# 2017 Spring Conference

# City Attorneys' Department

**The Westin St. Francis**
**San Francisco, California**

**May 3-5, 2017**

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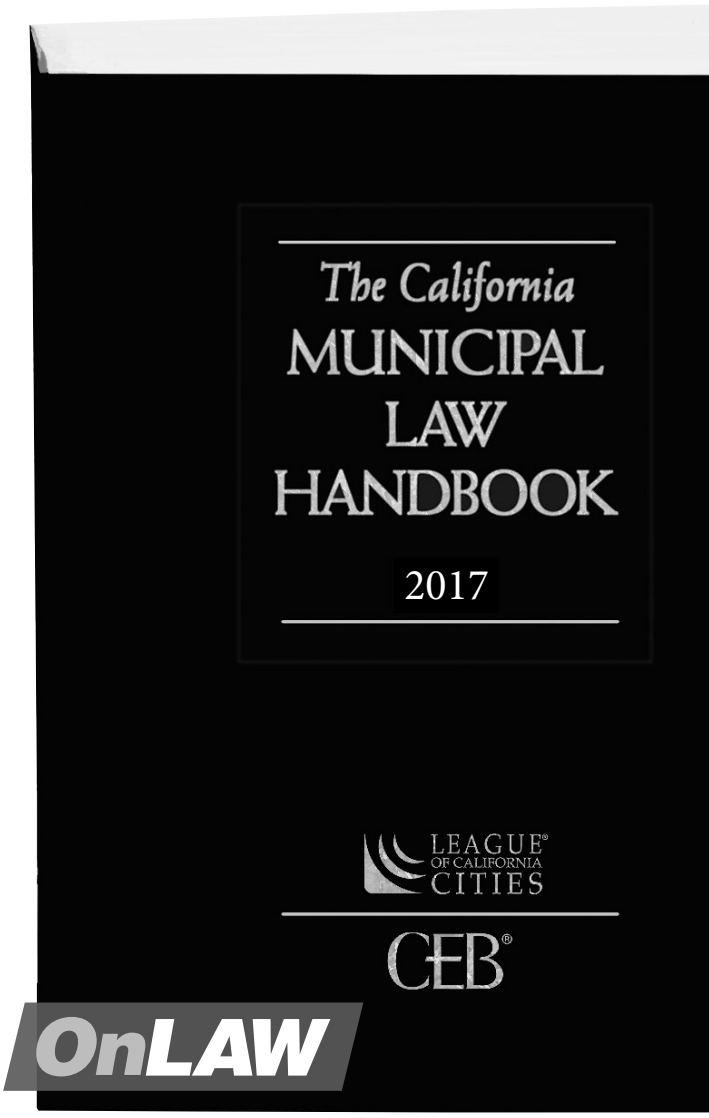


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# City Attorneys' Department
# 2017 Spring Conference
# *Program Materials*

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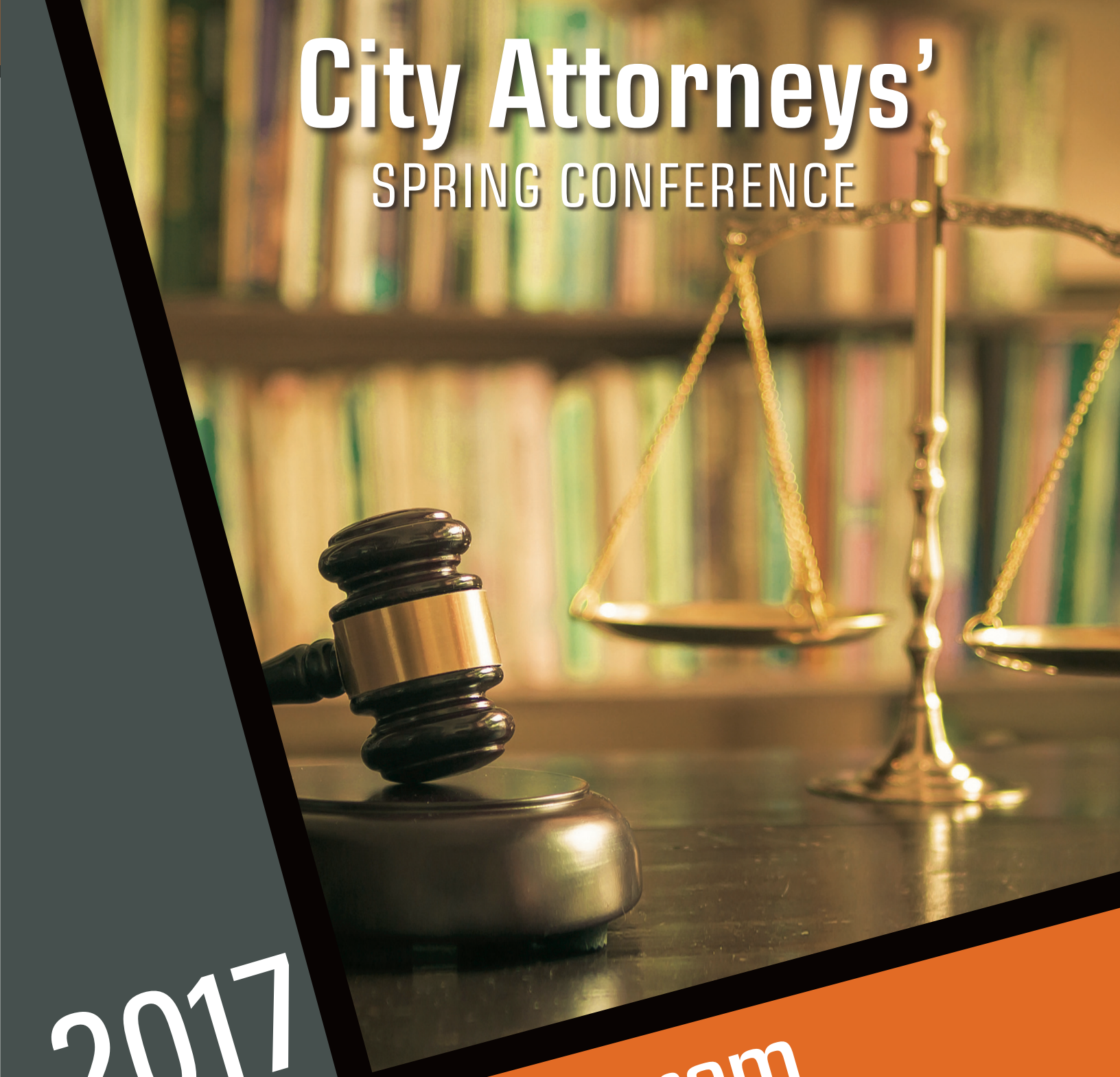

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# Program

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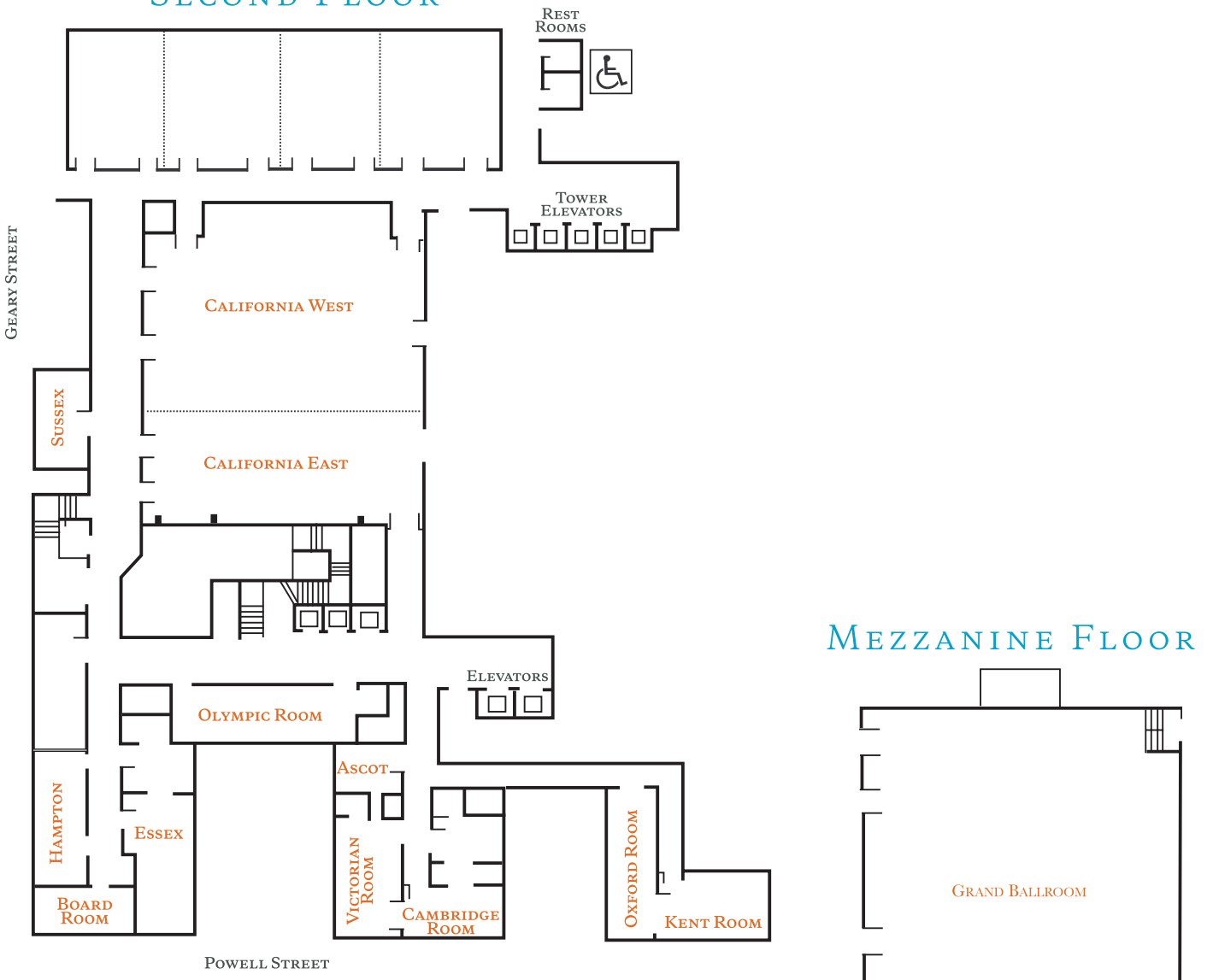
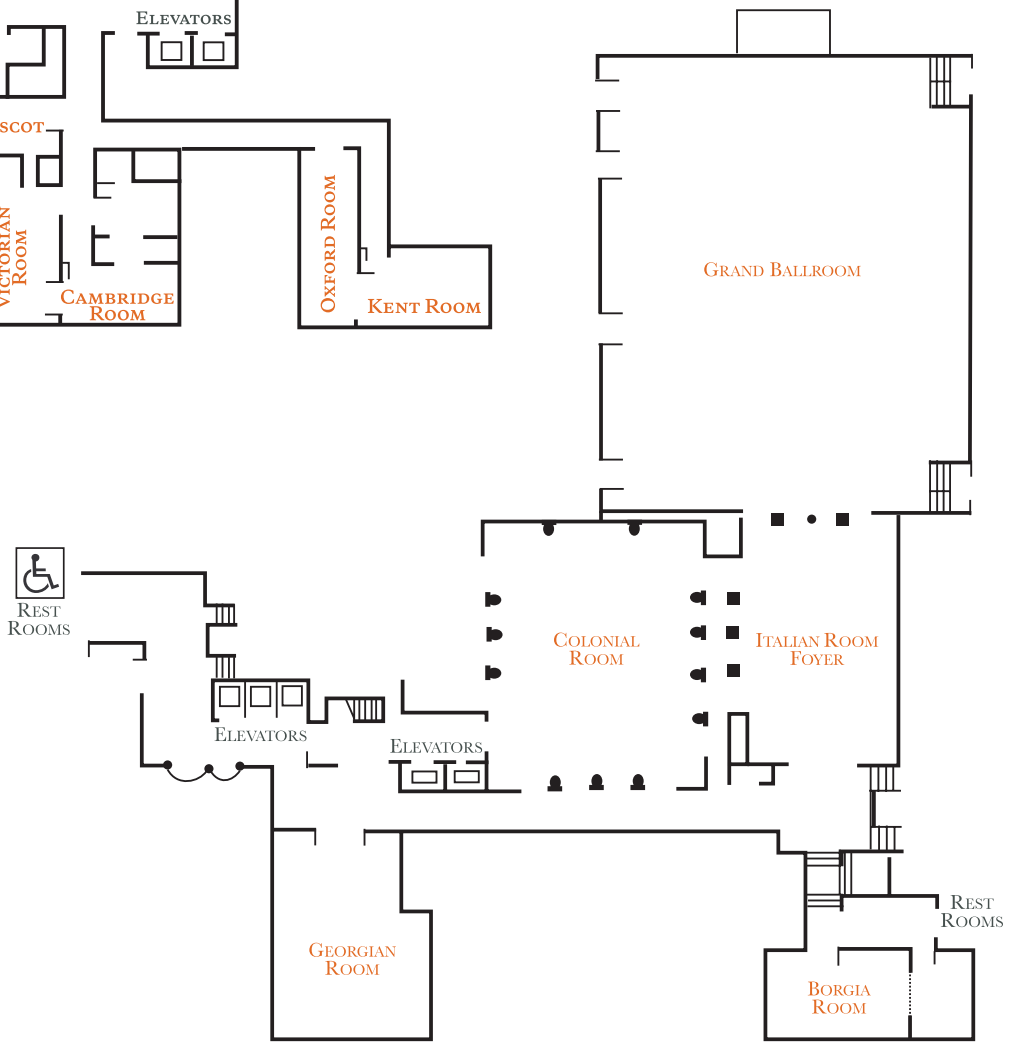



## Mezzanine Floor



# 2017 CITY ATTORNEYS' SPRING CONFERENCE

**Wednesday, May 3 – Friday, May 5**

*Westin St. Francis on Union Square, San Francisco*

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**Director:** Michele Beal Bagneris, City Attorney, Pasadena

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# Wednesday—May 3

**9:00 a.m. – 6:00 p.m.** **REGISTRATION OPEN**
*Italian Room, Mezzanine Floor*

**11:45 a.m. – 1:00 p.m.** **LUNCH ON YOUR OWN**

**1:00 – 3:00 p.m.** **GENERAL SESSION**
*Grand Ballroom, Mezzanine Floor*

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

**Welcoming Remarks**
*Speaker:* Dennis J. Herrera, City Attorney, City and County of San Francisco

**Land Use and CEQA Litigation Update**
*Speaker:* Whitman F. Manley, Remy Moose Manley

**Administrative Records: The Foundation of Land Use and CEQA Challenges**
*Speakers:* Ginetta L. Giovinco, Richards, Watson & Gershon
David M. Snow, City Attorney, Yucaipa, Assistant City Attorney, Beverly Hills

**CEQA and the People's Voice: Developer Ballot Measures**
*Speakers:* Celia A. Brewer, City Attorney, Carlsbad
Catherine C. Engberg, Deputy City Attorney, Orinda and Saratoga

# Wednesday—May 3

(Continued)

**3:15 – 4:45 p.m.**

**GENERAL SESSION**

*Grand Ballroom, Mezzanine Floor*

*Moderator:* Michele Beal Bagneris, City Attorney, Pasadena

**FPPC Update**

*Speaker:* Rachel H. Richman, City Attorney, Rosemead, Assistant City Attorney, Alhambra and Santa Clarita

**Section 1090 Overview and Recent Developments**

*Speakers:* Jack C. Woodside, Senior Commission Counsel, Fair Political Practices Commission
Sukhi K. Brar, Senior Commission Counsel, Fair Political Practices Commission

**Recent Developments, Defenses and Strategies in Brown Act Litigation**

*Speakers:* Thomas B. Brown, City Attorney, St. Helena
Stephen A. McEwen, City Attorney, Buellton, Assistant City Attorney, Atascadero and Hemet, Deputy City Attorney, Placentia

**5:00 – 6:00 p.m.**

**New Lawyers Meet and Greet/Orientation *(fewer than 5 years of practice)***
**How to Get Involved with the City Attorneys' Department**

*Grand Ballroom, Mezzanine Floor*

*Facilitator:* Lauren B. Langer, Assistant City Attorney, Lomita and Hermosa Beach

**6:00 – 8:00 p.m.**

**Evening Reception: A Taste of San Francisco**

*Italian Room/Colonial Room, Mezzanine Floor*

# Thursday—May 4

**8:00 a.m. – Noon** **REGISTRATION OPEN**
*Italian Room, Mezzanine Floor*

**8:00 – 9:00 a.m.** **BREAKFAST**
*Italian Room/Colonial Room, Mezzanine Floor*

**9:00 – 10:30 a.m.** **GENERAL SESSION**
*Grand Ballroom, Mezzanine Floor*

*Moderator:* Christine Dietrick, City Attorney, San Luis Obispo

**Tips for Drafting Contracts**
*Speaker:* Daniel S. Hentschke, Attorney at Law

**Take It or Leave It: Pitfalls and Challenges of IT Contracts**
*Speakers:* Margarita Gutierrez, Deputy City Attorney, City and County of San Francisco
Rosa M. Sanchez, Deputy City Attorney, City and County of San Francisco

**Front End First Aid: Critical Care for Public Works Documents**
*Speakers:* Clare M. Gibson, Assistant City Attorney, Hercules
Michael F. Rodriguez, City Attorney, Gonzales and Soledad

**10:45 a.m. – Noon** **GENERAL SESSION**
*Grand Ballroom, Mezzanine Floor*

*Moderator:* Damien Brower, City Attorney, Brentwood

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

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

**12:15 – 2:00 p.m.** **BUSINESS LUNCHEON**
*California East/West, 2nd Floor*

**Department Business Meeting and Colleague Recognition**
- *President's Report – Gregory W. Stepanicich*
- *Department Bylaws Amendment – Gregory W. Stepanicich*
- *Director's Report – Michele Beal Bagneris*
- *Colleague Recognition – Department Officers*

**KEYNOTE ADDRESS**
*Speaker:* Ann M. Ravel, Former Commissioner, Federal Elections Commission,
Former Chair, Fair Political Practices Commission, Former Santa Clara County Counsel

# Thursday—May 4
(Continued)

**2:15 – 4:30 p.m.**

**GENERAL SESSION: Sharing Economy Issues**
*Grand Ballroom, Mezzanine Floor*

*Moderator:* Damien Brower, City Attorney, Brentwood

**Sharing Economy Overview**
*Speaker:* Rebecca L. Moon, Senior Assistant City Attorney, Sunnyvale

**Sharing Economy – A View from Sacramento**
*Speaker:* Rony Berdugo, Legislative Representative, Transportation, Communication, and Public Works, League of California Cities®

**Shared Rides – City and California Public Utilities Commission Perspectives**
*Speakers:* Michael N. Conneran, Hanson Bridgett
Liane M. Randolph, Commissioner, California Public Utilities Commission

**Audience Sharing of Experiences and Questions**

**Residential Rental Regulation Issues**
*Speakers:* Andrea S. Visveshwara, Assistant City Attorney, Emeryville
Kevin R. Heneghan, Senior Counsel, Policy, Airbnb

**Audience Sharing of Experiences and Questions**

**4:45 – 5:45 p.m.**

**CONCURRENT GROUP DISCUSSIONS**

- **Coastal Cities (Discussion of short term vacation rentals and the Coastal Act)**
  *Kent Room, 2nd Floor*
  *Facilitator:* Christi Hogin, City Attorney, Lomita, Malibu & Palos Verdes Estates

- **Housing and Homelessness Issues**
  *Georgian Room, Mezzanine Floor*
  *Facilitator:* Barbara E. Kautz, Goldfarb & Lipman

- **Mobilehome Parks**
  *Oxford Room, 2nd Floor*
  *Facilitator:* Sunny K. Soltani, City Attorney, Carson

- **Public Law Specialty Certification**
  *Olympic Room, 2nd Floor*
  *Facilitator*: Craig Labadie, Committee Chair, City Attorney, Albany

- **Solo and Small City Attorney Office Management**
  *Borgia Room, Mezzanine Floor*
  *Facilitator:* Kathleen A. Kane, City Attorney, Burlingame

**7:00 p.m.** **NO FORM 700 DINNER**

# Friday—May 5

**7:00 a.m. – 7:45 a.m.** **POWER WALK and HISTORIC CITY TOUR -** *Sponsored by Richards, Watson & Gershon*
*Georgian Room, Mezzanine Floor*

**7:45 a.m. – 8:45 a.m.** **BREAKFAST**
*Italian Room, Mezzanine Floor*

**9:00 a.m. – 10:15 a.m.** **GENERAL SESSION**
*Grand Ballroom, Mezzanine Floor*

*Moderator:* Christine Dietrick, City Attorney, San Luis Obispo

**Municipal Tort and Civil Rights Litigation Update**
*Speaker:* Walter C. Chung, Lead Deputy City Attorney, San Diego

**Proposition 64 Discussion / Cannabis Distribution and Delivery**
*Speakers:* Tim Cromartie, Legislative Representative, Public Safety, and Revenue and Taxation, League of California Cities®
Jeffrey V. Dunn, Best Best & Krieger

**10:30 a.m. – 12:15 p.m.** **GENERAL SESSION**
*Grand Ballroom, Mezzanine Floor*

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

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

*(MCLE Specialty Credit for Recognition and Elimination of Bias in the Legal Profession and Society)*
**Implicit Bias Gone Explicit – Managing the Public Workplace in a Changing Environment**
*Speaker:* Suzanne Solomon, Liebert Cassidy Whitmore

**Closing Remarks / Evaluations / Adjourn**

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# City Attorneys'

## Spring Conference

# Land Use and CEQA Litigation Update

**Wednesday, May 3, 2017 Opening General Session; 1:00 – 3:00 p.m.**

**Whitman F. Manley, Remy Moose Manley**

## Notes:

# CEQA AND LAND-USE UPDATE: OCTOBER 2016 – MAY 2017

Prepared by Whit Manley
Remy Moose Manley LLP
Sacramento, California

May 2017
[current as of April 4, 2017]

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## CEQA OPINIONS

### Scope of "Project"; Negative Declarations

*Aptos Council v. County of Santa Cruz* (2017) – Cal.App.5th – [slip op. dated March 30, 2017]

The Sixth District held that Santa Cruz County did not engage in "piece-meal" environmental review in adopting three ordinances amending different parts of its zoning ordinance. The court also held that the negative declaration prepared in connection with the ordinance amending development standards for hotels was adequate because whether the ordinance would alter development patterns was speculative.

Santa Cruz County embarked on an effort to overhaul its zoning ordinance. As part of this effort, in 2010 the county adopted amendments to the ordinance to allow for administrative approval of certain minor exceptions to zoning standards, such as reduced setbacks. In 2013, the county extended and expanded these provisions. Also in 2013, the county streamlined its process for approving exceptions to its sign standards. In 2014, the county revised its standards for hotels. Other zoning code amendments in the works addressed wireless communications facilities, permitted uses within various zoning districts, and revised agricultural standards. The petitioner sued, alleging that the county was engaged in piece-meal environmental review because the amendments had to be analyzed as a single project in one over-arching environmental analysis. The petitioner also alleged that the negative declaration adopted by the county to support the amendments to the hotel standards was inadequate. The trial court denied the petition. The petitioner appealed.

