbei's account and Sahlolbei then paid Barth the agreed upon $36,000 per month and $10,000 relocation payment and retained the balance. The Riverside County District Attorney charged Sahlolbei with grand theft and violations of Government Code section 1090, which prohibits a government official, officer or employee from having a financial interest in a contract made by them in an official capacity. The trial court dismissed the section 1090 charges, finding that as an independent contractor, Sahlolbei was not an "employee" under the statute,

applying the tort law definition of "employee." The District Attorney's office appealed and, in a 2-1 decision, the Fourth District Court of Appeal agreed with the trial court. Prosecutors then took the case to the California Supreme Court.

The California Supreme Court held the term "employee" in section 1090 does not have the tort law definition, as it is used in the broadly construed and sweeping conflict statute, meant to prevent corruption and divided loyalties in connection with government contracts. Thus, the form of employment is irrelevant. Making new law, the Court held that the standard to determine whether an independent contractor or consultant qualifies as an "employee" under the statute is to look to see if "they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." To determine if they are involved in "making" a contract in their official capacity under the statute, one looks to whether "their position afforded them 'the opportunity to influence execution [of the contracts] directly or indirectly to promote [their] personal interests' and they exploit those opportunities." Prior appellate decisions applied a higher standard whereby an independent contractor or consultant had to have had "considerable influence" over the contract formation and execution decisions of the public agency to come within the meaning of "employee" under the statute and to be considered to have participated in the "making" of the contract.

Peace Officers' Procedural Bill of Rights

WHERE MULTIPLE PUNITIVE ACTION STEPS ARE TAKEN AS PART OF A SINGLE DISCIPLINARY PROCESS AGAINST A POLICE OFFICER, AN OPPORTUNITY FOR ADMINISTRATIVE APPEAL MUST FOLLOW THE ULTIMATE DISCIPLINARY DECISION

Morgado v. City and County of San Francisco, 13 Cal. App. 5th 1 (2017).

A citizen filed a complaint against Officer Morgado with the City's Office of Citizen Complaints ("OCC") in March 2008. The OCC investigated the alleged misconduct and provided its findings to the Police Chief. Upon further inquiry by the Department's Internal Affairs division, the Chief filed a disciplinary complaint with the City's Police Commission against Morgado in August 2009. The Commission assigned one of its seven members to investigate on August 28, 2009, and after that commissioner stepped down, assigned another on June 8, 2010. An evidentiary hearing was held before that commissioner on August 2-3, 2010, and later a hearing before the full Commission was held in March 2011. The Commission sustained four of six counts against Morgado and decided to terminate his employment. Morgado sued seeking reinstatement via injunction and administrative writ of mandate. In discovery, the City admitted that the Commission's termination decision was the only punitive action taken against him, and that no administrative appeal had been provided regarding that action. The trial court ruled for Morgado and issued an order enjoining the Commission from taking punitive action against Morgado, vacating his termination, and directing it to provide him an opportunity for administrative appeal under Government Code section 3304(b). The City appealed, arguing that the Chief's complaint was really the punitive action, and that the full Commission hearing <u>was</u> the appeal contemplated by statute.

The appellate court disagreed with the City and affirmed the trial court, holding that even if the Chief's complaint constituted a "punitive action," the Commission's termination decision was also a punitive action triggering the opportunity to appeal. "We do not hold a municipality must provide multiple administrative appeals during a single disciplinary proceeding against an officer. We hold only that the provision of a hearing that could be considered an administrative appeal, in the middle of the disciplinary proceeding, does not excuse the municipality from providing the officer an opportunity to administratively appeal the ultimate disciplinary decision at the end of it."

Public Employment Relations Board

"BLACKLISTING" AN EMPLOYEE BY INTERFERING WITH POTENTIAL ALTERNATE EMPLOYMENT CAN CONSTITUTE RETALIATION FOR PROTECTED UNION ACTIVITY

Moberg v. Monterey Peninsula Unified School District, PERB Dec. No 2530 (2017).

Moberg was a probationary certificated employee at Monterey Peninsula Unified School District ("District") during the 2009-10 school year. In the middle of the year, the District began dismissal proceedings and determined not to select him an employee for the following year. He filed an unfair practice charge with the Public Employment Relations Board (PERB) alleging the District dismissed him due to his protected activities (e.g. filing grievances), but PERB dismissed the charge finding he failed to establish a nexus between his protected activities and the adverse action. He later worked at three other districts, but when he lost those jobs as well, he brought another unfair practice charge with PERB against the District. His theory was that the District had "blacklisted" him in retaliation for his protected activity and, through its employees and attorneys, had conspired with the other districts to cause his dismissal. On appeal, the full Board affirmed dismissal of his charge.

The initial procedural issue was whether, as a former employee, Moberg had standing to pursue his blacklisting allegations, and PERB held that he did. The Educational Employment Relations Act protects *applicants* for employment as well as employees (unlike the Meyers Milias Brown Act), and the law does not say unfair practice charges can be filed only against an employee's *current* employer.

Pointing to precedent under the National Labor Relations Act on the substantive issue, PERB held that "blacklisting" can be an actionable form of retaliation, but that Moberg hadn't alleged facts sufficient to support his claim. To show a violation, a charging party must show the respondent interfered in the employment process by causing or attempting to cause a potential employer not to hire the applicant because of the applicants protected activities. Examples of such interference include directly informing the potential employer of the applicant's protected activities, such as by describing the applicant as a "union agitator" or troublemaker. Moberg provided no such allegations or evidence beyond his own speculation.

Supplement to Labor and Employment Litigation Update September 2017

Stacey N. Sheston

DISCRIMINATION/HARASSMENT

EMPLOYER'S ON-DUTY RESPONSE TO OFF-DUTY MISCONDUCT CAN ITSELF CREATE HOSTILE WORK ENVIRONMENT

Fuller v. Idaho Dep't of Corrections, 865 F.3d 1154 (9th Cir. 2017)

Plaintiff Cynthia Fuller was a probation and parole officer who began an intimate relationship with co-worker Herbt Cruz, a senior probation officer. (Both kept the relationship secret despite an agency policy requiring disclosure of such relationships.) Six months later, Cruz was placed on administrative leave due to a confidential investigation into a rape allegation against him by a civilian. District Manager Harvey called a staff meeting, advising the employees that Cruz was on administrative leave because of a confidential, ongoing investigation and "was not authorized to be on the premises," but that the IDOC looked forward to Cruz' prompt return to work. The next day, Fuller disclosed her relationship with Cruz to her supervisors. Over the next two weeks, according to Fuller, Cruz raped her three times, all outside the workplace. Fuller reported the rapes to the authorities and to IDOC, which received photographic evidence of her injuries, which were serious. Harvey told Fuller that Cruz "had a history of that kind of behavior." Fuller got a protective order against Cruz prohibiting him from coming within 1000 feet of her.

Henry Atencio, Deputy Chief of their division, directed Harvey to maintain contact with Cruz while he was on leave, to keep him informed of the investigation's status and "make sure he's doing okay in terms of still being our employee." Fuller knew about Cruz' continued contacts with supervisors while on leave. On the day Fuller obtained the civil protection order, Harvey sent an e-mail to all staff, including Fuller, saying he had talked to Cruz, that Cruz was understandably down, and that if they "wanted to talk to him, give him some encouragement," they should "feel free." Following an internal affairs investigation, the agency concluded it would terminate Cruz' employment, but it waited 2 months (as the criminal matter was proceeding) to notify Cruz and did not tell Fuller that Cruz would not be returning to the work place.

Fuller had gone on leave after reporting the rapes to management. Harvey told Atencio and Fuller's direct supervisors about her allegations, that she was on leave, and that if others inquired about the leave they should attribute it to a previously disclosed illness. Fuller was denied her requested paid administrative leave, and during the FMLA leave she was required to use vacation and other accrued leaves. Although she was diagnosed with extreme anxiety, she returned to work in a light duty capacity, taking only intermittent FMLA leave. Fuller later requested paid leave again, noting that (1) Cruz was being paid during his administrative leave; (2) she had "received no guidance from the IDOC regarding any assistance . . . as a victim, including" filing a sexual harassment claim; and (3) the IDOC had put other "potential victim[s]"

at risk by failing to disclose to staff why Cruz was on leave and by stating that it "hopes he returns soon." The IDOC did not respond to her letter. Her request was denied, according to the supervisors, because her situation was not deemed "unusual."

Fuller also told her supervisors she was in an "uncomfortable work environment". Staff, unaware of why she had been absent from work, suspected that she was "faking being sick" and ostracized her because they had been misled about Cruz' situation. Harvey explained that he was "not at liberty to say why [Cruz is on leave] because . . . that wouldn't be fair. . . if the allegations were proven untrue," and Cruz would have a "stigma hanging over [him]." Fuller said Harvey's later encouragement of staff to give Cruz "moral support," despite knowing that she had accused him of rape, was "completely insulting." Harvey replied that he was "trying to keep [her] out of it." Fuller asked that the IDOC inform District 3 employees of the civil protection order, explaining that she did not "feel safe" because Cruz could walk in to the building and no one would call the police. Atencio responded that, "as much as you find this distasteful, Cruz is still our employee. And we have to be conscious of his rights."

Fuller resigned and sued, *inter alia*, for hostile work environment and gender discrimination claim under Title VII. The district court granted the defendants' motion for summary judgment, rejecting Fuller's hostile work environment claim on the grounds that the rapes occurred outside the workplace and that the IDOC had taken remedial action. Fuller timely appealed and argued that the IDOC's reactions to the rapes — effectively punishing her for taking time off, while both vocally and financially supporting her rapist — created a hostile work environment. The issue on appeal was whether an objective, reasonable woman would find "her work environment had been altered" because the employer "condoned" the rape "and its effects."

Viewing the facts in the light most favorable to Fuller, the court held that Fuller had raised triable issues of fact as to the existence of a hostile work environment. In light of the severity of the sexual assaults on Fuller, documented by the photographs seen by the IDOC supervisors, a reasonable juror could find that the agency's public and internal endorsements of Cruz "ma[de] it more difficult for [Fuller] to do her job, to take pride in her work, and to desire to stay in her position." A reasonable woman in Fuller's circumstances could perceive the repeated statements of concern for Cruz' well-being by supervisors as evincing their belief that Fuller was lying or, perhaps worse, as valuing Cruz' reputation and job over her safety. This conclusion is reinforced by the fact that Harvey and Atencio held important supervisory positions. The court stated that Fuller "was victimized by three violent rapes," and a reasonable juror could find that her employer thereafter reacted in ways that "allowed the effects of the rape[s] to permeate [her] work environment and alter it irrevocably.

THOROUGH ANALYSIS AND PRESENTATION OF LEGITIMATE BUSINESS REASONS FOR A REDUCTION IN FORCE ARE CRITICAL TO DEFENSE OF AGE DISCRIMINATION CLAIM FOLLOWING LAYOFF

Merrick v. Hilton Worldwide, Inc., __ F.3d __, No. 14-56853, 2017 WL 3496030 (9th Cir. August 16, 2017)

Plaintiff Charles Merrick was 60 years old in July 2012, when he was terminated from his position as Director of Property Operations at a Hilton hotel as part of a reduction-in-workforce ("RIF"). Due to declining revenues, the Hotel underwent a series of RIFs beginning in 2008. It

laid off eight employees in 2008, three employees (the entire pastry department) in 2009, and six employees in 2011. The hotel also left a number of vacant positions unfilled during that time period. In May 2012, Hilton Worldwide ordered a number of properties, including the Hotel, to reduce payroll expenses by seven to ten percent by August 2012.

The mandate was outlined in a document titled "Management Reduction in Workforce (RIF) Timeline – May 2012" and provided that "[r]eduction decisions should be heavily weighted at the senior level." Hilton Worldwide issued revised guidelines for implementing the RIF. These guidelines clarified the termination criteria, providing that in "identifying the individual team members to be laid off . . . [t]he primary consideration should be a team member's overall performance," followed by "any disciplinary action a team member has received." If a decision could not be made based on those factors, the guidelines instructed decisionmakers to consider employees' length of service with the company.

Merrick directly supervised seven to twelve people in his department, including Assistant Director of Property Operations Michael Kohl. Merrick's performance evaluations were consistently positive. At the time of his termination, Merrick earned a salary of $110,325 per year, plus an annual bonus of $20,000, making him the highest paid Hotel employee after General Manager Patrick Duffy. At sixty, Merrick was also the oldest management-level employee after Duffy, who was sixty-one at the time of the RIF.

Consistent with the RIF guidelines, the involved decisionmakers determined that all twenty-nine managers met performance standards, and none had been subject to disciplinary action. The spreadsheet they reviewed included the years of service for each employee. Without an obvious candidate for termination based on performance and disciplinary action, the decisionmakers considered the business case for retaining or eliminating each management-level position, and ultimately they recommended elimination of Merrick's position.

They identified several reasons for their decision. First, unlike the food and beverage or sales departments, Merrick's face-to-face interaction with guests was limited, so they perceived him as having relatively little "guest impact," and his work did not directly generate additional revenue for the Hotel. Second, the managers believed Merrick had become less "hands on" in recent years, and few employees directly reported to him. They also believed much of Merrick's responsibility for capital projects had already been outsourced. Finally, Merrick's projected salary and bonus of $132,049 satisfied the target payroll reduction of $131,614, or seven percent of the Hotel's management payroll. Thus, the managers believed eliminating Merrick's position would allow them to comply with the RIF by terminating a single employee. The decisionmakers also concluded that the Hotel could not operate without a General Manager, the only employee besides Merrick whose single salary ($192,102) would satisfy the payroll reduction target. Selecting any other position would require more than one layoff to achieve the seven percent target. They recommended Merrick for the RIF.

Merrick's termination letter advised him that he was eligible to pursue internal job opportunities, and the Human Resources Department provided him a list of open positions within the company. Merrick asked to stay on at the Hotel as Assistant Director of Property Operations (the position occupied by Kohl), but the Hotel refused. Following the RIF, Kohl assumed most — if not all — of Merrick's duties. To compensate Kohl for his increased responsibilities, the Hotel

managers recommended that Kohl receive a raise. The Hotel also hired an hourly mechanic, at $15 to $16 per hour, to cover some of Kohl's former duties.

Merrick originally raised six claims against Hilton: wrongful termination based on age, in violation of the California Fair Employment and Housing Act ("FEHA"); age discrimination in violation of public policy; failure to prevent age discrimination; wrongful termination due to physical disability; and two counts of failure to prevent disability discrimination. The district court granted summary judgment on all claims, and Merrick appealed the age discrimination claims.

The appellate panel affirmed, applying the three-part *McDonnell Douglass* burden-shifting test to analyze Merrick's age discrimination disparate treatment claims under FEHA. First, the panel held that Merrick satisfied the elements for establishing a prima facie case of discrimination, concluding that Hilton acknowledged Merrick's duties were outsourced or assumed by other employees. Accordingly, Merrick satisfied the elements for establishing a prima facie case of discrimination. Second, the panel held that the burden shifted to Hilton, which produced evidence showing that it terminated Merrick for a legitimate, nondiscriminatory reason – namely, the economic challenges facing the business, and the analysis leading to selection of his position.

The burden then shifted back to Merrick to produce sufficient evidence to allow a jury to conclude that Hilton's proffered reasons were pretexts, and that age was a substantial motivating factor in his termination. The panel held that considering the context of the case – the lost profits during the economic downturn, a series of layoffs, the overall age of the workforce, the fact that Merrick survived previous RIFS, and the business reasons for selecting his position for elimination – Merrick did not present sufficient evidence to infer that Hilton's actual motive was discriminatory.

TO SURVIVE SUMMARY JUDGMENT, FEHA PLAINTIFF MUST DEMONSTRATE THAT EMPLOYER'S REASON FOR DISCIPLINE -- BASED ON CONDUCT OCCURRING PRIOR TO DISCLOSURE OF DISABILITY -- IS PRETEXTUAL

Alamillo v. BNSF Railway Co,. __ F.3d. __, No. 15-56091, 2017 WL 3648514 (9th Cir. August 25, 2017)

In 2012, Plaintiff Alamillo worked as a locomotive engineer for BNSF. Due to his seniority, he had the choice to work either (1) a five-day-per-week schedule with regular hours or (2) on the "extra board," which requires employees to come to work only when called. Alamillo chose to work on the extra board from January 2012 through June 2012. If an extra board employee failed to answer or respond to three phone calls from BNSF within a single 15-minute period, the employee would be deemed to have "missed a call" and marked as absent for the day. BNSF's attendance policy provided that a fifth missed call during any twelve-month period "may result in dismissal."

Alamillo missed a call on ten dates in 2012. He chose to receive "Alternative Handling" for the three January missed calls, which meant that he received additional training instead of discipline. After his next four missed calls, Alamillo received a 10-day suspension and a 20-day suspension. At that point, Richard Dennison, the superintendent of the terminal where Alamillo worked, advised him to get a landline or a pager (he had given BNSF only a cell phone number) to ensure that he would not miss another call. Alamillo did not give BNSF a pager or landline phone

number; he was having an affair at the time, and he did not want BNSF to call a landline number because there were occasions when he left the house to see his girlfriend when his wife thought he was at work. Nor did Alamillo (1) seek transfer to a five-day-per-week job; (2) set his alarm for 5:00 a.m., the most common time for BNSF to call, like he had done when he previously worked on the extra board; (3) ask his wife to wake him up if his mobile phone rang while he was sleeping; or (4) check the electronic job board to see the jobs for which he could be called the next day. He subsequently missed three more calls.

After his final missed call, Alamillo informed BNSF California Division General Manager Mark Kirschinger that he intended to undergo testing for a possible sleep disorder. Alamillo asked Kirschinger if he could switch to a job with set hours; Kirschinger told him to follow the usual procedures to bid on a regular five-day-per- week work schedule, but added that the disciplinary process for his previous missed calls would proceed. Alamillo then switched to a regular schedule and was able to wake up to his alarm clock and arrive at work on time every day. Alamillo completed a sleep study in late July and was diagnosed with obstructive sleep apnea (OSA) on August 16. He was prescribed a Continuous Positive Airway Pressure (CPAP) machine, and his symptoms immediately improved. On or about August 18, Alamillo provided Dennison with a report containing his diagnosis.

Alamillo's hearings for the May 13, May 21, and June 16 missed calls occurred on August 22. Alamillo discussed his OSA diagnosis at the hearings and submitted his provider's medical opinion that not being awakened by a ringing phone is "well within the array of symptoms" of OSA. However, no medical professional opined that the May 21 and June 16 missed calls actually were caused by his OSA. BNSF Director of Labor Relations Andrea Smith reviewed Alamillo's employee transcript, the hearing transcripts, and the hearing exhibits before rendering her opinion that Alamillo should be given a 30-day suspension for the May 13 missed call and be dismissed for the May 21 and June 16 missed calls. Kirschinger, the BNSF officer responsible for making the final decision, approved the dismissal. Alamillo was told on September 18 that he was being dismissed for the May 21 and June 16 missed calls. Alamillo's union appealed his dismissal and prevailed, and he was reinstated to service.

Alamillo then sued, claiming that BNSF discriminated against him on the basis of his disability, failed to accommodate his disability, and failed to engage in an interactive process with him to determine a reasonable accommodation for his disability. *See* Cal. Gov. Code §§ 12940(a), (m)(1), (n). The district court granted summary judgment to BNSF, reasoning that BNSF could not have violated the FEHA because Alamillo's attendance violations took place before he was diagnosed with a disability and before any accommodation was requested.

The court of appeal affirmed. First, it held that Alamillo failed to establish that BNSF discriminated against him based on his disability – obstructive sleep apnea (OSA) – under FEHA. The panel applied the three-step burden-shifting test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and held that appellant's claim failed at the first step – establishing a prima facie case of discrimination – because the record contained no evidence that appellant's OSA was a substantial motivating reason for BNSF's decision to terminate him. BNSF did not know that Alamillo was disabled when the decision to initiate disciplinary proceedings was made, and Alamillo conceded that BNSF "disregarded" his disability when it decided to terminate him.

The panel also held that even if appellant had made a prima facie case of discrimination, his claim would fail at the third step because appellant had not offered evidence that BNSF's stated reason (appellant's history of attendance violations) was either false or pretextual. The Labor Relations Director (Smith) had concluded: "Mr. Alamillo entered documentation to support his argument that he has sleep apnea; this was allegedly the reason he did not hear his phone ring. While certain arbitrators could be sympathetic, he did not seek assistance until after he faced dismissal (this would be his second dismissal), which is arguably too late." In other words, Smith considered the possibility that sleep apnea may have prevented Alamillo from hearing his phone and refused to change her decision on that basis. But that is not evidence "which would permit a reasonable trier of fact to conclude the employer intentionally discriminated." *Id.* To the contrary, it reinforces the conclusion that BNSF's articulated nondiscriminatory reason for firing Alamillo — his history of attendance violations, which culminated in the May 21 and June 16 missed calls — was sincere.

Finally, the panel held that BNSF did not violate its reasonable accommodation duty under FEHA. Essentially Alamillo expected "a 'second chance' to control the disability in the future," but that is not a reasonable accommodation. Since reasonable accommodation is always prospective, an employer is not required to excuse past misconduct even if it is the result of the individual's disability.

FEHA'S ONE-YEAR STATUTE OF LIMITATIONS RUNS FROM DATE EMPLOYMENT TERMINATES RATHER THAN DATE OF DECISION TO TERMINATE

Aviles-Rodriguez v. Los Angeles Community College Dist., 14 Cal. App. 5th __, No. B278863 2017 WL 3712199 (August 29, 2017))

Plaintiff Guillermo Aviles-Rodriguez was employed by Los Angeles Community College District (LACCD) as a professor. On November 21, 2013, a tenure review committee voted to deny him tenure, and he received written notice on March 5, 2014. Before receiving notice of the final decision, plaintiff initiated a grievance procedure, the third and final step of which was denied by a grievance review committee on May 21, 2014. That same month, plaintiff allegedly contacted the Department of Fair Employment and Housing (DFEH) to discuss the filing of a claim alleging racial discrimination including, but not limited to, the denial of tenure, and was advised that he had until one year from the last day of his employment to file a complaint with the DFEH. Plaintiff's employment terminated June 30, 2014, the last day of the academic year, and on June 29, 2015, he filed his complaint with DFEH. After being issued a right-to-sue letter, he filed an action against LACCD. Following several demurrers, plaintiff filed his third amended complaint (TAC) alleging a single cause of action under FEHA for racial discrimination. LACCD demurred to the TAC, arguing that plaintiff's claim was barred because he failed to file his DFEH complaint within one year "from the date upon which the alleged unlawful practice . . . occurred." (Gov't Code § 12960(d).) The trial court sustained the demurrer without leave to amend.

The appellate court reversed, concluding that the one-year limitations period for plaintiff to file a timely DFEH complaint began to run from the last day of his employment rather than from the decision to deny tenure. The court cited *Romano v. Rockwell Internat'l, Inc.* (1996) 14 Cal.4th 479, where the California Supreme Court concluded that the purpose of the FEHA is better served by interpreting the statute of limitations on a wrongful termination claim to run from "the

date of actual termination, and not from notification of termination." Here, assuming the denial of tenure was discriminatory, the harm resulting from that wrongful act was the termination of appellant's employment.

FEHA DOES NOT ENTITLE EMPLOYEE TO CHOICE OF ACCOMMODATIONS SO LONG AS ACCOMMODATION OFFERED IS REASONABLE.

Light v. California Dep't of Parks & Rec., 14 Cal. App. 5th 75 (2017)

Light worked as a seasonal Park Aide at the Department's Ocotillo Wells District in San Diego County. She was "laid off" during the summer months (July through September), which constitute the low tourist season due to the summer desert heat. In the fall, Light was rehired as a senior seasonal Park Aide. In January 2011, Light was promoted to a permanent but "intermittent" position as an Office Assistant, also at the Ocotillo Wells District. "Intermittent" meant she was not guaranteed full-time, regular hours, and that under normal circumstances, she was limited to a total of 1500 working hours per year. She was "laid off" again during the low summer months of 2011.

In the fall 2011 and spring 2012, Light worked in two different out-of-class assignments granted by her supervisor, Seals. Light was friends with a coworker, Hurley, who Seals believed was a lesbian. Seals repeatedly made comments to Light intended to make her uncomfortable about her friendship with Hurley, to enlist Light in Seals' harassment of Hurley based on her sexual orientation, and to encourage Light to cease all contact with Hurley. Hurley filed complaints against Seals and the Department for harassment and discrimination. The Department's Human Rights Office sent investigators to the Ocotillo Wells District in January 2012 to assess Hurley's allegations. Before Light met with investigators, Seals told Light she and Dolinar (Seals' supervisor and friend) expected Light and other employees to lie to the investigators. Light was expected to be on Dolinar's "team" and protect her supervisors. Seals said, "If you're not on [Dolinar's] team, your career will be over. If you don't protect [Dolinar], [and Dolinar's] staff, then your career will be over. [Dolinar] will see to it that your career will be over." (Seals went to another employee, Gravett, and told her to lie as well.) After Light met with the investigators, Seals contacted Light (and Gravett) about their interviews, wanted to know what they had said, and berated Light for not backing Seals. Seals said she should not have hired Light or given her out-of-class assignments. Light did not "fit in" and did not follow orders. Light tried to leave Seals' office, but Seals blocked her way. The next day, Seals spoke with Gravett and complained that Light had betrayed her and "knif[ed] her in the back" because she would not tell Seals what she told the investigators. Later Seals called Gravett and told her not to have any contact with Light. Dolinar was in the car with Seals during this conversation. In March 2012, Dolinar told Light she would not be receiving training previously scheduled for her. Around the same time frame, funding for Light's position was eliminated by the Department, and after she did not receive a promotion for which she applied, she was informed that no hours would be scheduled for her until funding could be restored.

Light filed a workers' compensation claim and went on medical leave for three months, after which she notified the Department that she had been diagnosed with PTSD and anxiety disorders. She requested to return to work in a higher level position (i.e., one that would otherwise require promotion) or to Ocotillo Wells only if the Department guaranteed no further hostile work environment or retaliation. The Department offered her a choice of two Office Assistant positions: one at Ocotillo Wells (where the former supervisors were gone, but where

hours were still not guaranteed), or (2) one at San Diego District (for which, if she accepted, the Department would pay her reasonable moving expenses.) She returned to work at Ocotillo Wells, but later sued the Department, Seals, and Dolinar. The trial court granted the individual defendants' motions for summary judgment as to Light's intentional infliction of emotional distress and related claims, and granted summary judgment for the Department as to claims for disability discrimination (failure to accommodate), retaliation, and failure to prevent discrimination or retaliation.

On appeal, the court concluded that the evidence viewed most favorably to Light did raise a triable issue of fact as to the alleged retaliatory "course of conduct" by Seals and Dolinar, and it reversed summary judgment against the Department on that claim accordingly. However, it affirmed as to the disability-related retaliation claim because the alleged adverse actions occurred before she disclosed a disability to the Department. It also affirmed as to the failure to accommodate and failure to prevent discrimination claims, finding that the Department reasonably accommodated Light in offering her the choice of two positions in a classification she previously held. The court explained that Light was not entitled to her choice of accommodations so long as what was offered was reasonable, and that she was not entitled to a promotion. Finally, the court as to the IIED claim against Seals that "workers' compensation exclusivity" does not bar tort claims arising out of conduct that also violates FEHA.

PUBLIC AGENCY

LAW ENFORCEMENT AGENCY MAY MAINTAIN INTERNAL "*BRADY*" LIST BUT MAY NOT DISCLOSE TO DISTRICT ATTORNEY OR OTHER THIRD PARTIES ABSENT COMPLIANCE WITH THE PITCHESS PROCESS

Association for Los Angeles Deputy Sheriffs v. Superior Court, 13 Cal. App. 5th 413 (2017)

Petitioner, the Association for Los Angeles County Deputy Sheriffs (ALADS), is the union that represents non-supervisory Los Angeles County Sheriff's deputies. The LA Sheriff's Department created a so-called "*Brady*" list of deputies whose personnel files contain sustained allegations of misconduct allegedly involving moral turpitude or other bad acts relevant to impeachment. The LASD proposed to disclose that list to the district attorney, as well as to other prosecutorial agencies that handle LASD investigations, so that prosecutors in individual cases could file *Pitchess* motions to discover the underlying misconduct or advise the defense of the disclosure so the defense could file its own *Pitchess* motion. ALADS opposed disclosure of the *Brady* list and filed this action seeking (among other things) an injunction that prohibits disclosure of the list or any individual on the list to anyone outside the LASD, including prosecutors, absent complete compliance with the *Pitchess* statutes.

In *Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*), the United States Supreme Court held that constitutional due process creates an affirmative obligation on the part of the prosecution, whether or not requested by the defense, to disclose all evidence within its possession that is exculpatory to a criminal defendant. Exculpatory evidence under *Brady* includes impeachment evidence. The prosecution's disclosure obligation under *Brady* extends not only to evidence in its immediate possession, but also to evidence in the possession of other members of the prosecution team, including law enforcement.

Eleven years after *Brady*, the California Supreme Court, in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537 (*Pitchess*), held that under certain circumstances, and upon an adequate showing, a criminal defendant may discover information from a peace officer's otherwise confidential personnel file that is relevant to his or her defense. The California Legislature eventually codified what became known as *Pitchess* motions in Penal Code sections 832.7 and 832.8, as well as Evidence Code sections 1043 through 1045.

After full briefing, the trial court issued a preliminary injunction prohibiting general disclosure of the *Brady* list to the district attorney or other relevant prosecutors. The trial court determined that such a disclosure, because it identifies administratively disciplined deputies by name in the absence of a properly filed, heard, and granted *Pitchess* motion, violates the *Pitchess* statutes. The injunction, however, expressly allowed disclosure of individual deputies from the list to prosecutors, in the absence of compliance with *Pitchess* statutes, so long as any disclosed deputy was also a potential witness in a pending criminal prosecution. The trial court acknowledged that such a disclosure also violates the *Pitchess* statutes, but held that a filed criminal case triggers *Brady* and that the LASD, as part of the prosecution team, then has a "*Brady* obligation" to disclose exculpatory evidence in its possession. Because of this obligation, the LASD, "may" notify the prosecutor that the identified deputy has a founded administrative allegation of misconduct relevant to his or her credibility. ALADS sought mandamus relief at the court of appeal.

The appellate court ruled that LASD was not precluded from maintaining an <u>internal</u> "*Brady* list" so long as it was not disclosed. However, it concluded that LASD may not disclose the identity of any individual deputy on the *Brady* list to any agency or individual outside the LASD, absent a properly filed and granted *Pitchess* motion and corresponding court order, even if the affected deputy is a potential witness in a filed criminal prosecution. The court of appeal ordered the injunction language modified accordingly.

POBRA REQUIRES DISCLOSURE OF INITIAL INTERROGATION RECORDING OR TRANSCRIPT EVEN WHERE SUBSEQUENT INTERROGATION IS BASED ON LATER-ACQUIRED NEW EVIDENCE

Santa Ana Police Officers' Ass'n v. City of Santa Ana, 13 Cal. App. 5th 317 (2017)

Two City of Santa Ana Police officers were the subjects of an internal affairs investigation based on their conduct during the execution of a search warrant at a marijuana dispensary commonly referred to as the "Sky High Medical Dispensary" (the Dispensary). A number of undercover officers, wearing masks to hide their identities, participated in the search. After all civilians were escorted/detained outside, Doe Officer 1, as instructed by his superior officers, disabled all known recording devices (video cameras and DVR). The officers stated that they reasonably believed that all surveillance systems had been rendered inoperable at that time. Once the camera systems had been made inoperative, many of the officers, including the two individual plaintiffs, removed their facial coverings, "let down their guard," and began communicating with one another as they would in a non-public setting outside the purview of the public. Unbeknownst to the officers, the Dispensary owners had placed hidden cameras in the Dispensary in anticipation that it would be raided. The Dispensary owners had neither obtained nor received the consent of the police officers to have their communications recorded. The hidden cameras secretly recorded the communications of the police officers, including Doe Officer 1 and Doe Office 2. The Dispensary owner later released edited portions of the

recordings to media outlets "in a manner to distort the officers[‘] actions and cause problems for both the involved officers and the City's enforcement actions."

The Santa Ana Police Department initiated an investigation after video recordings of the officers were released to the media. Before the interrogations of the subject officers, the officers watched selected portions of "the illegal recordings," and their respective counsel objected to the investigation on the ground it was "based solely on the illegal recordings." Their objections were rejected and they were ordered to proceeding with the interrogation or be subjected to discipline for insubordination."

Later, the Police Department obtained more footage from the recordings made at the Dispensary during execution of the warrant and, based on the additional footage, notified both officers of additional interrogations. Both officers reasserted their objections to the investigation on the ground "it was based on evidence obtained as the result of an unlawful recording of the officers." Counsel for Doe Officer 1 and Doe Officer 2 requested that Defendants provide materials pursuant to Government Code section 3303(g).

The City did not produce the requested materials. Both Doe Officer 1 and Doe Officer 2 were interrogated again. Before the interrogations and during breaks between interviews, representatives of Defendants confirmed that the interviews were based on "newly acquired recordings from the service of the search warrant."

Plaintiffs Santa Ana Police Officers Association (SAPOA) and the two officers sued the City of Santa Ana, the Police Department, and the Police Chief, alleging: (1) violations of the California Invasion of Privacy Act, Penal Code section 630 et seq., by using the video recordings made at the marijuana dispensary as the basis for, and as evidence in, the internal affairs investigation; and (2) violations of Government Code section 3303, subdivision (g) by refusing to produce tape recordings of the initial interrogations of the officers, transcribed stenographer notes, and any reports or complaints made by the investigators or other persons, before interrogating the officers a second time.

The trial court sustained Defendants' demurrer without leave to amend, and plaintiffs appealed. The appellate court affirmed as to the first claim, holding that no violation of the privacy statute could be stated because the officers had no reasonable expectation as a matter of law that their communications during the raid of the marijuana dispensary were not being overheard, watched, or recorded. "Objectively, a reasonable officer would expect that [his or her] conversations and conduct may be recorded by hidden cameras of an owner of a location where they are engaged in the on-duty execution of a search warrant."

However, the court reversed as to the second claim under POBRA. Under section 3303(g), Defendants were required to produce the tape recordings of the initial interrogations, transcribed stenographer notes, and reports and complaints made by the investigators or other persons, before Doe Officer 1 and Doe Officer 2 were interrogated a second time.

Understanding the Rapidly Shifting Landscape of Healthcare Obligations

Thursday, September 14, 2017 General Session; 4:15 – 5:30 p.m.

David W. Tyra, Shareholder, Kronick Moskovitz Tiedemann & Girard

DISCLAIMER: *These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

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Notes:

Rx for City Employers: Understanding the Rapidly Shifting Landscape of Health Care Obligations.

Presentation By:

David W. Tyra*
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
400 Capital Mall, 27th Floor
Sacramento, CA 95814
Tel.: (916) 321-4594
Fax: (916) 321-4555
Email: dtyra@kmtg.com

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INTRODUCTION:

Current U.S. healthcare costs are staggering! Based on the most recently available data (2015), the Centers for Medicare and Medicaid Services (CMS) estimate that the U.S. national health expenditure totals over $3 trillion.[1] A 2016 study by the UCLA Center for Health Policy Research, estimated total health care expenditures in California at $367 billion.[2] This same study revealed that public funds account for 71 percent of this expenditure in California compared to a national average of 45 percent.[3] To further underscore the magnitude of these numbers for California public employers, the UCLA study calculated public employer healthcare premium contributions at $13.1 billion.[4]

In addition to the high costs of providing healthcare coverage to existing employees demonstrated by the numbers cited above, public employers also often face the daunting task of providing retiree healthcare benefits, also known as Other Post-Employment Benefits (OPEB). Historically, cities have paid for these benefits on a "pay-as-you-go" basis, leaving cities with large unfunded liabilities. In September 2016, the League of California Cities (LOCC) issued its "Retiree Health Care Costs: A Cost Containment How-To Guide" to address the rapidly escalating costs of OPEBs.[5] The LOCC publication notes that "[b]ecause of rapidly rising medical costs, increases in longevity post-retirement, and the growing number of retirees receiving benefits, retiree health costs increased significantly over the last decade."[6] The LOCC publication cites a 2007 survey of 1,200 agencies in California that revealed unfunded liability for retiree health benefits of at least $118 billion. For the 231 cities responding to this same survey, the total unfunded liability equaled $8.8 billion. A more recent survey conducted by the LOCC in 2016 showed an unfunded liability of $10.8 billion for 312 responding cities.[7]

While the significance and magnitude of the issues created by employee healthcare costs and costs of OPEBs is undeniable, solutions have proven elusive. There are a number of reasons for this, some of which, e.g., accounting and actuarial considerations, are beyond the scope of this paper. This paper will address two factors, however, that certainly contribute to the difficulty in addressing the high costs of employee and retiree healthcare costs: (1) the fluid, highly-politicized, and largely unsuccessful nature of both federal and state legislative efforts to regulate the healthcare markets, and (2) constitutional and legal impediments to unilateral reduction of retiree benefits.

[1] Keehan SP, Cuckler GA, Sisko AM, Madison AJ, Smith SD, Lizonitz JM, Poisal JA, Wolfe CJ. 2012. *National Health Expenditure Projections: Modest Annual Growth Until Coverage Expands and Economic Growth Accelerates*. Health Aff 31(7). doi: 10.1377.
[2] Sorensen A, Nonzee N, Kominski G, *Public Funds Account for Over 70 Percent of Health Care Spending in California*, UCLA Center for Health Policy Research, Health Policy Brief (8/2016).
[3] *Ibid.*
[4] *Ibid.*
[5] League of California Cities City Managers Department – OPEB Task Force, *Retiree Health Care: A Cost Containment How-To Guide*, (September 2016).
[6] *Ibid.*
[7] *Ibid.*

SECTION 1: THE AFFORDABLE CARE ACT (ACA)

On March 23, 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act and also the Health Care and Education Reconciliation Act of 2010 on March 30, 2010.[8] Together, these acts are commonly referred to as the Affordable Care Act (ACA).[9] The ACA was designed to be implemented during the course of ten years and be fully implemented by 2020.[10]

The ACA requires Applicable Large Employers (defined as any entity employing 50 or more full-time equivalent employees, including governmental employers) to provide specified levels of health-care benefits to certain employees or face financial penalties.[11] The ACA, and the federal regulations for its implementation, provide options for how these benefits may be provided, and California has added its own requirements. Public-sector employers must stay abreast of all new requirements, evaluating whether they need to adjust their health-care programs and operations in order to comply.

The following sections address each of the major phases of the ACA and discusses the changes that the ACA brought, or will bring, during these phases.[12]

PHASE 1: THE "PATIENT'S BILL OF RIGHTS" 2010 PROVISIONS

To avoid insurance companies from undermining health care access, certain provisions of the ACA took effect six months after it was enacted. These provisions are known as the "Patient's Bill of Rights" and took effect either on or after September 23, 2010.[13] Significantly, these provisions apply to all plans, including grandfathered plans.[14] Under these provisions, the ACA sought to provide more protections, extend coverage and services, and reduce unnecessary spending among its more significant aspects.

First, any new individual or group health plans that provides dependent coverage is required to provide coverage to adult dependents until they are twenty-six (26) years old.[15] These plans were first prohibited from imposing a pre-existing condition exclusion on children under nineteen (19) and, as of January 2014, these plans were prohibited from discrimination against adults with pre-existing conditions.[16] Also, these plans could no longer rescind benefits or invalidating policies on the basis of a genuine mistake on the enrollee's insurance application.[17]

[8] Pub. L. No. 111-148, 124 Stat. 119 (2010); Pub. L. No. 111-152, 124 Stat. 1029 (2010).
[9] Rachel Hansen, Rebecca Newman, *Health Care: Access After Health Care Reform*, Georgetown Journal of Gender and the Law 192, 194 (2015).
[10] *Id.*
[11] See 26 U.S.C.A. § 4980H
[12] *Infra* Part *i-iii.*
[13] Rachel Hansen, Rebecca Newman, *Health Care: Access After Health Care Reform*, Georgetown Journal of Gender and the Law 192, 194 (2015).
[14] *Id.*
[15] 42 U.S.C.A. § 300gg-14.
[16] 42 U.S.C.A. § 300gg-3 (excluding grandfathered individual coverage).
[17] 42 U.S.C.A. § 300gg-12.

This can only be done when an error is an intentional misrepresentation of a material fact or fraud.[18]

The ACA also grants policyholders the right to appeal coverage determinations, claims, and denials of services or treatment.[19] During an appeals process, the policyholder must continue to receive coverage until a decision is made.[20] Decisions by the insurer must be made within seventy-two hours when the denial is for urgent care, within thirty days for none urgent denials, and within sixty days for denials of services already rendered.[21] Any denial must include an explanation of the basis for its denial and how a policyholder can obtain an independent review of that decision.[22]

Second, the ACA extended services to policyholders by requiring most plans to cover the cost of preventive services without cost sharing.[23] These services include vaccinations, breast cancer screening, mammography, regular child visits, and certain counseling.[24]

Third, the ACA sought to make the health care industry more efficient by capping the amount of administrative spending and promoting spending towards services and to improve the quality of care provided.[25] For example, large group insurers are required to spend at least 85%, and small group insurers are required to spend at least 80%, of premium dollars on direct medical care and efforts to improve the quality of care.[26] If these insurers spend less than the amount they are required to spend, they must rebate policyholders the difference.[27]

Fourth, the ACA prohibited insurance companies from establishing lifetime limits on essential benefits under any plan.[28] However, these plans are still allowed to include annual lifetime limits on non-essential services.[29] In addition, most insurers are required to disclose a wide range of information to the public and to applicants before enrollment or re-enrollment, including periodic financial disclosures, data on enrollment and disenrollment, the number of claims denied, rating practices, etc.[30] Also, insurers may not establish rules for eligibility of a plan that discriminate in favor of higher wage employees and must annually report information to both the HHS Secretary and the enrollees of their plan.[31]

[18] *Id.*
[19] 42 U.S.C.A. § 300gg-19.
[20] *Id.*
[21] *Id.*; 29 C.F.R. § 2560.503-1.
[22] 42 U.S.C.A. § 300gg-19.
[23] 42 U.S.C.A. § 300gg-13.
[24] *Id.*
[25] 42 U.S.C.A. § 300gg-18.
[26] *Id.*
[27] *Id.*
[28] 42 U.S.C.A. § 300gg-11.
[29] *Id.* (excluding grandfathered plans).
[30] 42 U.S.C.A. § 300gg-15; 42 U.S.C.A. § 300gg-17; 42 U.S.C.A. § 18031.
[31] 42 U.S.C.A. § 300gg-16; 42 U.S.C.A. § 300gg-17; 42 U.S.C.A. § 300gg-18; 26 U.S.C.A. § 105.

PHASE 2: MARKET REFORM 2014 PROVISIONS

After the Patient's Bill of Rights took effect, significant change did not occur until the second phase of the ACA in 2014. During this phase the ACA opened the marketplaces, or exchanges, required the majority of Americans to have health insurance, penalized non-compliant employers or Americans, and provided subsidies and tax credits for low-income families.

The ACA created marketplaces, or exchanges, where either a state or the federal government provides an online platform.[32] Here, residents of each state can see what plans are available, compare plans, and choose the plan that best suits their needs.[33] These exchanges must maintain a call center, a website for customer service, and a single form for applying.[34] Every plan in these marketplaces, called a "qualified health plan,"[35] is required to provide essential health benefits, including ambulatory patient services, emergency services, hospitalization, maternity and newborn care, preventive and wellness services, chronic disease management, and pediatric services.[36] The exchanges created under the ACA are either governmental or nonprofit agencies and are subject to regular review to ensure the plans being offered through those exchanges meet minimum coverage standards.[37] Although these plans must meet the federal minimum, a state can require higher benefits in addition to the essential health benefits as long as the state pays the extra cost.[38]

An exchange can offer four types of plans, which are defined by how the plan pays for the specified percentage of costs.[39] The Bronze level covers 60% of the full actuarial value of the benefits provided under the plan, the Silver level covers 70%, the Gold level covers 80%, and the Platinum level covers 90%.[40] All plans have an out-of-pocket limit equal to the Health Savings Account (HSA).[41] For plans beginning in 2017, the maximum amount that a consumer with individual health insurance coverage will pay out-of-pocket is $7,150, while a family will pay no more than $14,300.[42] Additionally, a lower-benefit "catastrophic plan" is available for individuals under age 30 and others who are exempt from the insurance mandate.[43]

On January 1, 2014, the ACA implemented an individual mandate where almost all Americans were required to be covered by health insurance or would have to pay a tax penalty.[44]

[32] 42 U.S.C.A. § 18031; 42 U.S.C.A. § 18041.
[33] 42 U.S.C.A. § 18031; 42 U.S.C.A. § 18041.
[34] 42 U.S.C.A. § 18031 (d)(4); 42 U.S.C.A. § 18041.
[35] 42 U.S.C.A. § 18021 (defining a qualified health plan as a plan providing essential health benefits and offering at least one silver plan and one gold plan).
[36] 42 U.S.C.A. § 18022 (b).
[37] 42 U.S.C.A. § 18031.
[38] *Id.*
[39] 42 U.S.C.A. § 18022 (d).
[40] *Id.*
[41] 42 U.S.C.A. § 18022 (c)(1)(A).
[42] *Out-of-Pocket Maximum Limit*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/out-of-pocket-maximum-limit/ (last visited June 13, 2017).
[43] 42 U.S.C.A. § 18022 (e).
[44] 26 U.S.C.A. § 5000A (b)(1).

The penalty began at $95 in 2014, increased to $325 in 2015, and was indexed at $695 for 2016.[45] For any year after 2016, the penalty is $695 multiplied by the cost of living adjustment.[46] If the person is under the age of 18, the penalty is half of the penalty an adult would paid on the year of the violation.[47] People exempted from this individual mandate include some religious subscribers, people not covered for less than 3 months, unlawful immigrants, incarcerated inmates, members of an Indian tribe, and those receiving a hardship waiver or taxpayers for whom the lowest cost plan exceeds 8% of the individual's income.[48]

Additionally, on January 1, 2015, large employers were also required to offer health insurance coverage to their employees.[49] A large employer is an employer with more than fifty employees.[50] Failing to provide such insurance coverage will result in a fee of $2,000 for each full-time employee that receives federal premium tax credits to purchase health insurance, excluding the first thirty employees from the assessment.[51] If a large employer does offer such coverage, they will pay the lesser of $3,000 for each employee receiving a federal premium credit or $2,000 for each full-time employee.[52] Employers that do not offer such coverage must provide free vouchers to lower-income employees to purchase a plan through the marketplace.[53] The amount of the voucher will be equal to what the employee would have paid to get coverage under the employer's health plan.[54] Employers with fifty or fewer employees will be exempt from these requirements.[55] For small businesses with fewer than fifty employees and individuals who must purchase insurance on their own, each state will have an American Health Benefit Exchange and Small Business Health Options Program (SHOP) where people not covered through their employers can shop for health insurance at competitive rates.[56] Additionally, a Consumer Operated and Oriented Plan (CO-OP) program will create non-profit health plans wherein all profits from the CO-OP plans will be put toward lowering premiums, improving benefits, or improving the quality of health care delivered to members.[57]

After 2014, the ACA provides small businesses that elect to provide its employees with health care coverage with a tax credit.[58] A small business is classified as a business with no more than 25 employees.[59] However, the full credit will only be available to eligible businesses with ten or fewer employees, where the business's annual wages average less than $25,000 per full time employee, while eligible businesses with up to twenty-five employees and average annual

[45] 26 U.S.C.A. § 5000A (3)(c)(3).
[46] *Id.*
[47] 26 U.S.C.A. § 5000A (c)(3)(C).
[48] 26 U.S.C.A. § 5000A (e)(1)-(4).
[49] 26 U.S.C.A. § 4980H.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] 42 U.S.C.A. § 18031.
[57] 42 U.S.C.A. § 18042.
[58] 26 U.S.C.A. § 45R.
[59] *Id.*

wages of up to $50,000 will be eligible for a smaller tax credit.[60] The first phase of the provision provided up to four million eligible small businesses with tax credits that are worth up to 35% of the employer's contribution to the employees' health insurance provided that the employer contributes at least 50% of the premium cost.[61] Small non-profit organizations may also receive up to a 25% credit.[62] As of 2014, eligible employers who purchase coverage through the exchange are eligible to receive a tax credit for two years of up to 50% of their contribution.[63] Further, tax-exempt small businesses meeting the above requirements are eligible for tax credits of up to 35% of their contribution.[64]

Finally, the ACA provides cost-sharing subsidies (which reduce out of pocket expenses) and premium tax credits (which reduces monthly payments) to families and individuals with incomes of up to 400% the federal poverty level to make purchasing these plans affordable to them.[65] For example, in 2016 people making between 100 – 150% of poverty enrolled in a silver plan on healthcare.gov received cost-sharing assistance worth $1,440; those with incomes between 150 – 200% of poverty received $1,068 on average; and those with incomes between 200 – 250% of poverty received $144 on average.[66]

The premium tax credit is calculated on a sliding scale starting with a credit for 2% of income for those at 100% of the federal poverty level (FPL), and phasing out to a credit for 9.5% of income for those at 400% of poverty.[67] The tax credits are also refundable.[68] Therefore, if the amount of the credit is more than the amount of an individual or family's tax liability, they will receive the difference as a refund.[69] In the event that an individual or family owes no tax, they are eligible to receive the full amount of the credit as a refund.[70] It can also be paid to an individual's insurance company in advance to help cover the cost of premiums.[71] Individuals eligible for premium tax credits may also qualify for cost-sharing subsidies.[72] The subsidy pays for percentages of the full value of the plan on a sliding scale from 94% for those with an income at 150% of the FPL, and phasing out to a subsidy for 70% for those with an income at 400% of the FPL.[73] Out-of-pocket limits have also been reduced for enrollees with incomes up to 400% of

[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] 26 U.S.C.A. § 36B.
[66] *Premiums and Tax Credits Under the Affordable Care Act vs. the American Health Care Act: Interactive Maps*, http://www.kff.org/interactive/tax-credits-under-the-affordable-care-act-vs-replacement-proposal-interactive-map/ (last visited June 15, 2017).
[67] 26 U.S.C.A. § 36B.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] 42 U.S.C.A. § 18071.
[73] 26 U.S.C.A. § 36B.

the FPL.[74] Further, those with incomes under 133% of the FPL will, if residing in a state opting into the Medicaid expansion, be able to enroll in a newly expanded Medicaid program.[75]

PHASE 3: FINAL IMPLEMENTATION 2020 PROVISIONS

The most significant change in the coming years is the "Cadillac tax."[76] The Cadillac tax becomes effective on Jan 1, 2018. The goal of the Cadillac tax is to reduce the overall health care cost of the ACA coverage provisions. The Cadillac tax imposes a 40 percent excise tax on the cost of coverage for health plans that exceed a certain annual limit.[77] This excise tax will apply to the overall aggregate cost, the premium for the insured, the COBRA rate for the self-insured that has no premiums, and contributions to flexible spending accounts, health savings accounts, and health reimbursement accounts.[78] If a plan is insured, the insurer will be responsible for the tax, if the plan is self-insured, the employer bears the tax.[79] Essentially, both fully insured and self-funded employer health plans will be assessed a nonrefundable 40 percent excise tax on the dollar amount of any employee premiums that exceed annual limits of $10,200 for individual coverage and $27,500 for family coverage.[80] For plans with a qualified retiree or whose majority of employees are employed in a high-risk job, the annual limit increases by $1,650 for an individual plan and by $3,450 for a family plan, totaling $11,850 and $30,950 respectively.[81] Additionally, these limits increase as the inflation rate increases.[82]

The deadline for the full implementation of the ACA is in the year 2020 with the goals of simplifying administration, reducing costs, and standardizing billing across electronic exchanges.[83] The ACA states that states may exclude insurance companies with unjustified premium rates from participation in the exchange beginning in 2014.[84] The Department of Health and Human Services is charged with operating and maintaining an internet portal and to assist states in developing their own for Exchanges to assist individuals and employers to be ACA compliant.[85]

SECTION 2: COVERED CALIFORNIA.

On September 30, 2010, former Governor Arnold Schwarzenegger signed into law two complementary bills, AB 1602 and SB 900, to establish the California Health Benefit Exchange.

[74] *Id.*
[75] *Id.*
[76] 26 U.S.C.A. § 4980I.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* (excluding stand-alone dental and vision plans).
[81] 26 U.S.C.A. § 4980I (f)(2) (defining a qualified retiree as someone that receives coverage because he or she is retired, is 55 years old, or is not entitled to benefits or enrollment under the Medicare program).
[82] 26 U.S.C.A. § 4980I.
[83] Rachel Hanen, Rebecca Newman, Health Care: Access After Health Care Reform, 16 Geo. J. Gender L. 191, 203 (2015).
[84] 42 U.S.C.A. § 300gg-94 (b)(1)(B).
[85] 42 U.S.C.A. § 18031 (c)(5).

California was the first state in the nation to pass legislation creating a health insurance Marketplace. In October 2012, the Marketplace was renamed as Covered California.[86]

Covered California is a quasi-governmental organization, specifically an "independent public entity not affiliated with an agency or department."[87] It is governed by a five-member board, including the Secretary of California Health and Human Services, two members appointed by the Governor, one member appointed by the Senate Committee on Rules, and one member appointed by the Speaker of the Assembly.[88] The legislation specifies that each appointed member of the Board should possess expertise in key subject areas such as, individual or small employer health care coverage, health benefits plan administration, or health care finance.[89] Each member of the board has the responsibility and duty to meet the requirements under Covered California, the ACA, and all applicable state and federal laws and regulations.[90] Additionally, the Board is responsible for implementing procedures and standards to comply with section 1311 of the ACA and establishing an appeals process.[91] Covered California applied for a waiver to allow persons not able to obtain coverage by reason of immigration status under the ACA requirements.[92] However, in January 2017, following the election of President Trump, and at the request of the California Legislature, Covered California withdrew its application for such a waiver.[93]

Health plans and qualified health plans under Covered California are defined the same as ACA health plans.[94] Recently, Covered California unveiled sweeping reforms to its contracts with insurers, seeking to improve the quality of care, curtail costs, and increase transparency for consumers.[95] Now, health plans are required to dock hospitals at least 6 percent of their payments if they fail to meet certain quality standards, or alternatively, provide bonuses of an equal amount if they exceed the standards. Covered California requires health plans to identify hospitals and doctors that are performing poorly on a variety of quality metrics or charging excessively for their services.[96] The plans must drop providers from their networks as early as 2019 if they do not modify their practices to meet the standards.[97]

Additionally, Covered California requires that the health plans:

[86] Cal. Gov't Code § 100500.
[87] Cal. Gov't Code § 100500 (a).
[88] Cal. Gov't Code § 100500 (b).
[89] Cal. Gov't Code § 100500 (c).
[90] Cal. Gov't Code § 100500.
[91] Cal. Gov't Code § 100502; Cal. Gov't Code § 100504.5; Cal. Gov't Code § 100506.
[92] *See* Cal. Gov't Code § 100522.
[93] See http://khn.org/news/california-withdraws-bid-to-allow-undocumented-immigrants-to-buy-unsubsidized-obamacare-plans/ (last visited Aug. 15, 2017
[94] Cal. Gov't Code § 100501.
[95] § 8.02 The Modern Health Care System, 2014 WL 9967454; http://californiahealthline.org/news/covered-california-imposes-new-quality-cost-conditions-on-plans/; http://news.coveredca.com/2016/04/covered-californias-board-adopts.html, (last visited Jul. 26, 2017)
[96] *Covered California's Board Adopts Prescriptions for A Better Health Care System*, NEWS.COVEREDCA.COM, http://news.coveredca.com/2016/04/covered-californias-board-adopts.html, (last visited Jul. 26, 2017).
[97] *Id.*

- Assign a primary care doctor to enrollees within 30 days of coverage.
- Share data with other plans and doctors to better track and treat patients with chronic conditions such as diabetes.
- Monitor and reduce health disparities among all their patients, starting with four major conditions: diabetes, hypertension, asthma and depression.
- Better manage the price of high-end pharmaceuticals and aid consumers in reducing the cost of expensive drug treatments.
- Help consumers better understand their diseases and treatment choices and their share of the costs for those treatments.[98]

SECTION 3: LEGAL CHALLENGES TO THE ACA

In *National Federation of Independent Business v. Sebelius*, the Supreme Court considered the constitutionality of the individual mandate and Medicaid expansion of the ACA.[99] The Court considered whether the individual mandate was constitutional as congressional regulation through the Commerce Clause, through congressional regulation through the Necessary and Proper Clause, or as an exercise of the power to tax. The Court held the individual mandate was only constitutional if interpreted as a tax.

The Court held the mandate could not be sustained under federal Commerce Clause. The court reasoned the individual mandate could not be sustained per Congress' Commerce Clause authority because of the distinction between the power to regulate versus the power to create.[100] Congress can only regulate activity through the Commerce if "there is already something to be regulated."[101] The individual mandate does not regulate an already existing commercial activity but compels individuals to enter a market and purchase a product.[102] Justification of the individual mandate would encourage federal regulation of inaction instead of activities and furtherance of such logic would allow the federal government to justify forced purchases of products to solve "almost any problem."[103]

The Court held the individual mandate could also not be sustained through the Necessary and Proper Clause. The Court reasoned only laws that are "derivative of, and in service to, a granted power" can be sustained and avoid being an unlawful usurpation of power.[104] In the case of the ACA, the individual mandate was not derivative of the exercise of a granted power and thus the Necessary and Proper Clause analysis failed.