First, the petitioner argued the various amendments to the zoning code were, in fact, a single "project" under CEQA that had to be analyzed in a single program EIR, citing CEQA Guidelines sections 15168 and 15378. The court regarded this claim as raising a question of law that the court reviewed independently. The Court, relying on the Supreme Court's two-part test in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396, held that the three ordinances did not need to be analyzed as a single project. As the court explained, "[t]he key term here is 'consequence.' Thus, the issue is whether changing or reforming certain zoning regulations—for example, altering the density requirements for hotels and reducing the required number of parking spaces per hotel room—are reasonably foreseeable *consequences* of the other regulatory reforms challenged by [the petitioner], such as eliminating the need to obtain a variance for certain signs, or expanding administrative approval of minor exceptions to the entire county. We do not believe they are. . . . [T]he regulatory reforms operate independently of each other and can be implemented separately." (Footnote omitted, emphasis in original.) The court distinguished various cases in which piece-mealing was found because actions were functionally linked with one another. In this case, all the ordinances served the same, general objective: updating and modernizing its zoning ordinance. But the overarching goal was not analogous to development of a single, specific development project. Rather, the ordinances consisted of unrelated reforms in the service of a general goal. The approval of one ordinance did not beget the approval of another. Moreover, performing a single environmental analysis of the county's overarching goal, before even considering any amendments, would be "meaningless" because the county's proposal was not fixed and would evolve over time.

The petitioner argued the county also had an obligation to consider the cumulative effects of the ordinances. The court declined to reach this argument because the petitioner raised it only in its reply brief. Moreover, at the time the county considered the ordinances, "other regulatory reforms that may have cumulative impacts had not yet come to fruition. When future reforms are considered for environmental review, the cumulative impacts of all related reforms, as articulated in the CEQA Guidelines, will be examined."

Second, the petitioner challenged the negative declaration adopted to support the county's approval of amendments to development standards for hotels. The amendments reduced the county's existing hotel density requirement of 1,300 square feet per habitable room to 1,100 square feet per habitable room, eliminated a three-story height limit, and relaxed standards for required parking. The county's initial study/negative declaration concluded these amendments would not have environmental impacts because future hotel projects would still undergo review. The county took the position that there was no way to know the number of additional hotel rooms that might be authorized as a result of the amendments; rather, the impacts of additional rooms would be examined in the context of specific development proposals. The county surveyed owners of vacant land with zoning that authorized hotels, but none had applications on file, or disclosed plans to sell their land or to submit applications in the future.

The petitioner argued the negative declaration was flawed because it failed to account for the impacts of future development authorized by the amendments. The court acknowledged that, where a project may induce growth, the agency is not excused from performing environmental review simply because there is some uncertainty about what shape that future development may take. Rather, the agency must do its best to identify and analyze those impacts that are a reasonably foreseeable consequence of the project. "Thus, the issue is whether increased hotel developments, such as hotels proposed at higher densities than before, are a reasonably foreseeable consequence of the ordinance." The petitioner argued that the county "ignor[ed] its own stated reasons for pursuing the ordinance—to facilitate growth." The record did contain some evidence that the county adopted the ordinance in hopes of stimulating the development of hotels. But such hopes did not mean that hotel development was reasonably foreseeable. Moreover, the impacts of an increase in the number of hotel rooms could not meaningfully be analyzed except in the context of a specific proposal. Nor was there any evidence of imminent development; rather, the county investigated the plans of landowners with suitable zoning, and did not identify any reasonably foreseeable proposals. There was thus no evidence that the amendments would actually result in changed development patterns.

Finally, the court found that the petitioner had failed to carry its burden to show the existence of a "fair argument" of potentially significant impacts that would occur if county adopted the hotel ordinance. The petitioner cited evidence in the record suggesting that the ordinance would encourage development of higher-density hotels. But this evidence amounted to unsupported speculation. The county investigated whether increased development would result from the ordinance and concluded, based on this investigation, that no applications were forthcoming or foreseeable. Thus, "[a]t this point, environmental review of potential future developments would be an impossible task, because it is unclear what form future developments will take. The suggested environmental impacts are simply not reasonably foreseeable at this time, and evaluation of the impacts would be wholly speculative."

## Environmental Impact Reports

*East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281

The Third District held an EIR for an infill project was inadequate because it relied on General Plan level-of-service standards to conclude the project's traffic impacts on intersections within the city core would be insignificant.

A developer proposed a 336-unit residential development on an infill site in mid-town Sacramento. The city certified the EIR and approved the project. Neighbors sued. The trial court denied the petition. The neighbors appealed.

The neighbors argued the Draft EIR did not identify all the permits the project would need, citing a development agreement, revised zoning to increase the number of residential units, and a variance for driveways. The Court disagreed, noting that these approvals were described and analyzed in the Final EIR; the city provided notice of these approvals; such evolution of the project as it moved through the entitlement process was the norm; and the neighbors failed to show prejudice with respect to this evolution.

A proposal to develop an additional tunnel to provide expanded access to the site, while discussed, was not part of the project, and did not need to be included in the project description. Instead, the city merely approved studying the feasibility of the tunnel. Although the tunnel would serve the project, the tunnel was not essential, and the project could proceed without it. The city also approved a half-street closure, in order to divert project traffic onto adjacent streets that were less congested; this "modest change" did not constitute unlawful piece-meal review. Neither did a city council motion directing staff to delete a proposed parkway and interchange from the General Plan.

The neighbors challenged the EIR's analysis of toxic air contaminants, noting the site's proximity to railroad tracks, a freeway and an old landfill. Citing the California Supreme Court's decision in *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, the Court held that CEQA does not require an EIR to analyze the effects of the existing environment on future residents of the project and concluded that the neighbors failed to cite substantial evidence that the project would exacerbate health risks.

The neighbors also argued the project was inconsistent with various General Plan policies pertaining to transportation, the environment, and noise. Those policies, however, had either been amended such that they no longer applied to the project, or the city had discretion to find the project consistent with the General Plan as a whole despite tensions with certain policies, or the policies cited by the neighbors were couched in terms such that strict compliance was not required.

The neighbors argued the EIR's traffic analysis was inadequate in various respects. The Court disagreed, with one significant exception. Specifically:

- The city properly relied on Public Resources Code section 21159.28 to streamline its analysis of the project's impact on the regional transportation network, including freeways in the region. The record supported the city's conclusion that the project was consistent with SACOG's MTP/SCS program EIR.

- The city had discretion, pursuant to its guidelines, to focus on the project's impacts on intersections, rather than on road segments.

- The re-categorization of a roadway from a "major collector" to a "local collector," and the corresponding shift in the applicable level-of-service standard, did not require recirculation of the Draft EIR because the volume of traffic remained the same.

- A traffic engineer hired by the neighbors claimed the EIR's traffic study omitted certain, key road segments, but as noted the city had discretion to focus on intersections, and in any event the neighbors failed to show prejudice in light of the fact that the traffic study analyzed intersections on these same roadways.

- The city's mitigation measures, which called for monitoring and re-timing the signal at a key intersection and required the developer to pay "fair share" fees for traffic improvements, were adequate.

The neighbors challenged the city's reliance on General Plan traffic policies to establish thresholds to determine the significance of the project's traffic impacts. Those policies differed depending on where in the city the streets were located; those in the downtown/midtown "core" could tolerate greater congestion (LOS E or F) than those located elsewhere. The EIR concluded that traffic impacts would not be significant in light of these policies. The Court held that was not good enough; the EIR had to consider whether traffic impacts would be significant, despite the project's consistency with General Plan traffic standards. The traffic study showed traffic would degrade at certain intersections from LOS E or F, and found that impact to be significant or insignificant, depending on the location of the intersection. But the "EIR contain[ed] no explanation why such increases in traffic in the core area are not significant impacts, other than reliance on the mobility element of the general plan that permits LOS F in the core area during peak times." The EIR's reference to "community values" and to the General Plan did not provide a sufficient explanation for why the threshold differed. Thus, the EIR did not contain substantial evidence to support the finding of no significant impacts with respect to certain intersections in the core area where LOS would degrade to E or F.

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*Mission Bay Alliance v. Office of Community Investment and Infrastructure* (2016) 6 Cal.App.5th 160

The Golden State Warriors proposed to construct an 18,500-seat capacity arena in the Mission Bay South area of San Francisco. The Governor certified the arena under AB 900. The Office of Community Investment and Infrastructure – the successor to the city's redevelopment agency – prepared and certified a subsequent EIR. The subsequent EIR tiered off two prior EIRs prepared in 1990 and 1998 for the Mission Bay South redevelopment plan. These plans called for the transformation of the neighborhood from a disused industrial area into a medical and research complex. In November 2015, OCII approved the project. The Mission Bay Alliance – a coalition seeking to locate the arena elsewhere, rather than amidst the area's burgeoning hospital and research facilities (notably, the newly opened UCSF medical center) – sued. The trial court denied the petition. The alliance appealed.

In a lengthy opinion, the First District affirmed. First, the alliance argued that the city had improperly "scoped out" certain topics as adequately addressed in the prior EIRs. With respect to land use impacts, the alliance argued the record contained a "fair argument" that the project would adversely affect the community character in the vicinity of the arena. The Court held, however, that the "fair argument" standard did not apply; rather, "[s]ubstantial evidence is the proper standard where, as here, an agency determines that a project consistent with a prior program EIR presents no significant, unstudied adverse effect." OCII had a "reasonable basis" to conclude the arena would not interfere with other uses in the area. Similarly, the initial study explained why an area that had been excavated after the 1998 program EIR had been prepared, and subsequently filled with water, did not contain significant biological resources. The initial study, and responses to comments in the Final SEIR, also explained why there would be no new significant impacts with respect to the clean-up of hazardous substances in soil at the site, or to nearby parks.

With respect to transportation, the EIR analyzed traffic and transit impacts under various scenarios. The analysis took into account implementation of a "Transit Service Plan" (TSP) as a component of the project that would be implemented for larger events at the arena. The alliance argued that this approach ran afoul of the First District's decision in *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, which held that an agency violated CEQA when it cited project components that served to reduce impacts, and thereby avoided analysis of the project's impacts and the identification of mitigation measures. In this case, the Court observed: "Arguably, some components of the TSP might be characterized as mitigation measures rather than as part of the project itself. Any mischaracterization is significant, however, only if it precludes or obfuscates required disclosure of the project's environmental impacts and analysis of potential mitigation measures." In this case, the characterization of the TSP as part of the project, rather than as a mitigation measure, did not interfere with the identification of the transportation consequences of the project or the analysis of measures to mitigate those consequences. The SEIR analyzed the project's transportation impacts both with and without implementation of the TSP, and applied the same significance thresholds to both scenarios. Because substantial evidence in the record showed that adequate funding would be available to implement the TSP, OCII was not required to consider other funding sources. Moreover, because the accompanying Transportation Management Plan included specific performance standards, the Warriors might have to provide additional funding if necessary to meet those standards. Mitigation measures requiring the Warriors to "work with" regional transit agencies to provide necessary additional service were similarly adequate, given the city's track record of working with these transit agencies to expand service to accommodate regional transit demand from events at nearby AT&T Park and elsewhere in the city. The record also showed that expanded regional transit service was available from a variety of sources, including the city's ½-cent sales tax, fare-box recovery, and disbursements from the Metropolitan Transportation Commission.

With respect to noise, the SEIR's significance thresholds focused on the extent to which the project would cause an incremental increase on noise levels, above existing, ambient noise. The threshold varied depending on the nature of the noise source (construction, transportation, crowds, and fixed sources) and existing noise levels (the higher the level of ambient noise, the lower the threshold). The Court held this approach was within OCII's discretion. The SEIR also contained sufficient information on the health effects of noise.

The alliance attacked the SEIR's analysis of the project's impact on greenhouse gas emissions (GHG) and climate change. The SEIR concluded this impact would be less than significant because the project was consistent with the city's adopted "GHG Strategy." According to the alliance, that was not enough; the SEIR also had to quantify both the project's GHG emissions, and the GHG emission reductions that would occur as a result of implementing the strategy. The Court disagreed, noting that CEQA Guidelines concerning GHG emissions authorize an agency to "[r]ely on a qualitative analysis or performance based standards." (CEQA Guidelines, § 15064.4, subd. (a).) "Given the nature of greenhouse gas emissions—gases that trap heat in the atmosphere, contributing to global climate change but with little immediate perceptible effect on the locale from which they emanate—a project's compliance with an area-wide greenhouse gas reduction plan may be more useful in determining the significance of those emissions on a global scale than quantification of its incremental addition to greenhouse gas emissions." In *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, the California Supreme Court endorsed this approach as a potential pathway to compliance.

The Court ruled that the SEIR was not required to study the impact of wind at on-site, publicly-accessible open space. The SEIR's inclusion of this information for disclosure purposes did not mean the impact was cognizable under CEQA.

OCII had discretion to determine the appropriate significance threshold to assess cancer risks associated with toxic air contaminant emissions. The record included guidance indicating various thresholds that had been deemed acceptable, and the threshold used in the SEIR was consistent with this guidance.

On non-CEQA claims, the alliance argued the project exceeded allowable square footage limits for retail uses. The Court disagreed, insofar as the claim rested on a misinterpretation of the meaning of "retail" under the operative redevelopment plan. The Court also upheld approval of a "place of entertainment" permit under the city's police code, finding that substantial evidence supported the arena's compliance with the code's requirements.

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*Residents Against Specific Plan 380 v. County of Riverside* (2017) – Cal.App.5th – [slip op. dated February 14, 2017, ordered published March 15, 2017]

The Fourth District upheld an EIR prepared for a master plan community, holding that revisions to the project that occurred after the county certified the EIR did not require recirculation or invalidate the approvals or notice of determination.

The project consisted of a master-planned community with seven planning areas containing medium-density residential housing, mixed uses, commercial retail, and dedicated open space on 200 acres of undeveloped land in Riverside County. Planning area 6, the mixed use area, was analyzed as potentially providing for the development of a Continuing Care Retirement Community ("CCRC") for seniors. The county prepared and, in December 2012, certified an EIR and voted tentatively to approve the project. In November 2013, the project returned to the county with certain modifications, and the county approved it. The petitioners sued. The trial court denied the petition. The petitioners appealed.

First, the petitioners argued the county approved the project in December 2012, when the county certified the EIR and voted to approve the project. The petitioners claimed the county erred because the developer and the county thereafter substantially modified the plan. The court rejected this claim. The record made clear that the county's approval in December 2012 was only *tentative*. The modifications brought back to the Board of Supervisors in November 2013 were designed to address directions provided by Board members at the December 2012 hearing. The final vote, and actual approval, occurred in November 2013, not December 2012. That was also when the county adopted CEQA findings, an override, and an MMRP.

Second, the court concluded that the notice of determination posted by county substantially complied with the informational requirements of CEQA, despite conceded errors in the notice's description of the project, stating: "We conclude the notice's description of the project is close enough to the project as approved that it provided the public with the information it needed to weigh the environmental consequences of the [c]ounty's determination, seek additional information if necessary, and intelligently decide whether to bring a legal challenge to the approval within the 30-day limitations period." In any event, the petitioners could not show prejudice because they filed their petition well before the statute of limitations had run.

Third, the petitioners argued that the county had to recirculate the draft EIR following the changes to the project that occurred after the December 2012 Board hearing. The court disagreed. The differences between the plan described in the final EIR and as approved focused on the allocation and arrangement of uses within the project site, not the kinds of uses permitted or the overall extent or density of the proposed development. The footprint of the project remained the same. Because the overall number of residential units and square footage of commercial development did not increase, substantial evidence supported the county's conclusion that the generation of traffic trips would be no greater than disclosed in the EIR. Similarly, moving uses within the project would cause no greater impacts on adjacent biological resources. The record did not support the petitioners' claim that relocated residential and mixed uses within the site would result in new, significant noise or land-use impacts. For these reasons, substantial evidence supported the county's decision not to recirculate the draft EIR.

Fourth, the petitioners argued the EIR did not provide an adequate analysis of the air quality, noise, and traffic impacts that would occur as a result of development in the mixed use planning area. The analysis focused on development of a CCRC. According to the petitioners, the EIR's approach erred because, although a CCRC was one permitted use of this area, the plan did not *require* the area be used for building a CCRC. Thus, the developers could pursue other permitted commercial or residential land uses, and those uses might generate substantially more traffic than a CCRC and, as a consequence, have greater air quality and noise impacts as well. The court rejected this claim, stating that the county's decision to focus on the impacts of the CCRC was based on substantial evidence. If the developer decides not to build a CCRC and seeks to pursue other permitted options, it could do so only if the proposed uses were found to be compatible with adjacent uses, and if the county found that no additional impacts would occur. For this reason, the county "could reasonably conclude in view of those requirements that it was not necessary to undertake an environmental analysis of what are merely possible development schemes. . . . The agency merely decided to limit the analysis to the proposed and likely development while imposing restrictions that would limit the scope of potential changes to the development plan."

Finally, the court ruled that the EIR adequately considered the specific suggestions for mitigating the project's air quality and noise impacts. The South Coast Air Quality Management District proposed revising air quality mitigation to require the use of cleaner construction equipment. The EIR responded that this proposal was infeasible because lower-emission equipment might not be available when needed. The City of Temecula proposed that the project comply with the 2010 Energy Code, rather than the 2008 code cited in adopted mitigation; the EIR's response noted, however, that the project had to comply with whatever code was in place at the time of construction. Similarly, although Temecula proposed that the project incorporate specific requirements of the Green Building Standards Code, the county acted within its discretion in committing to an overall performance standard, rather than a prescriptive list of requirements. The petitioner proposed various measures to reduce the project's significant traffic noise impacts, but the county was not required to respond because these proposals were made at the December 2012 hearing, more than a year after the comment period had closed. Moreover, the county was justified in declining to adopt these noise mitigation measures because they required electric construction equipment that may not be available or duplicated existing requirements.

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*Banning Ranch Conservancy v. City of Newport Beach* (2017) – Cal.5th – [slip op. dated March 30, 2017]

The California Supreme Court ruled that the EIR prepared for a project located in the coastal zone was deficient because it did not flag areas on the property that would likely be found by the Coastal Commission to constitute "environmentally sensitive habitat areas" (ESHA) under the Coastal Act, and therefore did not consider mitigation measures and alternatives designed to reduce impacts on those areas.

Newport Banning Ranch (NBR) proposed the Banning Ranch project on a 400-acre property located in the coastal zone. The project proposed to develop 1,375 residential units, 75,000 square feet of retail uses, and a 75-room hotel; roughly three quarters of the site would be preserved as open space, and historic oil operations would be consolidated and remediated. The site was in the coastal zone, and therefore required a Coastal Development Permit (CDP) from the Coastal Commission. The EIR prepared by the City of Newport Beach acknowledged the Coastal Commission's jurisdiction, but did not map ESHA on the property; instead, the EIR stated that the Commission would make the determination regarding where ESHA was located in considering NBR's CDP application. The City certified the EIR and approved the project. Banning Ranch Conservancy sued, alleging (1) the EIR was inadequate, and (2) the city had failed to adhere to a policy in its General Plan. The trial court rejected the Conservancy's CEQA claim, but agreed that the city had not complied with its General Plan policy. The Fourth District rejected both the CEQA and General Plan consistency claims. The Supreme Court granted the conservancy's petition for review.

The Supreme Court characterized the "principle issue" as "whether the Banning Ranch EIR was required to identify potential ESHA and analyze the impacts of the project on those areas." The Court held that CEQA imposed such an obligation on the city, and that the city's failure to do so was "a procedural question subject to de novo review." CEQA directs the lead agency to integrate its environmental review with the permitting and review processes being

carried out by other agencies. In this case, the city acknowledged the Coastal Commission's permitting authority, but did not adequately integrate its CEQA review with the requirements of the Coastal Act, despite comments from Coastal Commission staff and others asking that the city take into account the potential presence of ESHA on the property. This, in turn, meant that the EIR did not consider alternatives or mitigation measures designed to avoid or lessen impacts on ESHA. "[T]he regulatory limitations imposed by the Coastal Act's ESHA provisions should have been central to the Banning Ranch EIR's analysis of feasible alternatives." The EIR did not identify which areas might qualify as ESHA, or flag specific areas that had been delineated as ESHA in prior Commission proceedings. "As a result, the EIR did not meaningfully address feasible alternatives or mitigation measures. Given the ample evidence that ESHA are present on Banning Ranch, the decision to forego discussion of these topics cannot be considered reasonable." (Footnote omitted.)

The Court acknowledged that the Coastal Commission would ultimately make the determination whether ESHA was present. That fact, however, did not relieve the city of the obligation to include in the EIR a prediction of where the Commission would find ESHA to be located: "[A] lead agency is not required to make a 'legal' ESHA determination in an EIR. Rather, it must discuss potential ESHA and their ramifications for mitigation measures and alternatives when there is credible evidence that ESHA might be present on a project site. A reviewing court considers only the sufficiency of the discussion." (Footnote omitted.)

The city argued that identifying potential ESHA would be speculative, because only the Commission could make that determination. The Court disagreed. Two small areas on the property had already been designated ESHA in a prior proceeding. A biologist had mapped potential ESHA on the property, and Coastal Commission staff had offered to assist, but the city declined. Thus, the city "did not use its best efforts to investigate and disclose what it discovered about ESHA on Banning Ranch." The city could not deflect this obligation by pointing to the permitting jurisdiction of the Coastal Commission.

That did not mean the city had to accept the ESHA designations and related measures proposed by Commission staff. An agency could disagree with conflicting views, even those advanced by other agencies. But "an EIR must lay out any competing views put forward by the lead agency and other interested agencies. [¶] . . . [B]oth the commissioners and interested members of the public are entitled to understand the disagreements between commission staff and the [c]ity on the subject of ESHA. . . . Rather than sweep disagreements under the rug, the [c]ity must fairly present them in its EIR. It is then free to explain why it declined to accept commission staff suggestions." Although EIR appendices and other documents in the record addressed these issues, this "fragmented presentation" was inadequate, and did not reflect a good-faith effort at full disclosure. The EIR's detailed analysis of biological resources did not suffice, given the project's location in the coastal zone.

By certifying an inadequate EIR, the city abused its discretion. This error was prejudicial because it resulted in inadequate evaluation of project alternatives and mitigation measures, and deprived the Coastal Commission of information relevant to its permitting decision.

The Court reversed the Court of Appeal's judgment. The Court did not address, and "express[ed] no view," on the General Plan consistency claim.

**Supplemental Review**

*San Diegans for Open Government v. City of San Diego* (2016) 6 Cal.App.5th 995

The Fourth District ruled that CEQA did not require the city to provide an appeal to the city council of the planning department's "substantial conformance review" of modifications to an approved planned development permit.

In 1997, the city certified a program EIR and approved a high-density, mixed-use retail, commercial, and industrial business park on 242 acres. In 2000 and 2002, the city prepared, respectively, an addendum and mitigated negative declaration, and amended the plan to include 1,568 residential units. In 2012, the city approved a planned development permit for several hundred units, subject to carrying out adopted mitigation measures. In November 2013, the developer applied to the city to modify the approved design; the changes included a slight increase in building heights, a shift in the mix of units, and a reduction in parking. Various city departments performed "substantial conformance review" (SCR) to determine whether the developer's proposal was consistent with the city's approved plans. In January 2014, the planning department approved the project revisions, subject to appeal to the planning commission. The petitioner appealed the decision, arguing that the modifications were not minor, and that the SCR process was inappropriate. Following a hearing, the commission denied the appeal and upheld the approval. The petitioner appealed the commission's decision to the city council. The city refused to process the appeal based on its view that the commission's action was not appealable. The petitioner sued. The trial court denied the petition. The petitioner appealed.

According to the Court, "[t]he sole issue on appeal is whether plaintiffs are entitled to an administrative appeal of the SCR decision to the City Council." The petitioner argued that Public Resources Code section 21151, subdivision (c), required such an appeal. That statute states: "If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any." According to the petitioner, because planning staff and the commission were not elected, the city had to allow an appeal to the council. The Court disagreed. Staff and the commission did not certify an EIR or approve a negative declaration or mitigated negative declaration. Nor did they determine that the project is not subject to CEQA. The city council had already determined that the entire master plan was subject to CEQA. The SCR decision did not alter that determination. Rather, the SCR process confirmed that the project remained subject to the city's previously-adopted mitigation measures. The fact that the SCR decision involved discretion did not, in of itself, trigger a right to a city council appeal. The municipal code, which contained a right of appeal paralleling the language of section 21151, subdivision (c), did not alter that conclusion.

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*Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237

The First District Court of Appeal upheld the decision of the San Francisco Municipal Transportation Agency ("Muni") to approve a contract to complete construction of the "T-Line Loop" – an extension of the City's light-rail system through the Dogpatch neighborhood on the

City's southeast waterfront. The Court held that substantial evidence supported Muni's conclusion that supplemental environmental review was not required.

In 1998, Muni issued an EIR/EIS covering expansion of the City's light-rail system. The analyzed improvements included construction of an "Initial Operating Segment" – an extension of light rail down Third Street, connecting Mission Bay and Dogpatch with the City's downtown transit system. By 2003, Muni had constructed much of this segment, including portions of a loop track at the end of this extension. Muni did not complete all components of the Third Street Loop, however, due to budget constraints. Operations commenced in 2007. In 2013, Muni received a Federal grant to complete the Loop. Muni asked the City's Planning Department to determine whether the 1998 EIR still "covered" the Loop, particularly in light of increased development in Mission Bay, and the proposal to construct an arena for the Golden State Warriors on Third Street. The Planning Department concluded that supplemental review was not required because the 1998 EIR had anticipated such growth. In 2014, Muni approved a contract to construct the remaining improvements to complete the Loop. The committee sued. The trial court denied the petition. The committee appealed.

The Court considered the standard of review applicable to review of Muni's threshold decision to rely on the rules governing supplemental environmental review under Public Resources Code section 21166, rather than treating the proposed contract as a new, stand-alone project. Citing *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, the Court held that the petitioner had the burden of proof to show that Muni's decision to rely on section 21166 was not supported by substantial evidence.

The committee argued the 1998 EIR did not analyze the impacts of the 2014 construction contract and, therefore, the "fair argument" standard of review applied. The Court disagreed. The 1998 EIR had identified the Loop as part of the "Initial Operating Segment." These passages, and other documents in the record, showed that the "Loop" approved in 2014 was the same "Loop" described and analyzed in the 1998 EIR. Case law applying the "fair argument" standard of review involved instances in which the prior EIR either did not address the latter activity, or was a "program EIR" prepared under Public Resources Code section 21094 for which latter, site-specific review was contemplated. The 1998 EIR, by contrast, was a project-specific EIR, and specifically considered the impacts of the Loop as part of the project.

The committee argued that, even if the 1998 FEIR mentioned the Loop, its analysis was insufficiently detailed to pass CEQA muster. The Court rejected this argument as a belated attack on the 1998 EIR.

Substantial evidence supported Muni's decision not to prepare a further EIR. Muni had twice asked the Planning Department whether there were substantial changes to the project, or to the circumstances surrounding the project, necessitating further analysis. Both times, the Planning Department confirmed that the project had not changed, and that although surrounding growth had occurred or been proposed, the underlying EIR had already assumed substantial growth would occur in the area. A separate analysis prepared by the Federal Transit Administration ("FTA") under NEPA provided further support that no new or more severe impacts would occur.

Finally, the committee argued that the City failed to follow required procedures in making its determination that no further CEQA review was required. The Court was unmoved. CEQA does not establish a particular procedure that must be followed to make a determination

under section 21166. In particular, no initial study or public hearing is required. Moreover, the FTA had circulated its NEPA analysis, and a Board of Supervisors subcommittee had held a hearing; the committee had participated in both proceedings.

## LAND-USE OPINIONS

### School District Preemption of Local Zoning

*San Jose Unified School Dist. v. Santa Clara Office of Education* (2017) 7 Cal.App.5th 967

The Sixth District Court of Appeal held that Government Code section 53094 does not authorize a county Board of Education to override local zoning with respect to the use of property for a proposed charter school.

Rocketship Education proposed to locate a charter school on property owned by the city of San Jose. The city's General Plan designated the site for parks, habitat, or other open space uses. The city's zoning ordinance zoned the site for "light industrial" uses. Neither designation allows schools. At Rocketship's request, the county Board of Education adopted a resolution pursuant to Government Code section 53094 exempting the property from the city's General Plan and zoning ordinance. The school district and an adjacent property own sued. The trial court granted the petition, ruling that only the school district – not the county Board of Education – had authority to adopt such a resolution. The county Board of Education appealed.

Government Code section 53094 states in part: "[The governing board of a school district . . . by a vote of two-thirds of its members, may render a city or county zoning ordinance inapplicable to a proposed use of property by the school district." The issue was whether "governing board of a school district" referred to all agencies involved in public education, or more narrowly to local school districts. The statute did not define these terms. Section 53094 was adopted in order to immunize school districts from local interference, given the State-wide interest in ensuring uniformity in school construction standards. Here, the statute was being invoked by the county Board of Education in support of a charter school. Even for charter schools, however, Education Code section 47614 provides that school districts – not county Boards of Education – are responsible for ensuring that adequate facilities are available for county authorized charter schools. Evidence that some school boards may have invoked section 53094 was too equivocal to persuade the Court to adopt another construction of the statute.

### Local Regulation of Billboards on State Highways

*D'Egidio v. City of Santa Clarita* (2016) 4 Cal.App.5th 515

The Second District Court of Appeal ruled that the Outdoor Advertising Act does not preempt local regulation of billboards, and that cities and counties therefore have discretion to adopt billboard regulations that are more stringent than the Act.

A property owner erected a billboard next to the freeway to advertise homes the owner was developing on the property. At the time, the site was unincorporated. The county's sign ordinance allowed such signs, but only for on-site home sales, and not for off-site goods and services. D'Egidio bought the property and, in 1987, leased out the sign for advertising of off-site goods and services. The city annexed the site in 1990. The city adopted the county's sign

ordinance, and amended the ordinance from time to time thereafter; ultimately, the city's ordinance prohibited such signs unless they were grandfathered under the county's ordinance; nonconforming signs had to be removed within five years. In 2014, the city sent the owners a letter directing them to remove the sign by 2019. D'Egidio sued. The city filed a cross-complaint. The trial court granted the city's motion for summary judgment. D'Egidio appealed.

The primary issue on appeal was whether the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.) preempted the city's authority to adopt and enforce its code. Section 5270 states that the Act is "exclusive of all other regulations for the placing of advertising displays within the view of the public highways of this state in unincorporated areas." Although section 5270 on its face seems to supplant local control, other sections in the Act provide that cities and counties have discretion to adopt regulations that go beyond the Act. The Court concluded that the Legislature intended that local agencies would retain the authority to adopt regulations that were more restrictive than the regulations under the Act. The Act's legislative history supported this conclusion. Nor was there sufficient reason under the statute to differentiate between incorporated or unincorporated areas. Thus, cities and counties have discretion to adopt and enforce regulations as or more restrictive than those in the Act.

D'Egidio argued its billboard was legal. The Court disagreed. The sign became unlawful in 1987, when D'Egidio leased it out for off-site advertisers. The sign ceased to be lawfully erected at that time.

D'Egidio argued that, under section 5216.1, there was a "rebuttable presumption" that the sign was lawful because it had been in place for more than five years, and the owner had not received notice of the illegality of the sign. Here, the sign had been in place, and used for off-site advertising, for more than 20 years before D'Egidio received such a notice. The Court rejected this argument. The "rebuttable presumption" had the effect of placing the burden of proof on the city to show the sign was not lawfully erected. The city met that burden. The city was not barred by estoppel or laches from obtaining summary judgment. The trial court did not err in awarding the city its attorneys' fees in an action to abate a nuisance.

**Planning and Zoning Law – General Plan Consistency**

*Orange Citizens for Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141

The Supreme Court ruled a city abused its discretion in finding a project to be consistent with its general plan, where the face of the plan showed a different land-use designation for the subject property. The Court rejected attempts to point to a decades old "recommendation" to amend the plan, where that recommendation, although seemingly approved by the council at the time, never found its way into the plan itself.

In 1973, the city adopted the "Orange Park Acres Specific Plan." The city council's approving resolution endorsed "recommendations" of the planning commission. One of the commission's recommendations was to designate the property at issue as "low-density residential," rather than as open space. The published text and maps in the plan continued to show the area as "open space." In 2007, Milan (the property owner) submitted a plan to develop the property for low-density residential sues. Milan's application requested a General Plan amendment and rezone. The EIR showed the property's existing General Plan designation as "open space." In 2009, Milan's attorney exhumed the planning commission's 1973 resolution recommending rezoning the property for residential uses. In 2010, the city adopted a new

General Plan; that plan referred readers to various adopted specific plans, including the specific plan for Orange Park Ares. The 2010 General Plan included a land-use map showing the property as "open space." In 2011, the city certified the EIR for Milan's project and adopted a general plan amendment changing the land-use designation to match up with the commission's 1973 recommendation (low-density residential). A referendum petition was launched. While signatures were being gathered, the city and Milan took the position that the outcome of the vote was irrelevant, because the Orange Park Acres plan already designated the site for residential uses, and the amendments adopted by the council in 2011 were unnecessary. Both sides sued; Milan and the city claims that the project could go forward regardless of how the vote turned out; and the citizens claimed that the project was inconsistent with the General Plan's open-space designation. The trial court ruled in favor of Milan and ordered the referendum off the ballot. The citizens filed a writ, and the Court of Appeal granted the citizens' request to stay the trial court's order. The referendum appeared on the ballot in November 2012; 56% of the voters rejected the general plan amendment. In 2013, the Court of Appeal ruled that, in light of ambiguities regarding the designation of the property, deference to the city's construction of the plan was appropriate, and the general plan amendment subject to the referendum was unnecessary for the project to be approved by the council. The Supreme Court granted review.

Milan argued the residential designation was established in 1973, and had never been disturbed. Under this theory, the voters' rejection of the 2011 general plan amendment merely preserved the status quo of the property as zoned for open space and residential development. The citizens' disagreed, noting that throughout the city's consideration of the project, the publicly available version of the general plan showed the property as "open space"; thus, the voters' rejection of the 2011 general plan amendment meant that the property remained open space.

The Court acknowledged that its review of the city's general plan consistency determination was entitled to deference. Here, the city found that the project was consistent with the plan. That finding, however, was contingent on the city's 2011 amendment of the plan, and that amendment was rejected by the vote on the referendum.

The plan in place at the time included "an unambiguous designation of the [p]roperty as open space." "With such a specific land use designation for the [p]roperty, and without any competing designations, policies, or extant amendments to the contrary, no reasonable person could conclude that the [p]roperty could be developed without a general plan amendment changing its land use designation." The city's finding, based on the planning commission's 1973 recommendation that never found its way into the plan itself, was an abuse of discretion. "The 1973 planning commission amendment authorizing residential development never became integrated into the publicly available [Orange Park Acres Specific] Plan, let alone the 2010 General Plan. [Citations.] Any reasonable person examining the documents publicly available in 2010 would have concluded that the OPA Plan was consistent with the General Plan map designating the Property as open space." Moreover, the general plan, as adopted by the city in 2010, did not purport to refer to other documents, such as the OPA plan, to determine permitted uses; for this reason, the designation lurking hidden in the OPA plan was irrelevant. The Court therefore reversed the Court of Appeal's decision.

**Constitutionality of Land-Use Initiative; Brown Act**

*Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194

The Fourth District ruled the Town of Apple Valley violated the Brown Act by approving a memorandum of understanding in which Walmart committed to pick up the cost of a special election, because neither the agenda nor its accompanying packet mentioned the MOU. The Court also ruled that the land-use initiative at issue did not violate California Constitution article II, section 12, because the initiative assigned powers and duties not to "Walmart," but to the property's "owner" and the project's "developer."

In 2013, the town adopted resolutions (1) calling for a special election allowing the voters to approve a proposed specific plan, (2) providing for ballot arguments on the measure, and (3) approving a memorandum of understanding ("MOU") accepting a gift from Walmart to cover the cost of the special election. The proposed specific plan authorized a 30-acre commercial development, to be anchored by a Wal-Mart supercenter. The council agenda identified the action as ""Walmart Initiative Measure," but did not list the proposed resolutions or specific plan. The phrase "Walmart Initiative Measure" also referred to an earlier initiative measure approved by the town council in 2011 that had subsequently been ruled void. Hernandez sent a letter stating the town had violated the Brown Act and demanding a cure. The town declined. Hernandez sued. The trial court granted Hernandez' motion for summary judgment. The town and Walmart appealed.

The Court of Appeal ruled the town had violated the Brown Act because neither the agenda nor the attached agenda packet said anything about the MOU. This MOU allowed the town to accept a gift from Walmart in order to pay for the special election. Walmart had proposed to make this gift after the town had posted the agenda, so the hearing itself was the first time anyone knew about the proposal. The agenda item listed only the "Walmart Initiative Measure" and the direction to be given to staff would be discussed at the meeting. The agenda packet included a summary of the resolutions and the initiative. None of these documents identified the MOU as an "item of business" the town council would consider. According to the Court, "[t]his is troublesome as it is conceivable this was a major factor in the decision to send the matter to the electorate." The town therefore violated the Brown Act.

Because the item was likely to return to the town council after the town cured its Brown Act violation, the Court went on to consider whether the initiative violated article II, section 12, of the California Constitution. That section states: "No amendment to the Constitution, and no statute proposed by the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." Hernandez argued that, although the initiative did not name Walmart, the initiative violated this provision because Walmart was the universally acknowledged beneficiary of the initiative, and the various functions, powers and duties established by the specific plan could be carried out only by Walmart. Rather than naming "Walmart," the initiative used such terms as "developer" and "owner." The "developer" and "owner" referred to whomever had the power to develop the property and the duty to obtain the proper permits and approvals. The initiative did not assign these powers to Walmart. After all, Walmart could sell the property. As the Court explained, "[i]f we were to extend article II, section 12 as requested by Hernandez … , any land-use initiative would be invalidated as one only would need to establish the company who intended to

develop the property or owned the property, even though the [i]nitiative itself makes no reference to the entity. We do not find anything in the legislative history or the language of the statute that article II, section 12 was intended to be this broadly interpreted. As such, we find that the Initiative does not violate article II, section 12."

**Coastal Act; Affordable Housing; Density Bonuses**

*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927

The Second District held that a city had discretion to deny a project in the coastal zone as inconsistent with Coastal Act policies, notwithstanding the fact that the project qualified for density bonuses and waivers of height and set-back restrictions due to the inclusion of affordable housing. Thus, the Court held that the Housing Accountability Act (HAA), the Mello Act and the Density Bonus Act did not override the agency's discretion to deny a project under the Coastal Act.

The city planning department approved a 15-unit project in the Venice area in the coastal zone. The project included low-income units, and thus qualified for more density and greater heights than authorized under applicable zoning. Neighbors appealed to the city's planning commission, claiming the project was too tall and intense for its surroundings. The commission denied the permit based on its finding that the project was inconsistent with Coastal Act policies due to its size, height, bulk and scale. The city council affirmed the commission's denial. Kalnel – the developer – sued. The trial court rejected the lawsuit based on its view that Coastal Act policies trumped the HAA, the Mello Act and the Density Bonus Act – the three laws that authorized the bonus units. Kalnel appealed.

The Court of Appeal affirmed. First, as to the claim under the Housing Accountability Act, Government Code section 65589.5, subdivision (m), states that appellate review under the HAA must be sought by filing a writ petition within 20 days of the trial court's order (with the potential for extensions granted by the trial court for good cause). Here, the trial court ruled the city had violated the HAA, but denied relief under the Coastal Act. Kalnel did not file a writ petition seeking appellate review of that order. The Court of Appeal therefore had no jurisdiction to consider Kalnel's HAA claim.

Second, as to Kalnel's claim under the Density Bonus Act, Government Code section 65915, subdivision (m), states that the statute "does not supersede or in any way alter or lessen the effect or application of the [Coastal Act]." Given this clear language, the Coastal Act took precedence. Thus, section 65915 required local agencies to grant density bonuses to qualifying projects, *unless* doing so would violate the Coastal Act.

Third, the interrelationship between the Coastal Act and the Mello Act (Gov. Code, § 65590) was less clear cut. The Mello Act states that it applies in the coastal zone. (Gov. Code, § 65590, subd. (a).) Kalnel argued that this meant an agency had to grant a qualifying project a density bonus, even if doing so would violate the Coastal Act. The Court disagreed, reasoning that under Public Resources Code sections 30007.5 and 30009, the Legislature has directed that the Coastal Act should be construed in the manner that is most protective of coastal resources. The Court then explained: "Which interpretation is most protective of coastal resources? One that requires Mello Act housing even if it blocks coastal access, intrudes into environmentally sensitive areas, or is visually incompatible with existing uses, or one that requires application of the Mello Act's affordable housing requirements within the coastal zone so long as those housing

projects abide by the Coastal Act's overall protective provisions? Remembering the Legislature's statements that protecting coastal resources is a paramount concern because those resources are of vital and enduring interest, it seems clear that the latter interpretation must prevail." Thus, the project was still subject to the Coastal Act, and the city had discretion to disapprove the project based on its inconsistency with Coastal Act policies, even though the project's affordable housing satisfied the Mello Act.

The city did not need to adopt a finding under Public Resources Code section 30604, because that section requires such a finding only where the agency reduces a project's density, not where, as here, the agency disapproves a project in its entirety. Moreover, the record showed the commission's concern focused on visual compatibility, not density.

Finally, Kalnel argued the city abused its discretion because the project was consistent with the Venice Land Use Plan, and that plan stated the city had to issue a permit under those circumstances. The Court rejected Kalnel's premise because in this instance the city did not find that the project was consistent with the plan. The plan included policies requiring that development preserve the character of existing neighborhoods. Other policies acknowledged the density bonuses and waivers available under the Density Bonus Act and the Mellow Act, and called upon the city to take steps to accommodate increased density, if feasible and consistent with Coastal Act policies. Here, however, the city denied the project due to its visual impacts on the neighborhood. Kalnel was free to submit a revised application with the same density, provided the resubmitted project addressed the aesthetic concerns that were the basis for the city's denial.

## CALIFORNIA SUPREME COURT

### Depublication Ordered

*Bay Area Clean Environment, Inc. v. Santa Clara County* (2016) 2 Cal.App.5th 1197

The Sixth District found that the county complied with SMARA and CEQA in approving a reclamation plan for an existing quarry. Petition for review denied. Ordered depublished December 14, 2016.

———————

*Coastal Hills Rural Preservation v. County of Sonoma* (2016) 2 Cal.App.5th 1234

The First District held that the "substantial evidence" test applied to its review of a subsequent mitigated negative declaration that supplemented a previously adopted mitigated negative declaration. On November 22, 2016, the Supreme Court issued the following memorandum opinion:

> The petition for review is granted. The matter is transferred to the Court of Appeal, First Appellate District, Division One, for reconsideration in light of *Friends of the College of San Mateo Gardens v. San Mateo County Community College District et al.* (2016) 1 Cal.5th 937, 957-959, footnote 6 [] and [CEQA Guidelines] section 15384. The request for an order directing depublication of the opinion in the above entitled appeal is granted.

**Opinions Issued**

*Orange Citizens for Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141

See summary above.

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*Banning Ranch Conservancy v. City of Newport Beach* (2017) – Cal.5th – [slip op. dated March 30, 2017]

See summary above.

**Petition for Review Granted**

*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (No. S238563). Review granted on January 11, 2017. Court of Appeal opinion at 4 Cal.App.5th 103.

(1) Is the enactment of a zoning ordinance categorically a "project" within the meaning of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?

(2) Is the enactment of a zoning ordinance allowing the operation of medical marijuana cooperatives in certain areas the type of activity that may cause a reasonably foreseeable indirect physical change to the environment?

_____

*United Auburn Indian Community of Auburn Rancheria v. Brown* (No. S238544). Review granted on January 25, 2017. Court of Appeal opinion at 4 Cal.App.5th 36.

May the Governor concur in a decision by the Secretary of the Interior to take off-reservation land in trust for purposes of tribal gaming without legislative authorization or ratification, or does such an action violate the separation of powers provisions of the state Constitution?

_____

*T-Mobile West LLC v. City and County of San Francisco* (No. S238001). Review granted on December 21, 2016. Court of Appeal opinion at 3 Cal.App.5th 334.

(1) Is a local ordinance regulating wireless telephone equipment on aesthetic grounds preempted by Public Utilities Code section 7901, which grants telephone companies a franchise to place their equipment in the public right of way provided they do not "incommode the public use of the road or highway or interrupt the navigation of the waters"?

(2) Is such an ordinance, which applies only to wireless equipment and not to the equipment of other utilities, prohibited by Public Utilities Code section 7901.1, which permits municipalities to "exercise reasonable control as to the time, place and manner in which roads, highways, and waterways are accessed" but requires that such control "be applied to all entities in an equivalent manner"?

**Petition for Review Granted – Previously Reported But Still Pending**

*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (No. S223603). Review granted on March 11, 2015. Oral argument letter sent December 28, 2016; argument not yet scheduled. Court of Appeal opinion at 231 Cal.App.4th 1056.

Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05, so as to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?

———————

*Friends of the Eel River v. North Coast Railroad Authority* (No. S222472). Review granted December 10, 2014. Oral argument letter sent February 8, 2017; argument not yet scheduled. Court of Appeal opinion at 230 Cal.App.4th 85.

(1) Does the Interstate Commerce Commission Termination Act [ICCTA] (49 U.S.C. § 10101 et seq.) preempt the application of the California Environmental Quality Act [CEQA] (Pub. Res. Code, § 21050 et seq.) to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)?

(2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property?

———————

*Sierra Club v. County of Fresno* (No. S219783). Review granted October 1, 2014. No oral argument letter sent. Court of Appeal opinion at 226 Cal.App.4th 704.

This case presents issues concerning the standard and scope of judicial review under the California Environmental Quality Act. (CEQA; Pub. Resources Code, § 21000 et seq.)

# A BROADER LOOK AT THE SUPREME COURT

## Make-up of the California Supreme Court

| Name of Justice | Year Appointed | Appointing Governor | Year Retired | Replaced By |
|---|---|---|---|---|
| Kennard | 1989 | Deukmejian | 2014 | Kruger |
| Baxter | 1991 | Wilson | 2014 | Cuéllar |
| George (C.J.) | 1991 | Wilson | 2011 | Cantil-Sakauye |
| Werdegar | 1994 | Wilson | August 2017 | ??? |
| Chin | 1996 | Wilson | | |
| Brown | 1996 | Wilson | 2005 | Corrigan |
| Moreno | 2001 | Davis | 2011 | Liu |
| Corrigan | 2006 | Schwarzenegger | | |
| Cantil-Sakauye (C.J.) | 2011 | Schwarzenegger | | |
| Liu | 2011 | Brown | | |
| Cuéllar | 2015 | Brown | | |
| Kruger | 2015 | Brown | | |

- At present, four Justices appointed by Republican Governors, three Justices appointed by Democratic Governors.
- When Justice Werdegar steps down in August 2017, Governor Brown will have an opportunity to appoint a fourth justice.
- Era of dominance by Justices appointed by Republican Governors coming to a close.