[98] *Id.*
[99] Nat'l Fed'n of Indep. Bus. v. Sebelius 132 S. Ct. 2566, 2577.
[100] *Id*. at 2586.
[101] *Id*. at 2586.
[102] *Id*. at 2587.
[103] *Id*. at 2588.
[104] *Id*. at 2591.

However, the individual mandate was sustainable as a tax. Though the Act describes the individual mandate as prescribing a "penalty" and not a tax makes no difference whether the individual mandate can be analyzed under the taxing power of Congress.[105] The Court is concerned with the practical function of the mandate and not the label. Additionally, the court reasons that the "penalty" is not a penalty but rather a tax because there are no negative legal consequences for not buying health insurance; someone who chooses to pay the penalty instead of receiving health insurance will comply with the law.[106]

In 2015 the Supreme Court considered the jurisdictional scope of the ACA in *King v. Burwell*.[107] The ACA provides tax credits shall be allowed for applicable employers if the taxpayer enrolls in an insurance plan "through an Exchange established by the State."[108] An IRS regulation implementing the statute interpreted such an exchange could be established by a state or by a federal exchange.[109] Petitioners argued the IRS regulation was an unlawful agency interpretation contrary to the plain meaning of the statute. The Court reasoned that petitioners were incorrect to read the regulation by itself; the regulation must be read in context in the overall statutory scheme.[110] Though the term "exchange" is indeed ambiguous, according to the Court, the broader statutory scheme of the ACA provides illumination.[111] The Court reasons if "State" in the IRS regulation did not apply to federal exchanges, fewer people would meet coverage requirements of the ACA; the Court estimates in 2014 alone "approximately 87 percent of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all those people would become exempt."[112] Additionally, a Court interpretation favorable to the plaintiffs "could well push a State's individual insurance market into a death spiral."[113] The Court reasons it is implausible Congress intended the statute to be interpreted in such a way and refuses to apply a plain meaning interpretation.[114]

SECTION 4: WHAT IS EXPECTED IN THE FUTURE?

Since the adoption of the Affordable Care Act, the mantra of opponents of that legislation has been "repeal and replace." Recently, however, the political difficulty of such a course has been on full display.

[105] *Id*. at 2594.
[106] *Id*. at 2597.
[107] King v. Burwell 135 S. Ct. 2480, 2483 (2015).
[108] 26 U.S.C. Section 36B (a).
[109] 45 C.F.R. Section 155.20.
[110] King v. Burwell 135 S. Ct. 2480, 2489 (2015).
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*.

THE AMERICAN HEALTH CARE ACT OF 2017: HR 1628

H.R. 1628, the American Health Care Act of 2017 (AHCA) was passed by the House on May 4, 2017. Given the Senate's inability to come to an agreement either to pass the AHCA, or to pass an alternative, the AHCA is now moribund. It does, however, provide an interesting glimpse into the alternatives to the ACA that are being proposed in Congress. This section will describe briefly those parts of the ACA that would have been repealed by H.R. 1628, those parts of the ACA that would have been changed by H.R. 1628, and those parts of the ACA that would have been retained by H.R. 1628. [115]

A. *H.R. 1628 and Repealed ACA*

The individual mandate would be eliminated.[116] There would be no penalty if individuals chose to forego health insurance. However, to encourage individuals to keep health insurance coverage the bill provides for a continuous health insurance coverage incentive.[117] The incentive provides for a 30% penalty for people on the individual market for lapses in health insurance.[118] The AHCA would also appeal the employer mandate[119] immediately. The cost-sharing subsidy would be repealed by 2020.[120]

The bill provides that no federal funding to Planned Parenthood would be granted following the first year after the AHCA is enacted.[121] The bill also would prohibit any spending on prohibited entities, either directly or indirectly, by the states using funding from federal payments.[122] Prohibited entities under this provision include entities who provide for abortions other than abortions for pregnancies resulting from rape or incest or if the pregnancy places a woman's life at risk.[123]

B. *H.R. 1628: What Would Change*

The bill changes the subsidization of health care coverage rates. Tax credits would be distributed by age instead of by income using a flat tax structure.[124] Tax credits would be available to individuals making less than $75,000 a year and households earning less than

[115] Haeyoun Park and Margot Sanger-Katz, The Parts of Obamacare Republicans Will Keep, Change, or Discard (March 6, 2017) https://www.nytimes.com/interactive/2017/03/06/us/politics/republican-obamacare-replacement.html?_r=0.
[116] H.R. 1628 § 204.
[117] H.R. 1628 § 133.
[118] *Id.*
[119] H.R. 1628 § 205.
[120] H.R. 1628 § 131.
[121] H.R. § 103 (a)(2).
[122] H.R. § 103 (a).
[123] H.R. § 103.
[124] H.R. § 36B.

$150,000 a year.[125] The AHCA provides states can create a mandatory work requirement for nondisabled, nonelderly, non-pregnant adults under Medicaid.[126]

The bill would have a substantial effect on older Americans and retirees. The AHCA permits states to keep the Medicaid expansion under the ACA and does not change the amount of federal funding until 2020.[127] After 2020, federal funding for individuals who recently qualify for eligibility and individuals who left the Medicaid program would have reduced funding. The bill would allow insurance companies to charge older customers five times the rate younger customers are charged.[128] This would substantially reduce the cost of premiums for young adults while substantially raising the cost of premiums for elderly Americans.[129] The Congressional Budget Office estimates these changes would result in an estimated 52 million Americans being uninsured by 2026, in large part because of the changes to Medicaid.[130] The savings in Medicaid spending would contribute to a reduction of the federal deficit by $337 million by 2026.[131]

C. *H.R. 1629: What Would Remain*

The bill does retain several components of the Affordable Care Act. The bill retains the prohibition for refusing coverage to individuals with pre-existing conditions. The bill retains health insurance marketplaces and an annual open enrollment period. The bill continues to allow children to remain on their parent's insurance policy until age 26.

THE HEALTHY CALIFORNIA ACT: SB 562

The Healthy California Act ("SB 562"), introduced on February 17, 2017, would create the Healthy California Program ("Cal-Health"). Cal-Health would provide comprehensive universal single-payer health care coverage in California, including a health care cost control system. It would create a Healthy California Board consisting of nine members from specific fields. Additionally, it would create a Healthy California Trust where all federal and state funds would be placed relating to health care.

Cal-Health prohibited health care service plans and health insurers from offering health benefits or covering services if they were not a part of Cal-Health. However, it left the same rules and standards in place for plans and providers. California would have to obtain waivers from federal and state programs so that those funds would be deposited to the Cal-Health trust fund. Thereafter, Cal-Health would provide health coverage equal to or exceeding what those

[125] *Id.*
[126] H.R. § 117.
[127] H.R. § 112.
[128] American Health Care Act Cost Estimate, Congressional Budget Office (March 13, 2017) *available at* https://www.cbo.gov/publication/52486.
[129] *Id.*
[130] American Health Care Act Cost Estimate, Congressional Budget Office (March 13, 2017) *available at* https://www.cbo.gov/publication/52486.
[131] *Id.*

programs usually provided. If a waiver for some funds was not obtained, these funds would be pooled in the Cal-Health trust fund and Cal-Health would provide the services.

On June 23, 2017, California Assembly Speaker Anthony Rendon announced that SB 562 was going to be held in the Assembly committee, while leaving open the possibility of reconsidering the bill during the second year of the legislative session. Although Speaker Rendon supports the idea of universal health care, he stated that the bill "didn't make sense … [i]t just didn't seem like public policy as much as it seemed a statement of principle." Speaker Rendon's position largely steamed from SB 562 not including a funding plan for the legislation estimated to cost $400 billion, calling the bill a "woefully incomplete proposal."[132]

Protest erupted after Speaker Rendon shelved SB 562 and proponents of the bill expressed a desire to make universal health care a litmus test for California Democrats and threatened to run candidates against opponents of SB 562 during the 2018 primaries.[133] The bill's sponsor, the California Nurses Association, described Speaker Rendon's action as a "cowardly act" and a campaign led by the nurses' Healthy California coalition, pressured Speaker Rendon to take up SB 562 by holding an "Inaction Equals Death" rally in Speaker Rendon's district office. Also, the President of the California Nurses Association denounced Speaker Rendon's action, describing him as the "Insurance Industry's Man of the Year." Speaker Rendon and his family even received death threats.[134]

As a strong supporter of a single payer system, U.S. Senator Bernie Sanders expressed that he was "extremely disappointed" by the Speaker's actions and called on the Speaker to allow a floor vote.[135] Senator Sanders stated that "[i]f the great state of California has the courage to take on the greed of the insurance companies and the drug companies, the rest of the country will follow."[136]

SECTION 5: THE ECONOMIC IMPACT OF THE ACA, COVERED CALIFORNIA, AND THE PROPOSED ALTERNATIVES

Since the passage of the ACA in 2010, the annual premiums for employer-sponsored health insurance have increased by approximately twenty percent.[137] With the cost of healthcare

[132] *Why Universal Health Care Died in* California, SACBEE.COM, http://www.sacbee.com/news/politics-government/capitol-alert/article158363674.html, (last visited on Jul. 26, 2017); *Will Anthony Rendon Pay a Price for Blocking Universal Health Care Bill in California?* http://www.sacbee.com/news/politics-government/capitol-alert/article158543369.html, (last visited on Jul. 26, 2017).
[133] *Id.*
[134] *Death Threats Directed at Assembly Leader Over Universal Care Bill*, SACBEE.COM, http://www.sacbee.com/news/politics-government/capitol-alert/article158738529.html
[135] *Will Anthony Rendon Pay a Price for Blocking Universal Health Care Bill in California?* http://www.sacbee.com/news/politics-government/capitol-alert/article158543369.html, (last visited on Jul. 26, 2017); http://www.washingtontimes.com/news/2017/jun/24/sen-bernie-sanders-rips-california-democrats-pulli/
[136] http://www.washingtontimes.com/news/2017/jun/24/sen-bernie-sanders-rips-california-democrats-pulli/;https://twitter.com/berniesanders/status/878659234916904960.
[137] Kaiser Family Foundation 2016 Employer Health Benefits Survey: http://www.kff.org/health-costs/report/2016-employer-health-benefits-survey/

continuing to rise, examining the economic impact of these increases and the potential alternative systems may design the path forward for California.

THE ACA'S IMPACT ON HEALTHCARE COST

In 2008, the average employer-sponsored family plan cost a total of $12,680, with employees paying $3,354.[138] By 2016, the cost of the average employer family plan was $18,142, with workers paying $5,277.[139] Also, the average family premiums rose 20% from 2011 to 2016. However, that rate of increase was lower than the previous five years (up 31% from 2006 to 2011) and the five years before that (up 63% from 2001 to 2006).[140]

Additionally, in 2008, 18% of covered workers had deductibles of at least $1,000, up from only 10% in 2006.[141] For workers with employer-sponsored plans at small firms, 35% had deductibles of $1,000 or more in 2008, up from 16% in 2006. In contrast, in 2016, 51% of all covered workers, and 65% of workers in small firms, face deductibles of at least $1,000.[142]

The total prescription drug spending in the U.S. was $457 billion in 2015, representing 16.7% of all health care service expenditures. In 2012, by contrast, total drug spending was measured at $367 billion, for 15.4% of all health care service dollars.[143]

COVERED CALIFORNIA'S IMPACT ON HEALTHCARE COST

For the first time since launching, Covered California announced double-digit rate increases, averaging 13.2 percent for 2017.[144] In each of the past two years, rate hikes for Covered California policies were about 4 percent, putting the state's three-year average at 7 percent.

THE SINGLE PAYOR SYSTEM ALTERNATIVE

California's recent attempt to implement a single payer system begs the question whether such a system is the right way for California to move forward economically. Several previous studies examining the economic impact of a single payer system determined the impact it would have on several states. The two following studies examined the impact a single payer system would have nationally, and the impact such a system would have on California.

The Funding HR 676: The Expanded and Improved Medicare for All Act: How We Can Afford a National Single-Payer Health Plan study examined the single-payer system created by HR 676, The Expanded and Improved Medicare for All Act, introduced by Rep. John Conyers Jr., D-Mich. The study found that the U.S. could save an estimated $592 billion annually by

[138] http://time.com/money/4503325/obama-health-care-costs-obamacare/.
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] http://news.coveredca.com/2016/07/covered-california-announces-rates-and.html.

slashing the administrative waste associated with the private insurance industry ($476 billion) and reducing pharmaceutical prices to European levels ($116 billion).[145]

Also, a recent study by the Lewin Group, The Health Care For All Californians Act: Cost and Economic Impacts Analysis, found that a single payer system would save California $343.6 billion in health care costs over 10 years, mainly by cutting administration and using bulk purchases of drugs and medical equipment.[146] This study examined a California bill that would have achieved universal coverage in California while reducing total health spending for California by about $8 billion in the first year alone.[147] The study found that these savings would come from replacing the current system of multiple public and private insurers with a single, reliable insurance plan, saving about $20 billion in administrative costs.[148] Additionally, California buying prescription drugs and durable medical equipment (e.g., wheelchairs) in bulk, would result in saving about $5.2 billion in spending.[149]

In terms of state and local governments, the study found that they would save about $900 million during the first year in spending for health benefits provided to state and local government workers and retirees.[150] Under the study, an aggregate savings to state and local governments from 2006 to 2015 was calculated to be about $43.8 billion.[151]

SECTION 6: RETIREE HEALTH CARE BENEFITS (OPEBS): ARE THEY STILL IMMUTABLE?

Aside from the escalating costs of providing healthcare coverage to existing employees, local public agencies also generally bear the cost of retiree health benefits or (OPEBs). Historically, efforts to reduce those costs through changes to retiree benefits have run head long into challenges brought under the Contracts Clause of both the U.S. and California Constitutions. Article 1 Section 10 of the U.S. Constitution provides "No state shall enter into any Treaty, Alliance, or Confederation…or Law impairing the Obligation of Contracts."[152] The California Constitution similarly provides "A… law impairing the obligation of contracts may not be passed." The California Supreme Court currently has before it two cases that could change the legal landscape in this area.

Public employers attempting to reduce or change pension benefits is not a new struggle in the state. The current California legal structure, often referred to as the "vested rights doctrine", originates from a series of cases from the 1940's and 1950's when the City of Long Beach struggled to fund police and firefighter retirement obligations when veterans returned from World War II.[153] In 1955, the California Supreme court ruled in the seminal case *Allen v. Long Beach* that modifications to public pensions do not violate the Contracts Clause if the

[145] http://www.pnhp.org/sites/default/files/Funding%20HR%20676_Friedman_7.31.13_proofed.pdf.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] U.S. Constitution Art 1. § 10.
[153] 1-9 California Public Sector Employment Law § 9.03 (2017).

modifications are (1) reasonable; (2) have a material relation to the pension system and its successful operation; and (3) that "changes in a pension plan which result in disadvantages to employees should be accompanied by comparable new advantages."[154] As a result, if pension benefits of a vested contractual nature are withdrawn by the Legislature, the modification must be reasonable and must also be replaced by a comparable benefit.

The vested rights legal analysis has been evolved since the decision in *Allen.* Today, in analyzing on a contracts clause case, the focus is on whether (1) a valid contract exists; (2) was a valid contract impaired, i.e. what was the nature and extent of any contractual obligation; (3) did the impairment of the contract substantially affect the rights in the contract, invalidate the contract, or significantly alter it; and (4) was the modification reasonably expected under the contract?[155] The California Supreme Court expanded the vested rights doctrine as recently as 2011 in *Retired Employees Assn. of Orange County, Inc. v. County of Orange*.[156] In that case. the court considered whether county public employees can form an implied contract that confers vested rights for health benefits for retirees. The court held there could be vested rights in a contract with implied terms if there is clear legislative intent to create a vested contractual right.[157]

However, more recently, appellate courts have begun taking a more limited view of the vested rights doctrine. For example, in *Protect Our Benefits v. City and County of San Francisco*, the First Appellate District considered whether a San Francisco initiative amendment conditioning payment of a supplemental cost of living allowance to retired city employees on the retirement fund being fully funded impairs the vested contractual right.[158] The court held that employees who retired before the implementation of the living allowance was enacted in 1996 did not have a vested contractual right to the living allowance. Employees who retired between 1996 and the implementation of Proposition C did have a fully vested contractual right and the requirement of Proposition C could not lawfully apply to their benefits.[159] In 1996, retired San Francisco employees were able to receive supplemental cost of living allowance as part of their pension benefits when the retirement fund's annual earnings exceed projected earnings.[160] In 2011, voters passed Proposition C, a reaction to the effects of the Great Recession, which only allowed payment of the supplemental living allowance if the fund was fully funded. The court reasoned that individuals only have vested rights for the benefits in effect at the time of their retirement but there is no contractual expectation for a benefit not in existence at the time of retirement.[161] This supports the rule that the Legislature, in accordance with their sovereign powers, may modify retiree benefits if the right has not fully vested; i.e. the right only becomes

[154]Allen v. Long Beach, 45 Cal. 2d 128.
[155] Marin Ass'n of Pub. Emps. v. Marin Cty. Employee's Ret. Ass'n, 2 Cal App. 5th 674, 703 (2016).
[156] Retired Emps. Ass'n of Orange Cty., Inc. v. Cty. of Orange, 52 Cal. 4th 1171, 1172 (2011).
[157] *Id*. at 176.
[158] Protect Our Benefits v. City and County of San Francisco, 235 Cal. App. 4th 619 (2015).
[159] *Id*. at 622.
[160] *Id*. at 622.
[161] *Id*. at 427-428.

vested upon retirement and the vested right is only the right which existed at the time of retirement.

The conflicting policies have presented two cases that have been granted review in the California Supreme Court which may determine the hierarchy between the Legislature's power and vested retiree benefits in *Marin Association of Public Employees v. Marin County Employees Retirement Association* and *Cal Fire Local 2881 v. California Public Employees Retirement System*.

In *Marin County*, the First Appellate District of California considered whether a new pension formula for Marin County employees constituted a substantial impairment of the employee's contracts.[162] California's Public Employees' Pension Reform Act of 2013 (PEPRA) enacted, among other things, an amendment to Government Code 1 section 31461, a provision of the County Employees Retirement Law, with the aim of curtailing pension spiking by excluding specified items from the calculation of retirement income.[163] In response, Marin County began excluding standby pay, administrative response pay, callback pay, cash payment for health insurance waivers, and other items from the calculation of final pensions.[164] The pension policy change was challenged under a contracts clause theory and plaintiffs alleged certain provisions of PEPRA impaired their vested pension rights.[165] The court held it did not.[166] The court reasoned that while pension rights may not be destroyed, the government has the right to modify and such right is "inalienable."[167] In regards to active employees, any modification of a vested pension right must be reasonable.[168]The modification of an employee's future pension benefits is only a limited vested right that is subject to legislative modification.[169] Before a pension is payable, the legislature may make reasonable modifications subject to changing public policy.[170] Employees only retain the right to a substantial pension subject to changeable benefits.[171]

In *Cal Fire*, the First Appellate District considered whether there was a contract clause violation based on a separate provision of PEPRA, namely, the revocation of so-called airtime service credits, which when purchased by a retiree with at least five years of state service, could become credits increasing the retirement allowance of the retiree. Under PEPRA, CalPERS members could no longer purchase airtime service credits after 2012. In response to a claim this provision of PEPRA violated employees' vested rights, the appellate court determined there was no viable Contracts Clause claim because retirees are only entitled to a reasonable pension, not a pension of fixed benefits. Because the issue was the right *to purchase* credit, not the denial of a

[162] Marin Ass'n of Pub. Emps. v. Marin Cty. Employee's Ret. Ass'n, 2 Cal App. 5th 674, 703 (2016) and Cal Fire Local 2881 v. California Public Employees' Retirement System, 7. Cal. App. 5th 115 (2016).
[163] *Id*.
[164] *Id*. at 687.
[165] *Id*. at 690.
[166] *Id*. at 694.
[167] *Id*. at 697.
[168] *Id*. at 698 citing Allen v. Board of Administration 34 Cal.3d 114, 120.
[169] *Id*. at 700.
[170] *Id*. at 701 citing Allen v. Board of Administration 34 Cal.3d 119, 120.
[171] *Id*. at 707.

retirement allowance rate because of purchased claims, there was no vested right and such a legislative modification was reasonable.

Both *Marin County* and *Cal Fire* have been accepted for review by the California Supreme Court. Both cases have the potential to impact dramatically Contracts Clause challenges to so-called vested rights. A decision by the California Supreme Court that the legislative changes wrought by PEPRA do not violate the Contracts Clause in either the U.S. or California Constitutions could become a vehicle for changes to retiree healthcare benefits – if not for current retirees then for existing employees who have yet to retire. If the Supreme Court upholds the rulings by the First Appellate District, such a decision could well constitute an erosion of the vested rights doctrines thereby enabling local governments and the Legislature to respond to the growing unfunded liability issue resulting from OPEBs.

SECTION 7: CONCLUDING THOUGHTS

Local public employers will continue to struggle with the high costs of healthcare for existing employees and retirees absent a solution either in the Legislature or in the courts. At this point, the legislative solution seems more remote. At the federal level, the effort to "repeal and replace" the ACA is stalled. Efforts by the California Legislature to enact a single payor system also have been set aside for the time being.

Developments in the court appear more hopeful, however. A decision by the California Supreme Court affirming the rulings in *Marin County* and *Cal Fire*, would give local public employers greater flexibility to reduce retiree benefits at least prospectively.

While both the political and legal landscape remain uncertain, one fact is beyond debate. Healthcare costs continue to increase at significant rates. If these costs continue to increase unchecked, the cost of healthcare will become an ever increasing and debilitating drain on public resources in the future.

General Municipal Litigation Update

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

Javan N. Rad, Chief Assistant City Attorney, Pasadena

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Notes:

General Municipal Litigation Update

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

Prepared by
Javan N. Rad
Chief Assistant City Attorney
City of Pasadena

League of California Cities
2017 Annual Conference

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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."

Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?

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

Bart W. Brizzee, Principal Assistant County Counsel, San Bernardino County Counsel
Deborah J. Fox, Chair of First Amendment Practice Group and Trial and Litigation Practice Group, Meyers Nave

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Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?

Deborah J. Fox, Principal
Margaret W. Rosequist, Of Counsel
Meyers Nave
707 Wilshire Blvd., Suite 2400
Los Angeles, CA 90071
213.626.2906
dfox@meyersnave.com
mrosequist@meyersnave.com

Deborah J. Fox, Meyers Nave
Margaret W. Rosequist, Meyers Nave

Introduction

Restrictions on panhandling and solicitation reach back to the origins of the Republic. Regulation of this activity is an intensely local issue, with policy objectives and goals often differing from jurisdiction to jurisdiction. Over the years, the Supreme Court has attempted to achieve a balance between First Amendment protections and the government's desire to achieve certain policy interests. Developments in the 1960s, which have continued through to the present, show the Court's jurisprudence tilting in favor of free speech rights over the authority of municipalities to regulate panhandling and solicitation. Most recently, the Supreme Court has articulated a very exacting approach to determining the content neutrality of regulations impacting speech. Specifically, in *Reed v. Town of Gilbert*, the Supreme Court states that "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[1] The content neutrality test presents a particularly daunting challenge when it comes to drafting constitutionally sound panhandling and solicitation regulations.

This paper will provide a history of the development of the legal jurisprudence governing panhandling and solicitation regulations. It will then evaluate the jurisprudence governing charitable solicitation, forum analysis, and the content neutrality determination. The final section of the paper will provide tips for practitioners to consider when faced with a request to draft a local law or policy regulating solicitation.

I. History[2]

Historically, Americans addressed the problems associated with panhandling by simply prohibiting it. In fact, the Articles of Confederation specifically exempted "paupers, vagabonds, and fugitives from justice" from the privileges and immunities guaranteed to all citizens.[3] By the middle of the twentieth century, every state had laws in place regulating vagrancy and a common feature of these laws was prohibitions on begging.[4] These laws

[1] *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015)

[2] Special thanks goes to former associate David S. Warner for his contribution to the historical section of this paper.

[3] William Mitchell, II, Comment, *"Secondary Effects" Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling*, 24 U. Balt. L. Rev. 291, 297-98 n.23 (1995).

[4] Robert Teir, Article, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 La. L. Rev. 285, 300 (1993). For example, until a recent series of judicial decisions declared the law unconstitutional, it had been unlawful in the State of Michigan since 1929 to be "found begging in a public place." *Mich. Comp. Laws Ann. § 750.167(1)(h).*

were implicitly supported by the United States Supreme Court in decisions such as *Cox v. New Hampshire,* which upheld a state law prohibiting parades or processions on public streets without a license.[5] According to the Court, laws assuring the safety and convenience of the people to use the public highways have "never been regarded as inconsistent with civil liberties, but rather as one of the means of safeguarding the good order upon which they ultimately depend."[6] State courts were generally supportive of local vagrancy statutes as well.[7]

Judicial deference began to wither in the second half of the century, however, as petitioners successfully challenged the arbitrary nature of laws that made it a crime merely to be poor or a transient. In 1972, for example, the Supreme Court held a Jacksonville, Florida city ordinance unconstitutional due to its vagueness.[8] The ordinance punished acts of vagrancy including, among other things, "habitual loafers," "dissolute persons who go about begging," "common night walkers," and "persons able to work but habitually living upon the earnings of their wives or minor children."[9] According to the Court, no person of ordinary intelligence would contemplate that such conduct would be a crime. In addition, the law had such an expansive definition of vagrancy, the police had unfettered discretion to make arrests for behavior that, in many cases, may have been perfectly legal.[10]

In a series of decisions in the 1980s, the Supreme Court looked more specifically at the issue of solicitation and its interplay with the First Amendment. In *Village of Schaumburg v. Citizens for a Better Environment*, the Court struck down a local ordinance prohibiting door-to-door or on-street solicitation by charitable organizations that did not use at least 75 percent of their receipts for charitable purposes.[11] While acknowledging that soliciting financial support was subject to reasonable regulation, Justice Byron White opined for the majority that such regulation:

> [M]ust be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and for the reality that without solicitation, the flow of such information and advocacy would likely cease.[12]

[5] *Cox v. State of New Hampshire,* 312 U.S. 569 (1941).

[6] *Id.* at 574.

[7] Mitchell, "Secondary Effects" at 298 n.27.

[8] *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

[9] *Id*. at 164.

[10] *Id.* at 162, 168.

[11] *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

[12] *Id.* at 632. White relied, in part, on several Supreme Court decisions (primarily from the 1940s and 1950s) involving canvassing and soliciting by religious and charitable organizations. See *Id.* at 628-32.

Subsequent Supreme Court decisions found solicitation by other types of organizations to be protected speech, and courts in several federal circuits have relied on the Court's analysis in *Schaumburg* and its progeny to conclude that solicitation and panhandling by individuals is subject to the same First Amendment protection given to solicitation by private charities.[13] Indeed, in the recent *Santopietro v. Howell*, case the Ninth Circuit noted that the solicitation of tips is entitled to the same constitutional protection as traditional speech.[14] In *Santopietro,* police officers arrested women dressed as "sexy cops" on the Las Vegas strip for engaging in commercial activity without a business license.[15] While the trial court granted the police officers summary judgment motion, the Ninth Circuit reversed, finding that there was a factual dispute as to whether the "sexy cops" were seeking tips for having a photograph taken with them or whether they were demanding a quid pro-quo payment that might have fallen outside protected noncommercial First Amendment activity and instead been subject to analysis as commercial speech.[16] As such, the Ninth Circuit remanded for a resolution of the factual issues at trial and a determination (based on the factual resolution) as to whether the business licensing requirement validly applied to the women.[17]

Given the evolution of modern jurisprudence, municipalities considering panhandling and solicitation regulations should draft such restrictions with the understanding that the speech associated with solicitation or panhandling activity is given full First Amendment protection.

II. Charitable Solicitation

In *Schaumburg,* the Supreme Court laid the foundation for its modern jurisprudence regarding charitable solicitation. The Court applied an "overbreadth" analysis and found that an ordinance that banned solicitors from seeking door-to-door charitable contributions was not the least restrictive means of achieving a legitimate governmental interest.[18] Specifically, the ordinance prohibited solicitation by organizations that did not use at least 75 percent of

[13] *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 (1988) (professional fundraisers); *United States v. Kokinda,* 497 U.S. 720 (1990) (political organizations); and *International Society for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992) (non-profit religious organizations); *Loper v. New York City Police Dep't,* 802 F.Supp. 1029 (S.D.N.Y. 1992), aff'd, 999 F.2d 699 (2d Cir. 1993); *Speet v. Schuette,* 726 F.3d 867 (6th Cir. 2013); *Gresham v. Peterson,* 225 F.3d 899 (7th Cir. 2000).