## CEQA / Land-Use Opinions Issued by Supreme Court (2006 – 2017)

[green shading denotes decisions issued by the Court as currently constituted]

| Opinion | Topic | Who "won"? | Author | Concur | Dissent |
|---|---|---|---|---|---|
| *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341 | Duty to mitigate under CEQA | Petitioner | Werdegar | Chin | |
| *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412 | Water supply analysis in EIR for large development project | Petitioner | Werdegar | | Baxter |
| *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372 | Definition of "project"; common-sense exemption | Respondent* | Werdegar | | |
| *Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2008) 43 Ca1.4th 936 | Geographic scope of analysis; responses to comments | Respondent | Werdegar | | |
| *In re: Bay Delta etc.* (2008) 43 Cal.4th 1143 | Program EIR | Respondent | Kennard | | |
| *Environmental Protection and Information Center v. California Dep't of Forestry and Fire Protection* (2008) 44 Cal.4th 459 | Forest Practices Act; CEQA findings; take permits | Forest Practices Act: Petitioner; CEQA: Respondent | Moreno | | |
| *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 | Definition of "project" | Petitioner | Werdegar | | |

| | | | | | |
|---|---|---|---|---|---|
| *Sunset Sky Ranch* | Project denial | Respondent | Corrigan | | |

| | | | | | |
|---|---|---|---|---|---|
| *Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902 | | | | | |
| *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32 | Notice of determination – statute of limitations | Respondent | Corrigan | | |
| *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 | Negative declaration; baseline | Petitioner | Werdegar | | |
| *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481 | Notice of exemption – statute of limitations | Respondent | Baxter | | |
| *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155 | Negative declaration; standing | Respondent (negative declaration); petitioner (standing) | Corrigan | | |
| *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281 | Exhaustion of remedies | Respondent | Kennard | | |
| *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 | EIR; baseline | Respondent* | Werdegar | Baxter Cantil-Sakauye Chin | Liu |
| *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029 | CEQA and land-use initiatives | Respondent | Corrigan | | |
| *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 | Exceptions to categorical exemptions | Respondent | Chin | | Liu Werdegar |

| | | | | | |
|---|---|---|---|---|---|
| Cal.4th 1086 | | | | | |
| *City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945 | Duty to mitigate under CEQA | Petitioner | Werdegar | | |
| *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204 (*Newhall Ranch*) | GHG emissions under CEQA; "take" of fully protected species | Petitioner | Werdegar | | Corrigan Chin |
| *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369 | "Reverse CEQA" | Petitioner* | Cuéllar | | |
| *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist*. (2016) 1 Cal.5th 937 | Supplemental review | Respondent* | Kruger | | |
| *Orange Citizens for Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141 | General Plan consistency and referenda | Petitioner | Liu | | |
| *Banning Ranch Conservancy v. City of Newport Beach* (2017) – Cal.5th – [slip op. dated March 30, 2017] | EIR adequacy | Petitioner | Corrigan | | |

* For those cases marked with an asterisk, the prevailing party is the party that achieved its basic objective – that is, either affirmance or reversal of the Court of Appeal's opinion. The manner in which the Supreme Court reached its decision, however, has less clear implications, and does not obviously favor either petitioners or respondents.

**Some Observations**

- Debate over CEQA cases often focuses on input/accountability versus predictability/efficiency. Query whether the current Court may have a different perspective than its predecessor Courts with respect to this debate.

- After several fractured CEQA decisions (*Neighbors for Smart Rail, Berkeley Hillside, Newhall Ranch*), recent cases have been unanimous. But the manner in which some cases have been written may suggest a negotiated compromise in order to achieve unanimity (*CBIA v. BAAQMD, San Mateo Gardens*). Other issues may have been ducked in order to achieve unanimity (*Banning Ranch*). As a result, most of the Court's recent decisions (whether unanimous or not) have raised as many questions as they have resolved.

- Justice Werdegar has served as an important and respected voice on the Court, and has authored a number of significant decisions (*Vineyard, City of Marina, Muzzy Ranch, Save Tara, CBE v. SCAQMD, Neighbors for Smart Rail, Newhall Ranch*) that are often nuanced and do not constitute clear "wins" for either side. Query whether her replacement will cause a meaningful shift in the center of gravity on the Court.

# Administrative Records: The Foundation of Land Use and CEQA Challenges

**Wednesday, May 3, 2017 Opening General Session; 1:00 – 3:00 p.m.**

**Ginetta L. Giovinco, Richards, Watson & Gershon**
**David M. Snow, City Attorney, Yucaipa, Assistant City Attorney, Beverly Hills**

## Notes:

**League of California Cities**

**City Attorney Department**

**2017 Spring City Attorney's Conference**

# Administrative Records: The Foundation of Land Use and CEQA Challenges (And Successful Defenses)

Presented by:


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# Administrative Records: The Foundation of Land Use and CEQA Challenges (And Successful Defenses)

**By**
**David M. Snow and Ginetta L. Giovinco**

## I. Why is the Administrative Record Important to You?

The administrative record is the set of documents that memorializes administrative proceedings such as a decision on a discretionary land use entitlement. Proceedings to attack public agency land use decisions typically take the form of mandamus proceedings – either administrative mandate for matters that require evidentiary hearings,[1] or ordinary or traditional mandate when no evidentiary hearing is required.[2] The administrative record is the heart of any administrative mandate (and, often, traditional mandate) lawsuit. Because the record typically constitutes the entire universe of evidence upon which the court will base its decision,[3] along with judicially noticeable documents, the contents of the record are critical.

Indeed, a complete, detailed, and well-organized administrative record is critical to the successful defense of a writ petition.[4] A public agency's decision may be reversed based on a deficient record.[5] Similarly, an incomplete record could result in the denial of a client's petition for writ of mandate.[6]

This paper addresses both the procedural steps of record preparation – who prepares the record, who pays for it, who certifies it – and substantive issues including the contents of administrative records and what does *not* belong in a record. This paper also discusses issues unique to records in cases involving the California Environmental Quality Act ("CEQA") (Public Resources Code § 21000, *et seq*.). This paper also provides practice tips along the way, including tips focused on thinking about creating your record during the course of the administrative proceedings and tips for what to do once you are in litigation over a decision or action.

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[1] Code of Civil Procedure (hereafter, C.C.P.)§ 1094.5.
[2] C.C.P. § 1085.
[3] Code of Civil Procedure § 1094.5(e) includes certain exceptions whereby evidence outside of the record may be considered by a reviewing court. Specifically, "Where are court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case."
[4] See *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 834.
[5] See e.g., *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 373 ("The consequences of providing a record to the courts that does not evidence the agency's compliance with CEQA is severe – reversal of project approval").
[6] See *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357.

## II. Preparation and Certification of the Administrative Record

### A. Who Prepares the Administrative Record and Who Pays for It?

The question of who prepares the administrative record – either who "must" prepare the record or who can "choose" to prepare the record – is one of the first questions that must be answered in an administrative mandate lawsuit. Preparing the record is one of the most important tasks because, with some limited exceptions noted below, the record will comprise all of the evidence upon which the case will be tried, and the parties will be limited to citing to the record in their briefs. In addition, depending on the size of the record, the cost and time involved may be significant, so getting the process started early is important.

***Practice Tip***

Some judges will not set a briefing schedule until the administrative record has been prepared, certified, and served. In this circumstance timely preparation of the record becomes even more important, or you may be forced to wait months until the court will set a writ hearing date. Then, depending on how busy the court is, find yourself with a hearing date that is several months out from there!

There are various options for who prepares the record. Depending on the type of case this may be the petitioner, the respondent, both of them working together or sequentially, and possibly, even the real party in interest.

#### 1. Non-CEQA Administrative Mandate Lawsuits

In non-CEQA administrative mandate cases (for example, a non-CEQA challenge to a discretionary land use entitlement such as a conditional use permit or a variance)[7] there is no option – pursuant to statute, the respondent public agency must prepare the administrative record: "The complete record of the proceedings shall be prepared by the local agency or its commission, board, officer, or agent which made the decision and shall be delivered to the petitioner within 190 days after he has filed a written request therefor."[8]

[7] See C.C.P. § 1094.6(e): "As used in this section, decision means a decision subject to review pursuant to Section 1094.5, suspending, demoting, or dismissing an officer or employee, revoking, denying an application for a permit, license, or other entitlement, imposing a civil or administrative penalty, fine, charge, or cost, or denying an application for any retirement benefit or allowance."

[8] See C.C.P. § 1094.6(c).

The law is also very clear in this circumstance that although the public agency prepares the record, the petitioner must pay the costs of the record: "The local agency may recover from the petitioner its actual costs for transcribing or otherwise preparing the record."[9]

### 2. CEQA Lawsuits

In CEQA lawsuits, the petitioner has the option of either requesting that the respondent lead agency prepare the record or electing to prepare the record itself.[10] In either case, CEQA calls for the record to be completed within 60 days from the date of the request or election.[11] It is important to note that despite this fairly short timeframe, CEQA also provides that extensions of the deadline shall be "liberally granted by the court when the size of the record of proceedings renders infeasible compliance with that time limit…."[12] To obtain an extension, the parties must submit a stipulation or otherwise seek an order of the court.[13] There is no limit to the number of extensions that may be granted but no single extension may be for longer than 60 days unless the court determines that a longer extension is in the public interest.[14]

***Practice Tip***

Some courts have local rules which establish additional deadlines related to preparation of the administrative record. For example, Los Angeles Superior Court local rules set forth deadlines for a preliminary cost estimate if the agency prepares the record, preparation and exchange of a draft record index, and comments on the index. See LASC Local Rules, Rule 3.232(d).

Many public agencies prefer that a petitioner ask the public agency to prepare the record; this allows the respondent to have greater control over the time and cost for preparing the record. In addition, as the respondent ultimately is responsible for certifying the administrative record (discussed below), it can cut down on back-and-forth discussions over the contents of the record, and what the public agency will require to certify it as complete, if the public agency prepares the record in the first instance.

With respect to costs, CEQA provides that where petitioners request that the public agency prepare the record, "[t]he parties shall pay any reasonable costs or fees imposed for the preparation

[9] C.C.P. § 1094.6(c).
[10] Pub. Res. Code § 21167.6(a) and (b)(2).
[11] Pub. Res. Code § 21167.6(b)(1) and (b)(2).
[12] Pub. Res. Code § 21167.6(c).
[13] Pub. Res. Code § 21167.6(c).
[14] Pub. Res. Code § 21167.6(c).

of the record of proceedings in conformance with any law or rule of court."[15] This requirement furthers the principle that "taxpayers ... should not have to bear the cost of preparing the administrative record in a lawsuit brought by a private individual or entity."[16] To that end, a public agency that has been requested to prepare the record may refuse to release the record until the petitioner making the request has paid the agency's preparation costs.[17] CEQA also cautions, however, that "[i]n preparing the record of proceedings, the party preparing the record shall strive to do so at reasonable cost in light of the scope of the record."[18]

California courts have held that recoverable costs and fees related to preparation of the administrative record may include staff time and paralegal time[19] and attorney time when that can be shown to be reasonably necessary.[20]

Older case law held that where a public agency delegated preparation of the record to a real party in interest (project applicant) without the consent or knowledge of petitioners, the real party was not entitled to recover costs following denial of the writ petition.[21] More recent case law has narrowed this principle, holding, for example, that where a city incurred the costs for preparing the record but then was reimbursed by the project applicant pursuant to an indemnification obligation, the real party project applicant was entitled to recover those costs.[22]

When a petitioner elects to prepare the record, the public agency may not recover costs associated with reviewing the petitioner-prepared record of proceedings "for completeness," as this is considered "a chore public agencies face in every case in which the petitioner elects to prepare the record."[23] Similarly, a public agency may not be able to recover the cost of hearing transcripts that were prepared after the fact and were not presented to the decisionmakers during the administrative process.[24] But, the petitioner also cannot escape an agency's right to recover costs even when the petitioner has prepared the record in the first instance if its record ultimately is incomplete and the public agency is forced to prepare a supplemental record to ensure a complete administrative record is before the court: "When a record prepared under subdivision (b)(2) is incomplete, and an agency is put to the task of supplementation to ensure completeness, the language of the statute allows, and the purpose of the record-preparation cost provision to protect public monies counsels, that the agency recoup the costs of preparing the supplemental record."[25]

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[15] Pub. Res. Code § 21167.6(b)(1).
[16] *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 677.
[17] *Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 677-678.
[18] Pub. Res. Code § 21167.6(f).
[19] *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227.
[20] *Otay Ranch, L.P. v. County of San Diego* (2014) 230 Cal.App.4th 60.
[21] *Hayward Area Planning Ass'n v. City of Hayward* (2005) 128 Cal.App.4th 176.
[22] *Citizens for Ceres v. City of Ceres* (2016) 3 Cal.App.5th 237.
[23] *Coalition for Adequate Review v. City & County of San Francisco* (2014) 229 Cal.App.4th 1043, 1059.
[24] *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1.
[25] *Coalition for Adequate Review v. City & County of San Francisco* (2014) 229 Cal.App.4th 1043, 1055-1056.

In order to keep costs down, many petitioners who elect to prepare the record are now submitting Public Records Act requests[26] to public agencies for all documents that will comprise the administrative record. This puts the public agency in the position of having to assemble and produce all documents that will be in the record. But, because the Public Records Act limits costs associated with production of records to direct costs of duplication or a statutory fee, if applicable,[27] the public agency may not recover all costs associated with that effort such as costs for retrieval, review, and redaction of records.

***Practice Tip***

Some takeaways regarding record preparation:

- Keep records organized as much as possible during the administrative proceedings; this will make it easier and less costly to respond to a Public Records Act request.
- Consider during the course of the administrative proceedings whether transcripts of earlier hearings (planning commissions, etc.) should be prepared and presented to the final decisionmakers; the costs of transcripts prepared after a lawsuit is filed may not be recoverable.
- Carefully document all costs related to preparing a record or supplementing petitioner's draft record; courts like to see costs documented concurrently with preparation of the record.
- If your agency was asked to prepare the record, insist on payment prior to releasing the record to the petitioner – don't be caught in the position of chasing costs later once you've won!

### B. Who Certifies the Record?

Regardless of whether the administrative mandate case involves CEQA or not, and regardless of whether a petitioner prepared the record in the first instance or the respondent public agency did, the public agency is responsible for certifying the record.[28] The certification attests to the accuracy of the documents included in the record.[29] Many agencies also will choose to include language in the certification stating that the record is complete. The certification is typically signed by the City Clerk or other official tasked with records management for the public agency.

[26] Gov't Code § 6250, *et seq*.
[27] Gov't Code § 6253(b).
[28] C.C.P. § 1094.6(c); Pub. Res. Code § 21167.6(b)(1) and (b)(2).
[29] Pub. Res. Code § 21167.6(b)(2).

## III. What is Properly Included In (or Excluded From) the Record?

### A. An Upfront Word About the Importance of Good Record Keeping

Good record keeping practices can make the compilation of an administrative record much easier should litigation ensue. Diligently separating final documents from administrative drafts (disposing of such drafts if they are no longer necessary in the ordinary course of business, if allowed by the agency's record retention policies, and there is no litigation hold in place), keeping confidential documents separate from non-confidential materials, and keeping copies of all documents relied upon during the proceeding will streamline the record compilation process. It is equally important to organize both paper documents and electronic documents.

Further, when litigation is reasonably anticipated, there is a duty to preserve evidence, including electronically stored information. This can come into play whether the agency is the potential plaintiff/petitioner or defendant/respondent. Whether litigation is "reasonably anticipated" can be unclear, however, some indicia suggesting litigation is forthcoming include the filing of a Government Claims Act claim,[30] considering the filing of litigation (and certainly after a grant of authorization by the governing body or retention of special litigation counsel for a matter), and threats of litigation in writing or at public meetings.

Federal and California law (and Federal Rules of Civil Procedure) require a party in a lawsuit to take affirmative steps to preserve potential evidence related to that suit. These obligations are the outgrowth of common law obligations of litigants to avoid spoliation of evidence. If records are deleted or destroyed and the court later determines that those records should have been preserved, the court may impose monetary or evidentiary sanctions against the party that destroyed or deleted the records. Federal courts in particular have been very insistent that electronically-stored records (e-mails, spreadsheets, word processing systems, and all other computer-stored information) be maintained and preserved during the course of the litigation. California's Code of Civil Procedure has followed the federal procedural rules with respect to electronically stored information.

To comply with the law, agencies must preserve those records that would ordinarily be destroyed or deleted as part of its routine records management program. Thus, when litigation is reasonably anticipated, steps should be taken to ensure that relevant documents do not get deleted as part of an automatic electronic records deletion protocol.

If records are deleted or destroyed, and the court later determines that those records should have been preserved, the court may impose monetary or evidentiary sanctions against the party that destroyed or deleted the records.

[30] *Arntz Builders v. City of Berkeley* (2008) 166 Cal.App.4th 276, 289 (claims give governmental entity opportunity to settle just claims before suit and to allow early investigation of the facts surrounding the claim); C*ity of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902–903.

### B. What's in A Writ of Administrative Mandate Record?

The vehicle for challenging administrative decisions of actions for which the law requires that a hearing be given, evidence be taken, and where the lower body (for purposes of this paper, a city or affiliated entity) has discretion to determine the facts in support of its determination, is a Writ of Administrative Mandamus (C.C.P. § 1094.5). Code of Civil Procedure Section 1094.5(a) provides guidance regarding the record of proceedings for administrative writs, stating that "… all or part of the record of proceedings …" may be filed. Unless there are very specific reasons for submitting only part of the record, the best practice is to submit a complete (and well organized) record for consideration and use by the reviewing court. When a reviewing court is called upon to determine if an agency's decision is supported by substantial evidence in the record, the court and the parties need to have the entire record at its disposal.

The documents constituting the administrative record will depend largely on the statutory scheme that governs a particular cause of action. One such common scheme is CEQA, which provides a detailed list of documents to be included in an administrative record, and which is discussed in more detail below.

Documents that should be included in the administrative record include such things as:

1) Applicable ordinances, regulations or rules (including, in the case of a land use dispute), a copy of the General Plan and any applicable specific plan.

2) Staff reports and other documents providing analysis of the issue at hand.

3) Resolutions or other documents memorializing the decision.

4) Transcripts and/or minutes from the hearing(s) required for decision.

5) PowerPoint presentation and other visual materials presented to decision makers (in color if that is important to convey the content).

6) Correspondence related to the decision, including, from interested members of the public, and internal agency correspondence that is not subject to a privilege, such as the attorney client privilege.

**Resist the Urge to be Over Inclusive**

While it is important to have a complete administrative record, including documents that are only tangentially related to the issue at hand can be counterproductive. Courts generally look unfavorably at efforts to "lard up" the record, and such efforts not only add to the cost of preparing the record in the first instance, but also raise the risk of clouding the court proceedings with record disputes.

Parties also generally have the ability to stipulate as to the contents of the record, keeping in mind the duty to provide all relevant evidence to the court.

### C. What's in Your Traditional Writ Record – And Do You Even Have One?

Adjudication of traditional mandate cases often proceeds in a manner similar to administrative mandate cases. Extra-record evidence is generally not admissible in traditional mandate actions challenging quasi-legislative administrative decisions (such as adoption of a specific plan), and such evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making the quasi-legislative decision or to raise a question regarding the wisdom of that decision.[31] Extra-record evidence may be admissible in traditional mandate actions challenging quasi-legislative administrative decisions only under rare circumstances, such as when the evidence existed before the public agency made its decision and it was not possible in the exercise of reasonable diligence to present that evidence to the agency before the decision was made.[32] Thus, in situations where a hearing was held and evidence was taken but the decision was quasi-legislative, there will still be an administrative record, sometimes also called a "record of proceedings" to distinguish it from records in administrative mandate cases.

Where traditional mandate is used to challenge a decision where no hearing was held and no evidence was taken – for example, a refusal to issue a ministerial permit or a challenge to the scope of records produced in response to a Public Records Act request – there is no official record. In these cases, the parties submit declarations and evidence in connection with their briefs; as with administrative mandate cases, live testimony is extremely rare and most courts will decide the case based on declarations and documents.[33] Discovery may be permitted in some instances as well; as one example, the Court of Appeal has just held that the Civil Discovery Act applies to Public Records Act proceedings, which are brought as writ actions.[34]

### D. CEQA Cases and Issues Specific to Them

Whether the underlying project is subject to judicial review through a traditional writ or administrative writ, the contents of the CEQA record must include, at a minimum, the following documents:[35]

(1) All project application materials.

(2) All staff reports and related documents prepared by the respondent public agency with respect to its compliance with the substantive and procedural requirements of this division and with respect to the action on the project.

(3) All staff reports and related documents prepared by the respondent public agency and written testimony or documents submitted by any person relevant to any findings or

[31] *Western States Petroleum Ass'n v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012.
[32] *Western States Petroleum Ass'n v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012.
[33] *California School Employees Assn. v. Del Norte County Unified Sch. Dist.* (1992) 2 Cal.App.4th 1396, 1405.
[34] *City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272.
[35] Pub. Res. Code § 21167.6(e).

statement of overriding considerations adopted by the respondent public agency pursuant to this division.

(4) Any transcript or minutes of the proceedings at which the decisionmaking body of the respondent public agency heard testimony on, or considered any environmental document on, the project, and any transcript or minutes of proceedings before any advisory body to the respondent public agency that were presented to the decisionmaking body prior to action on the environmental documents or on the project.

(5) All notices issued by the respondent public agency to comply with this division or with any other law governing the processing and approval of the project.

(6) All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation.

(7) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project.

(8) Any proposed decisions or findings submitted to the decisionmaking body of the respondent public agency by its staff, or the project proponent, project opponents, or other persons.

(9) The documentation of the final public agency decision, including the final environmental impact report, mitigated negative declaration, or negative declaration, and all documents, in addition to those referenced in paragraph (3), cited or relied on in the findings or in a statement of overriding considerations adopted pursuant to this division.

(10) Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study, any drafts of any environmental documents, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental documents prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division.

(11) The full written record before any inferior administrative decisionmaking body whose decision was appealed to a superior administrative decisionmaking body prior to the filing of litigation.

The above requirements are mandatory but nonexclusive.[36] Although the statute provides guidance on the contents of a CEQA administrative record, there are a number of nuances that must also be taken into account, many of which are described in the following sections.

### 1. E-mails

Public Resources Code Section 21167.6(e)(10) includes "any other written material relevant to the respondent public agency's compliance with [CEQA] including … all internal agency communications, including staff notes and memoranda related to the project or to compliance with [CEQA]." Therefore, electronic communications received by the public agency relating to a project or its CEQA review should be included in the record. As discussed below, this does not require inclusion of privileged communications including attorney client privileged communications, documents protected by the attorney work product doctrine, or documents subject to the deliberative process privilege. Given the prevalence of electronic communications in the conduct of business, producing a record that includes no or very few e-mails is likely to raise questions regarding the record's completeness. That said, all such communications should be reviewed very carefully to ensure that privileged or confidential information is not inadvertently included in the record. And, it may be worthwhile to periodically remind staff and consultants that project-related e-mails may end up in the record, so good judgment should always be exercised when drafting such correspondence.

### 2. Administrative Drafts

Pursuant to Pub. Res. Code Sec. 21167.6(e)(10) the record should include "… any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project…."