[14] *Santopietro v. Howell*, 857 F.3d 980, 988 (9th Cir. 2017)

[15] *Id.*

[16] *Id.* at 986 & 989.

[17] *Id.* at 994.

[18] *Village of Schaumberg*, 444 U.S. at 628.

their receipts for charitable purposes.[19] The Court explained that while the Village had a substantial interest in preventing fraud and maintaining residential privacy, the 75 percent requirement only peripherally promoted these interests.[20] For example, the Court said that there is a class of charitable organizations whose primary goal is to research and advocate, and that such organizations typically use more than 25 percent of their funds to pay their own staff.[21] These organizations could not be labeled fraudulent, said the Court, and thus the ordinance was overbroad.[22]

In order for a charitable solicitation regulation to pass muster under the standard set forth by the *Schaumburg* it must: (1) serve a sufficiently strong, subordinating interest that the government is entitled to protect (such as the prevention of fraud); and (2) be narrowly drawn to serve the interest without unnecessarily interfering with First Amendment freedoms.[23]

The courts have used the charitable solicitation framework to analyze the relatively new issue of donation bins. Some courts initially found the bins to be a form of charitable solicitation subject to the higher standards set forth in *Schaumberg* rather than the more forgiving standard set forth under the Supreme Court's commercial speech doctrine. In *National Federation of the Blind of Texas v. Abbott*, the Fifth Circuit explained that the inclusion of a charity's name on donation bins communicated information about the beneficiaries and implicitly advocated for the charity's views, ideas and goals, thus making it more than mere commercial speech.[24] The Fifth Circuit thus applied the *Schaumberg* standard of review and found unconstitutional the requirement that donation bins include information as to any fee arrangement between the non-profit and a for-profit organization.[25] Similarly, in *Linc-Drop v. City of Lincoln*, a district court within the 8th District Court of Appeals rejected regulations restricting donation bins to those where 80 percent of the proceeds from the bins were used for charitable purposes.[26] And, in *Planet Aid v. City of St. Johns, MI,* the Sixth Circuit also rejected a regulation imposing a total ban on donation bins.[27] Instead of relying on *Schaumberg*, however, the Sixth Circuit turned to the Supreme Court's jurisprudence regarding time, place and manner restrictions on non-commercial

[19] *Id*. at 622.

[20] *Id*. at 636.

[21] *Id*.

[22] *Id*. at 637.

[23] *Id*. at 636.

[24] *National Federation of the Blind of Texas v. Abbott*, 647 F.3d 202 (5th Cir. 2011).

[25] *Id*. at 214. The Fifth Circuit found that the other regulation at issue, which required the donation bins to disclose the name of any third party involved in the transaction, did pass constitutional muster. *Id*. at 215.

[26] *Linc-Drop v. City of Lincoln*, 996 F.Supp.2d 845 (D.Neb. 2014).

[27] *Planet Aid v. City of St. Johns, MI*, 782 F.3d 318, 331 (6th Cir. 2015).

speech in a public forum, and found that the regulation failed because it was content-based.[28] Specifically, the regulation only banned unattended outdoor receptacles with expressive messages regarding charitable giving, while receptacles with no messages such as dumpsters, collection bins, and trash cans, were allowed.[29]

By contrast, in the 2017 *Recycle for Change v. City of Oakland* case, the Ninth Circuit upheld regulations of unattended collection bins.[30] The regulations at issue required any property owner with a collection bin on its property to obtain an annual permit and imposed a 1000 feet separation requirement between collection bins.[31] The regulations were challenged on both First Amendment and Fourteenth Amendment grounds (which the district court rejected).[32] The case, however, was only appealed on First Amendment grounds.[33] On appeal, the plaintiff argued that the regulations were unconstitutionally content-based because they required the enforcing officer to read the information on the collection bin to determine if it was a charitable bin.[34] The Ninth Circuit assumed (without deciding) that regulations of these collection bins posed First Amendment concerns.[35] The Court reviewed the Sixth Circuit's *Planet Aid* decision and noted that the Sixth Circuit interpreted the regulations before it as applying to charitable donations alone which in turn required an enforcing officer to look at the content of the message on the collection bin to determine whether it was soliciting charitable donations.[36] By contrast, in *Recycle for Change,* the Ninth Circuit explained that the regulations at issue applied to all donation bins, regardless of whether they were dedicated for profit or charitable purposes.[37] Thus, the Ninth Circuit did not frame the issue as one relating to charitable donations but instead posited that the question was whether "the activity of collecting, distributing, or recycling personal items" constitutes "communicative content" against which any hint of discrimination should trigger strict scrutiny.[38] The Court answered this question in the negative. The Ninth Circuit cited to the *Reed* test but found the regulations to be content-neutral and thus applied the

[28] *Id.*

[29] *Id.* at 328.

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

[31] *Id.* at

[32] *Id.* at 669.

[33] *Id.*.

[34] *Id.* at 670.

[35] *Id.* at 669.

[36] *Id.* at 671-72.

[37] *Id.* at 670.

[38] *Id.* at 671.

intermediate scrutiny test which the regulations passed.[39] The Ninth Circuit also explained that the regulations at issue were not rendered content-based merely because they may require an enforcing officer to determine if the collection bin was intended to collect, distribute, or recycle personal items.[40] Instead, the Court cited to the Supreme Court's *Hill v. Colorado* case and its own *Berger v. Seattle* decision to support a common sense approach to applying the "officer must read it" test.[41]

The evolving case law in this arena indicates that a critical issue for determining whether the regulation of collection bins will pass constitutional muster is the content neutrality analysis. Content-neutrality comes into play whether the collection bins are located on private property or government property[42] While restrictions on collection bins may implicate either private property or government property, many other forms of solicitation restrictions are aimed at government property alone. Where regulations are aimed at government property the courts look to forum classification and the accompanying tests for each forum in applying the First Amendment analysis. The nuanced forum analysis is discussed below.

III. Forum Analysis

The most common approach of the lower federal courts when analyzing solicitation or panhandling regulations is to utilize the test applicable to the forum at issue. Regulations for a nonpublic forum are subject to a more deferential review standard than regulations for a public forum. Accordingly, forum classification of the property being regulated can be determinative as to whether the restrictions at issue are constitutionally sound based on the First Amendment.

In *Perry Education Association v. Perry Local Educators' Association,* the Supreme Court set forth the standard for the traditional public forum explaining that in places, which by long tradition or government fiat, have been devoted to assembly and debate (e.g., streets, sidewalks, public parks), the rights of the state to limit expressive activity are sharply

[39] *Id.* at 669-70.

[40] *Id.* at 671-72.

[41] *Id.* at 671.

[42] In the *Recycle for Change* case, the Ninth Circuit used neither the *Schaumberg* framework nor the forum analysis tests but instead looked to the intermediate scrutiny test outlined by the Supreme Court in *United States v. O'Brien,* 391 U.S. 367, 377 (1968.) *See Recycle for Change,* 356 F.3d at 674. Presumably the Ninth Circuit looked to the *O'Brien* test because the regulations were not limited to charitable donations nor were the regulations directed at conduct on government property (which would have triggered the tests under forum analysis). The choice to use the *O'Brien* intermediate scrutiny test over the forum analysis intermediate scrutiny test is unlikely to have impacted the outcome of the case. Rather, the critical issue was the Ninth Circuit's determination that the regulations were content-neutral which thus avoided the application of a strict scrutiny standard of review.

circumscribed. [43] Thus, a restriction on speech in a public forum will pass constitutional muster if: (1) it is content-neutral; (2) it is narrowly tailored to serve a significant governmental interest; and (3) it leaves open ample alternative channels for communication of the information (this is known as the time, place and manner test).[44] In a traditional public forum, First Amendment activities generally may not be prohibited completely, and complete bans are only allowed when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[45] Thus, courts routinely strike down wide-ranging bans that prohibit solicitation from an occupant of motor vehicles or ban solicitation from all traffic median strips as these are not deemed to meet the narrow tailoring requirement.[46] Additionally, content-based regulations (*i.e.* rules that either allow or exclude speech based on the subject matter being expressed) are deemed presumptively unconstitutional for a public forum, and only pass muster if they are the least restrictive means to further a compelling governmental interest.[47] Thus, a content-based restriction that prohibits panhandlers from knowingly touching or grabbing could pass strict scrutiny while restrictions that ban fighting words uttered in connection with panhandling, ban repeated requests for money or ban panhandling in a group of two or more in an intimidating manner have been found to fail the strict scrutiny test.[48]

In contrast to the public forum, a nonpublic forum is government property that has traditionally not been open to the free exchange of ideas, such as a courthouse lobby, a prison or a military base. The government may also establish a limited public forum by opening a nonpublic forum for a limited purpose or for the discussion of certain subjects.[49] A limited public forum is governed by the same rules that govern a nonpublic forum.[50] In a nonpublic forum or limited public forum, the government is given more latitude to restrict speech. A restriction for a nonpublic (or limited public) forum will pass muster if it is: (1) reasonable;

[43] *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

[44] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[45] *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

[46] *See Comite de Jornaleros v. City of Redondo Beach,* 657 F.3d 936 (9th Cir. 2011); *see also Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015).

[47] *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998); *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989).

[48] *See McLaughlin v. City of Lowell*, 140 F.Supp.3d 177 (D. Mass. 2015).

[49] *Hills v. Scottsdale Unified Sch. Dist.,* 329 F.3d 1044, 1049 (9th Cir. 2003).

[50] *See id*. Note that the government may also create a designated public forum by opening nonpublic forum property for general First Amendment activities (as opposed to limiting the activity) and that the designated public forum (as opposed to the limited public forum) is governed by the same rules that apply to a public forum. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074-1075 (9th Cir. 2001); *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998).

and (2) viewpoint neutral (*i.e.* not an effort to suppress expression merely because the public officials oppose the speaker's view).[51]

In *United States v. Kokinda*, the Supreme Court considered regulations for a postal sidewalk that provided "soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited."[52] In a 5-4 decision, the Court upheld the regulation. The majority opinion explained that the postal sidewalk was not a traditional public forum and that the regulation passed muster as reasonable and viewpoint neutral.[53] Critical to the nonpublic forum classification was the fact that the sidewalk was constructed solely to provide for the passage of individuals engaged in postal business, not as a public passageway.[54]

Similarly, the Supreme Court has found airport terminals to be a nonpublic forum. In *International Society for Krishna Consciousness v. Lee*, the Supreme Court considered a regulation prohibiting solicitation and the receipt of funds inside an airport terminal.[55] A divided Court held that the Port Authority could prohibit the solicitation and receipt of funds because the terminal had not historically been made available for speech activity.[56] This made the terminal a "nonpublic forum" where the regulation needed to be only reasonable and viewpoint neutral to pass muster.[57] The Court found the restriction met this test explaining that the Port Authority's need to restrict speech to reduce passenger congestion was reasonable and unrelated to any particular speaker's viewpoint.[58] The Court noted that the government's interest in preventing congestion and fraud were heightened at an airport terminal where people travel on tight time schedules.[59] Likewise, in *International Society for Krishna v. City of Los Angeles*, the Ninth Circuit used the nonpublic forum test and upheld a ban at LAX on the

[51] *Perry*, 460 U.S. at 46.

[52] *United States v. Kokinda*, 497 U.S. 720, 724 (1990). The Court only considered the prohibition on soliciting funds and did not examine the remainder of the prohibition. *See id.* at 723-724.

[53] *Id.* at 724. Only four Justices found that the postal sidewalk was a nonpublic forum. Justice Kennedy concurred in the judgment that the regulations were constitutional but took issue with classifying the sidewalk as a nonpublic forum. *Id.* at 721. Rather, he found that the regulations passed muster under the time, place and manner test for a public forum. *Id.* The four dissenting Justices found that the sidewalk was a public forum and that the regulations did not pass muster. *Id.* at 740.

[54] *Id.* at 743.

[55] *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

[56] *Id.* at 680.

[57] *Id.* at 683.

[58] *Id.* at 680-81.

[59] *Id.* at 684.

solicitation for the immediate receipt of funds when done in a continuous and repetitive manner.[60]

The post office and airport cases illustrate that with certain property the government can regulate solicitation and panhandling under the reasonableness standard applicable to a nonpublic forum. However, the vast majority of solicitation and panhandling regulations are directed at a public forum (such as sidewalks, streets, and parks) where less deferential tests apply. For instance, in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* the Ninth Circuit ruled that Redondo Beach's city-wide ban on soliciting for employment, business or contributions from the occupants of any vehicle was unconstitutional.[61] The Ninth Circuit found the ordinance invalid because it was not narrowly tailored to achieve the City's goals.[62] The City enforced the ordinance as part of its "Day Laborer Enforcement Project" and a pair of day-laborer organizations sued. The Court found that Redondo Beach had a legitimate interest in keeping the streets open and available for movement but that the ordinance was not narrowly drawn because it applied everywhere in the City, while the City only provided evidence of traffic problems at a small number of major streets and medians.[63] Furthermore, the ordinance swept within its coverage school children shouting "car wash" at motorists, girl scouts selling cookies on the sidewalk, and even a motorist stopping on the side of the street to ask if a neighbor's teenager was available to babysit.[64] The City also had numerous alternative state law provisions at its disposal to achieve its goals while burdening little or no speech.[65]

Likewise, the First Circuit in *Cutting v. City of Portland* also rejected a city-wide ban that prohibited people from standing, sitting, staying, driving, or parking on median traffic strips.[66] While the ordinance was content-neutral, the First Circuit found that it was not narrowly tailored, but instead was geographically over-inclusive.[67] The First Circuit suggested that an ordinance that prohibits the activity on only the smallest or most dangerous of medians and intersections could potentially meet the narrow tailoring requirement.[68] Indeed, in *Houston Chronicle v. City of League City, Texas*, the Fifth Circuit found that the narrow

[60] *International Society for Krishna v. City of Los Angeles*, 764 F.3d 1044 (9th Cir. 2014).

[61] *Comite de Jornaleros,* 657 F.3d 936. Of note, while the Ninth Circuit found the regulation unconstitutional, it assumed without discussion that the regulation was content-neutral. *Id.* at 940. In light of the Supreme Court's recent ruling in *Reed*, it is unlikely that this assumption remains valid. The content neutrality issue is discussed in detail in Section IV *infra*.

[62] *Id.* at 940.

[63] *Id.* at 948-949.

[64] *Id.* at 959.

[65] *Id.* at 947-51.

[66] *Cutting*, 802 F.3d 79.

[67] *Id.* at 89.

[68] *Id.* at 92.

tailoring requirement was met where the regulation at issue only prohibits soliciting, selling, or distributing material to the occupants of cars stopped in obedience to a traffic control signal or light.[69] The Fifth Circuit rejected the argument that the ordinance was under-inclusive and instead found that intersections with traffic lights are generally the most heavily trafficked and dangerous, and thus the ordinance was appropriately tailored to meet the city's interests.[70]

IV. Content Neutrality

As noted above, content-neutral regulations of a public forum (such as for sidewalks, streets, and parks) are subject to intermediate scrutiny under the time, place and manner test, whereas content-based regulations are presumptively invalid and subject to strict scrutiny. Thus, drafting a content-neutral ordinance is critical to the success of implementing valid regulations for a public forum.

In the past, the courts and parties would often either assume without any analysis that solicitation and panhandling regulations were content-neutral, or would look to the Supreme Court's ruling in *Ward v. Rock Against Racism* for guidance. The *Ward* decision stated that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[71] This approach, however, is no longer valid.[72] The Supreme Court's recent decision in *Reed* has put the content neutrality issue in the spotlight and makes clear that a more exacting approach is mandated.[73] Specifically, as noted in the introduction to this paper, *Reed* states that "[g]overnment regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[74] Many solicitation ordinances fall within *Reed's* definition of "content-based," and are now potentially vulnerable to a constitutional challenge.

In a forewarning of things to come, the Ninth Circuit used an exacting understanding of content neutrality when it analyzed an ordinance regulating solicitation at the 80 acre Seattle Center (a public park and entertainment complex) prior to the *Reed* case.[75] Specifically, in *Berger v. City of Seattle*, the Ninth Circuit found the ordinance to be an impermissible content-based restriction because it prohibited street performers from actively

[69] *Houston Chronicle v. City of League City*, *Texas,* 488 F.3d 613 (5th Cir. 2007).

[70] *Id*. at 622.

[71] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[72] *See Reed* ., 135 S.Ct. 2218.

[73] *See id*.

[74] *Id*. at 2227.

[75] *See Berger v. City of Seattle,* 569 F.3d 1029 (9th Cir. 2009).

soliciting donations.[76] The Ninth Circuit found the very terms of the ordinance to be content-based because they prohibited performers from verbally communicating a particular set of messages – requests for donations – based on the idea expressed.[77] The Court then declared the ordinance unconstitutional even though the City may have had a legitimate interest in reducing the "aggressive solicitation" of street performers since it banned all active solicitation and not just aggressive behavior.[78]

The Seventh Circuit also considered the content neutrality of panhandling regulations in a decision that pre-dated *Reed.* Unlike the Ninth Circuit decision in *Berger*, the Seventh Circuit's decision in *Norton v. City of Springfield,* originally found the regulation at issue to be content-neutral, a decision it later reversed in light of *Reed*.[79] The Springfield ordinance defined panhandling as an oral request for an immediate donation of money.[80] Signs requesting money were allowed as were oral requests to send money later.[81] Initially, the Seventh Circuit rejected the argument that the ordinance was content-based explaining that the ordinance did not interfere with the marketplace of ideas, that it did not practice viewpoint discrimination, and that the distinctions were an effort to make the ordinance less restrictive.[82] The Seventh Circuit relied on the Supreme Court jurisprudence to classify two types of regulations as content-based: those that restrict speech because of the ideas they convey, and those that restrict speech because the government disapproves of the message.[83] It found that the panhandling restriction did not encompass either type of discrimination and was an ordinance regulating subject matter rather than content or viewpoint.[84]

After the Supreme Court's *Reed* ruling, however, the Seventh Circuit reconsidered its decision and, in light of *Reed,* found the Springfield ordinance to be unconstitutionally content-based.[85] Specifically, the Seventh Circuit found that Springfield's ordinance regulated speech based on the topic discussed and, therefore, was content-based under *Reed*.[86] Following this ruling, Springfield adopted a new ordinance that prohibited panhandling at any time before, during, or after the panhandler knowingly approaches within

[76] *Id*. at 1051.

[77] *Id*.

[78] *Id*. at 1053.

[79] *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).

[80] *Id*. at 412.

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*. at 412-413.

[86] *Id*. at 413.

five feet of the solicited person.[87] The new ordinance defined panhandling as a vocal appeal for an immediate donation of money or other gratuity.[88] The district court found that although the language of the ordinance had been modified, it was still content-based since it prohibited making a vocal appeal for donations while it allowed other topics of speech such as asking about the weather, requesting someone to sign a petition, or asking for future donations.[89] Accordingly, the City's panhandling regulation was once again found invalid.[90]

Similarly, in *Thayer v. City of Worcester,* the First Circuit initially upheld a panhandling restriction as a content-neutral regulation.[91] This decision was later reversed in light of *Reed*.[92] Retired Supreme Court Justice Souter, sitting by designation, found that regulations prohibiting aggressive panhandling and restricting the use of traffic medians and roadways to be content-neutral.[93] Souter noted that for decades, the City "had been pushed and pulled by concerns about panhandling on its streets."[94] Among other things, the City was concerned about public safety from individuals walking in and out of traffic to collect money in intersections, traffic islands, and roadways.[95] To address this problem, the City adopted two ordinances. The Aggressive Panhandling Ordinance made it unlawful to beg, panhandle, or solicit any person in an aggressive manner.[96] It applied to speech attempting to obtain an immediate donation of money or other things of value.[97] The second ordinance regulated activity on traffic islands and the roadway.[98] Plaintiffs, two homeless people and a political activist on the City's school committee, challenged the constitutionality of the ordinances.[99] The First Circuit looked to the test set forth in *Ward* and determined that the ordinances were content-neutral.[100] Souter explained that while panhandling and solicitation of immediate donations may convey a message of need, and waving placards at traffic islands may often be a political expression, the regulations were not directed at suppressing

[87] *Norton v. City of Springfield*, 2015 WL 8023461, 1 (C.D. Ill. 2015).

[88] *Id*. at 1.

[89] *Id*. at 2.

[90] *Id*. at 2-3.

[91] *Thayer v. City of Worcester* , 755 F.3d 60 (2014) (vacated and remanded).

[92] *Thayer v. City of Worcester*, 135 S.Ct 2887 (2015).

[93] *Thayer*, 755 F.3d 60 (2014).

[94] *Id*. at 63.

[95] *Id*. at 64.

[96] *Id*.

[97] *Id*.

[98] *Id*. at 65.

[99] *Id*. at 65-66.

[100] *Id*. at 67.

speech because the government disapproved of the message and, therefore, did not run afoul of the content neutrality standard.[101]

The Supreme Court remanded the *Thayer* case for further consideration in light of *Reed*.[102] The First Circuit vacated its original opinion and remanded to the district court for consideration.[103] In light of *Reed*, the district court found the Aggressive Panhandling Ordinance to be a content-based restriction on speech. It found the ordinance regulating the use of traffic islands and roadways failed as well because, although it was content-neutral, it was not sufficiently tailored to meet the government's interest in public safety.[104] The court noted that post-*Reed*, "municipalities must go back to the drafting board" and, in doing so, "define with particularity the threat to the public safety they seek to address, and then enact laws that precisely and narrowly restrict *only* that conduct which would constitute such a threat."[105]

A survey of post-*Reed* decisions shows the challenge of drafting content-neutral regulations since courts have routinely been striking down panhandling and solicitation regulations as content-based restrictions on speech.[106] The regulations that have survived the content neutrality test of *Reed* focus on defining the conduct being regulated, such as prohibiting the distribution of anything to the occupant of vehicles.[107] While *Reed* was not a solicitation case, its impact on the constitutionality of solicitation and panhandling regulations has been profound.

[101] *Id*. at 68.

[102] *Thayer*, 135 S.Ct 2887.

[103] *See Thayer v. City of Worcester*, 144 F.Supp.3d 218, 221 (D. Mass. 2015).

[104] *Id*. at 233-234 and 237.

[105] *Id*. at 237.

[106] *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177 (D. Mass. 2015) (finding that regulations of solicitation that single out the solicitation of the immediate transfer of funds for charitable purposes are content-based); *Browne v. City of Grand Junction*, 136 F.Supp.3d 1276 (D. Colo. 2015) (observing that any law prohibiting all solicitation in a public forum constitutes content discrimination under *Reed*); *Working America v. City of Bloomington*, 142 F.Supp.3d 823 (D. Minn. 2015) (finding that a regulation of door-to-door solicitors was content-based since, by definition in the ordinance, it applied to speech that had the purpose of generating money or property on behalf of a person, organization or cause); *Norton*, 806 F.3d 411 (2015) (reversing after *Reed* and finding that an ordinance targeting oral requests for money now, but not requests for money later, constitutes content discrimination); *Homeless Helping Homeless v. City of Tampa*, 2016 WL 4162882 (M.D. Fla. 2016) (finding the City's ordinance regulating the solicitation of donations or payments was unconstitutionally content-based under *Reed,* but noting strong disagreement with *Reed* in the context of solicitation and belief that *Reed* was likely a "transient reign.")

[107] *Traditionalist American Knights of the Ku Klux Klan v. City of Desloge, Missouri,* 2016 WL 705128 (E.D. Mo. 2016); *Watkins v. City of Arlington,* 123 F.Supp.3d 856 (N.D. Tex. 2015).

V. Tips for Practitioners

In drafting or analyzing the legal adequacy of a solicitation ordinance, attorneys should begin with the assumption that this activity implicates the full protection of the First Amendment. From there, the analysis should focus on the forum being regulated. If the forum is a public one (as it will be in the majority of situations), the critical point is to tailor the ordinance to the specific conduct and government interest(s) the regulation is addressing. For a public forum, municipalities will also need to draft content-neutral regulations except in the rare instances where the regulation is supported by a compelling governmental interest.

While not exhaustive, the following is a list of tips a practitioner should consider for assessing the legal soundness of a solicitation regulation:

1. Consider doing a wholesale review of your solicitation and/or panhandling regulations to identify any content-based concerns under the *Reed* test.

2. Identify the forum at issue.

3. For a public forum, draft content-neutral regulations aimed at conduct, and not speech.

4. Identify the governmental interests at play and examine how the ordinance serves those interests. The courts have deemed legitimate such interests as protecting citizens from fraud and crime, promoting traffic safety, and ensuring citizens feel secure in their surroundings. Be aware that legitimate interests are not the same as compelling interests needed to justify a content-based regulation of a public forum.

5. Build the factual basis to support the identified City interests called out. Use your in-house knowledge including traffic reports, traffic counts, police calls for service, etc.

6. Review and tightly define the scope of activity you are regulating. For example, if traffic problems only exist in certain areas of the city, narrowly tailor the ordinance to address the specific problem areas rather than banning solicitation on all streets.

7. Treat all forms of solicitation the same way whether by individuals, churches, community organizations, professional fundraisers, etc. Do not exempt favored organizations such as Girl Scouts or Little League Teams from the ambit of the ordinance.

8. Be aware that entire city-wide bans are almost certainly impermissible.

9. Consider whether solicitation concerns involve commercial activity alone, and whether regulations can be drafted to address such.

10. Consider whether there are non-regulatory, alternative approaches to addressing panhandling concerns such as housing, substance abuse and/or mental health services.

11. Build an extensive staff report and findings for a new ordinance or consider adopting added findings for an existing ordinance.

12. Constitutional challenges are costly so an ounce of prevention goes a long way.

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Business Improvement Districts: Potential for Public/Private Conflicts

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

Mark E. Mandell, Mandell Municipal Consulting

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Notes:

Business Improvement Districts:
Potential for Public/Private Conflicts

By

Mark E. Mandell

Mandell Municipal Counseling

August 17, 2017

I. Introduction

Over the past several decades, Business Improvement Districts ("BIDs") have become an increasingly common feature of downtowns and other commercial areas. Business owners and their landlords often appreciate BIDs because they provide localized marketing, sanitation, security, and other services. These services can help commercial areas that are oriented along public streets to more effectively compete with privately owned and managed commercial developments. Cities find BIDs attractive because—with minimal investment of general fund tax dollars—a BID can help "liven up" an aging commercial area, ideally leading to increased civic pride, economic development, and increased tax revenue for the city.

Because their proponents promise that BIDs will be largely self-managed and self-funded, cities sometimes allow them to be formed with minimal involvement from city staff and elected officials. This can lead to problems down the road. The establishment and operation of a BID involves a fair amount of cooperation between entities that often have distinct--and sometimes conflicting—interests and goals. The purpose of this paper is to identify some issues that city attorneys may want to discuss with city management and staff at the beginning of the establishment process.

II. What is a BID?

A. Basic Description.

Many possible conflicts stem from misunderstandings about the basic nature of BIDs. Therefore, it might be helpful to start off by explaining what a BID is. For this paper, I propose the following description:

> A Business Improvement District is a program of a city under which the city levies an assessment against businesses or property to fund services or improvements that benefit the assessed businesses or property.
>
> The program of services, improvements, and assessments are described in documents created during the establishment process. The description of the program is typically created by a BID consultant. A city council can only establish a BID after the owners of the businesses or property have indicated their support (or lack of opposition) for the BID via a petition; a ballot or protest proceeding; or both.
>
> Services and improvements are generally provided by a nonprofit organization, often called an 'owners' association,' which is under contract to the city. The owners' association also generally prepares an annual report, which is used by the city as the basis for annual decision making.

Below, I describe in more detail each aspect of this description.

B. "A Business Improvement District is a program of a city…"

Two statutory schemes authorize the establishment of BIDs: (i) the Parking and Business Improvement Area Law of 1989[1] (the "'89 Law") and (ii) the Property and Business Improvement District Law of 1994[2] (the "'94 Law").[3] BIDs governed by the '89 Law are funded by assessments against businesses. BIDs governed by the '94 Law can be funded by assessments against businesses, assessments against property, or a combination of the two types of assessments.

All cities have the authority to utilize their choice of the '89 Law or the '94 Law.[4] In addition, charter cities, unless prohibited by the terms of their charter, can use their home rule powers to levy assessments and establish BIDs.[5] Typically, when a charter city proceeds in this manner, it adopts a local "procedural ordinance" that incorporates as municipal law the terms of either the '89 Law or the '94 Law, with locally desired modifications.[6] BID proceedings are then conducted directly under the procedural ordinance, rather than pursuant to state law.