While it should be clear what draft documents have been released for public review, failure to properly maintain the files and dispose of administrative drafts when they are no longer necessary could result in the documents residing in the files for the project and inviting argument over whether they belong in the administrative record presented to the court. Good file management practice could help establish that administrative drafts 1) are not normally kept by the agency in the ordinary course of business; and 2) are merely a temporary step in the process of preparing a final document or determining a course of action. If administrative drafts are disposed of when no longer needed, issues should not arise later when preparing the record. And, if the documents are sought through a Public Records Act request during the administrative process, the agency could likely make a case that disclosure is not required taking into account the factors noted above and because disclosing the documents could expose the agency's decision-making process and lead to

[36] *Madera Oversight Coalition Inc. v. County of Madera* (2011) 199 Cal.App.4th. 48, 63-64 (overruled on other grounds by *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439.)

public confusion through release of preliminary (and potentially inaccurate) information, such that the public interest in nondisclosure clearly outweighs the public interest in disclosure.

***Practice Tip***

Unless your local document retention polices dictate otherwise, and provided there is not a litigation hold in effect, once an administrative draft document has outlived its usefulness, dispose of it!

### 3. Audio Recordings of Meetings for Which No Transcript is Prepared

In the absence of written transcripts, "tape recording of public agencies qualify as 'other written materials' for purposes of section 21167.6 subdivision (e)(10)."[37] Copies of such recordings, therefore, should be included in administrative records. In *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 703, the lead agency argued that the quality of audio recordings of certain meetings was not adequate to allow for the preparation of meaningful written transcripts. Because no transcripts existed, the court considered whether the audio recordings should be part of the record, and concluded that inclusion was appropriate. The case suggests that audio recordings of meetings for which transcripts are prepared and included in the record would not need to be included in the record, however, the legal basis for this distinction is unclear, and in the later case of *San Francisco Tomorrow v. City and County of San Francisco,* both the audio recordings and transcripts were included in the record.[38]

### 4. Documents Referenced in (But Not Attached to) Written Comments

Although documents that are merely cited in a comment letter "cannot be bootstrapped into the record or proceedings" as part of written comments received by the public agency,[39] such documents may constitute "written evidence" and thus included in the administrative record pursuant to Section 21167.6(e)(7).[40] Whether such written evidence must be included in the record turns on whether the documents are "submitted to" the lead public agency. The court in *Consolidated Irrigation* concluded that "the term 'submit to' – which generally means presented or made available for use or study – is concerned with the effort that must be expended by the lead agency in using the 'written evidence' presented."[41] The court construed Section 21167.6(e)(7) to

[37] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 703; see also *San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239.
[38] *San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239.
[39] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,721-22.
[40] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,722.
[41] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,723.

mean that written evidence has been submitted "when a commenter has made the document readily available for use or study by the lead agency personnel."[42] In determining how to apply this, the court balanced the level of effort lead agency staff would have to exert in order to obtain the referenced documents. The court concluded as follows: [43]

| Document Type | Part of the Record per 21167.6(e)(7)? |
|---|---|
| Documents previously provided to the lead agency, and which commenter offers to provide again upon request | YES |
| Documents named in a comment letter, with citation to a general webpage through which the document could be located **and** a specific request that they be included in the record of proceedings | NO |
| Documents named in a comment letter, with citation to a specific webpage, **but without** a specific request that they be included in the record of proceedings. Assumes the document is directly accessible via the cited uniform resource locator (URL) | YES |
| Documents named in comment letters, with references to the organization that created the document, but without information as to where the document may be available on the World Wide Web, and with no offer to provide hard copies | NO |

***Practice Tip***

Agency staff who process comment letters should carefully review those letters for references to specific documents that are immediately accessible through the World Wide Web, and should print out or save electronic versions of those documents for the record (even though that burden arguably should be placed on the commenter rather than the lead agency!).

[42] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,723.
[43] *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697,724-25.

### 5. Studies/Reports Referenced and Relied Upon in the CEQA Document

All studies and reports cited in the CEQA document should be printed out and kept for the record. Many referenced documents will be included in appendices, however, all studies and reports cited in the CEQA document should be printed out and kept in the lead agency's files. You do not want to be in a position where you must inform a court that you don't have a document that is cited and relied upon in the CEQA analysis!

If questions arise regarding cited documents that are in the possession of consultants and subconsultants, they should be analyzed consistent with the discussion in paragraph 6 below.

### 6. Consultant/Subconsultant Documents

When the lead agency has either actual or constructive possession of consultant (or subconsultant) documents, some of the consultant documents may be properly part of the record. This conclusion was reached in the case of *Consolidated Irrigation District v. Superior Court* in 2012, and was further reinforced by the California Supreme Court's citation to *Consolidated Irrigation* in the recent *City of San Jose v. Superior Court* public records act case, in which it held that a public official's writings on a personal device or account about the conduct of public business may be subject to disclosure pursuant to the California Public Records Act.[44]

When dealing with consultant files, the first question is whether the consultant documents are "in the possession of the agency." Courts have construed "possession" to include both actual and constructive possession.[45] In the CEQA context, "an agency has constructive possession of records if it has the right to control the records, either directly or through another person."[46] Whether the lead agency had the right to control consultant records will largely turn on the document ownership provisions contained in the consultant contracts.

Based on this, a lead agency should critically consider whether it is in its best interest to assert ownership of all consultant (and subconsultant) documents in consulting agreements. If such agreements are drafted to afford the lead agency broad ownership or control of consultant documents, constructive possession of those documents may be imputed to the lead agency.

Once it is determined that the documents are in the lead agency's possession, any documents falling within the categories set forth in Public Resources Code Section 21167.6(e) should be included in the administrative record. If the expansive interpretation of public agency files to include consultant documents applies, special attention should be given to documents covered by the catchall provision of Section 21167.6(e)(10).. This potentially expansive interpretation would

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[44] *City of San Jose v. Superior Court* (2017) 2 Cal.5th, 608.
[45] *Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163, 172.
[46] *Consolidated Irrigation District v. Superior Court* (2012), 205 Cal.App.4th 697, 710, as modified on denial of reh'g (May 23, 2012); citing *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 (doctrine of constructive possession for crime of felon in possession of a firearm).

not, however, negate the attorney client privilege or other potentially applicable privileges that might extend to certain consultant documents.

***Practice Tip***

When drafting or reviewing contracts for CEQA documentation services consider whether it is more beneficial to the lead agency to assert ownership over all consultant and subconsultant documents, or whether the potential inclusion (or argument over inclusion) of those documents in the administrative record warrants less agency control over the consultant documents.

### 7. Confidential Information (Trade Secrets and Tribal Cultural Resources)

CEQA contemplates that some documentation prepared or provided by interested parties must be kept confidential. This requires special attention during the administrative process with respect to document preparation, review, and how it is kept in the project files. In the event of litigation, special attention will also be required when preparing the administrative record.

Information that contains trade secrets, which are defined in Govt. Code Sec. 6254.7, cannot be included in an agency's CEQA documentation or otherwise disclosed.[47]

Similarly, information regarding cultural resources, including tribal cultural resources, is protected from disclosure through the Public Records Act and CEQA.[48]

To the extent that such confidential information is to be shared with decisionmakers, it should be compiled in a confidential appendix, and kept separate from the public project and related CEQA documents. Such confidential information should not be included in the administrative record, but should instead be provided separately to the court under seal as permitted by the court.

The confidentiality requirements applicable to information regarding tribal cultural resources do not extend to documents that are "publicly available, are already in the possession of the project applicant before the provision of the information by the California Native American tribe, are independently developed by the project applicant or the project applicant's agents, or are lawfully

[47] Pub. Res. Code § 21160; 14 Cal Code Regs. 15120(d).
[48] Govt. Code § 6254(r), Govt. Code § 6254.10, Pub. Res Code § 21082.3(c); 14 Cal Code Regs § 15120(d).

obtained by the project applicant from a third party that is not the lead agency, a California Native American tribe, or another public agency."[49]

### 8. Privileged Documents

Attorney-Client and Attorney Work Product Privileges

Documents subject to the attorney client or attorney work produce privileges do not belong in the administrative record.[50] In the past, questions arose regarding whether lead agencies could share privileged documents with legal counsel for the project applicant without waiving the attorney-client privilege. In 2009, the court in *California Oak Foundation v. County of Tehama* held that the common interest exception to the waiver doctrine allowed the lead agency to share confidential information with the applicant's legal counsel without losing the protections of the attorney client privilege.[51] This ruling, however, was significantly scaled back in 2013 by the decision in *Citizens for Ceres v. Superior Court*. In that case, the court held that prior to a decision on the project, the interests of the lead agency and project applicant are "fundamentally at odds" because the lead agency's obligation to prepare "environmental documents that reveal the project's impacts without fear or favor" conflicts with "the applicant's primary interest … in having the agency produce a *favorable* EIR that will pass legal muster."[52] This more constrained view of the common interest exception means that sharing otherwise privileged documents with legal counsel for an applicant during the administrative process would waive the privilege, making them public documents and properly part of any administrative record.

The common interest exception to the waiver doctrine could, however, apply after a decision on the project has been made, and litigation commenced, if there is no dispute remaining between the lead agency and the applicant.[53] That, however, is well after the content of the administrative record has been set!

Deliberative Process Privilege

The deliberative process privilege, as articulated by the California Supreme Court, "reflects a concern that the quality of decision making suffers when the deliberative process is prematurely exposed to public scrutiny."[54] The privilege furthers three policies: "'First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been

[49] Pub. Res. Code § 21082.3(c)(2)(B).
[50] *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 914.
[51] *California Oak Found. v. County of Tehama* (2009) 174 Cal.App.4th 1217, 1222.
[52] *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 918 (italics in original).
[53] *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 922.
[54] *California First Amendment Coal. v. Superior Court* (1998) 67 Cal.App.4th 159, 170, citing *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided(,) not for matters they considered before making up their minds." ' " [55] The privilege, in California, represents a common factual circumstance where "the public interest in confidentially clearly outweighs the interest in disclosure."[56]

Documents protected by the deliberative process privilege need not be included in the administrative record, however, the agency invoking the privilege has the burden of showing that the privilege applies.[57] Thus agencies should bolster the case for non-disclosure with specific reasons supporting that determination. General policy statements of the reasons underlying the privilege, are not sufficient to invoke the protections, and an explanation of the "public's specific interest in nondisclosure" is required.[58] In *Humane Soc'y of the United States v. Superior Court of Yolo County*, the Humane Society sought to compel the University of California to disclose records related to the its publication of a study of the economic impacts on egg-laying hen housing in California.[59] The University claimed the deliberative process privilege in its refusal to produce documents related to the prepublication communications and deliberations regarding the study. The University supported its assertion of the privilege "with expert opinion evidence and explained specific interests in nondisclosure, including diminution in the quantity and quality of studies from which the public benefits."[60] Disclosure would fundamentally impair the academic research process to the detriment of the public that benefits from the studies produced by that research. The University's articulation of the specific interest in nondisclosure led to the court upholding the assertion of the privilege..[61]

### 9. Rules of Court and Organization of the Record

California Rule of Court 3.2205 governs the form and format of administrative records in CEQA lawsuits. This rule lays out a specific order for documents to appear in the record.[62] The rule also provides that the parties may stipulate, or the court on its own may order, that the documents be organized in a different fashion.[63] As a practical matter, a pure chronological order is often a useful way to proceed, provided that the parties and the court agree to that organization. Regardless of the organization, a detailed index must be placed at the beginning of the record.[64]

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[55] *California First Amendment Coal. v. Superior Court* (1998), 67 Cal.App.4th 159, 170, citing *Jordan v. United States Dept. of Justice* (1978) 192 U.S.App.D.C. 144, 591 F.2d 753, 772–773.
[56] *California First Amendment Coal. v. Superior Court* (1998), 67 Cal.App.4th 159, 170.
[57] *Citizens for Open Govt. v. City of Lodi* (2012) 205 Cal.App.4th 296, 307; *Humane Soc'y of the United States v. Superior Court of Yolo County* (2013), 214 Cal.App.4th 1233, 1267.
[58] *Citizens for Open Govt. v. City of Lodi* (2012) 205 Cal.App.4th 296, 307 (city failed to meet its burden to show applicability of the privilege).
[59] *Humane Soc'y of the United States v. Superior Court of Yolo Cty*. (2013), 214 Cal.App.4th 1233.
[60] *Humane Soc'y of the United States v. Superior Court of Yolo Cty*. (2013), 214 Cal.App.4th 1233, 1267.
[61] *Humane Soc'y of the United States v. Superior Court of Yolo Cty*. (2013), 214 Cal.App.4th 1233, 1267. ()
[62] Cal. Rules of Court, Rule 3.2205(a)(1).
[63] Cal. Rules of Court, Rule 3.2205(a)(3).
[64] Cal. Rules of Court, Rule 3.2205(b).

Increasingly, courts are becoming amenable to, and oftentimes even requesting, electronic versions of the record. In addition, many courts request hyperlinked briefs where citations to the administrative record immediately pull up the relevant document(s). Some courts also request hard copy excerpts of portions of the record that have been cited, an approach expressly contemplated by the Rules of Court.[65]

***Practice Tip***

Preparing hyperlinked briefs and excerpts of records takes time. When setting a briefing schedule, be sure to account for the time necessary to prepare these documents. Oftentimes, the parties will agree that joint excerpts of the record will be submitted a certain number of days following filing of the reply brief so that the excerpts include all citations from the reply brief.

### E. Optional Concurrent Preparation of CEQA Administrative Record?

Public Resources Code Section 21167.6.2, which was added to CEQA effective January 1, 2017 by Senate Bill 122, allows a project applicant to request in writing that the lead agency prepare a record of proceedings concurrently with the preparation of a negative declaration, mitigated negative declaration, EIR, or other environmental document for a project. The request must be filed within 30 days after the lead agency has determined whether an EIR, MND or ND will be prepared for the project, and must include "an agreement to pay all of the lead agency's costs of preparing and certifying the record of proceedings … in a manner specified by the lead agency."[66]

The lead agency can grant or deny the request within 10 days after receipt of the request, unless otherwise extended by agreement of the parties. Concurrent record requests are deemed denied if the lead agency fails to timely respond.[67]

When prepared concurrently pursuant to Section 21167.6.2, the documents placed in the record must be "posted on, and be downloadable from, an Internet Web site maintained by the lead agency commencing with the date of the release of the draft environmental document for the project. If the lead agency cannot maintain an Internet Web site with the information required pursuant to this section, the lead agency shall provide a link on the agency's Internet Web site to that information."

[65] Cal. Rules of Court, Rule 3.2205(c).
[66] Pub. Res. Code Sec. 21167.6.2(f).
[67] Pub. Res. Code § 21167.6.2(e)(3).

The statue requires the draft and final EIR, MND, ND or other environmental document to include a notice, in no less than 12-point type, stating that:

> "THIS DOCUMENT IS SUBJECT TO SECTION 21167.6.2 OF THE PUBLIC RESOURCES CODE, WHICH REQUIRES THE RECORD OF PROCEEDINGS FOR THIS PROJECT TO BE PREPARED CONCURRENTLY WITH THE ADMINISTRATIVE PROCESS; DOCUMENTS PREPARED BY, OR SUBMITTED TO, THE LEAD AGENCY TO BE POSTED ON THE LEAD AGENCY'S INTERNET WEB SITE; AND THE LEAD AGENCY TO ENCOURAGE WRITTEN COMMENTS ON THE PROJECT TO BE SUBMITTED TO THE LEAD AGENCY IN A READILY ACCESSIBLE ELECTRONIC FORMAT."[68]

Before a lead agency agrees to the concurrent preparation, it should be aware of the strict timelines for making documents available through the Internet web site, or in some other readily accessible electronic format, as well as the requirement to certify the record of proceeding within 30 days after the filing of a notice of determination.

The benefits of expediting the administrative record preparation phase of any litigation that may follow the lead agency's action on the project should also be considered.

On a final note, Environmental Leadership Projects, which require the Governor certification as to the project's investment of at least $100 million in California, creation of highly skilled jobs paying prevailing wages, and other criteria, qualify for streamlined litigation, and require that the administrative record be certified within 5 days after project approval.[69] In order to meet that deadline, concurrent record preparation will be necessary!

### F. Litigation Related to the Contents of the Record

A petitioner who disagrees about the contents of the record may engage in law and motion proceedings related to the record; presumably, a respondent lead public agency will not need to engage in similar proceedings because it certifies the record in the first instance and is in a position to include or exclude the documents it believes are appropriate.

Where a petitioner contends that the public agency improperly excluded documents from the record, a motion to augment the record is the appropriate procedural vehicle to address the situation.[70] Some courts will hear these motions in advance of the writ hearing so that the record is settled and the parties know the universe of documents prior to briefing, while other courts will have the parties brief the issue but will defer deciding the motion until the writ hearing itself.

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[68] Pub. Res. Code § 21167.6.2(d).
[69] Pub. Res. Code § 21186(g).
[70] *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187.

There is no officially sanctioned form of motion when a petitioner believes that a record improperly includes documents that do not belong there, but secondary treatises and our practical experience suggests that a motion to strike is the common means of addressing this.[71]

[71] See, e.g., Procedural Motions, The Rutter Group California Practice Guide: Administrative Law Ch. 20-C [20:198] (2016 update).

## IV. Checklists for Record Contents***[72]

| A. | General Contents of an Administrative Mandate Record |
|---|---|
| | All project application materials, if applicable |
| | Correspondence, as applicable |
| | All notices related to public hearings |
| | Agendas for public hearings |
| | Staff reports and all attachments thereto, and related documents (e.g., PowerPoint presentations) |
| | All written testimony or documents submitted by any person, agency, or group |
| | Transcripts from public hearings |
| | Minutes from public hearings |
| | Final versions (adopted/signed) of resolutions and ordinances, including exhibits thereto |
| | Proposed findings or decisions |
| | Final findings or decisions (e.g., hearing officer decisions) |
| | Emails, notes, and memoranda, as applicable (and not privileged) |

| B. | General Contents of a CEQA Record |
|---|---|
| | All project application materials |
| | Environmental review documents (ND, MND, EIR) |
| | Technical studies and appendices to environmental review documents (see above discussion regarding confidential documents) |
| | All notices (both related to CEQA documents and public hearings) |
| | Agendas for public hearings |
| | Staff reports and all attachments thereto, and related documents (e.g., PowerPoint presentations) |
| | All written testimony or documents submitted by any person, agency, or group, related both to the environmental documents and the project as a whole |
| | All written evidence or correspondence related to compliance with CEQA (e.g., consultation letters, scoping meeting summaries) |
| | Transcripts from public hearings (and audio recordings?) |
| | Minutes from public hearings |
| | Draft documents released for public review (including resolutions, ordinances, and findings) |
| | Final versions (adopted/signed) of resolutions and ordinances, including exhibits thereto |
| | Findings, mitigation monitoring and reporting programs, and statements of overriding considerations (if applicable) |
| | All documents cited or relied on in the environmental documents, findings, or statement of overriding considerations |
| | Internal (non-privileged) public agency communications, including emails, notes, memoranda (consider whether consultant/subconsultant records are in agency's "possession") |
| | Record before any lower administrative decisionmaking body (e.g., Planning Commission) whose decision was appealed to a higher administrative decisionmaking body (e.g., City Council) prior to the filing of litigation |
| | Is a confidential appendix needed for tribal cultural resource or trade secret documents? |

[72] These checklists are intended to provide general guidance regarding documents that often are part of the record, but are not intended to be exhaustive.

# CEQA and the People's Voice: Developer Ballot Measures

**Wednesday, May 3, 2017 Opening General Session; 1:00 – 3:00 p.m.**

**Celia A. Brewer, City Attorney, Carlsbad**
**Catherine C. Engberg, Deputy City Attorney, Orinda and Saratoga**

## Notes:

# CEQA and the People's Voice: Developer Ballot Measures

**Prepared by:**

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League of California Cities
Spring City Attorney Conference
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# CEQA and the People's Voice: Developer Ballot Measures

## I. Introduction

In *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, the California Supreme Court held that CEQA does not apply to "citizen-sponsored" initiatives, even where the initiative is adopted by local officials rather than the voters. Since that decision, California cities and counties have seen a sharp increase in development projects being proposed by the ballot. These "developer-sponsored initiatives" typically seek a full suite of land use approvals for a particular project or development plan. If adopted, such initiatives significantly limit the scope of future CEQA review. In addition, because voter initiatives can only be revised by another vote of the people, successful developer-sponsored initiatives can place the regulations that govern a project beyond the City Council's reach. This paper provides tips for processing developer-sponsored measures, and summarizes substantive legal issues relevant to such measures.

The authors have also canvassed election results for commercial and residential developer-sponsored measures and present those results in the last section of this paper. Based on these results, it is our conclusion that developer-sponsored measures are difficult to pass and thus do not appear to be a "silver bullet" for short-circuiting the CEQA and administrative permitting process.

The scope of this paper is limited to the procedural and substantive issues specific to developer-sponsored initiatives. For additional guidance on the initiative and referendum process, you may wish to consult the following publications and white papers:

- League of California Cities, Municipal Law Handbook (CEB 2016 Ed.) §§ 3.80-3.150
- Craig A. Steele, Initiatives/Referendums (League Spring Conference May 7, 2015)
- Peter N. Brown, City Attorney, Carpinteria, The New Universe of Land Use Initiatives: Project Permitting Through the Ballot Box (League Spring Conference May 6, 2011)
- Solano Press, Ballot Box Navigator (2003)
- Local Land Use Initiatives and Referendums, California Environmental Law and Land Use Practice (Matthew Bender)
- Institute for Local Self Government, Ballot Box Planning: Understanding Land Use Initiatives in California (2001)

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*Celia A. Brewer, City Attorney, Carlsbad*

## II. Initiative Power

### A. Reserved power of the people

In 1911, the people of California amended the State Constitution to reserve unto themselves the power of initiative. The initiative power is made applicable to local agencies through article II, section 11.

- "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const. art. II, § 8(a).

- The referendum is the power of the electors to approve or reject statutes or parts of statutes except [stating several exceptions]." Cal. Const. art. II, § 9(a).

The procedures governing the initiative power were enacted by the Legislature.

- Elections Code sections 9200-9295 govern initiatives in cities.

- Elections Code sections 9100-9190 govern initiatives in counties.

The city and county provisions generally parallel one another. However, some differences exist. For example, to qualify a citywide initiative for the next regular municipal election, the petition must be signed by "not less than 10 percent of the voters in the city." Elec. Code § 9215. On the other hand, to qualify a countywide initiative for the next regular election, the petition must be signed by "not less in number than 10 percent of the entire vote cast in the county for all candidates for Governor at the last gubernatorial election[.]" Elec. Code § 9118.

### B. Courts have interpreted the initiative power broadly.

California courts have consistently acknowledged their "solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise." *Legislature v. Eu* (1991) 54 Cal.3d 492, 501. The California Supreme Court reiterated this in *Tuolumne Jobs*, when it confirmed that voter-initiatives adopted outright by a governing body are not subject to CEQA. *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1035. Courts have continued to adhere to this principle in upholding developer-sponsored initiatives, in whole or in part. *See, e.g., Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 210 (review of initiative "strictly circumscribed by the long-established rule of according extraordinarily broad deference to the electorate's power to enact laws by initiative") (quoting *Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565, 573-74).

## III. Components of a Developer-Sponsored Initiative

While traditional land use initiatives tend to target a particular policy (e.g. adopt an "urban growth boundary" to prevent urban sprawl), developer-sponsored initiatives frequently include a full suite of approvals for a particular project. Such approvals may be highly specific;

variations on previously contemplated conditions of approval and mitigation measures often appear in developer-sponsored initiatives.