The term "business improvement district" is commonly used to refer to all BIDs, whether created under the '89 Law, the '94 Law, or a typical charter city procedural ordinance.[7] However, none of these authorities authorize the creation of a special district, as that term is normally used under California Law.[8] BIDs are not entities that have a separate legal existence from the cities that establish them, nor are BIDs political subdivisions that have their own governing boards.[9]

Instead, a BID is a form of assessment district, not unlike assessment districts formed under the Landscaping and Lighting Act of 1972[10] or the Benefit Assessment Act of 1982[11]. In this context, a "district" is understood not to mean a "governmental subdivision", but to mean "an area fixed,

[1] Str & Hwy Code §36500 *et seq.*
[2] Str & Hwy Code §36600 *et seq.*
[3] Some older BIDs were established under the Parking and Business Improvement Area Law of 1965 (Str & Hwy Code §36000 *et seq.*). Such BIDs were funded by special taxes, rather than by benefit assessments. Because the California Constitution now requires two-thirds voter approval for special taxes, new BIDs are rarely, if ever, established in this manner. (*see* Cal. Const. Art. XIII A, §4 and Cal. Const. Art. XIII C, §2 for voting requirements).
[4] Although this paper will refer generically to "cities", BIDs can also be established by counties and by certain joint powers authorities. (Str & Hwy Code §36508 ['89 Law] and §36608 ['94 Law]). A city can create a BID that extends into another city, or an unincorporated area of a county, but only with the consent of the relevant city councils or county boards of supervisors. (Str & Hwy Code §36521.5 ['89 Law] and §36620.5 ['94 Law]).
[5] *See, Redwood City v. Moore* (1965) 231 Cal.App.2d 563, 582 [home rule authority to levy assessments].
[6] Common types of modifications include changes to the types of services and improvements that can be funded, changes to petition requirements, and changes to time limits on the life of a BID before it must be renewed.
[7] Technically, a BID established under the '94 Law is a "property and business improvement district" (Str & Hwy Code §36614.5) while a BID established under the'89 Law is a "parking and business improvement area" (Str & Hwy Code §36511). The word "district" appears nowhere in the '89 Law.
[8] *See, e.g.,* Gov't Code §56036(b)(5) (excluding "special assessment districts" from the class of special districts subject to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000).
[9] Note that, in contrast with statutory schemes that permit the creation of special districts, the '89 Law and the '94 Law do not include authorizations for BID's to exercise so-called "corporate powers," such as the right to sue and be sued or the right to enter into contracts. (*see*, *e.g.*, Gov't Code §61060 *et seq.* [community services districts] and Hlth & Saf Code §13861 [fire protection districts]). Instead, the city exercises its own corporate powers when administering the BID program.
[10] Str & Hwy Code §22500 *et seq.*
[11] Gov't Code §54703 *et seq.*

established, and formed by a city…that is specially benefited by, and assessed, or to be assessed, to pay the costs and expenses" of that which is funded by the assessment.[12] A BID is not, itself, a unit of government. Instead, a BID is a program of the city that establishes it.

C. "…under which the city levies an assessment against businesses or property…"

In most downtowns and commercial areas, it is common for businesses to rent the spaces in which they operate, rather than own their own buildings. In that situation, assessments against businesses are paid by assessed business, while assessments against property are paid by the landlords. Note, however, that it is common for commercial leases to pass on special assessments to tenants in what amounts to an automatic rent surcharge.

Assessments against businesses are usually collected by cities along with their business license taxes.[13] Assessments against property are usually collected on the property tax roll.[14]

The practice of collecting BID assessments along with existing taxes almost certainly increases compliance and reduces collection costs. Nonetheless, cities do incur costs associated with these collection methods, and counties do deduct a service charge from assessments that they collect on the tax roll on a city's behalf.

Under the '94 Law, no assessment can be levied against "properties zoned solely for residential use, or that are zoned for agricultural use."[15] Presumably, this restriction can be omitted from charter city local procedural ordinances.

D. "…to fund services or improvements…"

BIDs most commonly fund services, such as security services, sanitation services, and marketing services.[16] So long as the services properly benefit assessed businesses or property, the scope of services that can be provided under either the '89 Law or the '94 Law is essentially unrestricted.[17]

BIDs can also acquire, construct, install, and maintain improvements. These might take the form of bus benches, trash receptacles, or other street furniture. It is also common for BIDs to install

[12] This definition is borrowed by me from Gov't Code §56075, which defines "special assessment district" for purposes of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000.
[13] Assessments against hotels in connection with BIDs that fund tourism-related services are usually collected by cities along with transient occupancy taxes, and calculated as a percentage of rents. Because hotel BIDs, which generally encompass the entire territory of a city but only involve assessments against hotels, involve a different set of issues than typical BIDs, they will not be further discussed in this paper.
[14] The '94 law provides that "assessments levied on real property may be collected at the same time and in the same manner as for the ad valorem property tax, and may provide for the same lien priority and penalties for delinquent payment." (Str & Hwy Code §36631). Gov't Code §51800 authorizes the collection of municipal assessments (implicitly including assessments levied under a charter city procedural ordinance) by counties along with property taxes.
[15] Str & Hwy Code §36632.
[16] Both the '89 Law and '94 Law use the term "activities" rather than "services." However, due to the requirements of Propositions 218 and 62, it can be analytically useful to analyze all activities of BID, including the public events that have traditionally been funded by BIDs, as services being provided to assessed businesses or properties.
[17] Str & Hwy Code §36513 ('89 Law) and Str & Hwy Code §36606 ('94 Law).

banners on existing street lighting standards (poles). The scope of permissible improvements is very broad, essentially encompassing any tangible property with an estimated useful life of at least five years.[18]

E. "…that benefit the assessed businesses or property."

Proposition 218, which was adopted by the voters in 1996 and added Articles XIII C and XIII D to the California Constitution, sets forth requirements that assessments against property must be tied to "special benefits."

For purposes of Proposition 218, "special benefit" means:

> [A] particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."[19]

The "special benefit" requirements are that:

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.[20]

[18] Str & Hwy Code §36510 ('89 Law) and Str & Hwy Code §36610 ('94 Law).

[19] Cal.Const. Art. XIII D, §2(i). Str & Hwy Code §36615.5, a provision of the '94 Law, attempts to further define "special benefit" to mean:

> [A] particular and distinct benefit over and above general benefits conferred on real property located in a district or to the public at large. Special benefit includes incidental or collateral effects that arise from the improvements, maintenance, or activities of property-based districts even if those incidental or collateral effects benefit property or persons not assessed. Special benefit excludes general enhancement of property value.

This definition incorporates language from *Dahms v. Downtown Pomona Property* (2009) 174 Cal.App.4th 708, which interprets Proposition 218 in the context of a BID. Note, however, that the constitutional language of Proposition 218, as interpreted by *Dahms* and other published court decisions such as *Silicon Valley Taxpayers Assn v. Santa Clara County Open Space Auth* (2008) 44 Cal.4th 431, has superior authority to statutory language in the '94 Law. Str & Hwy Code §36622(k)(2) also restates certain requirements of Proposition 218, incorporating language from *Dahms*.

[20] Cal.Const. Art. XIII D, §4(a).

Assessments against businesses are not subject to the requirements of Proposition 218.[21] However, as a result of the adoption by the voters in 2010 of Proposition 26, an assessment against businesses requires two-thirds voter approval as a special tax unless it meets one of several enumerated exceptions.[22] The exceptions most relevant in the context of BIDs are for:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege. [or]
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.[23]

Under Proposition 26:

> The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.[24]

A complete discussion of the requirements of Propositions 218 and 26 is beyond the scope of this paper. It is often a useful exercise, when designing a BID program under either set of rules, to describe each service in terms of being provided to the businesses or property assessed, and then describe why that service would be useful to assessed businesses or property. This is most easily done for services that are provided directly in front of a business or property (such as security or sanitation), are clearly done on behalf of businesses (such as directories and wayfinding aids), or are events that can be participated in only by assesses (such as training programs and seminars). It can be more difficult in connection with sponsorship of events, such as concerts-in-the-square,

[21] *Howard Jarvis Taxpayers Assn v. City of San Diego* (1999) 72 Cal.App.4th 230.

[22] Cal.Const. Art. XIII C, §§ 1(e) & 2(d).

[23] Cal.Const. Art. XIII C, §§ 1(e)(1) & 1(e)(2). Gov't Code §53378 attempts to further define "specific benefit" and "specific government service" for purposes of these constitutional provisions. It provides that:

> A specific benefit is not excluded from classification as a "specific benefit" merely because an indirect benefit to a nonpayor occurs incidentally and without cost to the payor as a consequence of providing the specific benefit to the payor.

It also provides that:

> A specific government service is not excluded from classification as a "specific government service" merely because an indirect benefit to a nonpayor occurs incidentally and without cost to the payor as a consequence of providing the specific government service to the payor. A "specific government service" may include, but is not limited to, maintenance, landscaping, marketing, events, and promotions.

No court has interpreted the applicability of these definitions with respect to the constitutional language.

[24] Cal.Const. Art. XIII C, §1(e).

that are attended by the public but are arguably provided to the businesses as a means of attracting customers to assessed businesses.

F. "The program of services, improvements, and assessments are described in documents created during the establishment process."

The '94 Law requires that a "management district plan," containing specific information about the proposed BID, be prepared for each BID at the beginning of the establishment process.[25] Additionally, if assessments are to be levied against property, Proposition 218 requires that the assessment be supported by a "detailed engineers report" prepared by a registered professional engineer.[26] The engineers report typically includes, among other things, analysis describing how the proposed assessment complies with the substantive requirements of Proposition 218.

These documents are sometimes combined into a single document; otherwise the engineers report is included as an exhibit to the management district plan.[27] In either event, it is important that these documents be prepared together, as the services, improvements, and assessments described in the management district plan must be supported by, and consistent with, the descriptions and analysis contained in the engineer's report.

The management district plan and engineers report, together with resolutions adopted by the City Council during the establishment process, serve as a sort of "constitution" for a '94 Law BID. Though the '89 Law does not require a management district plan or an engineers report, the resolutions and ordinances establishing an '89 Law BID contain much of the information required of a management district plan and similarly serve as the "constitution."

G. "The description of the program is typically created by a BID consultant."

While BID programs can be designed in-house or by the business or property owners who propose establishment of the BID, it is typical for these programs to be created by a specialized BID consultant. Consultant fees are sometimes paid by the city and are sometimes paid by BID proponents. It is not uncommon to reimburse these costs from the initial BID assessments; however, if the BID is not successfully established, there will be no assessments from which to make reimbursements. In that event the city (or the proponent group) will have essentially lost the money it advanced.

Regardless of who pays the consultant's bills, consultants typically work very closely with the proponent group as a starting point for designing the BID program. They then meet with other business and property owners at community meetings and via one-on-one contacts. A key goal of consultants is typically to develop a program that has wide support and is likely to be approved (or not to be protested) by affected business or property owners. It is not uncommon for BID

[25] Str & Hwy Code §§36621 and 36622. Note that pursuant to §36621(b), the management district plan must be available made available upon request during the petition process. Therefore, the management district plan must be completed prior to the commencement of circulation of the petition.
[26] Cal.Const. Art. XIII D, §4(b).
[27] Str & Hwy Code §36622 provides that "The management district plan shall include… (n) In a property-based district, a detailed engineer's report prepared by a registered professional engineer certified by the State of California supporting all assessments contemplated by the management district plan."

consultants to continue in an administrative or consulting role once a BID is formed. Those services are typically funded with BID assessment proceeds.

H. "A city council can only establish a BID after the owners of the businesses or property have indicated their support (or lack of opposition) for the BID via a petition; a ballot or protest proceeding; or both."

Establishment of a BID under the '89 Law requires the following steps:

1. The city council adopts a "resolution of intention" setting forth the details of the BID program, a date and time for a public hearing, and other information required by statute.[28]
2. Within seven days of adopting the resolution of intention, a complete copy of that resolution must be mailed to each business owner in the territory of the proposed BID.[29]
3. The city must mail to each business a "joint notice of public meeting and public hearing."[30] This "joint notice" is typically mailed along with the copy of the resolution of intention.
4. No earlier than ten days after mailing the "joint notice," the city council must hold "at least one public meeting at which [the city council] shall allow public testimony regarding the proposed…new…assessment."[31]
5. No earlier than forty-five days after mailing the joint notice, and no earlier than seven days after the public meeting, the city council must hold a public hearing.[32]
6. At the public hearing, the city council must consider oral and written protests.[33] If written protests meeting the requirements of Section 36524 of the Streets & Highways Code are received (and not withdrawn) from "the owners of businesses in the proposed area which will pay 50 percent or more of the assessments proposed to be levied", then proceedings must be abandoned for no less than one year.[34] Otherwise, the city council may (but is not required to) adopt an ordinance establishing the BID.[35]

Establishment of a BID under the '94 Law requires the following steps:

1. Proponents circulate a petition, and obtain signatures from "property or business owners in the proposed district who will pay more than 50 percent of the assessments proposed to be levied."[36] If any proposed assesse will pay more than 40 percent of the assessment, that assessee's obligations in excess of 40 percent do not count towards this calculation.[37] The '94 Law requires that the petition include a summary of the management district plan,

[28] Str & Hwy Code §36522.
[29] Str & Hwy Code §36523(b).
[30] Str & Hwy Code §36523.5 and Gov't Code §§54954.6(a)(2) & 54954.6(c)
[31] Gov't Code §§54954.6(a)(1) & 54954.6(c)(1).
[32] Gov't Code §§54954.6(a)(2) & 54954.6(c)(1).
[33] Str & Hwy Code §36523.5.
[34] Str & Hwy Code §36525(a). However, "if the majority protest is only against the furnishing of a specified type or types of improvement or activity within the area, those types of improvements or activities shall be eliminated." (Str & Hwy Code §36525(b)).
[35] Str & Hwy Code §36527. The city council may, at this time, make certain modifications to the proposed BID, such as eliminating territory from the BID or reducing all assessments. (Str & Hwy Code §36526).
[36] Str & Hwy Code §36621(a).
[37] *Ibid.*

which must include: (i) "a map showing the boundaries of the district;" (ii) "information specifying where the complete management district plan can be obtained;" and (iii) "information specifying that the complete management district plan shall be furnished upon request."[38]

2. The city council adopts a "resolution of intention."[39]
3. If the BID includes assessments against property, the city must conduct a property-owner assessment ballot proceeding pursuant to Proposition 218.[40] This involves mailing a notice and ballot to each affected property owner at least forty-five days prior to the public hearing. For more information about conducting assessment ballet proceedings, refer to the League of California City's Proposition 26 & 218 Handbook.
4. If the BID includes assessments against businesses, the city must notice and conduct a public meeting and public hearing pursuant to Section 54954.6 of the Government Code, as outlined in the discussion of the '89 Law.[41]
5. The city council holds a public hearing.
6. After conducting the public hearing, the city council must abandon proceedings in connection with an assessment against property if the ballots submitted (and not withdrawn) in opposition to the assessment against property exceed the ballots submitted (and not withdrawn) in support of that assessment.[42] For purposes of this calculation, ballots are weighted by the amount of the assessment obligation of the parcel.[43]
7. After conducting the public hearing, the city council must abandon proceedings for at least one year in connection with an assessment against businesses, if written protests meeting the requirements of Section 36623(b) of the Streets & Highways Code are received (and not withdrawn) from "the owners or authorized representatives of businesses in the proposed district that will pay 50 percent or more of the assessments proposed to be levied."[44]
8. Except to the extent it is required to abandon proceedings by virtue of protests or the assessment ballot proceedings, the city council may (but is not required to) adopt a resolution of formation that establishes the BID.[45]

By adopting a local procedural ordinance, a charter city can change or eliminate these requirements, except for the assessment ballot proceeding requirements applicable under

[38] Str & Hwy Code §36621(b).
[39] Str & Hwy Code §36621(c).
[40] Str & Hwy Code §36623(a). Such proceedings are governed by Cal.Const. Art XIII D, §4 and Gov't Code §53750 *et seq.*
[41] Str & Hwy Code §36623(b).
[42] Gov't Code §§53753(e)(4) & 53753(e)(5).
[43] Gov't Code §§53753(e)(4)
[44] Str & Hwy Code §36623(b).
[45] Str & Hwy Code §36625(a). The city council may, at this time, make certain modifications to the proposed BID, such as eliminating territory from the BID or reducing assessments. (Str & Hwy Code §36624). If only the assessment against property or the assessment against businesses has been blocked by protests or the ballot proceeding, and the other type of assessment has also been a part of the proceedings, then the other type of assessment may still be adopted as proposed. (Str & Hwy Code §36623(c)).

Proposition 218 to assessments against property and the notice, meeting, and hearing requirements applicable under Section 54954.6 of the Government Code to assessments against businesses.

It is not unusual for cities, including general law cities, to create additional procedural steps, such as a petition requirement for BIDs established under the '89 Law. One reason for imposing additional requirements can be to gauge stakeholder interest before using municipal resources to develop a BID program. Cities can impose such requirements because under both the '89 Law and the '94 Law a city council always has the discretion (i) not to adopt a resolution of intention to establish a BID and (ii) not to establish a BID. Consequently, city councils can impose additional requirements on BID proponents by refraining from taking action on a BID unless both locally requirements and statutory requirements have been met.

I. *"Services and improvements are generally provided by a nonprofit organization, often called an 'owners' association'…"*

Cities can structure BIDs so that the services and improvements are provided directly by the city. However, it is much more common for services and improvements to be provided either by an existing nonprofit organization (such as a chamber of commerce) or by a nonprofit organization formed by BID proponents specifically to serve the BID. Such a nonprofit is often called an "owners' association."

Owners' associations are governed by their articles of incorporation and bylaws. They usually are governed by a board of directors that is elected, in a self-administered proceeding, by the business or property owners subject to the assessment. Those owners usually constitute the membership of the association. The associations usually have an administrative staff (sometimes consisting of little more than an executive director), but often contract with specialized firms, such as security firms, to provide most services and improvements.

The '94 Law permits the management district plan to specifically identify an owners' association and to mandate the use of that association. Specifically, the '94 Law provides:

> The management district plan may, but is not required to, state that an owners' association will provide the improvements, maintenance, and activities described in the management district plan. If the management district plan designates an owners' association, the city shall contract with the designated nonprofit corporation to provide services.[46]

The '94 Law further provides that:

> An owners' association is a private entity and may not be considered a public entity for any purpose, nor may its board members or staff be considered to be public officials for any purpose. Notwithstanding this section, an owners' association shall comply with the Ralph M. Brown Act [California's open meetings law] at all times when matters within the subject matter of the district are heard, discussed, or

[46] Str & Hwy Code §36651.

deliberated, and with the California Public Records Act for all records relating to activities of the district.[47]

While the '89 Law does not include the concept of an "owners' association," the use of this type of nonprofit organization for delivery of services is common in connection with '89 Law BIDs. Additionally, the '89 Law does require the appointment by the city council of an "advisory board" which has duties in connection with annual proceedings.[48] It is common for city councils to appoint the board of directors of the owners' association to serve in this role.

J. "…which is under contract to the city."

The relationship between a city and an owners' association is contractual.[49] Typically the core provisions of the contract between a city and an owners' association are that:

(i) the city agrees to pay the owners' association the proceeds of the BID assessment, sometimes with a deduction for administrative and collection costs incurred by the city; and

(ii) the owners' association agrees to use those proceeds to fund BID services and improvements as set forth in the management district plan and/or other documents governing the BID.

These contracts also usually include most of the provisions that are typically found in municipal contracts, such as insurance, audit, termination, reporting, and similar provisions.

The '94 Law provides that "the city council may execute baseline service contracts that would establish levels of city services that would continue after a property and business improvement district has been formed."[50]

K. "The owners' association also prepares an annual report, which is used by the city as the basis for annual decision making."

Both the '89 Law and the '94 Law require that annual reports be filed with the City Council.[51] These reports (i) must include specified information about the BID services, improvements, assessments and budget for the upcoming fiscal year and (ii) may propose changes to the BID.[52]

[47] Str & Hwy Code §36612 (citations omitted).
[48] Str & Hwy Code §36530.
[49] *See, e.g.,* Str & Hwy Code §36651 ("'Owners' association' means a private nonprofit entity that is under contract with a city to administer or implement improvements, maintenance, and activities specified in the management district plan.")
[50] Str & Hwy Code §36634. This provision does not make clear at what point in the process it is appropriate to enter into such a contract, or who would be the other party to that contract.
[51] Str & Hwy Code §36533 (filing requirement for advisory boards under'89 Law) and Str & Hwy Code §36650 (filing requirement for owners' associations under '94 Law). Under the '94 Law, no report is required before the first year of operations. (Str & Hwy Code §36650(a)).
[52] *Ibid.* Care should be taken to ensure that any changes would not increase an assessment or expand the businesses or properties subject to assessment. Such changes are subject to the procedures set forth in Proposition 218 or Gov't Code §§54954.6(a) & 54954.6(c).

Additionally, though not required, it is common for these reports to include a summary of achievements and activities from the concluding fiscal year.

Under the '89 Law, each fiscal year, in order to levy the assessment, the city council must conduct annual proceedings. These proceedings involve the following steps:

1. The city council approves the annual report, either as filed by the advisory board or with modifications.[53]
2. The city council adopts a resolution of intention.[54]
3. Not less than seven days before the date scheduled in the resolution of intention for a public hearing, the city clerk publishes the resolution of intention once in a newspaper of general circulation in the city.[55]
4. The city council accepts oral and written protests and holds a public hearing.[56]
5. Proceedings must be abandoned if written protests are received (and not withdrawn) from owners of businesses that will pay 50 percent or more of the assessments proposed to be levied.[57]
6. Otherwise, the city council may adopt a resolution confirming the annual report (with or without changes) and levying the assessment for the fiscal year.[58]

Under the '94 Law, after receiving the annual report, "the city council may approve the report as filed by the owners' association or may modify any particular contained in the report and approve it as modified."[59] If the city council chooses to modify the report, it must conduct specific proceedings.[60]

The '94 Law, unlike the '89 Law, does not require a public hearing and protest proceeding each year. However, each '94 Law BID has a limited duration (specified during establishment proceedings).[61] The '94 Law provides that "Any district previously established whose term has expired, or will expire, may be renewed by following the procedures for establishment" set forth in the '94 Law.[62] Consequently, while there is no annual public hearing, '94 Law BIDs are subject

[53] Str & Hwy Code §36533(c).
[54] Str & Hwy Code §36534(a).
[55] Str & Hwy Code §36534(b).
[56] Str & Hwy Code §§36535(a) & 36524.
[57] Str & Hwy Code §36525(a).
[58] Str & Hwy Code §§36525(b) & 36525(c).
[59] Str & Hwy Code §36650(c). It is not clear what happens if the city council rejects or takes no action on the report. Normally, it might be presumed that approval of the report is a prerequisite to the levy of the annual assessment. However, Str & Hwy Code §36625(b), relating to the adoption of the resolution forming a BID under the '94 Law, provides that "the adoption of the resolution of formation…shall constitute the levy of an assessment in each of the fiscal years referred to in the management district plan." This language implies that, as soon as a BID is established, the assessment is formally levied for all fiscal years of the planned life of the BID.
[60] Str & Hwy Code §§36650(c) & 36636(c).
[61] Str & Hwy Code §36622(h) (management district plan must include "the specific number of years in which assessments will be levied. In a new district, the maximum number of years shall be five. Upon renewal, a district shall have a term not to exceed 10 years. Notwithstanding these limitations, a district created pursuant to this part to finance capital improvements with bonds may levy assessments until the maximum maturity of the bonds.").
[62] Str & Hwy Code §36660(a).

to periodic renewal/reestablishment proceedings that include all the steps required for establishment proceedings.

III. Conceptual Issues

The formal relationship between the public and private entities associated with the establishment and operation of a BID can often be confusing to stakeholders.

Much of this confusion occurs because stakeholders are not aware of the distinction between a business improvement district (which is a city program) and an owners' association (which is a private organization under contract to the city). Stakeholders frequently assume that an owners' association *is* a business improvement district. They also assume, effectively, that (i) a business improvement district is a type of special district that possesses governmental powers and (ii) the board of directors of the owners' association serves as the legislative body of that special district.

These assumptions can lead stakeholders to understand the BID establishment and operating process roughly as follows:

> When petitioned by business or property owner stakeholders, a city holds a mail ballot election regarding establishment of a BID. If the stakeholders approve the ballot measure proposing the management district plan for the BID, then the BID is incorporated as a nonprofit corporation. The stakeholders, as members of the new BID, then elect a board of directors to govern the BID. The board of directors levies the assessment as set forth in the management district plan; hires staff; provides the services and improvements described in the management district plan; and issues annual reports that are filed with the city. The city assists the BID by acting as the BID's agent for collection of assessments.

Under this model, which is not supported by the relevant statutes, the owners' association takes on the role of a special district, and the city is reduced to a role somewhat like (i) the role a local agency formation commission plays in the formation of a new special district and (ii) the role a county plays in the collection of municipal taxes.

Some common practices lead to this confusion. In everyday speech, it is very common for city staff, elected officials, stakeholders and the public to refer to the owners' association as "the BID," to the owners' association board of directors as "the BID board," and to the executive director of the owners' association as "the executive director of the BID." Also, many owners' associations confusingly have the same name as the BID they serve (for example the Central Downtown Business Improvement District, Inc. might serve a BID called the Central Downtown BID). BID proponents also tend to stress, when speaking in support of the establishment of a BID, the concepts of BID self-governance, stakeholder control, and independence from the city.

A problem with this conception of BIDs is not only that it is technically incorrect, but also that it is potentially undemocratic. The services provided by BIDs to businesses and property are paid for through assessments against those businesses and properties, but have the potential to impact

the general public. Employees and contractors of owners' associations often patrol, clean, decorate and improve streets, sidewalks and other public spaces in the territory of a BID. But those spaces are still municipal property that is open to all members of the public. The owners' association, which is a private, internally governed, organization of business and property owners, does not govern these public spaces and cannot create enforceable rules of conduct for these spaces. Yet owners' associations often employ uniformed security personal who operate on these spaces.

Because the membership of the owners' association is usually comprised of the businesses and property owners who are assessed; owners' associations often see BID assessment proceeds as "their money" rather than "public money." However, BID assessments are not dues voluntarily paid by members to a voluntary association. Assessments are a mandatory levy that must be paid by all assessed businesses or property owners, regardless of whether the business or property owner supported the assessment, desires to pay, or has chosen to "join" the owners' association. The levy of these sorts of involuntary assessments, even if supported in a mail ballot proceeding by most of those subject to the assessment, is power possessed by cities, but not generally possessed by private organizations. Assessment proceeds are public funds that are earmarked for a specific purpose.

Ultimately, a BID is a city program and the owners' association provides services under contract to the city. This can potentially lead to municipal liability for decisions and actions taken by the owners' association. Although owners' associations typically are insured and execute indemnities in favor of a city, often owners' associations are cash poor, with the assessments as their main source of funding. As a practical matter, it is impossible to entirely eliminate all legal risk to the city.

It is important that city staff and elected officials are aware of potential stress points in the relationship between cities and the entities and stakeholders associated with a BID.

IV. Things to Pay Attention To

A. Notices and Documents

The process of establishing a BID involves the production of a number of documents that are provided to business and property owners to help them understand what is proposed. These documents can include notices, petitions, ballots and management district plans. It is generally in the public interest that these documents be as complete, factual and neutral in tone as possible, since these documents are, for the most part, issued or approved by the city. If these documents are not complete, factual and neutral in tone, business and property owners can feel misled.

However, these documents are often initially drafted by proponents of the proposed BID or by consultants who work closely with those proponents. The proponents have a strong interest in "selling" the proposed BID to stakeholders who might sign petitions, submit protests, or cast ballots in connection with the proposed BID. Therefore, it is important that city legal and

management staff review these documents not only to ensure that they comply with applicable legal requirements, but also that they are complete, factual, and have an appropriate tone.

B. Specificity of Management District Plan

As noted earlier, a management district plan (or other council-adopted document) serves as the "constitution" for a BID. Proponents often desire that the Management District Plan include much flexibility regarding how money can be spent. This desire is understandable, given the difficulty of planning a new, long term program. However, too much flexibility can allow for delivery of a program that might not seem to match what was promised. Too much flexibility arguably can also undermine the benefit analysis that legally justifies the amounts of assessments. City staff should consider the level of flexibility that the city is comfortable with.

C. Security Services

Security services can be especially controversial. It is a good idea for city and police department management to explore early in the process what kind of security is envisioned in order to determine their comfort level with those plans.

D. Administrative Expenses

There are two sorts of administrative expenses associated with a BID: (i) expenses incurred by the city and (ii) expenses incurred by the owners' association. It should be determined early on to what extent city expenses, such as expenses associated with collection of assessments, administration of the owners' association contract, or administration of annual proceedings, will be funded from assessment proceeds. Especially if the owners' association is an organization that has functions beyond providing BID services and improvements, it can be important to define what owners' association administrative expenses can be funded with assessment proceeds. These choices should be covered in detail in the contract between the city and the owners' association.