For example, developer-sponsored initiatives may include the following suite of proposed land use approvals:

- General Plan Amendments
- New or Amended Specific Plans
- Zoning Ordinance and Zoning Map Amendments
- Conditions of Approval
- Development Agreements (see discussion below)

Developer-sponsored initiatives may also dramatically change the relationship between developers and local government. Such initiatives often bypass negotiations with the legislative body, which can result in one-sided approvals that limit public benefits. Developers may also leverage the initiative process to influence negotiations with local government.

***Case Study: Lake Elsinore***

In June 2016, the City of Lake Elsinore approved the Aberhill Villages Specific Plan that included aspects opposed by the developer, including limitations on building near mining operations and financing a public sports park. The developer subsequently qualified an alternate specific plan initiative for a special election. However, after the City placed the initiative on the ballot, the developer and the City reached an agreement on compromise specific plan amendments. Because the initiative had already been placed on the ballot (scheduled for May 2, 2017), both the city and the developer are now campaigning against it.

## IV. Steps to Place an Initiative on the Ballot

### A. Action by the City Council

Once the elections official has certified the sufficiency of the signatures on the initiative petition, the City Council's options depend on whether the initiative qualifies for consideration at a special election or a regular municipal election.

In order for an initiative measure to qualify for consideration at a special election, the initiative petition must request that the initiative be submitted immediately to a vote of the people at a special election and be signed by at least 15 percent of the city's registered voters. Elec. Code § 9214. On the other hand, if the initiative petition is signed by 10 percent of the city's registered voters, it would qualify for consideration at a regular election. Elec. Code § 9215.

In response to such an initiative petition, the City Council must:

(a) adopt the measure, without alteration, at the regular meeting at which the certification of the petition is presented, or within 10 days thereafter (Elec. Code §§ 9214(a), 9215(a)); or

(b) place it on the ballot by either:

- ordering a special election pursuant to Elections Code section 1405(a)[1], (Elec. Code § 9214(b)); or

- ordering that the measure be placed on the ballot for the next regular municipal election occurring at least 88 days after the date on which the measure is ordered on the ballot (Elec. Code § 9215(b)); or

(c) order a report on the initiative's effects and, upon receipt of the report, take either of the two actions specified above (Elec. Code §§ 9214(c), 9215(c)). The report must be submitted within 30 days of the certification of the sufficiency of the petition to the legislative body. Elec. Code § 9212 (b).

***Tip: Proponents of developer-sponsored initiatives are more likely than proponents of "traditional" land use initiatives to have sufficient resources to qualify an initiative for a special election. Because special elections are far more expensive for cities to administer, developer proponents may offer to pay for the cost of a special election to avoid the negative publicity associated with "forcing" the city to cover the added election costs.***

*See, e.g., Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194 (invalidating election results after finding that the Town violated the Brown Act when it failed to provide notice of the developer's proposed MOU offering to pay the costs of a special election).

### B. The "9212 Report" on the Initiative's Effects

At any time after the initiative proponents begin circulating the initiative petitions for signature, the City Council may order a report from City agencies on:

1. the initiative's fiscal impact;

2. the initiative's effects on internal consistency of the general plan, any specific plans and its zoning ordinance, and limitations on city actions with respect to housing approvals, affordable housing, and housing discrimination under Government Code section 65000 et seq.;

[1] A special election must be called not less than 88 days nor more than 103 days after the date of the order of election. Elec. Code § 1405(a). However, when such special election falls within 180 days of a regular or special election wholly or partially within the same territory, the election on the initiative measure may be held on the same day and consolidated with the other election. Elec. Code § 1405(a)(1). No more than one special election for an initiative measure may be held in the same jurisdiction during any 180-day period. Elec. Code § 1405(a)(4).

3. its effect on the use of land, the impact on the availability and location of housing, and the ability of the city to meet its regional housing needs;

4. its impact on funding for all types of infrastructure;

5. its impact of the community's ability to attract and retain business and employment;

6. its impact on the use of vacant land;

7. its impact on agricultural lands, open space, traffic, business districts, and areas designated for revitalization; and

8. any other matters requested by the City Council to be in the report. Elec Code § 9212(a).

This report must be submitted no later than 30 days after the elections official certifies the sufficiency of the number of signatures on the initiative petition. Elec. Code § 9212(b).

***Tip: 30 days is often insufficient to analyze the full impacts of a development project. Indeed, for projects subject to CEQA, it often takes several months to produce a Draft Environmental Impact Report and several more months to obtain and respond to public comment.***

***As noted above, a city can order preparation of a 9212 report any time after the proponents commence circulating the initiative for signatures. Thus, if it appears likely that a developer-sponsored initiative will qualify, consider seeking direction from the City Council on whether to commence preparation of the 9212 report in advance of the measure qualifying for the ballot.***

### C. Case Study: *Carlsbad Measure A*

In the City of Carlsbad, a developer circulated an initiative known as the Agua Hedionda South Shore Specific Plan. The initiative proposed a Specific Plan governing future land uses and development in a specific area. It also amended the General Plan, the Agua Hedionda Land Use Plan, and the Zoning Code to facilitate the development of various visitor-serving commercial uses, increase open space, allow public access to open space and continued agricultural uses.

The original initiative was signed by at least 15% of Carlsbad registered voters. After a contentious public meeting, the City Council voted unanimously to adopt the measure outright instead of placing the item on the ballot. The City Council relied heavily on the Elections Code 9212 report in determining that the Specific Plan proposal met Carlsbad's strict growth management and development standards. The 9212 report also analyzed the developer's "Environmental Assessment", approximately 6,000 pages of analysis submitted with the signed initiative petitions.

Subsequently, citizens circulated a referendum petition signed by at least 10% of the voters which required the Carlsbad City Council to reconsider its ordinance adopting the

initiative. Referendum proponents argued that the initiative was used to avoid CEQA, that signature gatherers had lied about the scope and impacts of the proposal, and that the City Council had deprived the citizens of a vote. The initiative proponents argued that Council-adopted initiatives are ministerial (not legislative) acts that are not subject to referendum.[2]

Ultimately, the Council decided to call a special election to allow voters to decide what became known as Measure A. Ultimately, the Measure A referendum vote defeated the proposed initiative 52% to 48% with 20,542 voting No and 18,903 voting Yes, a difference of 1,639 votes.

## V. California Environmental Quality Act

### A. Basics

Unlike the initiative power, CEQA is solely a creature of statute, and is not based on constitutionally reserved power. CEQA is codified in the Public Resources Code section 21000 et seq., and implemented through the CEQA Guidelines, 14 C.C.R section 15000 et seq.

CEQA applies to discretionary projects, not ministerial ones. Pub. Res. Code § 21080(a), (b)(1). "'Ministerial' describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project." CEQA Guidelines § 15369. CEQA does not apply to ministerial projects because the reviewing agency completing CEQA review must have authority to deny or modify the proposed project to "meaningfully address any environmental concerns that might be identified." *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 933 (citing *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 266-67).

CEQA also contains a host of other statutory and categorical exemptions. CEQA Guidelines §§ 15260 et seq. (statutory exemptions); 15300 et seq. (categorical exemptions). For example, adoption of coastal plans and programs (CEQA Guidelines § 15265) and approvals for emergency projects (CEQA Guidelines § 15269) are statutorily exempt. CEQA also exempts certain categories of projects based on the determination that, barring unusual circumstances, those projects will never have a significant effect on the environment and therefore will never require environmental review or mitigation. *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1107. Categories of exempt projects include certain changes to existing facilities (CEQA Guidelines § 15301) and construction of small structures (CEQA Guidelines § 15303).

### B. Citizen-sponsored initiatives are not subject to CEQA.

It has long been established that CEQA compliance is not required before a legislative body submits a voter-sponsored initiative to the voters under Elections Code section 9214(b).

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[2] However, as discussed below, the Supreme Court stated in *Tuolumne Jobs* that Council-adopted initiatives are subject to referendum. *See Tuolumne Jobs*, 59 Cal.4th at 1043.

*See, e.g.*, *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 793-95. The CEQA Guidelines have codified this exemption to CEQA compliance. *See* Guidelines § 15378(b)(3).

In *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, the Supreme Court held that voter-sponsored initiatives that are adopted outright by the local decision-making body are not subject to CEQA either. *Id.* at 1036. The Legislature has established procedures for promptly processing voter-sponsored initiatives, and these procedures "would essentially [be] nullif[ied]" if time-consuming CEQA review were required before direct adoption of a voter-sponsored initiative. *Id.* at 1036-37. In addition, cities would not be able to act on the results of CEQA review because they do not have the authority to reject or modify projects proposed by initiative. *Id.* at 1040. Further, voters may fall back on the referendum power to stop a direct-adopted initiative from going into effect. *Id.* at 1043. In sum, "[b]ecause CEQA review is contrary to [the statutes governing voter-sponsored initiatives], and because policy considerations do not compel a different result, such review is not required before adoption of a voter initiative." *Id.* at 1036-37; *see* Elec. Code §§ 9212, 9214.

The Court acknowledged that this rule could allow developers to evade CEQA, but noted that any such concerns should be directed to the Legislature. *Tuolumne Jobs*, 59 Cal.4th at 1043. This means that a 9212 report is "the exclusive means for assessing the potential environmental impact of such initiatives." *Id.* at 1036.

### C. Council-sponsored initiatives remain subject to CEQA.

However, *Tuolumne Jobs* did not alter the rule that Council-sponsored initiatives are subject to CEQA. *See Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 191. In *Friends of Sierra Madre*, a city council's decision to place its own measure on the ballot was held to be a discretionary act, not ministerial, and therefore not exempt from CEQA. *Id.*

### D. Legislative fix?

On February 16, 2017, Assembly Member Jose Medina introduced AB 890 as a legislative fix to address *Tuolumne Jobs*. The bill proposes to require CEQA review for proposed land use initiatives before they are circulated for signature. AB 890 is not limited to developer-sponsored measures but appears to apply to all land use initiatives. Depending on the results of the environmental review, certain initiatives would not be allowed to go to the ballot at all.

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB890

## VI. Other Substantive Legal Issues Arising From Developer-Sponsored Initiatives

### A. Initiatives May Only Address Legislative Acts

The power of initiative extends only to legislative acts, not to executive, administrative, and adjudicatory acts. *Yost v. Thomas* (1984) 36 Cal.3d 561, 569-70. In general, a legislative act declares a public purpose and provides for "ways and means of its accomplishment," while a non-legislative act "merely pursues a plan already adopted by the legislative body itself, or some

power superior to it." *Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954, 957-58 (quotations omitted).

Courts apply this rule categorically. *Citizens for Planning Responsibly v. County of San Luis Obispo* (2009) 176 Cal.App.4th 357, 367. General plans, specific plans, and zoning, typically enacted by ordinance or resolution, are legislative and may be adopted by voter initiative. *Id.* at 367-68. In contrast, decisions that "involve the application of general standards to specific parcels of real property" – such as approval of a zoning variance, use permit, subdivision map, and similar proceedings – are administrative and may not be adopted by initiative. *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 614.

As discussed in more detail below, the relationship between the initiative power and development agreements is an open question. Government Code section 65867.5(a) states, "A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum." The reference to a development agreement as "a legislative act" could imply that a development agreement could be adopted by initiative. However, the explicit reference to only "referendum," and not initiative, may imply a limit on the initiative power.

### B. Initiative May Not Name or Identify a Private Corporation

Article II, section 12 of the California Constitution states: ". . . no statute proposed to the electors . . . by initiative[] that . . . names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." Cal. Const., art. II, § 12. This naming rule prevents initiative proponents from using the initiative process for "self-aggrandizement" or to confer "special privilege or advantage on specific persons or organizations." *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 832-33.

Very few cases apply this rule, and the law is currently evolving in response to developer-sponsored initiatives. Key cases include:

- *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805: The California Supreme Court invalidated a provision of an initiative creating a non-profit corporation because the initiative would have conferred "some special privilege [on the new corporation] not afforded other organizations." *Id.* at 813, 833-34. However, the Court found the provision that created the corporation severable because it was "mechanically and functionally independent" from the rest of the initiative. *Id.* at 836.

- *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199: The City Council placed a development agreement between the city and a specific developer on the ballot for ratification for the voters, as required under local law. *Id.* at 1205-06. In dicta, the court noted tension with article II, section 12 because "it would be difficult, if not impossible, to draft a meaningful ballot measure involving a development agreement without some reference to the parties to that agreement." *Id.* at 1230.

- *Pala Band of Mission Indians v. Bd. of Supervisors* (1997) 54 Cal.App.4th 565: An initiative that proposed amendments to a general plan and zoning to accommodate a landfill assigned certain tasks to an "Applicant," and defined "Applicant" as a particular private corporation. *Id.* at 570, 584-85. The court held that that the definition of "Applicant" violated article II, section 12, but salvaged most of the initiative by finding the definition severable. *Id.* at 587, fn. 22.

- *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194: Distinguishing *Pala Band*, a court recently found that a specific plan initiative that clearly benefitted Walmart, but "did not name Walmart in the four corners of the Initiative," did not violate article II, section 12. *Id.* at 209-13.

A case currently in the court of appeal challenges a development agreement initiative that repealed a previously adopted development agreement and replaced it with a new development agreement. *Center for Community Action and Environmental Justice v. City of Moreno Valley* (E067200, app. pending) [*World Logistics Center*]. The initiative drafters attempted to fall within *Pala Band* by replacing the developer's name with "The Property Owners as of the Effective Date of This Agreement." The plaintiffs argue that the development agreement initiative violated article II, section 12 anyway because it "identifies" the parties to the agreement. A decision in this case is expected later this year.

### C. Exclusive Delegation

The Legislature may bar local initiatives by delegating legislative authority exclusively to a local governing body. *DeVita v. Cnty. of Napa* (1995) 9 Cal.4th 763, 776; *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 511 [*COST*]. To determine whether the Legislature intended to exclusively delegate authority, courts look to several factors, including "the language, subject matter, and history of the statute, and other pertinent matters suggested by the parties." *COST*, 45 Cal.3d at 50; *DeVita*, 9 Cal.4th at 776. Key factors identified in *COST* include:

(1) **Statutory Language**: References to "legislative body" or "governing body" support a weak inference that the Legislature intended to restrict the initiative and referendum power. *DeVita*, 9 Cal.4th at 776; *COST*, 45 Cal.3d at 501. References to "city council" and/or "board of supervisors" support a stronger inference. *Id.*

(2) **Statewide Concern**: It is more likely that the Legislature intended to bar initiatives and referenda when a statute addresses a matter of "statewide concern," rather than a "municipal affair." *Id.*

(3) **Other Indicia of Legislative Intent**: Courts will also consider other indications of legislative intent, including principles of statutory construction. *DeVita*, 9 Cal.4th at 776; *COST*, 45 Cal.3d at 507.

The Development Agreement Statutes, Government Code sections 65864-65869.5, may exclusively delegate the authority to enter into development agreements to local governing

bodies, thereby prohibiting adoption of development agreements by initiative. As mentioned above, section 65867.5 states, "A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum." The explicit reference to referendum and the absence of a reference to initiative could imply that the Legislature intended to exclude the initiative power. In addition, as a practical matter, a development agreement is a negotiated contract between two parties, while a developer-sponsored initiative is proposed unilaterally and cannot be changed by the city; the incompatibility between contractual negotiations the initiative process may be additional evidence of exclusive delegation. This question is currently being litigated in the *World Logistics Center* case.

## VII. Election Results: Developer-Sponsored Initiatives 2013-2016

| **November 2016** | | | |
|---|---|---|---|
| **City/County** | **Measure** | **Name** | **Result** |
| San Diego County | Measure B | Lilac Hills Residential and Commercial Development | DEFEATED<br>Yes 36.46%<br>No 63.54% |
| City of Beverly Hills | Measure HH | Hilton Condominium Tower | DEFEATED<br>Yes 45.85%<br>No 55.15% |
| City of Cupertino | Measure D | Vallco Shopping Center | DEFEATED<br>Yes 45%<br>No 55% |
| City of Cypress | Measure GG | Town Center and Commons Plan – Initiative to authorize development of a town center, housing, and a public park. | DEFEATED<br>Yes 48.9%<br>No 51.1% |
| City of Pacifica | Measure W | Rockaway Quarry Residential Development | DEFEATED<br>Yes 31.14%<br>No 68.86% |
| City of Poway | Measure W | Maderas Golf Course Hotel | DEFEATED<br>Yes 48.54%<br>No 51.46% |
| **Other 2016** | | | |
| City of Carlsbad | Measure A | Agua Hedionda South Shore Specific Plan<br><br>*Referendum of a Council-adopted, developer-sponsored initiative | DEFEATED<br>Yes 48.8%<br>No 51.2% |
| City of Richmond | Measure N | Riveria Residential Development | DEFEATED<br>Yes 33.76%<br>No 66.24% |
| City of Davis | Measure A | Nishi Property Land Use Designation | DEFEATED |

| | | | |
|---|---|---|---|
| | | and Development Project | Yes 48.47%<br>No 51.53% |
| City of San Ramon | N/A | Faria Housing Project<br>*Council-adopted, developer-sponsored initiative | N/A |
| **November 2015** | | | |
| City of Malibu | Measure W | Shopping Center at Cross Creek and Civic Center Way | DEFEATED<br>Yes 42.87%<br>No 57.13% |
| City of Moreno Valley | N/A | World Logistics Center<br><br>*Council-adopted, developer-sponsored initiative | N/A |

| | | | |
|---|---|---|---|
| **Other 2015** | | | |
| City of Redondo Beach | Measure B (March 2015) | AES Power Plant Removal & Harbor Village Development Plan Initiative | DEFEATED<br>Yes 47.6%<br>No 52.4% |
| City of Hermosa Beach | Measure O (March 2015) | E&B Oil Drilling and Production Project | DEFEATED<br>Yes 20.49%<br>No 79.5% |
| City of Chino | Measure V (March 2015) | General Plan Amendment to Rezone Land from Commercial to Residential (12.7 acres, to allow maximum of 113 single-family dwelling units)<br><br>*owner of the land reimbursed the City for the full cost to conduct the election & no opposition arguments submitted to ballot | PASSED*<br>Yes: 55.71%<br>No: 44.29% |
| City of Carson | N/A | Zoning initiative for a professional football stadium for the Oakland Raiders and the San Diego Chargers<br><br>*Council-adopted, developer-sponsored initiative<br><br>**Later passed over by NFL for Hollywood Park stadium below | N/A |
| City of Inglewood | N/A | City of Champions Revitalization Initiative for a Hollywood Park professional football stadium, backed | N/A |

| | | | |
|---|---|---|---|
| | | by Rams owner<br><br>*Council-adopted, developer-sponsored initiative | |
| **November 2014** | | | |
| Union City | Measure KK | Flatlands Development Initiative<br><br>Initiative to amend the City's General Plan and Hillside Area Plan to allow for the development of 63 acres of Flatlands privately owned by the Masons of California. | DEFEATED<br>Yes 34.15%<br>No 65.85% |
| City of Riverside | Measure L | La Sierra Hills Preservation and La Sierra Lands Development Initiative<br><br>Development portion of proposal would have allowed for 1,950 additional residential units to be constructed in the La Sierra Lands. | DEFEATED<br>Yes 42.80%<br>No 57.20% |
| City of Newport Beach | Measure Y | General Plan Land Use Element Amendment<br><br>Proposed amendment for reduction of non-residential development square footage by 375,782 square feet, while concurrently increasing the number of residential dwelling units by 138 units. | DEFEATED<br>Yes 30.70%<br>No 69.30% |
| City of Escondido Lakes | Proposition H | Specific Plan Initiative (For residential and recreational development) | DEFEATED<br>Yes 39.37%<br>No 60.63% |

| | | | |
|---|---|---|---|
| **Other 2014** | | | |
| Town of Los Gatos (June 2014) | Measure A | Netflix Construction Project Rezoning "Albright Way" Initiative<br>*Note that opponents and proponents of the measure settled the essential disputes over the development, thereby making the initiative superfluous however at that point it was too late to withdraw from the ballot. | PASSED*<br>Yes: 71.69%<br>No: 28.31% |
| **2013** | | | |

*Catherine C. Engberg, Shute, Mihaly & Weinberger*
*Celia A. Brewer, City Attorney, Carlsbad*

| | | | |
|---|---|---|---|
| San Francisco | Proposition B | 8 Washington Street Development Initiative<br><br>Development project for new housing, retail and recreational facilities, and open space | DEFEATED<br>Yes 37.21%<br>No 62.79% |
| Town of Apple Valley | Measure D | Walmart Initiative | PASSED (nullified by subsequent litigation) |
| **PASS RATE between 2013 to 2016: 7/24 (29%)*<br>Assumes that Council-adopted initiatives not overturned by referendum "passed."** | | | |

898874.1

# FPPC Update

**Wednesday, May 3, 2017 General Session; 3:15 – 4:45 p.m.**

**Rachel H. Richman, City Attorney, Rosemead, Assistant City Attorney, Alhambra and Santa Clarita**

## Notes:

# FPPC UPDATE SPRING 2017

# LEAGUE OF CALIFORNIA CITIES

# SAN FRANCISCO


## Prepared by:

## Rachel H. Richman, Partner

## Burke, Williams & Sorensen, LLP

## Political Reform Act Revision Project

In January the FPPC completed its Political Reform Act Revision Project ("Project"). As stated by the FPPC in its 2016 Annual Report, the overarching goal of the Project was to streamline and simplify the FPPC's foundational law without weakening disclosure or sacrificing accountability.

According to the Commission, a revised Act will:

- Improve compliance and reduce technical violations;
- Encourage participation in the political process by reducing the complexities and costs of seeking office;
- Increase public understanding of the law to promote trust in the system; and,
- Strengthen accountability of public officials and advance enforcement efforts.

In developing the draft, the FPPC partnered with the California Constitution Center, UC Berkeley Law School and UC Davis Law School. Under the supervision of a Berkeley law school professor, four law school students from each school undertook the review and presented the draft to the FPPC's staff. FPPC staff then made additional edits. Although the League's FPPC Committee requested a more involved role in the draft creation process, the FPPC preferred to not have parties that represent groups regulated by the Act to be involved in the initial drafting.

The FPPC stated in proposing amendments, it would not make any substantive changes to the Act. Instead the amendments had four goals:

(1) Redraft with "plain English"
(2) Incorporate key provisions of regulations into the Act
(3) Reorganize the Act to put related provisions together
(4) Repeal or amend language to be consistent with case law or other changes in the law.

Draft 1 of the Act was released at the end of August with a deadline of October 31 for comments. The initial deadline for comments was September 30th, but there were some requests from groups that with the election season overlapping with the comment period additional time was needed.

The FPPC committee reviewed Draft 1 and provided comments to about 12 sections. There were also comments submitted by the State Association of Counties, Political Attorneys Association, Common Cause and a few other groups and individuals. Draft 2 was released on December 6 for comments until December 30. In general most of the Committee's comments were not added to Draft 2.

One major change from Draft 1 to Draft 2 in response to comments, was removing much of the language that had incorporated FPPC regulations into the Act. The FPPC

Committee as well as other groups felt that moving FPPC regulations into the Act created substantive changes. As a result of those deletions, many Committee comments to Draft 1 were not relevant as the language was removed in Draft 2.

In addition, in speaking with the FPPC's Legal Counsel about the Committee's comments to Draft 1 generally not making it into Draft 2, they felt that as to those items which were still relevant in Draft 2, some of our changes were substantive or were otherwise addressed with different changes or deletions.