E. Cash Flow

The collection method used for assessments will affect the schedule on which a city received assessment proceeds. In some cases, this schedule may not synchronize well with the BID's fiscal year. Care should be taken to make sure that all interested parties have a good understanding of the schedule on which proceeds are likely to be available; as well as the means for their use. Many cities transfer proceeds to the owners' association as they come in. Other cities maintain proceeds in a segregated account, and use that account to reimburse the owners' association for expenses or directly pay bills incurred by the owners' association. These choices should be covered in detail in the contract between the city and the owners' association, and should be discussed with proponents early in the process.

F. Proposition 26 and 218 Risk

Legal challenges against new assessments are not uncommon, and legal threats against new assessments are quite common. If an assessment is under challenge, or likely to be challenged, a city will commonly consider "impounding" the assessment proceeds until the challenge (or threat of challenge has ended). Cities explore the idea of impounding because they realize that once proceeds are paid to the owners' association and expended on services, those proceeds will not be available for refunds or satisfaction of judgments. Impounding thus buffers a city's general fund from refund/judgement risk. Owners' associations, understandably, do not like impounding, since they cannot pay for services if their funding is being held by the city. It is a good idea to discuss this issue early in the process and document impounding rights, if any, in the contract between the city and the owners' association.

As a related issue, proponents and owners' associations may be less risk adverse with respect to Proposition 26 and 218 risks than the city. City legal staff should be aware of this possibility when reviewing engineers reports and assessment methodologies.

G. Policy Development

Proponents often hope that the owners' association will play a role in helping the city develop policies and programs that might be desired by businesses or property interests. City management and legal staff should consider their comfort level with using assessment proceeds for this purpose.

H. Designation of Owners' Association

The management district plan for a '94 Law BID can designate a specific nonprofit organization that will serve as the owners' association. Such a designation obligates the city to contract with that nonprofit. Theoretically, it could be very difficult for a city negotiate a contract with an owners' association if it has no legal alternative to using that association. Furthermore, if the city is locked to a specific nonprofit, it may be difficult for the city to effectively enforce the contract. Consequently, city management and legal staff should consider whether such a designation in the management district plan is appropriate.

I. Baseline Services

Business and property owners often worry that cities will see the establishment of a BID as an opportunity to reduce existing services provided by the city within the territory of the BID. During the establishment process, it is common for proponents to ask cities for a formal contractual guarantee that these "baseline" services will be maintained if the BID is established. Such a guarantee, if given, would tie the hands of future city councils with respect to the expenditure of city general funds. As BIDs have long lives, and as it is impossible to predict city revenues and service levels into the far future, it is important for cities to give very careful consideration to any decision to grant such a guarantee. It can be very difficult to draft language that ensures baseline services within a BID, but does not interfere with future decisions about how to respond to future budgetary constraints or changes to city services.

J. Internal Organization of Owners' Association

Like any private corporation, an owners' association is governed by its articles of incorporation and bylaws. These documents determine who is a member of the corporation and how the corporation selects its board of directors. Outside of the BID context, a city generally has little interest in the internal organization of corporations that it contacts with. However, businesses and property owners subject to assessment in connection with a BID generally expect that the board of directors of an owners' association will be selected in an inclusive process that fairly involves all those subject to assessment. Cities therefore may want to have input into the provisions included in the bylaws.

As a related issue, despite efforts of owners' association officers and management staff to encourage stakeholder participation, owners' associations (especially owners' associations associated with small BIDs) often become dominated by a relatively small number of stakeholders who actively attend meetings and volunteer their time to work on association management or projects. There is a tendency for stakeholders who are not part of this dominant group to seek help from the city in solving perceived "leadership" problems with the association. City management and elected officials should be aware of this dynamic, and should consider the extent to which they are willing to become involved in helping to resolve these sorts of conflicts.

K. Meetings and Records

Business and property owners who serve on owners' association boards often are not used to the type of open meeting and open records requirements that have become second nature to long-time public officials and staff. Small owners' associations often have extremely small staffs, and therefore depend on boards members to volunteer their time to directly perform management and operational functions. This dynamic can make it hard for board members to comply with open meeting laws. City management and legal staff should be aware of the possibility of this dynamic, and should consider the extent to which they will attempt to provide open meetings and open records training and support to owners' associations.

Where the nonprofit organization has functions that are unrelated to the BID for which it is owners' association, it can be difficult for the organization to determine which of its meetings and records are subject to open meeting and open record requirements.

L. Types of Businesses

Where the area to be served by a proposed BID is large or diverse, it is common for some types of businesses (or the owners of property occupied by those businesses) to be much less supportive of a proposed BID than others. For example, it is common for doctors, dentists and other professionals who don't depend on "drop-in" customers to be less supportive of a BID than retailers and restaurants. Similarly, when a business area is centered on a square or park, businesses that are relatively distant from the area center are often less interested. Often these businesses (or their landlords) benefit less from proposed services and improvements, and are

therefore subject to a lower assessment. However, despite a relatively low assessment, they may still remain opposed.

The petition, ballot proceedings, and protest rules applicable to BIDs all weight the "vote" (or voice) of a stakeholder by the amount of his or her assessment. This potentially means that a small number of stakeholders will account for a large majority of the weighted voice. Thus, it is sometimes possible for a BID to be established despite the existence of a large number of small stakeholders. City Management staff and elected officials may want to be aware of the possibility of this dynamic. A city council always has the option to not establish a BID, even if the BID has survived petition, ballot proceeding or protest hurdles.

V. Conclusion

BIDs can be an exciting type of public-private partnership. However, as noted in this paper, they can present a number of challenges for cities.

Many of these challenges can be mitigated if city management, city legal staff, and elected officials are aware of potential challenges and start thinking about them *early* in the process. As a practical matter, most issues are most effectively addressed by discussion before the management district plan is prepared and before the petition goes into circulation. It is not a good idea to rely entirely on the efforts of proponents, BID consultants, or junior city staff during the pre-petition phase. Doing so can have the effect of delegating key public policy choices to the proponent group. Therefore, it is a good idea to have management staff (including the police chief if a security program is proposed) active early on in meeting with proponents and BID consultants and to have management and legal staff carefully review the management district plan before it goes to petition.

The Transition From Citizen Activism to Elected Governance

Friday, September 15, 2017 General Session; 10:15 a.m. – 12:15 p.m.

Christine Dietrick, City Attorney, San Luis Obispo
Heidi Harmon, Mayor, San Luis Obispo

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Notes:

FROM ACTIVISM TO GOVERNANCE

League of California Cities Annual Conference
September 13-15, 2017
By: J. Christine Dietrick,
City Attorney, City of San Luis Obispo

Introduction and Disclosures[1]

Since I originally proposed to present on the issue of activism and governance, I have been confronted repeatedly, particularly at the national and international level, with questions about what it means to be an activist and what it means to govern. On the activist front, we have seen everything from the huge numbers of peaceful Women's March gatherings across the world, to the tragic and repugnant gatherings and murder in Charlottesville. On the governance side, we have been confronted with rejection of the traditional model of political leadership, an international demand for change, and the stark reality that the capacity to bring people of differing values, backgrounds and beliefs together in a functional and constructive way does not magically appear with election to office. As Martin Luther King Junior once said at a time of great change in our country, "Everybody can be great...because anybody can serve. You don't have to have a college degree to serve. You don't have to make your subject and verb agree to serve. You only need a heart full of grace. A soul generated by love." Yet, it is clear that for governmental leaders, rejection of the status quo is not enough to affect meaningful change; it will take extraordinary work, extraordinary people, and even more extraordinary politicians and electoral engagement, to elevate and unite beyond campaign rhetoric, base constituencies, polarization and personal biases. Not every activist leader who is swept into office on a wave of populist enthusiasm will be willing or able to do that hard work and to take such personal and political risks, but those who are deserve the very best from the bureaucrats that serve their constituencies and who share the desire to do the public good.

I believe local government is the strongest, most accessible, and most transparent governmental structure in existence today. I believe the people who occupy that space as a profession and/or calling, whether employed or elected, are largely

[111] There are some general assumptions and biases that will necessarily pervade this paper, as the product of its author and which I feel compelled to expressly disclose.

driven by altruistic objectives to better their communities, belief that they can be a part of positive change through their public service, and belief that local government plays a desirable and constructive role in the lives of the people we serve. Of course, reasonable minds can and do differ on what constitutes community betterment, positive change and the appropriate role and scope of government. Local government is a space uniquely situated to facilitate diverse discourse around those issues in a civil, practical and productive way.

Thus, I come to the interaction of activism and governance at the local level from a perspective that, while the two may conflict in fundamental ways, they are not incompatible and have the potential at this point in our national history to be extremely complementary. It is my position that career bureaucrats and committed community activists share more than might be immediately obvious and that the two working together with engaged communities have an immediate ability to positively affect their communities.

I contrast the above perspective with much of what we have seen occurring over the last several years at the federal level. The current state of political divisiveness, dysfunction, and paralysis represents the stark contrast between the positive vision of community activism driven by an altruistic vision and desire to better our communities and the human condition and another type of activism fueled by fear, fixed beliefs, mistrust of institutions and destructive impulses. The latter is the product of increasing ideological rigidity, the rejection of factual information[2], the villainization of genuine intellectual curiosity, and the breakdown of civil discourse and disagreement, resulting in the intentional undermining of the governmental structures on which civilized societies rely. In short, it is my opinion that what we have been witnessing is a vacuum in national leadership that is not the product of activism, but of extraordinary cynicism and a concerted desire for deconstruction with no coherent blueprint for reconstruction.

I do not believe hate, bigotry, violence, anarchy, exclusion or subjugation of other human beings should ever be accepted as activist values or acceptable means to any end. My thoughts expressed here on local government staff's role in supporting activist leaders presumes that the leaders about whom I speak do not espouse those values and that for staff representing a local government agency to facilitate or fail to oppose the manifestation of such values in one's organization would be both unethical and contrary to a principled commitment to public service.

This paper comes from the perspective that the larger societal and structural problems that we are experiencing did not emerge overnight and will not be solved overnight, but that local government represents our best hope to open dialogue,

[2] For a highly relevant article to the discussion informative to a consideration of the roles of staff and elected officials in local government and beyond, I recommend https://www.foreignaffairs.com/articles/united-states/2017-02-13/how-america-lost-faith-expertise

move in a more positive direction and bridge gaps that presently have proven too large at the federal level. Local government is the most direct path to connect the best of activism and bureaucracy in order to maintain and restore the foundations of civil discourse and trust in institutions on which any enduring societal progress must be based in a democratic society. The paper will discuss the basic realities of the context in which activists and staff who have chosen this local government path must operate. It will begin, and only begin, to highlight areas where activism and governance can come into immediate conflict. Finally, it will offer some thoughts and suggestions to build a productive space to be shared between activist values and the realities of governmental structure and rules, where both positive change and necessary structure can live in a supportive and complementary ecosystem.

The Fundamental Distinctions Between Activism and Governance

For purposes of this paper I start with a very basic definition of terms.

A quick Google search[3] of the words activism, activist, governing body and bureaucrat yield the following (emphasis added):

> *activism (noun*): the doctrine or practice of *vigorous action* or involvement as a means of *achieving political or other goals*, sometimes by demonstrations, protests, etc. (Dictionary.com)
>
> *activist* (noun): *a person who campaigns to bring about* political or social *change*.
> synonyms: militant, zealot, protester; radical, extremist
>
> *governing body* (noun): a *group of people* who *formulate the policy and direct the affairs* of an institution in *partnership with the managers*, especially on a voluntary or part-time basis.
>
> *bureaucrat* (noun) an official in a government department, in particular one perceived as being concerned with procedural correctness at the expense of people's needs; or
>
> a person who is one of the people who run a government or big company and who does everything according to the rules of that government or company : a person who is part of a bureaucracy.
> synonyms: official, officeholder, administrator, public servant, civil servant, functionary;

[3] https://www.merriam-webster.com/dictionary/bureaucrat
Dictionary.com

The most relevant distinctions are immediately obvious from those most basic definitions: the activist is "*a person*" and the governing body is "*a group,"* working in partnership with government managers. The activist is often focused on and motivated by a purpose to change a particular action or policy and his or her "*vigorous action*" may, therefore, have a more singular focus; even if the focus is broader, the objective is "*change*." [4]

Those who govern must manage all of the "affairs of an institution" and bureaucrats must concern themselves with "procedural correctness" in the management of those affairs (even those of us who view ourselves as concerned with procedural correctness in *furtherance* of people's needs!). Governing the "affairs of an institution" and ensuring "procedural correctness" imply some significant degree of predictability and continuity, and necessarily include a breadth of issues on which the activist is unlikely to have expertise, including some issues about which s/he may have little interest. Governance also requires the mandatory consideration and inclusion of a variety of perspectives with which one may not individually or philosophically agree. All of that must operate in a context of rules prescribing the proper conduct of public officials' actions and communications that are often inflexible and at times may feel impractical, if not absurd, to the newly-initiated, activist councilmember.

Just as there is some negative connotation associated with the bureaucrat and, for some, the government itself, the listed synonyms of activist also suggest some more negative or ominous aspects that can feel at odds with the role of even the best of bureaucrats. Most public servants can embrace that some degree of change in an institution is desirable, healthy and expected, but wholesale institutional change, especially when perceived as driven by zealotry or militant or radical thought, can equate to chaos, disruption and, at its worst, abject organizational and societal dysfunction. Those are chilling thoughts to city staff and those accustomed to a stabilizing approach to governance. Most bureaucrats do not embrace chaos as an ethos and, even if they support some level of change or reform, their assessment of what is possible and in what time frame is informed, often over many years, by the realities of an increasingly divided representative democracy and public processes and laws and rules designed to mandate inclusiveness and transparency and to force more methodical action. While marches and protests may be important and necessary to raise important questions, the bureaucrat is acutely aware that the process of identifying answers and implementing solutions is a long game and compliance with those governmental rules and processes slow things down.[5]

[4] "Both have pledged to dramatically shake up the establishment and rid their capitals of power players and bureaucrats who have long wielded influence."
jenna johnson, Washington Post, "Trump and Macron, once cast as adversaries, show they have much in common," 13 July 2017

[5] I would argue that is by design. As I often say in trainings on these processes, government is not designed to operate like private business where the primary values are efficiency, productivity and profit. Government's primary values are inclusiveness, transparency and protecting and advancing the collective

Within the structure outlined here, the partnership between elected activists and bureaucratic managers - the subject matter experts - becomes increasingly important to the functional, informed governance of the organization and service to the community. Here, I highlight some potential areas of conflict and what they could mean both for the activist and the career bureaucrat, especially the City attorney charged with ensuring procedural correctness. In the live presentation that will follow at the conference, we will invite you to a conversation between an activist Mayor and a career bureaucrat that, hopefully, suggests the relationship between the two roles can be direct, transparent, supportive and constructive.

The Legal Realities of Local Government Service

"Congratulations on your election, New Activist Mayors and Councilmembers! Now let me explain all of the rules that will inhibit basic norms of human interaction and constrain your ability to fulfill the promises you made to your constituents in any time frame you previously would have deemed reasonable. Oh, and don't kill the messenger; I don't make the rules, I just enforce them."

While I would hope that is not exactly the staff orientation idealistic new electeds get from their city attorneys, it is no doubt how such orientations must feel to someone who comes to elected office with lots of energy, optimism and big ideas, but little or no experience with conflicts regulations, transparency and public participation laws, and due process requirements. As staff, we have to recognize that the words "regulation" "structure" and "governmental process" aren't the stuff of activist dreams of changing the world and may evoke feelings of disenchantment, frustration or even disdain among some of our elected, activist clients. It is true that the rules applicable to government officials often do conflict with the manner of achieving objectives envisioned by newly elected officials and the constituencies that carried them to office. Nonetheless, there is no getting around the fact that it is sometimes our obligation to be the fun police that keep our people out of trouble and our agency's decisions protected from challenge.

City attorneys are in a unique position, and have a professional and ethical obligation, to facilitate an understanding of and adherence to longstanding laws regarding public engagement, ethical accountability, and transparency. The hope is that we can do it in a manner that does not feel alienating, manipulative or obstructionist to our clients. The ultimate objective should be to understand and help to identify paths to achieving elected objectives in a legally compliant way that can repair and advance public trust in government founded on inclusiveness,

welfare about which there can be vehement disagreement. My standard response to input that government *should* operate like private business is that governance is not a speed boat meant to arrive quickly and turn on a dime; it's an oceanliner meant to carry a lot of passengers and a lot of baggage, stopping at a lot of ports along the way! Another favorite is, you can't put us in handcuffs and then complain we can't juggle.

compromise, and well-informed decision-making. Remaining mindful of that objective can support both positive activism and good governance.[6]

I begin with an overview of the most fertile ground for activism and governance conflicts, with the basics of the Brown Act, the Political Reform Act, Government Code Section 1090, the Public Records Act, and basic due process principles that all City attorneys must impress upon their elected officials immediately upon entering office. While all of these statutory and regulatory schemes can be quite complex in their detail, exemptions and application[7], the basics that have to be conveyed to an elected official are pretty straighforward, as dramatically oversimplified below:

- Every record of your public business, whether created or stored on a public or private network or device, and no matter how inconvenient or embarrassing to disclose it may be, is a public record, subject to inspection by and disclosure to any member of the public, for any reason, upon request. *See Gov. Code, §§ 6252, 6253; City of San José v. Superior Court (2017) 2 Cal.5th 608. See also the Department's excellent paper and webinar on this subject* http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2017/League_San-Jose-Resource-Paper-FINAL.aspx

- Before you can take action on anything, you must invite the entire public to every meeting you have with the majority of your Council colleagues, clearly tell the them what you intend to talk about, stick closely to that agenda, and allow any and all members of the public to comment on any and all of those issues before you act. *See Gov. Code, §§ 54952, 54952.2, 54953, 54954.1, 54954.2, 54954.3*

- You must also give the public an opportunity at your meetings to comment on anything else that may come to their minds, whether or

[6] See the City attorneys Department publication: https://www.cacities.org/Member-Engagement/Professional-Departments/City-Attorneys-Department/Publications/Counsel-and-Council_-A-Guide-for-Building-a-Produc.aspx for a great resource on the City attorney/Councilmember relationship.

[7] All of the statutory and regulatory language, with detail, exemptions and application tips can and should be reviewed more comprehensively in the following excellent, and recently updated, Department publications to which I credit any substantive references or information that may be included in this paper:
The People's Business: A Guide to the California Public Records Act (April 2017)
OPEN & PUBLIC V: A Guide to the Ralph M Brown Act (2016)
Providing Conflict of Interest Advice
The California Municipal Law Handbook

not you wanted to hear about those things, including criticizing your own actions or decisions *Gov. Code, § 54954.3*

- You can only discuss very limited subjects in closed session without the public present and you can't disclose any confidential information you learn during a closed session, unless a majority of your colleagues authorizes you to or the Brown Act allows or legally requires some publicly disclosure. *See Gov. Code, § 54956.96, 54957.1, 54963*

- While the public and staff can meet with your Council colleagues to discuss matters of City business outside of those noticed, public meetings, you cannot; you are required to do all of your group debate and thinking in public, in real time and sometimes on television. *See Gov. Code, §§54952.2, 54953.5.*
  Closed sessions *54954.2, 54954.5.*

- If the Council commits a Brown Act violation that it doesn't cure on demand, willful violations of the Brown Act can be prosecuted as misdemeanors and other violations can result in civil liability or invalidation of actions taken in violation of the Act, as well as an award of attorneys fees to a successful party bringing the action. *See Gov. Code, §§ 54959 -54960.5.*

- You can't make, participate in making, or in any way attempt to use your position to influence a governmental decision in which you know or should know you have a material financial interest; some of the things that may trigger conflicts might not be obvious, the regulations on those issues are labyrinth and just getting the advice of the City attorney won't protect you if you get it wrong. You'll need to seek formal FPPC advice, which could take weeks or months. *See Gov. Code, §§ 87100 through 87450; California Code of Regulations, title 2, section 18700, et seq.*

- If a contract is involved, your City can't even enter into a contract in which you or your immediate family members have a financial interest. The mere possibility of your influence on the decision is enough, the consequences for you and your agency can be very serious (large contracts void and criminal prosecution). And you can't solve the problem by simply recusing yourself or abstaining from participation in the decision. *Gov. Code § 1090.*

- Even when you have no financial interest in a decision, you may need to abstain where you have a personal relationship with an involved party or a bias for or against a certain person or project involved in the decision that may make it appear to reasonable observers that it is

impossible for you to consider a matter impartially; this is known as a common law conflict of interest.

These laws and rules can be overwhelming in their sheer number and certainly in their complexity and they can very quickly come into conflict with the objectives of elected officials.

The Realities of the Conflict Between Activism and Governance

For many activist elected officials, the rubber hits the road on conflicts between their big picture objectives and the application of the rules to specific decisions before them almost immediately after taking office. Consider the following scenarios:

- your Mayor was elected on a neighborhood enhancement platform, but now she can't vote on the traffic management project proposed in her neighborhood or the major housing project adjacent to her neighborhood that her neighbors vehemently oppose because it appears both projects could have a material financial effect on her real property or the long term lease on her spouse's business location;

- your new Councilmember was elected, in part, on an affordable housing and green building platform, but now can't contribute her green building expertise on major housing projects brought forward because she or her business partner did some relatively minor consulting work for a project developer or architect on unrelated projects outside her jurisdiction in the last year; it's a small professional community with few companies providing her expertise, so there's a lot of potential conflicts; see http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2017/17001.pdf.pdf

These are scenarios, aspects of which have arisen in my past experience and on which we have obtained formal or informal advice from the Fair Political Practices Commission requiring recusals that proved very frustrating to elected officials. Similarly, frustrations have been expressed by constituents who feel they have been deprived of their representative's voice due to the application of rules that often don't seem to make practical sense to the uninitiated and are frustrating from a practical standpoint even to the most seasoned public servant, well-versed in the "why".

I have seen frustrations regarding these rules manifest themselves in suggestions that councilmembers are trying to avoid difficult or controversial decisions by hiding behind the rules or that staff is being unduly cautious or rigid. I have even seen public assertions that staff has an "agenda" or is trying to manipulate outcomes or control councilmembers via conflict advice.

In addition to these more concrete or project based conflicts of interest scenarios, consider these additional potential circumstances that can arise as activists ascend to governance, which present opportunities for tensions between staff, elected officials and their constituents:

- Activists tend to have highly engaged constituencies that are often quite good at organizing large groups to advocate prompt action and many of them really like City resolutions on issues about which they are passionate, even where the City does not have direct jurisdiction over the matter at hand. They urge the City to "have a voice" or "take a stand." Large groups showing up at public comment, with dozens of people speaking on a matter not included on an already overburdened agenda presents obvious time and meeting management issues. Continual assent to such requests can have the effect of encouraging continuing requests on an ever broader scope of national issues. It also drives staff time and resources to research, agendize and prepare the documentation to implement such direction in a way that can strain the ability to progress on previously identified priorities.

- Activists are active on social media, often on multiple platforms and often blending discussions of pending City actions, individual issue advocacy and political and campaign activity on personal social media accounts, presenting records retention and public records response issues.

- Activists may have ideas for large scale new initiatives, which don't always align with existing operational demands, City defined goals and available staff and financial resources.

- Activists are generally committed to transparency and broad engagement and communication with constituencies; that's great, except where confidentiality is required, like closed session and confidential legal analysis.

- Activists often have roots in communities that will be organizers of protests and marches in your community and may want to speak at and/or participate in those events. Unfortunately, some of those events can strain public resources, present public safety concerns and result in conflict between local police and event organizers and participants.

Practical Ideas For Managing Activism & Governance Conflicts

While the above circumstances can create conflict, they also present opportunities for staff and activists to work closely together to problem solve, educate and engage broader cross sections of the community to help. Below are some ideas that can help open up a dialogue to address some of the above potential conflicts issues and

manage public, council and staff expectations before they become points of contention or frustration.

General

- *Encourage new Mayors and Councilmembers to attend the League's training designed specifically for them or at least review the materials from that training.* https://www.cacities.org/Resources/Newly-Elected-Officials-Packet
- *Encourage League conference attendance as one of the best resources by which to gain information, broaden perspective on important issues and be prepared to educate constituents.*
- *Make new members aware of League conflicts of interest, public records and Brown Act materials, as well as AB 1234 training materials as part of your orientation process.*
- *Where there are statutory or other legal constraints or requirements on Council discretion, take the time to explain the purpose behind the requirements; even if people disagree with the reasoning behind the rules, understanding it can make the rules easier to accept.*

Communication

- *Be open and non-defensive.*
- *Have an early discussion regarding objectives and invite questions and regular dialogue about application of the rules as specific circumstances emerge. Where you share frustration about rules or see opportunities to advocate to regulating agencies about practical changes, talk through those areas with your affected councilmembers.*
- *Clearly communicate your understanding of staff's role as advisor and technical expert, your unique role as legal advisor, and Council's role as policy maker and ultimate decision maker.*
- *Don't make assumptions or attribute motive for actions or objectives without asking questions first.*
- *Assist elected officials in understanding how to communicate clearly with audiences about when and where they are speaking as a representative of the City as the Mayor or Councilmember (e.g., as the Mayor) versus speaking as an individual, who happens to be the Mayor or Councilmember.*
- *Be open to the tremendous asset your elected officials' communication networks can be is helping the public access and understand City issues and important decisions.*
- *Utilize your elected officials' contacts with event organizers to ensure appropriate advance planning and staff contacts to increase the likelihood of better organized events and good communication with organizers.*

Conflicts of Interest and Ethics

- *Encourage your councilmembers regularly to review agenda forecasts with an awareness of potential financial and due process conflicts and seek advice on any potential issues as early as possible.*
- *Seek formal FPPC advice on issues that have potential to raise conflicts. Make sure that councilmembers understand that any individual advice you provide to them is for the benefit of the City and the Council as a whole and that there is no individual privilege regarding that advice as it relates to the Council and necessary staff.*
- *Make sure that councilmembers understand that your advice cannot protect them from FPPC enforcement action.*
- *Engage your councilmembers directly with FPPC staff on complex issues, so that they can assure themselves that all relevant information has been conveyed in the manner they feel is appropriate and they have had a direct opportunity to ask questions and provide FPPC staff with follow up information.*
- *Be as detailed as possible in FPPC advice requests to ensure accuracy of advice and to elicit advice letters that include sufficient detail to serve as a clear roadmap of the facts and an explanation of recusals for other councilmembers and the public.*
- *For controversial projects where you have sufficient advance notice, consider seeking formal advice even where the conflict analysis may appear relatively clear because independent third party advice can serve to diffuse conspiracy theories about staff or councilmember motives around conflict recusals.*
- *Provide regular reminders regarding due process requirements on adjudicatory matters on the agenda forecast and incorporate appropriate disclosures into your formal agenda reviews or scripts to remind the Mayor to elicit relevant disclosures during meeting.*

Meeting, Agenda & Resource Management

- Your Mayor may want to consider reaching out to advocacy group representatives in advance to discuss the most effective way for large groups to advocate to Council, perhaps relaying that bringing 50 people to public comment to say the same thing might not be the most effective option! Consider requesting the group designate a few speakers and have others indicate their support simply by raising hands during comment or a letter of support signed by all of the supporters.
- Offer priority to speakers who are willing to limit their comments to a time that is less than your normal public comment time.
- Ask the Mayor to have people wishing to speak on a matter not on the agenda raise their hands at the beginning of the meeting. Where regular agendas are heavy or large groups are appearing on matters not on the agenda, consider limiting the overall public comment time and reducing the

time of individual speakers to fit within that timeframe and/or continuing additional public comment until after the completion of agendized business.

- Consider adoption of a Council policy or at least consensus direction as to whether and how the council will address requests for resolutions on matters outside the council's jurisdiction; different communities and councils will have different approaches, but clarity and consensus from the council will help to communicate effectively with the public, prevent tensions between staff and council, and allow staff to better anticipate demands and manage additional resources that may be needed to address them.
- Have a process to accurately identify City priorities, align them with available resources and understand what impacts emerging priorities and new initiatives may have on existing priorities and resource allocations. Seek input on creative ideas to manage competing or emerging priorities.

Records Management & Confidentiality

- Ensure councilmembers are aware of the City's records retention policies and the scope of the records to which those policies apply, now including communications about City business conducted or stored on personal devices or networks.
- Encourage City business to be conducted via City networks and on City devices to the greatest extent possible.
- Ensure the that you are explicit regarding confidentiality requirements surrounding closed sessions and other confidential communications and, again, that there is no privilege or guarantee of confidentiality as to individual councilmembers among or between their colleagues, the Council as a whole. I recommend clear, up front written advisories that a particular communication is confidential and consideration of a written acknowledgement with respect to closed session materials. Explaining how confidentiality protects the City's interests, and ultimately the public interest, in those circumstances where it applies, as well as outlining early on when and how the public will be informed of final actions can help minimize concerns over unwarranted secrecy or exclusion of the public from decision making (e.g., in maintaining litigation settlement authority discussions as confidential to negotiate the most cost effective result for the taxpayers, but later making the terms of the settlement public).
- If there is information or analysis provided as context for a closed session that is not itself confidential, clearly communicate what that information is and whether and how it can be shared.
- Think creatively about how to manage legal public records act requirements for public access to private social media accounts in a way that makes sense to public officials and has the least administrative burden possible. For instance, as it relates to requests for social media records, could elected officials be advised of the obligation to retain content related to City business, consistent with the records retention schedule and then requestors of those records simply be permitted to join the social network in a manner that

permits them to view all past content (i.e., be permitted to review the documents in the manner retained by the City)?

Conclusion

The discussion here obviously represents only the very surface of the complex and evolving relationship between activism and governance, but hopefully may serve as an invitation to continue this important conversation. There are those who will dogmatically cling to mistrust, conspiracy theories, false divisions and attributions of nefarious intent about activism and about government, no matter what facts are provided to them. As we do the work of government and try to understand differing objectives and perspectives that will increasingly be represented by activist leaders, we have to accept that we simply are not going to be able to reason someone out of a strongly held negative belief system and we're probably not going to sway a government conspiracy theorist no matter what we say or do. However, for the reasoned middle, I do think there is a productive relationship to be built and maintained between activist leaders and governance that has the potential to enhance public trust and support positive change. As Malcolm X once said, "I'm for truth, no matter who tells it. I'm for justice, no matter who it is for or against. I'm a human being, first and foremost, and as such I'm for whoever and whatever benefits humanity as a whole." Ultimately our jobs as public servants, whether elected or employed, is to govern in a manner that fosters public trust and benefits our communities and humanity as a whole. At the core of all of the discussion here and the discussion that must continue, is an unrelenting focus on honest, direct, respectful communication and mutual openness to questioning and new ways of doing things, calculated to build the trust that facilitates creative, collaborative problem solving.

Public Law Specialty Certification Committee Report

Friday, September 15, 2017 General Session; 10:15 a.m. – 12:15 p.m.

Craig Labadie, Committee Chair, City Attorney, Albany

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Notes:

CHARGE FOR AD HOC PUBLIC LAW ATTORNEY DEVELOPMENT & SUCCESSION COMMITTEE

Purpose

The purpose of the Public Law Attorney Development & Succession Committee (the "Committee") is to define and direct the implementation of a new Public Law Attorney Development and Succession Program. The purpose of the program will be to develop and enhance among Department members the diverse set of legal, technical, practical and interpersonal skills necessary to succeed as a City Attorney or senior member of a City Attorney's Office. The Committee is envisioned to be a standing committee of the Department, consisting of approximately nine members, focused on identifying the skills development needs of Department members who are new to municipal practice or who wish to strengthen their municipal practice foundation. An additional objective of the committee is to engage and connect more experienced practitioners with newer practitioners in order to encourage departmental contribution, connectivity, and continuity; provide mentoring opportunities; encourage effective knowledge transfer; and enhance succession planning within the Department and the profession to benefit all Department members and cities. This program would provide educational programming, mentoring, and professional networking opportunities facilitated by more experienced practitioners for Department members wishing to build and expand their knowledge of both the hard and soft skills integral to municipal practice.

Program Structure and Format

The programming and networking components of the program will be provided as voluntary "add on" opportunities in conjunction with regularly scheduled Department programming and conferences and via webinar presentations. As a component of the program, newer member participants will be encouraged to present and contribute to content, as well as attending educational and professional networking programs. Newer Department members who choose to participate will earn formal recognition by the Department for completing a defined number of program educational and professional networking components. Program requirements necessary for completion and recognition will be defined and regularly reviewed by the Committee.

Those who complete the program would benefit in a number of ways. Participants would attain greater recognition of the evolving complexities of our practice, promote and foster attorney proficiency and competency in the fundamentals of municipal practice, and obtain League issued recognition of completion of a core curriculum representing a baseline knowledge of essential facets of municipal practice (e.g., public law ethics, the role of the City Attorney, conflicts of interest, Brown Act, meeting rules and procedures, due process fundamentals, police power scope and principles, and public law litigation fundamentals). It is envisioned that the recognition of completion would provide a useful indicator of baseline municipal knowledge for City Attorneys hiring deputies and assistants and for law firms hiring public law associates.

Committee membership should reflect the objectives of the program to integrate seasoned practitioners with newer or less experienced members and the committee should include members who reflect a diversity of experience and perspective.

Ethical Preparedness Training: Rules of Conduct in Action

(MCLE Specialty Credit for Ethics sub-field credit)

Friday, September 15, 2017 General Session; 10:15 a.m. – 12:15 p.m.

Christi Hogin, City Attorney, Lomita, Malibu and Palos Verdes Estates, Partner, Jenkins & Hogin LLP
Michael Jenkins, City Attorney, Hermosa Beach, Rolling Hills and West Hollywood, Partner, Jenkins & Hogin LLP

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Notes:

JENKINS & HOGIN, LLP
A LAW PARTNERSHIP

MICHAEL JENKINS
CHRISTI HOGIN
JOHN C. COTTI
LAUREN LANGER
TREVOR RUSIN
GREGG KETTLES
NATALIE C. KARPELES
PATRICK T. DONEGAN
JANE F. ABZUG

MANHATTAN TOWERS
1230 ROSECRANS AVENUE, SUITE 110
MANHATTAN BEACH, CALIFORNIA 90266
(310) 643-8448 • FAX(310) 643-8441
WWW.LOCALGOVLAW.COM

WRITER'S EMAIL ADDRESS:
CHOGIN@LOCALGOVLAW.COM
@CHRISTIHOGIN

ETHICAL PREPAREDNESS TRAINING: Rules of Professional Conduct in *Action*

Christi Hogin*
Michael Jenkins**
Jenkins & Hogin, LLP

*Christi's law firm, Jenkins & Hogin, LLP, specializes in representing public agencies. She currently serves as city attorney for Lomita, Malibu and Palos Verdes Estates and has an active litigation practice representing public agencies. Christi is the immediate past President of the City Attorneys' Department. She is married to a lawyer with whom she coached AYSO soccer and raised four children.

**Mike's law firm is also Jenkins & Hogin, LLP. He currently serves as city attorney for Hermosa Beach, Rolling Hills, and West Hollywood and he is interim city attorney for Goleta. Mike served as President of the City Attorneys' Department in 1991. He is also married to a lawyer, is a certified AYSO ref, and raised the same four children as Christi.

NOTE OF SUGGESTION AND GRATITUDE: The City Attorneys' Department's publication *Practicing Ethics: A Handbook for Lawyers,* 2d Ed. is a great resource for ethical issues relating to city attorneys. In fact, we relied heavily on it in preparing this presentation. We acknowledge and thank the members of the Practicing Ethics Drafting Committee for their work.

INTRODUCTION

The best way to avoid an ethical disaster is to be prepared. Know the rules of professional responsibility, of course. But also anticipate the likely scenarios where the rules direct how city attorneys are to handle their professional obligations. That exercise helps prepare us for when an ethical issue crops up unexpectedly (as they often do). In addition to drills and tabletop exercises, we are also well-served by keeping an inventory of all the resources available to us as city attorneys (and making regular use of them). Along with the Department's publications (which were reintroduced to the Department last spring, have all been updated, and are available at the City Attorneys' Forum and through the League, the City Attorneys' Department is comprised of committees that take deeper dives into specific areas. The committees keep Department members informed and help develop best practices. This paper takes the opportunity to (re)acquaint Department members with the committees that serve us as we explore professional rules of responsibility in the context of situations we regularly encounter as city attorneys.

Ethical standards for California lawyers are derived mainly from the Rules of Professional Conduct of the State Bar of California. Public lawyers are governed by the Rules and the ethical standards of the profession. See, e.g., *People ex. rel Deukemejian v. Brown* (1981) 29 Cal.3d 150 (Bar rule prohibiting taking of a position adverse to a client precludes Attorney General from suing client department on a matter on which he advised that department); accord *Santa Clara County Counsels Association v. Woodside* (1994) 7 Cal. 4th 525, 548 ("duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney's counterpart in private practice"). In addition to the Rules, California lawyers are subject to common law standards. *Santa Clara County Counsels Association, supra.*

Public lawyers have special ethical obligations to further justice. The heightened ethical responsibilities of government lawyers apply whether they are prosecuting criminal actions or representing the government in a civil action. *People ex. rel Clancy v. Superior Court* (1985) 39 Cal. 3d 740, 745. California courts have relied on the ABA Model Code's Ethical Considerations to define the city attorneys' duties, including EC 7-14, which provides, "[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." See, e.g., *People ex rel Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746 (contingent fee arrangement creates conflict for public lawyer); *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871 (city attorney may not argue parking not required where he knows the city determined there was a shortage).

We bring these high ethical standards to our representation of cities. Rule 3-600 governs the ethical obligations of a lawyer who represents an entity rather than a natural person. The client in such a representation is the entity itself as embodied in the "highest authorized officer, employee, body or constituent overseeing the particular engagement."

As we know, as city attorneys, if we are aware of conduct by city officials or employee which may be or is a violation of law "reasonably imputable to the organization" or "is likely to result in substantial injury to the organization," we may (should?) take the matter to the "highest internal authority within the organization" but may not disclose any confidential information beyond the organization. Our recourse if we cannot persuade those in command to change course? The city attorney retains the right to resign employment.

Ethical preparedness can help us work to avoid that last resort when disaster does strike (and it will occasionally) putting us uncomfortably on the horns of a dilemma. To prepare for the unannounced appearance of an ethical conflict in the middle of an otherwise ordinary day, in this paper, we reacquaint you with are some resources (the Department committees) and offer up some exercises.

R E S O U R C E
California Public Records Act Committee

This committee stays on top of legislation to amend the CPRA, monitors the case law developments in the area of public records, and keeps our members up to speed in this particularly demanding area of municipal practice. The committee also updates *The People's Business: A Guide to the California Public Records Act* and the CPRA section of *The Municipal Law Handbook.* As of the date of this paper, Department members should be aware that the CPRA Committee is also actively engaged in the California Law Revision Commission's recently initiated "nonsubstantive revision" of the CPRA, which is likely to include a renumbering of long familiar provisions of the Act.

E X E R C I S E

A city attorney becomes aware of the city manager's misuse of the city credit card for personal meals and a bar tab at the local pub. When the city attorney confronts the city manager, the city attorney is told that the city council is well aware of the situation and to butt out. The city receives a Public Records Act request from the local newspaper for all credit card statements and requests for reimbursement from the city manager. When asked for the records by the city attorney, the city manager states that he is destroying the records. Worried that this situation is going to end badly, the city attorney writes a comprehensive 85 page memorandum to the city council documenting the alleged misuse of public funds and violations of records retention policy. After receiving the memorandum, the city council fires the city attorney due to the council's impression that the trust relationship between the city manager and the city attorney is impaired. When local newspaper files a lawsuit claiming that it had not received all the responsive records, the city sues the former city attorney for malpractice, given that he was in

charge of responding to the PRA request. The former city attorney cross complains for wrongful termination.

FUN FACT FOR HAIRSPLITTERS: The attorney-client privilege is distinct from the duty of confidentiality. These two concepts are often used interchangeably. While both apply to confidential information, the duty of confidentiality, as contained in the California Business and Professions Code is broader than the attorney-client privilege, which is a rule of evidence found in the California Evidence Code. *Compare* Bus. & Prof.Code § 6068 ("It is the duty of an attorney to do all of the following: ... (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.") *with* Evid. Code § 954 ("[T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer ....").

Lawyers don't blow whistles (usually). A California Attorney General's opinion concludes that the whistleblower statutory protections applicable to employees of state and local public entities do not supersede the statutes and rules governing the attorney-client privilege. 84 Cal. Op. Att'y Gen. 71 (2001). But remember, the courts do not have to give the AG the last word. *Freedom Newspapers, Inc. v. Orange County Employees Ret. Sys.* (1993) 6 Cal.4th 821, 829 (the Attorney General's views are not binding although they are entitled to "considerable weight").

Indeed, in an unpublished case, one federal district court "declines defendants' invitation to accept as persuasive authority the California Attorney General's published opinion ("AG Opinion"), which concludes that attorneys cannot maintain CWPA[1] suits." *Carroll v. California ex rel. California Com'n on Teacher Credentialing* (E.D. Cal., Aug. 19, 2013, No. 2:13-CV-00249-KJM) 2013 WL 4482934, at *6 (allowing a retaliation lawsuit by fired in-house counsel to survive demurrer because it was too soon to determine whether the claims pleaded required disclosure of confidential information in order to prove them.) The federal district court rejected the AG Opinion because it found that the whistleblower statute's text does not say what the AG Opinion says it does (specifically, the court states that the AG improperly reads "individual in the exercise of official authority" into the provisions of Gov't Code §8547.8(f), which is the basis for the AG's analysis); and that the AG's interpretation that follows from this textual misrepresentation contravenes California Supreme Court precedent (specifically, *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, which held that attorneys may sue when they allege they were terminated for refusing to violate a mandatory ethical duty.).

An attorney may not pursue a lawsuit if it cannot be decided without breaching the lawyer-client privilege. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164 (in-house attorneys may bring retaliatory discharge claims in two circumstances: (a) attorneys may sue when they allege they were terminated for refusing to violate a mandatory ethical duty embodied in the Rules of Professional Conduct, such as refusing to commit a crime; and (b) where it can be shown both that "the employer's conduct is of the kind that would give rise to a

[1]California Whistleblower Protection Act, Gov't Code §§8547-8547.12

retaliatory discharge action by a *nonattorney* employee" and that "some statute or ethical rule specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the 'nonfiduciary' conduct for which he was terminated .").

The *General Dynamics* court's rationale for permitting in-house attorney-employees to bring retaliatory discharge claims against their private employers, notwithstanding the attorney-client privilege, applies with even greater force when the employer is a public agency with an explicit duty to the public. *See* 7 Cal.4th at 1180 ("[T]he theoretical reason for labeling the discharge wrongful in such cases is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy." (quoting *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 667).) Moreover, government lawyers are widely recognized to have responsibilities and obligations different from those facing members of the private bar. The unique role of governmental lawyers requires a nuanced interpretation of California's Rules of Professional Conduct. *See* Cal. Rules Prof. Conduct Rule 3–600 ("In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."); *c.f.* Restatement (Third) of Law Governing Lawyers § 97 (2000) ("No universal definition of the client of a governmental lawyer is possible.").

Lawyers suing their employers may not breach their duty of confidentiality to provide evidence to support their claims and risk state bar discipline if they do:

> Acknowledging the confidentiality concerns of companies with in-house attorney employees, the California Supreme Court noted several additional limitations on retaliation claims. For example, "where the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the lawyer-client privilege, the suit must be dismissed in the interest of preserving the privilege." *Id.* However, the court "underline[d] the fact that such drastic action will seldom if ever be appropriate at the demurrer stage of litigation." *Id.* The court also instructed that "the trial courts can and should apply an array of ad hoc measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege." *Id.* at 1191, 4 Cal.Rptr.2d 874, 824 P.2d 680. Some of these measures are "sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings." *Id.* The court also noted that an attorney who unsuccessfully pursues a retaliation claim risks being subject to State Bar disciplinary proceedings. *Id.* at 1191, 4 Cal.Rptr.2d 874, 824 P.2d 680.

Carroll v. California ex rel. California Com'n on Teacher Credentialing (E.D. Cal., Aug. 19, 2013, No. 2:13-CV-00249-KJM) 2013 WL 4482934, at *5

In finding that in-house counsel may maintain a retaliatory discharge claim, the Supreme Court explained, "Our conclusion with respect to the tort cause of action is qualified; our holding seeks to accommodate two conflicting values, both of which arise from the nature of an attorney's professional role-the fiducial nature of the relationship with the client, on the one hand, and the duty to adhere to a handful of defining ethical norms, on the other. As will appear, we conclude that there is no reason inherent in the nature of an attorney's role as in-house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, *provided* it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship." *General Dynamics, supra,* 7 Cal.4th at 1169.

HANDY DEFINITIONS: Evidence Code section 952 defines a "confidential communication between client and lawyer" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons...." In turn, Evidence Code section 954 provides that "the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer...."

R E S O U R C E
Cannabis Regulation Committee

Newly transitioned from an *ad hoc* committee to a standing committee of the Department (because we finally admitted after years that we can't live without this committee's sage advice), this committee assists with the education of our members in implementing medical and recreational marijuana laws, monitors case law and legislation in this rapidly changing area of municipal interest, and provides endless source of puns and munchie jokes for a grateful Department.

E X E R C I S E

A city council has asked the city attorney to draft a law that would allow the sale of recreational marijuana in the city and impose a tax on it. In addition, the city council has asked for a resolution declaring the city a "sanctuary city."

Marijuana - schedule I controlled substance under federal law. Comprehensive Drug Abuse Prevention and Control Act of 1970 is a comprehensive regime to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Title II of the Act is the Controlled Substance Act (21 U.S.C. § 801 et seq.). Under federal law, it is unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.

Even though state law allows certain activities related to marijuana and cities may impose regulations under state law, a city attorney that advises a city council on regulatory options that

comply with state laws may be offering advice that results in conduct that violates the Controlled Substance Act. Provided that the client limits his or her activities to those that comply with state law and provided that the lawyer counsels against otherwise violating the Controlled Substances Act, a lawyer should be permitted to advise and represent a client regarding matters related to medical marijuana under state law.

One of the duties of a lawyer is to support the laws of the United States and of California. Bus. & Prof. Code § 6068(a). In the unusual circumstance where state and federal law directly conflict, the city attorney must be careful to advise, assist, and represent the client in complying with state laws while, at the same time, counseling against conduct that may invite prosecution for violation of federal laws. This is an ethical obligation.

Rule 3-210 of the California Rules of Professional Conduct states as follows:

> A member shall not advise the violation of any law . . . unless the member believes in good faith that such law . . . is invalid.

Strictly construed, this rule might be read to mean that a city attorney cannot assist in drafting an ordinance or advising a city to promote conduct that violates the CSA. However, many legal commentators and bar associations have concluded that the marijuana situation raises an unanticipated dilemma under Rule 3-210. There is no other subject in which California law permits what is forbidden by federal penal law. California's public policy conflicts with federal law. Accordingly, legal commentators are concluding that, even if lawyers do not believe that the federal laws regarding marijuana are invalid, they may advise and assist their clients in complying with state laws, as long as they advise clients about the risks involved in violating federal law.

Given state policy, it would follow that a lawyer's assistance to a city who wants to regulate marijuana sales, cultivation, and/or delivery in accordance with state law should not be considered an act of moral turpitude because it does not suggest that the lawyer is dishonest, untrustworthy, or unfit to practice. *Cf.* Bus. & Prof. Code § 6106 (allowing disbarment or suspension for commission of acts involving moral turpitude, dishonesty or corruption).

All this said, city attorneys should be aware that they assume the risk that the State Bar's Office of Chief Trial Counsel may interpret Rule 3-210 or of Business & Professions Code section 6106 to the opposite conclusion reached above. In that case, the lawyers may be subject to discipline. Also, the lawyers are at risk of federal prosecution for aiding and abetting violation of federal law.

If your city does anything other than ban marijuana, be sure to tell the city about the risks of legislating in this area. Isn't that the city attorney's role anyway?[2]

(Thanks to the San Francisco Bar Ass'n for the above analysis)

Sanctuary City. The sanctuary city proposal does not raise the same ethical consideration. The legal authority for the interrogation, arrest, detention, and removal of noncitizens from the United States is found in the Immigration and Nationality Act ("INA").[3] The INA contains both civil and criminal provisions. Entering the U.S. without "inspection" in the manner prescribed by law is a crime. Few individuals are prosecuted under these provisions. Most undocumented individuals arrested by federal immigration authorities are placed in civil administrative proceedings to determine whether they should be deported. Violations of the INA that result in deportation are civil, not criminal, in nature. This distinction is important. State and local law enforcement may enforce only the criminal provisions of the INA. Illegal presence in the U.S. is a civil offense that is enforceable only by the federal government.

While illegal presence may be enforced only by the federal government, attention has turned to what assistance, short of actual enforcement, may be provided by officials at the state and local level. Federal statutes prohibit state and local governments from restricting communication with the federal government regarding the immigration status of any individual.[4] Neither law, however, mandates collection of information or cooperation or sharing of information with federal immigration authorities. These provisions have been cited both by those seeking greater local involvement in immigration enforcement, and by those seeking less local involvement. Many cities have adopted policies that limit their own jurisdiction's involvement in federal civil immigration enforcement efforts. The policies take a variety of shapes. Despite their diversity, these policies are sometimes lumped together under the label, "sanctuary policies."

[2]The lawyers who have been advising the dispensaries have taken comfort in the premise that lawyers are supposed to help people figure out what is and what is not legal. Canon 2 of the American Bar Association Code of Professional Responsibility was "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." EC 2-1 stated as follows:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. [citations omitted].

I suppose this same perspective may be applied to city attorneys advising city councils looking to regulate marijuana.

[3] 8 U.S.C. § 1101 et seq.

[4] 8 U.S.C. §§ 1373, 1644.

While many object to the label, the jurisdictions that have adopted these policies are sometimes referred to as "sanctuary cities" or "sanctuary jurisdictions."

Regardless of the precise approach a city takes, as long as the focus of the policy is on the city's level of cooperation or sharing of information with federal immigration authorities, the policy is not in conflict with a federal law, unlike the marijuana regulation situation with the federal Controlled Substance Act.

It is important when advising your city on such policies to carefully review the Executive Order and applicable federal statutes implicated by the various policy choices cities may wish to make.

R E S O U R C E
Municipal Finance Committee

This committee monitors proposed legislation that impacts municipal finance and helps develop resources for advising Revenue & Taxation Policy Committee of the League as well as monitoring the case law developing in this area. The committee updates the *Propositions 26 and 218 Implementation Guide* and assists with the finance sections of *The Municipal Law Handbook.*

E X E R C I S E

A city is in financial trouble. Every department has been asked to make cuts. A contract city attorney offers an alternative to hourly billing for lawsuits filed to abate nuisances. Instead, the law firm would limit its compensation to cost recovery from the defendant. In this way, the city attorney's office will function more like the planning department, which charges fees in the amounts that recover the costs of services provided, thereby alleviating the burden on taxpayers. The city council is thrilled with the cost-saving proposal except that one member of the council (who is not a big fan of the city attorney) thinks the city has to issue a request for proposals to consider changing the contract and thinks that the city attorney cannot advise the city council about whether an RFP is required or negotiate her law firm's contract without violating Section 1090.

Because city attorneys exercise government authority on behalf of the public, they are subject to heightened standards of impartiality. City attorney decisions in criminal and nuisance abatement proceedings must be made only based on probable cause and the interests of justice. *People ex rel. J. Clancy v. Superior Court*, 39 Cal.3d 740, 746 (1985) (citing ABA Code of Prof. Responsibility, EC 7-14). Consequently, the contingency fee itself – even if it saved the taxpayers money – is improper. *Clancy* involved a nuisance abatement action against an adult bookstore where the prosecuting attorney was being paid a contingency fee. The court of appeal concluded that certain nuisance abatement actions are like criminal prosecutions and thus raise the specter of the public interest in justice being served (over any other consideration). In *County of Santa Clara v. Superior Court* , 50 Cal. 4th 35, 54 (2010), the California Supreme Court clarified that the rules applicable to criminal prosecutors do not always apply in nuisance

abatement actions, but principles of heightened neutrality are valid and necessary in such actions. Unlike *Clancy*, in *Santa Clara*, the court upheld the public agency's engagement of contingent-fee counsel where the public entity's in house lawyers retained and exercised exclusive approval authority over all critical prosecutorial decisions in the case, including the unfettered authority to dismiss the case. In that case the court also noted that the action did not seek to put the defendant out of business and that the defendant had the resources to mount a full defense. *City of Los Angeles v. Decker*, 18 Cal.3d 860 (1977); *Clancy*, *supra*, 39 Cal.3d at 748-749.

If a city has a purchasing ordinance that sets out the types of contracts that must be subject to a request for proposal process, a contract city attorney could point city staff and the council to the relevant sections. A contract city attorney has an interest in whether a contract is subjected to RFP and should recuse himself/herself from that decision.

Government Code Section 1090 prohibits city officials, including city attorneys, from having a financial interest in contracts made by them "in their official capacity." Section 1090 does not apply to contracts made in their private capacity. This distinction is fact-dependent, and there is no bright line test for determining whether an official is acting in a private capacity. But Section 1090 does not prohibit contract city attorneys from negotiating the terms of their employment contracts directly with the city so long as they are acting solely in their private capacity. In *Campagna v. Sanger* (1996) 42 Cal.App.4th 533, a law firm provided contract city attorney services under an agreement providing a monthly retainer. The retainer excluded litigation, but the agreement provided that the firm would be paid reasonable fees for litigation, depending upon the type of services provided. An attorney with the firm negotiated a legal services contract with the City providing that his firm and another law firm would represent the city in prosecuting a toxic contamination lawsuit against chemical companies. The contingency fee agreement approved by the city council set forth how the total fee would be calculated, but the agreement did not explain how the two firms would split the fee. Under a separate oral agreement with the second law firm, the city attorney's firm was to receive a certain percentage of the total contingency fee, basically a "finder's fee" deal.

The court looked at both transactions. The court concluded the city attorney did not violate Section 1090 when he negotiated with the city on his firm's behalf. In that transaction, the attorney was functioning in his private capacity to negotiate a contract to provide additional legal services beyond the basic retainer agreement. However, when the city attorney cut his deal with the other law firm, the court found he was acting as a city official and therefore subject to Section 1090. Because he was financially interested in a contract made in his official capacity, the city attorney violated Section 1090. Consequently, the referral fee agreement was unenforceable.

R E S O U R C E
FPPC Committee

This committee monitors the proceedings of the Fair Political Practices Commission, advises the FPPC of city concerns and the practical implications of proposed policies (which is way harder than you would think), and keeps members up to date on the constantly moving target of FPPC regulations.

E X E R C I S E

A city councilmember asks the city attorney for an opinion as to whether he has a financial conflict of interest involving an upcoming agenda item. In order to prepare the opinion, the city attorney asks the councilmember for certain financial information, which he provides in a written document marked "confidential." The city attorney prepares a written opinion concluding that the councilmember has no conflict. When the item comes up on the agenda, the councilmember is asked whether he intends to recuse himself; he responds saying that the city attorney has provided him with a written opinion concluding that he has no conflict. Another member of the council asks to see a copy of the opinion; the councilmember objects, arguing that it contains sensitive, private financial information. He also states that the city attorney accepted the confidential information from him, without any hint that it could be shared with others. If he'd known that was a possibility, he would have engaged a different lawyer to advise him.

Lawyers owe a duty of undivided loyalty and confidentiality to their clients. *See* Rule 3-310 (C) and (E) of the California Rules of Professional Conduct; *see also* Bus. & Prof. Code §6068(e)(1) ("It is the duty of an attorney to do all of the following… To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.). The city attorney's client is the city "acting through its highest authorized officer, employee, body…." Rule 3-600(A) of the California Rules of Professional Conduct. The city attorney generally answers to the city council as a body and has no obligation or right to keep information obtained from an individual councilmember from his colleagues.

The city attorney shall advise the city officials in all legal matters pertaining to city business. Gov. Code, § 41801. But the "city" is still the client. Under the ethical rules, city attorneys are obligated to make clear that they represents the city and not individual councilmembers or officers:

> **(D)** In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

Rule 3-600 (D) of the California Rules of Professional Responsibility. Accordingly, when advising individual councilmembers, we need to pay close attention to the impression given regarding the confidentiality of our interactions with individual councilmembers or staff.

GOOD TO KNOW: The California Attorney General opined that when a city attorney obtains information in confidence from a councilmember under circumstances leading the councilmember to believe that a confidential relationship exists between the city attorney and the councilmember, the city attorney is precluded from prosecuting the council member under the Political Reform Act. 71 Ops. Cal. Atty. Gen. 255 (1988).

R E S O U R C E
Legal Advocacy Committee

The Department administers the League's legal advocacy program in accordance with the policy adopted by the League board of directors. In addition to making recommendations on the League's participation in litigation of broad importance to cities and the League's mission to promote home rule and local control, committee members regularly solicit input from and report the committee's actions back to their respective local city attorneys associations, if any.