The Committee discussed Draft 2, and that although our changes were not generally included, since the changes were in general not substantive in nature, we were not going to push the matter. The Committee did not submit new comments to Draft 2 as that comment period was considered a technical review period so it did not appear that further comments to Draft 2 would be productive. The Committee did note that even trying to review Draft 2 was difficult because there was still a significant re-ordering of sections from Draft 1. Lastly, the Committee noted that because every section has been re-ordered in some manner if the draft of the Act is adopted, it will require time to become familiar with it.

Commission staff is currently working with the Office of Legislative Counsel to prepare the revised PRA language for bill introduction. Commission staff are also working with the Legislature and other stakeholders to determine how best to ensure the bill's success. In January, the Commission voted to "sponsor" the bill in order to permit the Commission to have greater input in the legislative decisions and strategy.

FPPC Staff will notify the Commission when a bill is introduced and how to track its progress through the Legislature and the Committee will monitor that as well. They also stated in their report to the Commission that they will continue to send regular updates throughout the year to keep all interested persons, including the FPPC Committee, informed of any other developments on the Project.

One of the issues noted by Legal Staff at the FPPC was whether the final language drafted will stay intact or whether there will be amendments made to their proposal depending on which legislator sponsors the bill and as the bill moves through the adoption process. In addition, the bill language has to be vetted by the Legal Counsel's Office and meet its drafting style requirements which could also result in changes.

In speaking with FPPC staff in mid-March, the proposed draft is in the Legal Counsel's Office and given its length of 130 pages, they don't anticipate that there will be a bill to introduce this year.

All of the PRA Revision materials as well as the final Draft are on the FPPC's website:

http://www.fppc.ca.gov/the-law/21st-century-PRA.html

## Recent FPPC Regulations:

Due to the focus of the FPPC on the Political Reform Act Project the last few months, the FPPC has not undertaken many substantive changes to its regulations in the past few months and those that they have adopted were related to lobbying and campaign reporting activities. The Commission in November adopted amendments to Regulations 18700, 18730 and 18940.2 to make CPI adjustment to the Gift Limits. The gift limit for 2017-2018 is now $470.

Commission staff has stated in their agendas to the Commission that they plan to do a review and refinement of selected provisions of the conflict of interest regulations which were enacted in 2014 and 2015. They indicate that they will have some proposed amendments for its May agenda. It is also not clear how this process will be affected by the progress of the Political Reform Act bill and syncing up those changes if the bill is still pending.

## General Activities of the FPPC in 2016

The FPPC produces an annual report that included some interesting statistics on Staff and Commission activities:

- Answered 9,622 calls at its ASK FPPC line;
- Responded to 12,495 Emails (the Report noted that Staff responds quickly to basic questions regarding the Act);
- 252 Advice letters of which 57 dealt with Government Code Section 1090 were issued; and,
- The Enforcement division had 311 enforcement orders issued by the Commission which resulted in almost $900,000 in fines.

## Pending Legislation

In March, Commission Staff presented 20 bills that they are tracking. At that time, they were not recommending that the FPPC take any positions on the bills. In addition, the League has also identified several bills it is watching related to the Political Reform Act. Below are a few of the bills that both the FPPC and League are watching which are more substantive and germane to our group:

### AB 551 Levine Political Reform Act of 1974: employment restrictions

The Act imposes certain restrictions on post governmental employment of specified public officials of state and local agencies. This bill would prohibit an elected or appointed officer of a state or local agency, *while holding office* and for a period of one

year after leaving office, from engaging in specified conduct, including maintaining employment with, as specified, or being a compensated consultant of that agency or, for compensation, aiding, advising, consulting with, or assisting an entity with a permit, regulatory action, or enforcement action pending before the agency. Currently, the League has taken a Watch position. The relevant sections are below.

Section 87406.3 of the Government Code is amended to read:
(a) A local elected official, chief administrative officer of a county, city manager, or general manager or chief administrator of a special district who held a position with a local government agency as defined in Section 82041 shall not, for a period of one year after leaving that office or employment, act as agent or attorney for, or otherwise represent, for compensation, any other person, by making any formal or informal appearance before, or by making any oral or written communication to, that local government agency, or any committee, subcommittee, or present member of that local government agency, or any officer or employee of the local government agency, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

~~(b)Subdivision (a) shall not apply to any individual who is, at the time of the appearance or communication, a board member, officer, or employee of another local government agency or an employee or representative of a public agency and is appearing or communicating on behalf of that agency.~~
~~(c)~~
*(b)* ~~Nothing in this section shall~~ *This section does not* preclude a local government agency from adopting an ordinance or policy that restricts the appearance of a former local official before that local government agency if that ordinance or policy is more restrictive than subdivision (a).
~~(d)~~
*(c)* Notwithstanding Sections 82002 and 82037, the following definitions ~~shall~~ apply for purposes of this section only:
(1) “Administrative action” means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any local government agency of any matter, including any rule, regulation, or other action in any regulatory proceeding, whether quasi-legislative or quasi-judicial. Administrative action does not include any action that is solely ministerial.
(2) “Legislative action” means the drafting, introduction, modification, enactment, defeat, approval, or veto of any ordinance, amendment, resolution, report, nomination, or other matter by the legislative body of a local government agency or by any committee or subcommittee thereof, or by a member or employee of the legislative body of the local government agency acting in his or her official capacity.

**AB 1089 Mullin Local elective offices: contributions limitations**

The Act prohibits a person, other than a small contributor committee or political party committee, from making to a candidate for elective state office, for statewide elective office, or for office of the Governor, and prohibits those candidates from accepting from a person, a contribution totaling more than a specified amount per election. For a candidate for elective state office other than a candidate for statewide elective office, the limitation on contributions is $3,000 per election, as that amount is adjusted by the Fair Political Practices Commission in January of every odd-numbered year.

This bill, commencing January 1, 2019, would also prohibit a person from making to a candidate for local elective office, and would prohibit a candidate for local elective office from accepting from a person, a contribution totaling more than the amount set forth in the act for limitations on contributions to a candidate for elective state office. This bill would also authorize a county, city, special district, or school district to impose a limitation that is different from the limitation imposed by this bill. This bill would make specified provisions of the act relating to contribution limitations applicable to a candidate for a local elective office, except as specified. Currently the League has taken a Watch position. The relevant sections are below.

Section 85301 is amended as follows:
(a) A person, other than a small contributor committee or political party committee, ~~may~~ *shall* not make to ~~any~~ *a* candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office ~~may~~ *shall* not accept from a person, ~~any~~ *a* contribution totaling more than three thousand dollars ($3,000) per election.

(b) Except to a candidate for Governor, a person, other than a small contributor committee or political party committee, ~~may~~ *shall* not make to ~~any~~ *a* candidate for statewide elective office, and except a candidate for Governor, a candidate for statewide elective office ~~may~~ *shall* not accept from a person other than a small contributor committee or a political party committee, ~~any~~ *a* contribution totaling more than five thousand dollars ($5,000) per election.
(c) A person, other than a small contributor committee or political party committee, ~~may~~ *shall* not make to any a candidate for Governor, and a candidate for ~~governor may~~ *Governor shall* not accept from any person other than a small contributor committee or political party committee, ~~any~~ *a* contribution totaling more than twenty thousand dollars ($20,000) per election.
*(d) (1) A person shall not make to a candidate for local elective office, and a candidate for local elective office shall not accept from a person, a contribution totaling more than the amount set forth in subdivision (a) per election, as that amount is adjusted by the commission pursuant to Section 83124. This subdivision does not apply in a jurisdiction in which the local government imposes a limit on contributions pursuant to Section 85702.5.*
*(2) This subdivision shall become operative on January 1, 2019.*

85702.5. is added in full to read
*(a) A local government agency may, by ordinance or resolution, impose a limit on contributions to a candidate for local elective office that is different from the limit set forth in subdivision (d) of Section 85301. The limitation may also be imposed by means of a local initiative measure.*
*(b) A local government agency that establishes a contribution limit pursuant to subdivision (a) may adopt enforcement standards for a violation of that limit, which may include administrative, civil, or criminal penalties.*
*(c) The commission is not responsible for the administration or enforcement of a contribution limit adopted pursuant to subdivision (a).*
*(d) This section shall become operative on January 1, 2019. A local government agency's limit on contributions to a candidate for local elective office that is in effect on the operative date of this section shall be deemed to be a limit imposed pursuant to subdivision (a).*

**AB 1524 Brough / SB 45 Mendoza Political Reform Act: mass mailing prohibitions**

There are two bills on the topic of mass mailings both prohibit certain mass mailings that occur 90 days before an election. The House bill applies the 90-day prohibition to both candidates and agencies with ballot measures pending while the Senate Bill only applies the prohibition to candidates. The League has taken a Watch position.

89004 is added to read:
*(a) Within 90 days preceding an election, a mass mailing shall not be sent by either of the following:*
*(1) A candidate, or on his or her behalf, if the candidate's name will be on the ballot at that election.*
*(2) An agency, if a measure on the ballot at that election will have a direct financial impact on the agency, unless it is a school district or community college district providing information to the public about the possible effects of a bond issue or other ballot measure consistent with the criteria set forth in subdivision (b) of Section 7054 of the Education Code.*
*(b) Subdivision (a) does not apply to a mass mailing that is required by law to be sent to members of the public within 90 days preceding an election.*
*(c) For purposes of this section, "mass mailing" means a mass mailing, as defined by Section 82041.5, that is consistent with the criteria of subdivision (a) of Section 18901 of Title 2 of the California Code of Regulations and, pursuant to subdivision (b) of that section, is not prohibited by Section 89001.*

SB 45 89003 is added to read:
*(a) A mass mailing shall not be sent within the 90 days preceding an election by or on behalf of a candidate whose name will appear on the ballot at that election for a city, county, or special district elective office.*

*(b) For purposes of this section, "mass mailing" means a mass mailing, as defined by Section 82041.5, that meets the criteria of subdivision (a) of Section 18901 of Title 2 of the California Code of Regulations and, pursuant to subdivision (b) of Section 18901 of Title 2 of the California Code of Regulations, is not prohibited by Section 89001.*

**SB 24 Portantino Political Reform Act: Economic interest disclosure**

The Act requires disclosures to include a statement indicating, within a specified value range, the fair market value of investments or interests in real property and the aggregate value of income received from each reportable source. This bill would revise the dollar amounts associated with these ranges to provide for 8 total ranges of fair market value of investments and real property interests and 10 total ranges of aggregate value of income making more specific categories for those amounts. The League has taken a Watch position.

The proposed disclosure categories for investments, interests in real property and sources of income are being changed from: two thousand dollars ($2,000) to ten thousand dollars ($10,000), ten thousand dollars ($10,000) to one hundred thousand dollars ($100,000 one hundred thousand dollars ($100,000) to one million dollars ($1,000,000), or whether it exceeds one million dollars ($1,000,000), to following ranges:

*(A) At least two thousand dollars ($2,000) but not greater than twenty-five thousand dollars ($25,000).*
*(B) More than twenty-five thousand dollars ($25,000) but not greater than one hundred thousand dollars ($100,000).*
*(C) More than one hundred thousand dollars ($100,000) but not greater than two hundred fifty thousand dollars ($250,000).*
*(D) More than two hundred fifty thousand dollars ($250,000) but not greater than five hundred thousand dollars ($500,000).*
*(E) More than five hundred thousand dollars ($500,000) but not greater than one million dollars ($1,000,000).*
*(F) More than one million dollars ($1,000,000) but not greater than five million dollars ($5,000,000).*
*(G) More than five million dollars ($5,000,000) but not greater than ten million dollars ($10,000,000).*
*(H) More than ten million dollars ($10,000,000).*

**SB 529 Nguyen Inspection of public records**

This bill would require that nomination documents and signatures in lieu of filing fee petitions be furnished promptly upon request, and it would clarify that a member of the public need not request these records pursuant to the California Public Records Act. The League has taken a Watch position.

Section 17100 of the Elections Code is amended to read:
(a) All nomination documents and signatures in lieu of filing fee petitions filed in accordance with this code shall be held by the officer with whom they are filed during the term of office for which they are filed and for four years after the expiration of the term.
(b) Thereafter, the documents and petitions shall be destroyed as soon as practicable unless they either are in evidence in some action or proceeding then pending or unless the elections official has received a written request from the Attorney General, the Secretary of State, the Fair Political Practices Commission, a district attorney, a grand jury, or the governing body of a county, city and county, or district, including a school district, that the documents and petitions be preserved for use in a pending or ongoing investigation into election irregularities, the subject of which relates to the placement of a candidate's name on the ballot, or in a pending or ongoing investigation into a violation of the Political Reform Act of 1974 (Title 9 (commencing with Section 81000) of the Government Code).
(c) Public access to the documents described in subdivision (a) shall be limited to viewing the documents only. *However, these documents shall be furnished promptly upon request and without requiring that the records be requested pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).* The public ~~may~~ *shall* not copy or distribute copies of the documents described in subdivision (a) that contain signatures of voters.

Section 84226 is added to the Government Code, to read:
*In accordance with Section 81008, a recipient committee campaign statement filed with a local filing officer pursuant to this article shall be furnished promptly upon request and without requiring that the statement be requested pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).*

**Recent Opinion/Advice Letters as summarized from the FPPC**

**Conflict of Interest Advice Letters**

**Jolie Houston A-16-258**
The Act does not prohibit a council member from paying her share of the application fee for a Single Story Overlay District encompassing her residence or participating in the mail-in vote to establish the District because neither of these actions would constitute making, participating in making, or using her position to influence a governmental decision.

**Bill Kampe, Mayor A-16-267**
The Mayor owns residential real property within 500 feet of the Coastal Zone subject to Local Coastal Program decisions. He may participate in those decisions that only affect property that is further than 500 feet from his property, if the decisions do not implicate

materiality factors such as those listed in Regulation 18702.2(a)(10) and (12); and, he may participate in decisions that affect the entire Coastal Zone under the "public generally exception," so long as his residential property is not uniquely financially affected. More than 25% of the City is in or within 500 feet of the Coastal Zone.

**Donna Mooney A-17-010**
A Councilmember who is a real estate agent in her private capacity and receives commission income in connection with property transactions has an interest in party she represents in a sales transaction and her broker. Therefore, if she represents the seller of property in a transaction, she does not have an interest in the buyer/current owner of the property and the financial effect on the property and the buyer/current owner does not create a conflict of interest.

**John L. Fellows III A-16-226**
For the purpose of applying Regulation 18702.2, an official may measure from the boundary of his real property to the boundary of a specific project site as opposed to the boundary of an entire legal parcel. The official may participate in decisions regarding a parcel within 500 feet of his residence because the decision will not have a reasonably foreseeable material financial effect on his real property.

**Donald A. Larkin A-16-227**
A city councilmember may not take part in decisions to make recommendations to the High Speed Rail Authority regarding the proposed High Speed Rail that will run through the city. Depending on the route that is selected, it is likely that his residence will be affected by increased noise and traffic, and it is possible that his residence will be taken by eminent domain. The decisions will have a reasonably foreseeable material financial effect on his real property.

**Colin Doyle A-16-252**
The requestor is a Planning Commissioner and a local architect. In his private capacity as an architect, the Commissioner submitted a rezoning application on behalf of his client. While he may not appear before the Planning Commission, he may appear before the City Council on behalf of his client regarding the zoning change application so long as the Planning Commission has no further input on the application and he does not appear in his official capacity. He may also appear before the Design Review Board on behalf of his client. It is under the authority of the City Council and not the Planning Commission. Similarly, he must not appear in his official capacity.

**Laurence S. Wiener A-17-018a**
Councilmembers who own property in the Hillside zone of the city may participate in a procedural decision concerning how soon the planning commission should complete a proposed Hillside Ordinance so long as the decision will not affect the content of the proposed ordinance. This decision would be merely procedural and would not have a foreseeable financial effect on either councilmember or their property.

**Mary L. McMaster A-16-270**
A water district board member was advised that she may not participate in a decision before the water district board that would allow irrigation of areas planted entirely with low water use lawns or turf grasses because there is a reasonably foreseeable material financial effect upon her interest in her business. The business specializes in sustainable landscape design. She was also advised she had a conflict of interest in participating in a decision before the water district board to declare a Stage 4 Water Shortage Emergency for the same reason.

**Gifts**

**Alan Seem I-16-236**
The requestor organized the 2016 Autumn China Trip, for Silicon Valley mayors, councilmembers, and local business members to travel to China to meet with local Chinese government officials, potential investors, and CEOs from local high tech companies. Due to the fact that a local Chinese government authority paid for the Silicon Valley officials travel, lodging, and meals, and the travel was for the governmental purpose of economic trade and business development with the region, the tour payments would be reportable gifts, not subject to the gift limits. We noted the recent enactment of Section 89506(f), regarding nonprofits that regularly organize and host travel for officials for their future attention.

**Government Code Section 1090**

**John Mulligan A-17-023**
Section 1090 does not prohibit the City of Sanger from entering into a new contract for engineering services with the corporate consultant that currently provides those services because the consultant "took absolutely no part" in the City's decisions regarding the new contract's request-for-qualifications process. The City is a grantee under the federal Community Development Block Grant program and has ongoing projects subject to the new and existing contracts.

**Josh Wilson A-16-269**
A city council member does not have a conflict of interest in a decision to enter into a sponsorship agreement between the City and a business that is a source of income, because he would not be making or participation in making a decision under the Act. Further, Section 1090 does not apply since the sponsorship agreement is not under the authority of the City Council and is approved by an independent official under the direction and control of the City Manager.

**Robert M. Burns A-16-223**
Section 1090 does not prohibit Lassen County employees from purchasing books at a bookstore owned by a current member of the Lassen County Board of Supervisors. There is no contract between the County and the bookstore, and the series of small

purchases occasionally made at the discretion of county staff, without input from the Board of Supervisors, are made on the same terms and conditions as those made by members of the general public. Although these limited purchases involve a contract in the most technical sense, they are not the type of contractual situation Section 1090 seeks to prevent.

# Section 1090 Overview and Recent Developments

**Wednesday, May 3, 2017 General Session; 3:15 – 4:45 p.m.**

**Jack C. Woodside, Senior Commission Counsel, Fair Political Practices Commission**
**Sukhi K. Brar, Senior Commission Counsel, Fair Political Practices Commission**

## Notes:_____

STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

# An Overview of Government Code Section 1090

Prepared by: FPPC Senior Counsels Jack Woodside and Sukhi K. Brar

STATE OF CALIFORNIA
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**Preliminary Matters**

Government Code section 1090 prohibits an officer or employee from entering into or participating in making contracts in which they have a financial interest:

> (a) Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

(Gov. Code, § 1090, subd. (a).)

Section 1090 is a conflict of interest prohibition which has historically been subject to criminal penalties (if the violation is willful). As of January 1, 2014, Assembly Bill 1090 authorized the Fair Political Practices Commission (the "Commission") to seek and impose Administrative and Civil penalties against a public official who violates this prohibition against being financially interested in a contract, or who causes another person to violate the prohibition, only upon written authorization from the district attorney of the county in which the alleged violation occurred. (Gov. Code, § 1097.1, subds. (a) & (b).)

Importantly, the Commission is now authorized to issue an opinion or advice to those persons subject to Section 1090. (Gov. Code, § 1097.1, subd. (c)(2).) However, it is prohibited from issuing an opinion or advice where it relates to past conduct. (*Ibid.*)

Upon receipt of a request for an opinion or advice, the Commission is required to forward a copy of each request for an opinion or advice to the Attorney General's office and the appropriate district attorney's office. (Gov. Code, § 1097.1, subd. (c)(3).) The Commission will forward the response, if any, to the requestor or advise that no response was received. (*Id.* at subd. (c)(4).) The lack of any response does not indicate that those entities concur with the Commission's advice or opinion. (*Ibid.*)

Any opinion or advice issued by the Commission can be "offered as evidence of good faith conduct by the requester in an enforcement proceeding, if the requester truthfully disclosed all material facts and committed the acts complained of in reliance on the opinion or advice." (Gov. Code, § 1097.1, subd. (d).) The opinion or advice is only admissible as to the requester in a proceeding brought by the Commission pursuant to Section 1097.1 (Gov. Code, § 1097.1, subd. (d).)

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## Underlying Purpose

In *Thomson v. Call* (1985) 38 Cal.3d 633, the court explained the purpose underlying Section 1090:

> "However, examination of the goals and policy concerns underlying section 1090 convinces us of the logic and reasonableness of the trial court's solution. In *San Diego v. S.D. & L.A.R.R. Co.*, *supra*, 44 Cal. 106, we recognized the conflict-of-interest statutes' origins in the general principle that 'no man can faithfully serve two masters whose interests are or may be in conflict': 'The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. . . . For even if the honesty of the agency is unquestioned. . . yet the principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all this in his own favor.' (44 Cal. at p. 113.) We reiterated this rationale more recently in *Stigall v. City of Taft*, *supra*, 58 Cal.2d 565: 'The instant statutes [§ 1090 et seq.] are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials from exercising absolute loyalty and undivided allegiance to the best interests of the city.' [Citation.] . . ." (*Id.*, at pp. 647-648.)

Furthermore, Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) A contract that violates Section 1090 is void. (*Thomson*, *supra*, (1985) 38 Cal.3d at p. 646.) The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the public entity's advantage. (*Id.* at pp. 646-649.)

Courts have recognized that Section 1090's prohibition must be broadly construed and strictly enforced. (*Stigall*, *supra*, at pp. 569-571; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-580; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) "An important, prophylactic statute such as Section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled." (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1334.)

Apart from voiding the contract, where a prohibited interest is found, the official who engaged in its making is subject to a host of civil and (if the violation was willful) criminal penalties, including imprisonment and disqualification from holding public office in perpetuity. (See § 1097; *People v. Honig*, *supra*, 48 Cal.App.4th at p. 317; 89 Ops.Cal.Atty.Gen. 121, 123 (2006).)

## Application

Section 1090 codified the common law prohibition as to contracts in 1970 and has been broadly interpreted to cover most officials. On the other hand, the Political Reform Act (the "Act") will cover largely people who file Annual Statements of Economic Interests (Form 700). However, both laws are focused on people with influence over making, participating or influencing decisions.

Case law dating back to 1851, and Attorney General Opinions provide guidance as to interpretation of the law under Section 1090. In addition, the California Supreme Court in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91, applied the "*in pari materia*" canon of statutory construction to conclude that Section 1090 should be harmonized with the Act's conflict of interest provisions when possible.

As mentioned, the Commission has had jurisdiction to provide advice under Section 1090 as of January 1, 2014. From that time to the present, the Commission has issued over 150 advice letters pertaining to Section 1090.

When providing advice, the Commission's Legal Division generally uses a six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090:

1. Is the official subject to the provisions of Section 1090?
2. Does the decision at issue involve a contract?
3. Is the official making or participating in making a contract?
4. Does the official have a financial interest in the contract?
5. Does either a remote-interest or non-interest exception apply?
6. Does the rule of necessity apply?

## Step One: Is the official subject to the provisions of Section 1090?

***Relevant Law***

Section 1090 provides, in part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." This means that Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local level. It also applies to certain consultants and independent contractors.

Additionally, members of government boards are presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified themselves from participation in the making of the contract. If a board member is financially interested in the contract, and no exception applies, section 1090 prohibits the contract from being made with the governmental entity even if the conflicted member recuses himself or herself.

When an employee of an agency, as opposed to a board member, has a financial conflict the employee's agency may enter into the contract as long as the employee plays no role in the contracting process.