E X E R C I S E

The contract city attorney law firm for a small city also performs unrelated legal work for a nearby but not adjacent, large city. The large city has an in-house city attorney but sometimes contracts with outside law firms, especially to handle litigation. The large city takes an action that severely impacts traffic patterns to the detriment of residents of the small city. The city council of the small city asks the city attorney to notice a closed session to discuss whether to file a CEQA lawsuit against the large city.

FUN FACT ABOUT LITIGATION CLOSED SESSIONS: The Brown Act permits the legislative body to go into closed session to consult with legal counsel. A litigation closed session cannot take place under the Brown Act without legal counsel present.

California Rules of Professional Conduct Rule 3-310. Avoiding the Representation of Adverse Interests (as relevant):

> "(C) A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter….

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment. [Emphasis added.]"

Representing two or more clients with adverse interests simultaneously in different matters is prohibited unless both (or all) clients give informed written consent.

"'In evaluating conflict claims in dual representation cases, the courts have accordingly imposed a test that is more stringent than that of demonstrating a substantial relationship between the subject matter of successive representations. [Footnote omitted.] Even though the simultaneous representations may have *nothing* in common, and there is *no* risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required.* Indeed, in all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or "automatic" one.

The reason for such a rule is evident, even (or perhaps especially) to the non-attorney. A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter *wholly unrelated* to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All legal technicalities aside, few if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances. As one commentator on modern legal ethics has put it: "Something seems radically out of place if a lawyer sues one of the lawyer's own present clients on behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer's *sense of loyalty* is askew." (Wolfram, Modern Legal Ethics (1986 ed.) § 7.3.2, p. 350, italics added.) It is for that reason, and not out of concerns rooted in the obligation of client confidentiality, that courts and ethical codes alike prohibit an attorney from simultaneously representing two client adversaries, even where the substance of the representations are unrelated. [Footnote:] There are, of course, exceptions even to this rule. The principle of loyalty is for the *client's* benefit; most courts thus permit an attorney to continue the simultaneous representation of clients whose interests are adverse as to unrelated matters provided full disclosure is made and both agree in writing to waive the conflict."

Flatt v. Sup.Ct. (Daniel) (1994) 9 Cal.4th at 282–283; *see also* Cal. Rule of Prof. Conduct 3-310(C)(1),(2) (Counsel may accept or continue representation of clients whose interests *actually or potentially* conflict if *each client* gives "*informed* written consent" to the representation).

The Discussion under Cal. Rule of Prof. Conduct 3-310 states that this Rule "is intended to apply to representations of clients in both litigation and transactional matters."

In this instance, the law firm may represent City A in the CEQA action if it obtains both clients' informed written consent. Of course, some clients may be wary of such arrangements, in which event the law firm is best advised to recuse itself from the CEQA matter.

R E S O U R C E
Brown Act Committee

The committee vigilantly monitors legislation proposing changes to the Brown Act (more amendments are introduced than you'd imagine), keeps the Department abreast of case law changes and serves as a resource toward developing best open meeting practices. The committee also updates *Open and Public* and the Brown Act section of *The Municipal Law Handbook.*

City attorney calls the city manager to get his take on how long the council meeting will likely last. The city manager tells her to go ahead and make an 8pm dinner reservation because he has talked to each of the councilmembers and gotten them to all agree to continue the public hearing item. Also, he knows from his conversations that the councilmembers have reached a "compromise" on the controversial marijuana ordinance. The three councilmembers that were previously supporting an out-right ban have been persuaded by the councilmember advocating for the ordinance to vote for it if it is limited to allow just medical marijuana. The city manager expresses relief that, in light of this compromise, the meeting will not be as lengthy and contentious as the last meeting where the marijuana ordinance was discussed but continued by the council advocate because he clearly did not have the votes to support his proposal.

This is not a good position in which to find one's self. Essentially, the city manager in this scenario has described an illegal serial meeting[5].When a city attorney learns that the conduct of a city official or employee is or may be a violation of law that may be "reasonably imputed to the organization" or is "likely to result in substantial injury to the organization," State Bar rules expressly authorize the city attorney to take the matter to the "highest internal authority within

[5]Note that in some cities the city manager is authorized to schedule items for the agenda. In that situation, the city manager might make the decision to add am item or address in a recommendation or staff report an aspect of an item that the city manager learned is of interest to one or more councilmembers from individual contacts. This is not per se in conflict with the Brown Act but the conduct crosses over the line if the city manager is soliciting council opinions in order to make decisions.

the organization." Rule 3-600(B) of the California Rules of Professional Conduct. While reporting such activity up the city's hierarchy, the city attorney must not disclose any confidential information beyond the organization itself. Finally, in the event the "highest internal authority" fails to heed the city attorney's advice and that failure is likely to result in substantial injury to the client, the city attorney retains the right or, where appropriate, the obligation to resign employment pursuant to Rule 3-700. (Again the dreadful last resort.)

R E S O U R C E
Municipal Law Handbook Committee

On a grueling annual production schedule, through a huge network of volunteer editors, this committee updates and improves *The California Municipal Law Handbook*, published by CEB. The comprehensive publication is the owner's manual that comes with our jobs.

FUN CITATION FACT: The *Municipal Law Handbook* is the most authoritative secondary source for municipal law in California and it is citable authority! In all your briefs and motions, why not cite the most reliable authority on municipal law? The official Blue Book format for handbook is **City Attorneys' Dep't, League of Cal. Cities, The California Municipal Law Handbook (Cont.Ed.Bar 2014 ed.) §x.xx, p.xxx**. And, because it is maintained by the members of this Department, when you cite *The Municipal Law Handbook*, you are really citing yourself! *Cite yourself!* You deserve it!

E X E R C I S E

During budget hearings the city council cautions the in-house city attorney not to exceed his outside counsel budget. Midway through the year, the council directs the city attorney to negotiate a ground lease of a surplus piece of city property with a private developer. The city attorney has no experience with complex real estate matters and insufficient funds in his budget to hire a real estate attorney. The city attorney proceeds to negotiate the ground lease on his own.

A lawyer must faithfully discharge the duties of an attorney at law to the best of his or her knowledge and ability. Cal. Bus & Prof. Code § 6067. Rule 3-110(A) of the California Rules of Professional Conduct states that "[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

"Competence" is defined in paragraph (B) of Rule 3-110 to mean "to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service." Paragraph (C) outlines the steps a lawyer can take if he or she does not possess the requisite competence when representation is undertaken:

> (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer

reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Being a "generalist" – as city attorneys pride themselves on being – requires self-awareness and an honest appraisal of one's on "learning and skill" in order to abide the ethical obligation to competency.

Budget concerns aside, the city attorney in the scenario above has a professional obligation to educate himself to a level of proficiency in real estate transactions or to bite the bullet and engage counsel who is competent in the area of practice. Moreover, the duty of communication would require the lawyer to advise the client if he did not possess or could not obtain the requisite level of competence.

SCARY SIDE NOTE FOR TECHNOPHOBES: Competent lawyers are expected to have a working understanding of technologies in order to respond to Public Records Act requests and e-discovery demands appropriately. In other words "I didn't know text messages were saved on the phone" is no excuse. Absent a good understanding of the technology, a city attorney may end up in violation of Rule 3-110. On June 30, 2015, the Committee on Professional Responsibility and Conduct of the State Bar of California issued Formal Opinion 2015-193, which sets a standard for e-competence: "The ethical duty of competence requires an attorney to assess at the outset of each case what electronic discovery issues might arise during litigation, including the likelihood that e-discovery will or should be sought by the other side." Under the rules, a city attorney must become sufficiently e-competent or associate with someone who is and become sufficiently e-competent to be able to supervise that expert.

R E S O U R C E
Municipal Law Institute Committee

The MLI is a project of the City Attorneys' Department and every year this committee presents a symposium, which takes a deep dive into an important subject affecting cities. The overarching goal of the committee is toward "integrating the study of municipal law in law schools with the practice of municipal law in order to encourage and train students to work in municipal law as a profession." (quote from Department bylaws).

E X E R C I S E

During a closed session at which the city attorney sought authority to bring a civil injunction case against a scofflaw who had built a deck without proper permits, a councilmember inquires about whether the violation of the Municipal Code is punishable as a criminal offense. When told yes, the Councilmember moves to authorize the civil injunction only if criminal prosecution is unsuccessful. The motion carries.

A city attorney who serves as a prosecutor cannot seek direction from the city council when filing a criminal case. However, a city attorney filing a civil action can, and in many cases

must, receive direction from the city council before filing the lawsuit. In the case of a nuisance abatement action, the city attorney may bring either a criminal action in the name of the "People" or a civil action in the name of the city. *See* Penal Code §1054.6. In the former case, no council direction is required or permitted, and the case cannot be discussed in closed session because the People, not the city, are the client.

Criminal actions cannot be used to gain civil advantages. A prosecutor's "offer to dismiss a criminal prosecution may not be conditioned on a release from civil liability because that practice constitutes a threat to obtain an advantage in a civil dispute in violation of the Rules of Professional Conduct." *Salazar v. Upland Police Department* (2004) 116 Cal.App.3rd 294, 298.

ONE FINAL NOTE. If there were a City Attorneys' Department Credo, it would be this:

It is better to be right than to be City Attorney.[6]

The practice of public law requires a conscious understanding of the duty to the public and a purposeful decision to put the City's interests above all else. As a final observation, these public service jobs of ours have become more challenging as contempt for government is vogue and Twitter rules the airwaves.

As public officials, we all face the possibility of being the object of a cyberbully or the subject of a social media drubbing. But as lawyers, we owe our clients a duty of loyalty that requires us to face down reticence to do our jobs under such stress. That requires us to be conscious of the threat as a source of stress in our profession and develop tools for addressing the stress in order to perform our professional obligations competently (and be happier).

[6]Our gratitude to Natalie West, former city attorney for Novato and Brentwood and past President of the Department (1986-1987) for passing along this credo.

Speaker Biographies

Ryan Baron

Ryan Baron is a member of BB&K's Environmental Law & Natural Resources practice group. He focuses on energy and environmental issues with a particular focus on stormwater regulation. He practices before a number of federal and state agencies and advises on project development and transactional issues. Ryan is a member of the Public Law Section Executive Committee for the State Bar, co-chair of the Policy & Permitting subcommittee for the California Stormwater Quality Association, and a member of the board of directors for Sustain OC.

Bart Brizzee

Bart Brizzee graduated from California State University Los Angeles with a degree in Business Management and received his J.D. from the J. Reuben Clark Law School at Brigham Young University. He was in private practice for twenty-one years, litigating general business disputes that included real property, mining and environmental matters. He has served as an arbitrator, mediator and pro tem judge for the San Bernardino County courts, and was the President of the San Bernardino County Bar Association. He joined San Bernardino County Counsel in 2006 and currently advises the County Land Use Services Department.

Jeb Brown

Bio of James E. "Jeb" Brown Jeb is a Riverside native who graduated from Cal State University, San Bernardino with a Bachelor of Science in Political Science in 1989. He obtained his Juris Doctor from the University of the Pacific, McGeorge School of Law, in 1992. He is licensed to practice law before all of the Courts of the State of California as well as the United States District Court, Central District of California, Southern District of California, Ninth Circuit Court of Appeals, and the United States Supreme Court. Jeb began his career as an associate with the law firm of Fidler and Bell, (now Orrock, Popka, Fortino, Tucker and Dolen) in Riverside, where he represented numerous public entities in both state and federal court. He was hired in January, 1995 by the Riverside City Attorney's Office as a Deputy City Attorney. Jeb was the principal deputy in the Litigation Services Section and was involved in all aspects of representing the City of Riverside in tort defense litigation matters, personnel advisory services and general risk management issues. Most notably, Jeb worked closely with the Riverside Police Department in providing police legal services including responding to major incidents involving potential City liability. In May, 2001, he left the City of Riverside to work at the municipal law firm of Burke, Williams & Sorensen. While there, he represented numerous public entities including the Cities of Hemet, Santa Clarita, Compton, El Segundo and Alhambra. In August, 2002, he returned to the Riverside City Attorney's Office as Supervising Deputy City Attorney for the Litigation Services Section. Jeb supervised four attorneys, one legal assistant and two legal secretaries. In addition to supervising the Litigation Services Section, Jeb also served as the Legal Advisor to Public Safety (Police and Fire), provided advice on employment issues and represented the City and its employees in both state and federal court. Jeb regularly provided training on various legal issues to the Riverside Police Department. Jeb also represented the Riverside Police Department and its officers in civil rights cases. In 2014, Jeb left the City of Riverside to become Assistant County Counsel for Riverside County where he supervises 23 attorneys. His primary focus remains on representing public safety departments including the Probation Department, Fire Department and Sheriff's Department. Jeb is a Past President and board member of the Leo A. Deegan Inn of Court and the Inland Empire Federal Bar Association. He is an adjunct professor at Laverne School of Law (Civil Rights, First Amendment, Federal Courts and Conflict of Laws). Jeb was a Lawyer Representative to the Ninth Circuit (2007-10) and currently serves the Federal Court as an Attorney Settlement Officer. Finally, Jeb has been a speaker for the League of California Cities, Federal Bar Association, California County Counsel's Association, University of Laverne Law School Civil Rights Symposium, Los Angeles County Bar Association, Americans for Effective Law Enforcement and the American Jail Association.

Jim Brown

Jim Brown is the co-chair of Sedgwick LLP's Employment and Labor Practice Group in the San Francisco office. He is an experienced trial attorney and has spent his 29 years of practice representing both private businesses and public entities throughout California. The public entity work includes disability access issues, disability discrimination, wrongful termination, harassment claims, as well as leave of absence/return to work compliance. Mr. Brown routinely provides advice and counsel to management concerning best practices as well as pre-dispute guidance on potential or threatened claims. His practice includes all administrative agency forums, grievance and arbitration proceedings, as well as litigation and trial in California State Court, California Federal Court, as well as the Court of Appeal and the Ninth Circuit.

Tim Coates

Greines, Martin, Stein & Richland LLP Managing Partner Tim Coates is one of the leading appellate attorneys in the country. Over the past thirty years Tim has briefed and argued over 250 appeals in the state and federal appellate courts, including five cases in the United States Supreme Court. Tim has been recognized as the "go to" lawyer for appeals and related law and motion proceedings in major cases for governmental entities in the areas of civil rights, environmental regulation, employment and general tort liability. Reuters news agency named Tim one of the "Top Petitioners" in the United States Supreme Court based on his success in having review granted in that court, and the Los Angeles Daily Journal recognized Tim as one of the top 100 attorneys in California in 2011, 2012, and 2013 based on his success in the Supreme Court. In addition, Tim has received the prestigious California Lawyer of the Year award, for his United States Supreme Court work. Tim has been named a Southern California Super Lawyer in the area of appellate practice from 2007-2016, and has also been named in The Best Lawyers In America (Appellate Law) (2014-2016).

Deborah Fox

Deborah Fox is the Chair of Meyers Nave's First Amendment and Trial and Litigation Practice Groups. She is one of California's foremost experts on First Amendment issues affecting the public sector, with a specialty focus on cases involving the convergence of First Amendment, land use, and zoning laws and regulations. Deborah has handled a broad range of First Amendment litigation on matters that attract intense media attention, including vending and solicitation/panhandling ordinances, news rack restrictions, billboard and sign ordinances, public forum issues, parade and park regulations, adult use regulations, and matters relating to the Religious Land Use and Institutionalized Persons Act. Deborah is particularly skilled at advising on the development of constitutionally sound time, place and manner restrictions, and defending litigation challenging these types of rules and regulations. Deborah recently authored an amicus brief on behalf of the League of California Cities, the California State Association of Counties and the American Planning Association California Chapter in the high-profile Lamar Central Outdoor, LLC v. City of Los Angeles First Amendment related billboard case. In a landmark opinion in June 2016, the Second Appellate District upheld the ability of California cities and counties to continue using the onsite/offsite and commercial/noncommercial distinctions as a regulatory tool in their sign codes. Deborah is "AV" rated by Martindale-Hubbell and is a Fellow of the Litigation Counsel of America. She is named among Martindale-Hubbell's list of "Top Rated Lawyers in Land Use and Zoning," "Register of Top Rated Lawyers: Women Leaders in the Law," "Register of Preeminent Lawyers," and inaugural "Bar Register of Preeminent Women Lawyers." Deborah has also been named, twice, as one of California's "Top Women Litigators" by the Daily Journal.

Heidi Harmon

Mayor Heidi Harmon came to the central coast 30 years ago as a college student, and like many, she found the charm and community irresistible. She stayed to make a life and raise her family in San Luis Obispo. After graduating from Cuesta and Cal Poly she worked as an early childhood educator in SLO for many years. The more she got to know the young people and families in our area, the more of her time and energy she gave to the community to make it even better for future generations. She is an experienced community organizer, climate change activist and public speaker. As the Director of SLO 350 ,a point person with Protect SLO- Stop Oil Trains and a board member of the League of Women Voters Heidi has focused on the big picture and dedicated herself to public service. She has a track record of success impacting positive change through coalition building, policy advocacy and public education. In November 2016 she was elected as Mayor of San Luis Obispo. Heidi is committed to creating innovative housing solutions, revitalizing the unique culture of our downtown, and enhancing community resilience through energy efficiency and sustainability. She keeps the voice and concern of local citizens at the forefront of everything she does, and believes each person and perspective deserves the right to be heard.

Christi Hogin

Partner at the public law firm of Jenkins & Hogin, LLP. Past President of the City Attorneys Department and true believer in local government.

Lauren Isaac

Lauren Isaac is the Director of Business Initiatives for the North American operation of EasyMile. Easymile provides electric, driverless shuttles that are designed to cover short distances in multi-use environments. Prior to working at EasyMile, Lauren worked at WSP where she was involved in various projects involving advanced technologies that can improve mobility in cities. Lauren wrote a guide titled “Driving Towards Driverless: A Guide for Government Agencies” regarding how local and regional governments should respond to autonomous vehicles in the short, medium, and long term. In addition, Lauren maintains the blog, “Driving Towards Driverless”, and has presented on this topic at more than 75 industry conferences. She recently did a TEDx Talk, and has been published in Forbes and the Chicago Tribune among other publications.

Michael Jenkins

Michael practices municipal law at the law firm of Jenkins & Hogin and serves as city attorney for Hermosa Beach, Rolling Hills and West Hollywood, and interim city attorney for Goleta. He is a regular presenter at League conferences and educational seminars. Michael is a former President and Director of the City Attorneys Department.

Barbara Kautz

Barbara E. Kautz is a partner with Goldfarb & Lipman LLP and practices extensively in the areas of land use, affordable housing, CEQA/NEPA compliance, and real estate. Prior to joining Goldfarb & Lipman LLP, she worked as a professional planner for 30 years was the Community Development Director and Assistant City Manager for the City of San Mateo, California. She speaks frequently at conferences regarding housing issues and is a Fellow of the American Institute of Certified Planners and past editor of the Land Use chapter in the Municipal Law Handbook. She formerly served on the Board of Directors for the League of California Cities and the California Chapter of the American Planning Association. Ms. Kautz received her law degree summa cum laude from the University of San Francisco, holds a Master of City Planning from the University of California, Berkeley, and is a Phi Beta Kappa graduate of Stanford University.

Craig Labadie

Craig is a sole practitioner who serves as contract City Attorney for the City of Albany. He also advises the City of Walnut Creek on land use matters and is counsel to several Redevelopment Dissolution Oversight Boards located in Alameda, Contra Costa, and San Mateo Counties. He was the City Attorney in Concord from 2000 to 2011. His duties in that position included advising the Local Reuse Authority for the Concord Naval Weapons Station on the ongoing transition of that closed military base to civilian use. Before that, he was managing partner for the Oakland office of the McDonough, Holland & Allen law firm, serving as contract City Attorney for several Bay Area cities and providing outside counsel services in the areas of land use and environmental law. He has been actively involved in the League of California Cities and served on its Board of Directors in 2013-2015. He was President of the City Attorneys Department in 2006-2007 and previously was President for the Contra Costa City Attorneys Association and the Bay Area City Attorneys Association, Chairman of the Board of Directors for the Continuing Education of the Bar, and a member of the Executive Section for the Public Law Section of the State Bar.

Mark E. Mandell

Mark E. Mandell is a California Municipal Revenue Law specialist with more than fifteen years experience assisting cities that seek to impose or administer taxes, fees, assessments, and other financial matters. He earned his JD at Boalt Hall School of Law at UC Berkeley and has a BA in History and Sociology from UC Berkeley.

James Moose

James G. Moose is the senior partner in the Sacramento-based law firm of Remy Moose Manley, LLP, which emphasizes environmental law, land use and planning law, wildlife law, water law, integrated waste management law, initiative and referendum law, and administrative law generally.

Sean Patterson

Sean Patterson is a senior associate with the law firm of Sedgwick LLP. Based in San Francisco, Mr. Patterson has more than thirteen years' experience defending public agencies and corporations in complex civil litigation. He is admitted and has extensive experience practicing in state and federal court, and the Ninth Circuit Court of Appeals. His practice includes the representation and defense of public agencies, judicial officers and state officials in civil rights actions involving allegations of violation of constitutionally protected rights (e.g., discrimination/ denial of services, denial of due process). Mr. Patterson has direct experience defending these agencies and individuals through trial and appeal, in response to claims for disability discrimination and denial of services. Represent and defend companies and insurers in complex litigation, with an emphasis on product liability litigation (including toxic tort and general product liability claims). He also represents and has extensive experience defending corporations in product liability and mass tort litigation.

Jennifer Petrusis

Jennifer is a shareholder of the Firm and a member of RWG's Litigation Department. Jennifer concentrates on the representation and counseling of public entities in a variety of litigation contexts including police liability, dangerous conditions of public property, civil rights, personal injury, inverse condemnation, contract disputes, indemnity, actions to recover delinquent taxes, and other public entity litigation. The sampling below illustrates Jennifer's expertise and activities. Jennifer's practice is primarily devoted to defending cities and peace officers in lawsuits alleging constitutional rights violations, police liability, personal injury, and other torts. Jennifer also advises police departments on policies and procedures, represents police departments in Pitchess Motions, and assists police departments in responding to Public Records Act requests and to subpoenas and other discovery requests. Jennifer is also experienced in the petition process used to obtain the court's authorization to retain and destroy confiscated deadly weapons.

Javan Rad

Javan Rad is the Chief Assistant City Attorney for the City of Pasadena, and has been with Pasadena since 2005. Javan oversees the Civil Division of the City Attorney's office, and also handles a variety of litigation and advisory matters in the areas of constitutional, tort, and telecommunications law. Javan has been active in a variety of capacities for the League of California Cities' City Attorney's Department. Javan has previously served as President of the City Attorney's Association of Los Angeles County, and is currently on the Board of Directors of SCAN NATOA (the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors). Javan graduated in from Purdue University with a bachelor's degree in Quantitative Agricultural Economics and from Pepperdine University School of Law.

Rachel Richman

Ms. Richman is a partner at Burke, Williams & Sorensen, LLP. Ms. Richman has provided contract city attorney and general counsel services to public agencies throughout California for nearly 20 years. Ms. Richman is the City Attorney for the City of Delano and City of Rosemead; Assistant City Attorney for the City of Alhambra and Assistant City Attorney for the City of Santa Clarita and Legal Counsel to the Santa Clarita Manufactured Home Rent Control Panel. She is the former City Attorney to the City of Arvin.

Gregory Rodriguez

Gregory Rodriguez is with Best Best & Krieger's Washington, D.C. office. Greg uses his unique experience working on Capitol Hill and as in-house counsel for a transportation planning agency to provide legal and regulatory guidance concerning federal grant and contracting requirements, and monitors, counsels and advocates for clients on federal legislation, rulemakings and funding opportunities related to transportation infrastructure. He is a native Southern Californian braving the weather of the East Coast and is excited about all things policy and legal around smart cities, especially new connections through smarter transportation. Greg is a proponent of public transportation and wants to see new technologies enhance mobility for all. His practice includes providing strategic information, policy insight and legal assistance on the regulation and safe and effective incorporation of emerging transportation technologies into our transportation network, including on-demand mobility, autonomous vehicles, and drones. Greg is a member of the Transportation Research Board's Transit and Intermodal Transportation Law Committee and has authored various articles and spoken at a wide variety of conferences on legal and policy issues associated with emerging technologies, including before the Maryland Association of Counties, American Public Transportation Association, International Municipal Lawyers Association, the Arizona Roads and Streets Conference, the American Planning Association and the Eno Center for Transportation Leadership Conference. He previously served as in-house counsel for the San Diego Association of Governments, where he worked on the Mid-Coast Corridor Transit Project, and is well versed on the various procurement and contracting options available to public agencies and takes a hands-on approach to ensure a successful project delivery on construction projects, including large transportation infrastructure projects. Greg has extensive public contracting experience and advises on complicated governance issues, including open meetings laws and public records requests. Before attending law school, Greg was a staff member for U.S. Sen. Dianne Feinstein in Washington, D.C.

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Stacey N. Sheston

Stacey N. Sheston is a partner in the Labor & Employment practice group of Best Best & Krieger LLP. She is also a member of the firm's Executive Committee. Prior to joining BB&K, she was a shareholder, practice group leader and chief talent officer on the management committee of McDonough Holland & Allen in Sacramento. Stacey's practice includes day-to-day employment advice, such as dealing with problem employees (including discipline and terminations), handling harassment complaints and investigations, responding to requests for disability accommodations, addressing wage and hour and leave of absence questions, responding to grievances and unfair practice charges, and drafting employment agreements, handbooks and policies. On the litigation side, Stacey represents employers in mediations, arbitrations, administrative hearings and court proceedings (including jury and non-jury trials) arising out of employment matters, including wrongful termination, breach of contract, unpaid wages, harassment, discrimination and retaliation. Stacey is a member of the State Bar of California, the Employee Relations Policy Committee of the League of California Cities, the Sacramento County Bar Association Labor & Employment Section, Women Lawyers of Sacramento, and the California Public Employers Labor Relations Association. She is also former editorial chair of, and contributor to, the Personnel Chapter of the Municipal Law Handbook (CEB 2010). From 2012 to 2016, Stacey was named by her peers as a Northern California Super Lawyer for employment and labor law. She is admitted to the U.S. District Court for the Central & Eastern districts of California and the Ninth Circuit U.S. Court of Appeals. She is licensed to practice in the State of California. Education University of California, Davis, J.D. Drake University, B.A., cum laude

David Tyra

David Tyra, manager of the firm's labor and employment group, represents private and public sector employers in labor and employment law actions as well as providing advice and counsel on labor and employment issues. His practice covers all aspects of labor and employment law, including wage-hour actions, employee leave matters, workplace discrimination and harassment, work place privacy, and unfair labor practice claims. His litigation experience includes representing employers in federal and state courts at the trial and appellate levels and before numerous federal and state agencies. He is an active public speaker on employment topics, having presented numerous times before civic and commercial groups. In addition to his vast experience handling labor and employment matters, Mr. Tyra is experienced in representing owners and contractors in construction actions, including both the prosecution and defense of claims for extra work, acceleration, and delays, as well as the prosecution and defense of construction defect claims. Served as lead counsel for Governor Arnold Schwarzenegger and the State of California in 38 cases filed by public employee unions challenging Governor Schwarzenegger's executive orders furloughing California state employees. Mr. Tyra successfully represented the Governor and the State at the trial court and appellate court levels, including appearing on behalf of the Governor and the State before the California Supreme Court in Professional Engineers in California Government v. Schwarzenegger (2010) 50 Cal.4th 989, in which the Court validated the furloughs of state employees based on the Legislature's ratification of Governor Schwarzenegger's furlough plan. Mr. Tyra's professional activities and affiliations include: • Top Lawyer, Sacramento Magazine (2017) • Northern California Super Lawyer (2010-2017) • Top 25 Sacramento Super Lawyer (2013, 2014) • "Best of the Bar," Sacramento Business Journal (2013) Academic Background J.D. University of the Pacific, McGeorge School of Law, 1984 B.A. University of California, Santa Barbara, 1981

Mike Washburn

Chief Mike Washburn, a 31 year veteran of law enforcement, began his law enforcement career in 1986 at the Seattle Police Department before becoming Indio's 19th Chief of Police on August 16, 2016. While at the Seattle Police Department, he promoted through the ranks to Captain and Precinct Commander where he was then assigned to the Investigations Bureau and commanded the Violent Crimes Section, which included Robbery, Homicide, CSI, and the Gang Unit. From December 2013 through March 2015, he served as Interim Assistant Chief. Chief Washburn earned a Master's Degree in the Administration of Justice from the University of Alaska Fairbanks and Bachelor of Arts Degrees from Central Washington University in both Law & Justice and Sociology. He is also a graduate of the Senior Management Institute for Police at Boston University. In 2003, he served a six-month fellowship with the Department of Justice at FBI Headquarters in Washington, D.C. as the Safe Streets Executive Fellow. Chief Washburn and his wife Kerry have been married for 30 years and have four children.

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