Courts have also found independent contractors serving in advisory positions that have a potential to exert considerable influence over the contracting decisions of a public agency are subject to Section 1090. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124-1125; *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278.) In *Hub City*, the court stated that a person's status as an official under Section 1090 "turns on the extent to which the person influences an agency's contracting decisions or otherwise acts in a capacity that demands the public trust." (*Hub City*, *supra*, at p. 1125.) Corporate consultants are also included within Government Code Section 1090's definition of "officers" or "employees." (*Davis v. Fresno Unified School Dist.*, (2015) Cal. App.4th 261, pp. 299 -301.)

***Advice***

A city had employed a consultant for several years that provided advice and assistance relating to sales and use tax. The consultant was a key source of information for certain sales tax agreements and helped develop one of the city's tax revenue sharing policies. We advised that the consultant performed a public function and exerted a sufficient amount of influence in those areas; therefore, the consultant was an employee of the city and Section 1090 applied to him. (*Webber* Advice Letter, No. A-15-127.)

A contract interim finance manager and a contract treasurer were government employees subject to Section 1090. Both positions participated in making governmental decisions and performed the same or substantially the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code. (*Burns* Advice Letter, No. A-14-060.)

An energy company would be acting as the city's expert in both establishing and maintaining the various facets of a contract. The company would be selecting suppliers for the city's approval, negotiate contracts, and use its expertise to exert its influence over the agency's contractual decisions. We reasoned that because providing the city's residents and consumers with an energy supply is a public function and the company would be participating in and have influence over the related decisions the company would be acting "in a capacity that demands the

public trust" therefore its employees would be subject to Section 1090. (*Ennis* Advice Letter, No. A-15-006.)

A contractor was involved in designing a golf course project that it then bid on to build. The contractor had previously contracted with the city to develop a general plan that would lay out the design of the reconstructed golf course. The threshold question in that letter was: Does Section 1090 consider a corporate consultant that advises a public entity on the design phase of a project to be an 'employee.' (*Chadwick* Advice Letter, No. A-15-147.)

The contractor in *Chadwick* had advised the city, worked closely with city staff and project manager, and ultimately designed and developed the plan that became the RFP. The contractor was in a position to interact with and advise the city on its policy goals, create a design that interpreted and applied the city's stated plan for the golf course, and work closely with the project manager and other staff to ensure the city and community supported the design. Because the contractor contracted with the city and acted in an advisory capacity with the capability of exerting influence over the city staff's decision making, citing to recent case law in the *Davis* case, we advised it was subject to Section 1090 (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261).

The *Davis* case involved a situation where a contractor participated in the making of a contract with a school district that it later wished to become a party to. The subject of the contract was the construction of a school and a lease-back financing agreement. The court found that "allegations that Contractor served as a professional consultant to [the school district] and had a hand in designing and developing the plans and specifications for the project are sufficient to state that Contractor (1) was an 'employee' for purposes of Government Code section 1090 and (2) participated in making the Lease-leaseback Contracts.

With respect to other subconsultants that were hired by the main contractor in *Chadwick* and provided technical input, submitted reports, and similar information to support the project we advised that they were significantly more removed from directly advising city staff and therefore did not exert considerable influence and were not subject to Section 1090.

Section 1090 did not apply to a brokerage firm when the city had sought out the services of the brokerage firm for the limited purpose of facilitating the potential purchase, sale, and lease of commercial office space. This was because neither the real estate brokerage firm nor its employees were serving in an advisory position or exerted influence over the city or its decisions. (*Ancel* Advice Letter, No. A-16-173.)

Subconsultants who play a limited technical role, for and through a design consultant/advisor, such that they are more removed from influencing the contracting decisions of a public agency, may not be subject to Section 1090. (*Green* Advice Letter, No. A-16-084.)

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**Step Two: Does the decision involve a contract?**

***Relevant Law***

To determine whether a contract is involved in a decision, the Section 1090 analysis looks to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that "specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*People v. Honig*, (1996) 48 Cal. App. 4th 289, 351 citing *Stigall* v. City of Taft (1962) 58 Cal.2d at 569, 571, See also *Wilson* Advice Letter No. A-16-269). Under general principles of law, a contract is made on the mutual assent of the parties and consideration. If an agency agrees to a purchase, there is mutual assent by the parties and consideration. A basic element of a contract is consideration. If an entity provides a good or service without receiving any compensation, or other consideration, there is no contract. (*Webber* Advice Letter, No. A-16-007.)

***Advice***

In the *Bettenhausen* Advice Letter, No. A-16-229, citing Attorney General opinions and case law, we advised that development agreements are contracts:

> "A development agreement contemplates that both the city or county and the developer will agree to do or not to do certain things. Both parties will mutually consent to terms and conditions allowable under the law. Both will receive consideration. The developer will essentially receive the local agency's assurance that he can complete the project. The local agency in turn will reap the benefit of the development, with all the conditions it might legitimately require, such as streets, parks, and other public improvements or facilities. (78 Ops.Cal.Atty.Gen. 230.)"

Also in *Bettenhausen* we advised that decisions that are regulatory in nature do not necessarily involve contracts subject to Section 1090. For example, a corporation's certificate of public convenience and necessity issued by the city to operate an ambulance service without a fee upon the service provider was determined to be a license and regulatory permit and therefore, not a contract. (84 Ops. Cal. Atty. Gen. 34, *See Subriar v. City of Bakersfield* (1976) 59 Cal.App.3d 175; *See Motor Transit Co. v. Railroad Commission* (1922) 189 Cal. 573, 580; *Copt-Air v. City of San Diego* (1971) 15 Cal.App.3d 984, 987.)

A city council decision to adopt an ordinance to allow the city to participate in a community choice aggregation program through a JPA was akin to the certificate of public convenience and necessity described in Attorney General Opinion 84 Ops.Cal.Atty.Gen. 34 cited above. Like the certificate, the ordinance authorized a service provider to provide a service within the municipality's jurisdiction without the imposition of a fee upon the service provider. Therefore, the ordinance was more like a license or regulatory permit and not a contract for purposes of Section 1090. (*Diaz* Advice Letter, No. A-15-235.)

A member of a Board of Supervisors owned a gas station that county employees used to fill their vehicles. Once a month the receipts were tallied and the county billed. There was no contract with the county for the gas and the price charged was the same for the general public. County employees made the decision to fill their tanks at the station. We advised that this situation did not constitute the type of contractual situation normally covered by Section 1090. (*Hammond* Advice Letter, No. A-15-134.)

Like the purchase of a tank of gas, there was no contract between the county and a local bookstore owned by a member of the Board of Supervisors when for approximately 30 years several county department staff had chosen to purchase books from the bookstore. The decision to purchase books was made by staff within each department with no input from the Board of Supervisors. There was no contract between the county and the bookstore for books at a certain rate – nor was either party proposing to negotiate one. And presumably, the series of small purchases occasionally made by county staff, without input from the Board of Supervisors, were made on the same terms and conditions as those made by members of the general public. (*Burns* Advice Letter, No. A-16-223.)

**Step Three: Is the official making or participating in making a contract?**

***Relevant Law***

Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract:

> "The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests."

(*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

In addition, resigning from a governmental position may not be sufficient to avoid a violation. (See e.g., *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569-571[city councilmember involved in the making of a contract based on his involvement in the preliminary stages of the planning and negotiating process on the contract, even though he had resigned from the council prior to its vote on the contract]; 81 Ops.Cal.Atty.Gen. 317 (1998) [council member could not participate in the establishment of a loan program and then leave office and apply for a loan];66 Ops.Cal.Atty.Gen. 156, 159 (1983) [county employees could not propose agreement for consultant services, then resign, and provide such consulting services].)

Furthermore, individuals in advisory positions can influence the development of a contract during these early stages of the contracting process even though they have no actual power to execute the final contract. (See, e.g., *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 [member of Park and Recreation Board who owned a landscape architectural firm participated in the making of a contract in violation of Section 1090 where he was also a member of a committee created to advise the Board on the design, architecture, landscaping and technical planning of a Japanese garden].)

***Advice***

Where independent contractor prepared city's traffic signal Master Plan, it was prohibited under Section 1090 from entering a subsequent contract with the city to provide as-needed consulting services for a project to implement proposals it developed for the Master Plan. In this regard, the independent contractor participated in the preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications for the subsequent contract. (*Chadwick* Advice Letter, No. A-16-090.)

Where the planning commission had no input into the city council's decision-making process at any stage with respect to a specific contract to be made by the city, the planning commission, and each of its members, will not be considered to have participated in the making of the contract. Therefore, Section 1090 would not prohibit the city council from approving a contract between the city and a planning commissioner in his private capacity on behalf of his business. (*Asuncion* Advice Letter, No. A-14-062; see also *Williams* Advice Letter, No. A-15-029 [CUSD Board of Trustees has no authority over and provides no input for contracts MiraCosta College enters into. Therefore, CUSD trustee may enter into a contract with MiraCosta in her private capacity as she will not be participating in the making of the contract in her official capacity for purposes of Section 1090].)

A long-time city consultant advised the city on issues concerning sales and use tax, including the city's economic development incentive program that provides for sales tax sharing. The consultant played an integral role in shaping the policies for city's program. Section 1090 prohibits the city from entering a sales tax sharing agreement with a corporation, contingent on the city also entering a separate agreement with the consultant's company, where such contract would result in financial gain for the consultant as a direct result of the program he helped to create. (*Webber* Advice Letter, No. A-15-127.)

***Relevant Law***

When members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call*, *supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).) And when Section 1090 applies to a member of a governing body of a public entity, in most cases, the prohibition cannot be avoided by having the interested board member abstain from the decision. Rather, the entire governing body is precluded from entering the contract. (*Thomson*, *supra*, at pp. 647-649; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)

Moreover, a body such as a city council cannot avoid application of Section 1090 by delegating its contracting authority to another individual or body. (See 87 Ops.Cal.Atty.Gen. 9 (2004); 88 Ops.Cal.Atty.Gen. 122 (2005).) However, a governmental board may avoid violating Section 1090 when the contract is made by an "independent" government official and that official does not have a conflict of interest. (See e.g., 81 Ops.Cal.Atty.Gen. 274 (1998); 57 Ops.Cal.Atty.Gen. 458 (1974).)

***Advice***

City councilmember owns a pharmacy. Without involvement from the city council, staff from the fire department make all decisions regarding the purchase of morphine sulfate and versed. This arrangement is not sufficient to avoid a violation of Section 1090 where the city council, who has the ultimate authority to approve city contracts, delegated its authority to the fire department. (*Headding* Advice Letter, No. A-16-219; see also *Jernigan* Advice Letter, No. A-14-173 [City councilmember and city council do not avoid a violation of Section 1090 where city staff, upon authority delegated by the city council, makes the determination when to purchase glass from councilmember's business].)

No violation of Section 1090 will occur where the city manager, who has independent authority to enter contracts for specified professional services on behalf of the city, contracts with company that employs spouse of councilmember. (*Walter* Advice Letter, No. A-15-050.)

***Relevant Law***

Conversely, when an employee, rather than a board member, is financially interested in a contract, the employee's agency is prohibited from making the contract by Section 1090 only if the employee was involved in the contract-making process. Therefore, if the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested. (See 80 Ops.Cal.Atty.Gen. 41 (1997) [No Section 1090 violation where two firefighters, in their individual capacities, enter a contract with the city (upon recommendation of the fire chief) for the purchase of protective masks developed entirely on their own time and without the use of city materials].)

**Step Four: Does the official have a financial interest in the contract?**

***Relevant Law***

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest" (*People v. Honig* (1996) 48 Cal. App. 4th 289, 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid*.) Although Section 1090 nowhere specifically defines the term "financial interest," case law and Attorney General Opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson*, *supra*, at pp. 645, 651-652; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431- 432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002).) Therefore, "[h]owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void." (*People v. Deysher* (1934) 2 Cal.2d 141, 146.)

Employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

***Advice***

Board member considered taking employment position with company who has current contracts with the board on which he serves. Because the board member could be influenced by a desire to maintain a favorable ongoing relationship and foster the prospect of future business opportunities with his future employer, Section 1090 would prohibit both the board member and

board from making further contracts or renegotiating existing contracts with the company. (*Gallien* Advice Letter, No. A-16-263.)

Councilmember worked for a firm that provided various consulting services to clients of the firm, some of whom had contracts with the city that would likely need to be renewed during the councilmember's term. Section 1090 prohibits the city council from renewing these contracts where the councilmember will be influenced by a desire to "maintain favorable ongoing relationships" with not only the firm that employs him or her but also the clients of the firm seeking to renew a contract with the city, especially where the firm provides him a commission based upon clients brought in, and a year-end bonus based upon company-wide profits. (*Khuu* Advice Letter, No. I-14-107.)

***Relevant Law***

Generally, a member of a board or commission always has a financial interest in his or her spouse's source of income for purposes of Section 1090. (See 78 Ops.Cal.Atty.Gen. 230, 235 (1995).)

***Advice***

Section 1090 prohibits city councilmember and city council from approving a contract between the city and the firm that employs the councilmember's spouse where the contract could affect the financial health of the firm and impact, among other things, the spouse's year-end bonus. (*Kellner* Advice Letter, No. A-15-021.)

**Step 5: Does a statutory exception apply, such as a remote or noninterest exception?**

***Relevant Law***

To determine whether an official has a financial interest in a contract, it is appropriate to look to the provisions of the remote and noninterest exceptions contained in sections 1091 and 1091.5 for guidance in determining what falls within the scope of the term "financial interest" as used in Section 1090. (See e.g., 85 Ops.Cal.Atty.Gen. 34, 36 (2002).)

The Legislature has created various statutory exceptions to Section 1090's prohibition, however, where the financial interest involved is deemed a "remote interest," (Section 1091), or a "noninterest," (Section 1091.5). If a "remote interest" is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a "noninterest" is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist*. (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

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***Advice - Remote Interests (apply to members of multi-member bodies)***

***Section 1091(b)(1)***

Section 1091(b)(1) provides that an officer shall not be deemed to be interested in a contract if his or her interest is "[t]hat of an officer or employee of a . . . nonprofit corporation." Councilmember is executive director of a non-profit, 501(c)(3), which intends to enter into an agreement with the city. Based on the exception under Section 1091(b)(1), the councilmember can abstain and the city may enter into the agreement without her participation. (*Becnel* Advice Letter, No. A-16-097.)

***Section 1091(b)(2)***

Section 1091(b)(2) provides that there is a "remote interest" when: (1) the private contracting party has 10 or more employees other than the officer; (2) the officer was employed by the private contracting party at least three years prior to initially joining the public body; (3) the officer owns less than 3% of the stock in the private contracting party; (4) the officer is not an officer or director of the private contracting party; and (5) the officer did not directly participate in formulating the bid of the private contracting party.

Director of a board had not been employed by company for at least three years prior to becoming a director so he did not have a remote exception in potential future contracts between the district and the company. (*Scully* Advice Letter, No. A-16-086.)

Although the company employing her spouse had more than 10 employees and the spouse had worked there for more than three years prior to councilmember taking office, the councilmember did not have a remote exception in future contracts between the city and her spouse's employer because the spouse owned more than 3 percent of the shares of the company's stock. (*Kellner* Advice Letter, No. A-15-021.)

***Section 1091(b)(5)***

Section 1091(b)(5) provides that a public official who is a landlord or tenant of a contracting party has a remote interest in the contracts of that party.

Councilmember owned a cottage that was leased to a tenant. A sewer back up resulted in property damage for the tenant who filed a claim with the city. The city council may approve reimbursement of and settlement with the councilmember's tenant for his property and displacement claims as long as the councilmember discloses his remote financial interest, the interest is noted in the city council's official records, and the councilmember does not participate in the making of the agreement. (*Devaney* Advice Letter, No. A-14-142.)

***Section 1091(b)(8)***

Section 1091(b)(8) provides that an official has a remote interest in a contract entered into by the body or board of which they are a member if he or she is a "supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office." Thus, a councilmember would have a financial interest in a contract entered into by the city council if he or she provides services to the party contracting with the city, but only a remote interest if those services were provided for at least five years prior to election to the City Council.

Councilmember is employed by a firm that provides various services to clients who may enter into contracts with the city in the future. The remote interest under Section 1091(b)(8) did not apply where the councilmember had not been employed by the firm, and thus not providing services to the clients for at least five years prior to his election to the city council. (*Khuu* Advice Letter, No. No. I-14-107.)

***Section 1091(b)(15)***

Section 1091(b)(15) provides that an official has a remote interest when he or she is "a party to litigation involving the body or board of which the officer is a member in connection with an agreement in which all of the following apply:

> "(A) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.
>
> "(B) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.
>
> "(C) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board."

Councilmember owns a condo that sits adjacent to and has views of a fairway on a golf course. The golf course has sued the city over its deterioration due to the city's significant extraction of water from an aquifer used to water the golf course. The councilmember will have only a remote interest in any future settlement agreement so long as the factors set forth in subdivisions (A) - (C) are satisfied. Although the councilmember was not technically a party to the lawsuit, it was clear from the legislative intent that a settlement agreement in which an official has a financial interest should be allowed where the three specified factors are satisfied. (*Van Ligten* Advice Letter, No. A-15-038.)

***Advice - Noninterests***

***Section 1091.5(a)(1)***

Section 1091.5(a)(1) provides that a public officer shall not be deemed to be interested in a contract if his or her interest meets the following criteria:

> The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.

Mayor had no financial interest under Section 1090 in development-related agreements between the city and Costco where he owned 24 shares of Costco (which meets the less than 3 percent threshold), and his total annual income from Costco dividends, or other payments, did not exceed 5 percent of his total annual income. (*Sodergren* Advice Letter, No. A-16-155.)

***Section 1091.5(a)(3)***

Section 1091.5(a)(3) provides an officer or employee is deemed not interested in a contract if his or her interest is "[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board."

The phrase "on the same terms and conditions" requires there be no special treatment of an official, either express or implied, because of that person's status as an official. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1101.) Accordingly, the public services exception generally will not apply when the provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official's particular circumstances. (*Lexin*, *supra* at 1088, 1100, ftnt. 28.)

Board members had no financial interest in contracts with their agency stemming from a turf replacement program where the program was applied to each applicant in an identical manner. The method of choosing applicants was on a first-come, first-served basis, for as long as the program had funds available. Each applicant was required to be a current retail water customer, participate in a training course, replace existing turf with qualifying plants, and fill out the standard application form and agreement to program terms. While the program administrator did have some decision-making authority to determine that the replacement met all the program requirements (such as the amount of turf replaced and whether qualifying plants are used), the determination was essentially ministerial and did not involve discretion to pick and choose among applicants or to vary benefits from one applicant to the next. (*Hentschke* Advice Letter, No. A-14-187.)

The exception to Section 1090 for "public services generally provided" did not apply to permit a councilmember to enter into a property tax savings contract with the city where the program required administering officials to exercise judgment and discretion not only in negotiating the terms of each contract, but also in the continued enforcement of those terms for the duration of the contract. (*Hodge* Advice Letter, No. A-14-012.)

***Section 1091.5(a)(8)***

Section 1091.5(a)(8) provides that an officer or employee shall not be deemed to be interested in a contract if his or her interest is:

> That of a noncompensated officer of a nonprofit tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

Vice-Mayor, who was uncompensated officer of a nonprofit, tax-exempt, organization that was determined to support an important function of the city, had a noninterest in a lease agreement between the city and the nonprofit organization. (*Sullivan* Advice Letter, No. A-15-121.)

**Step Six: Does the rule of necessity apply?**

***Relevant Law***

In limited cases, the "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.) The rule has been applied where public policy concerns authorize the contract and "ensures that essential government functions are performed even where a conflict of interest exists." (*Ibid.*; See also 69 Ops.Cal.Atty.Gen. 102, 109 (1986)). The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so. (*Lexin*, *supra*, at p. 1097.)

The rule of necessity has been applied in at least two specific types of situations:

1. In procurement situations for essential supplies or services when no source other than the one that triggers the conflict is available.

2. In nonprocurement situations to carry out essential duties of the office when the official or board is the only one authorized to act.

It is important to note that the rule of necessity has only been applied in very limited situations. For example, a city could obtain emergency nighttime services from a service station

owned by a member of the city council, where the town was isolated and the council member's station was the only one in the area that was open. (4 Ops. Cal.Atty.Gen. 264 (1944).) Also, a healthcare district in a remote area could advertise its services on a local radio station, even though one of the district's directors was employed at the station. After exploring other outlets, it was clear that the radio station was the only source that would deliver the necessary information in an efficient, cost-effective, and timely manner. (88 Ops.Cal.Atty.Gen. 106 (2005).)

What these situations have in common is the exigency of the circumstances such that delaying action to contract with a non-conflicted source would be to the detriment of the affected people. (See *Ramos* Advice Letter, No. A-14-105).

Also it is important to note that "in the event that disqualifications are so numerous as to preclude attainment of a quorum, special rules may come into play. If a quorum is no longer available, the minimum necessary number of conflicted members may participate, with drawing lots or some other impartial method employed to select them." (See, 94 Ops. Cal. Atty. Gen. 100, footnote 43.)

***Advice***

A city was advised that the rule of necessity applied to some purchases made from the mayor's hardware store in emergency situations. For the purchases, the city made efforts to explore all other avenues in most situations, including purchasing from and contracting with larger hardware stores that were out of the area. In some situations, however, emergencies could arise and the mayor's hardware store may be the only option. Therefore, we advised the rule of necessity would allow the city to enter into the contracts with the mayor's hardware store in these emergency situations, but the rule still prevents the mayor from participating in the decisions. (*Ramos* Advice Letter, No. A-14-105.)

A city councilmember owned a pharmacy that was the fire department's only source for purchasing specific quantities of life saving medications. If the fire department was unable to purchase a specific quantity of the medications the fire department would have to stop carrying them and lose certain certifications. We advised that the fire department was providing an essential emergency service to the public by carrying these medications - saving lives. Therefore, the "rule of necessity" exception applied to allow the fire department to purchase the medications from the Mayor's pharmacy despite the conflict of interest under Section 1090. (*Headding* Advice Letter, No. A-16-219.)

A councilmember had a claim against the city for property damage caused by the city's sewer system. Only the city council had the authority to approve claims and settlements for larger amounts. If the city could not approve a settlement the parties would be forced to litigate a claim that could be settled outside of court. The settlement of claims deemed in their best interest is an essential and necessary function of any city. Were the city prohibited from taking action on the Councilmember's claim, there is no other body or person authorized to act. Looking to

relevant case law we noted that the Supreme Court had "recognized a century ago that settlement agreements are highly favored as productive of peace and good will in the community, as well as 'reducing the expense and persistency of litigation. The need for settlements is greater than ever before. Without them our system of civil adjudication would quickly break down.'" (*Salmon Protection and Watershed Network v. County of Marin* (2012) 205 Cal. App. 4th 195, 201, citations omitted.) Therefore, the rule of necessity applied and the city council could act on the councilmember's claim so long as the councilmember disqualified himself from participating in the decision in his official capacity. (*Devaney* Advice Letter, No. A-14-142.)

A councilmember had a financial interest in a contract between the city and a co-op involving an eroding hillside owned partially by the co-op and partially by the city. A report on a geotechnical inspection of the hillside concluded that the biggest immediate concern was the potential for falling debris to injure pedestrians or damage parked vehicles. The report noted that "there are several areas where slope failure or rockfall may be imminent" and that "[i]mmediate and decisive action is strongly recommended to avoid potentially serious injury to people and damage to property."

The city charter provided that the city council had the power to undertake all actions appropriate to the general welfare of its inhabitants that are not otherwise prohibited by State law. Because the protection and promotion of the general welfare of the City's inhabitants was an essential duty of the city council, and because the hillside erosion put the general welfare of the city's inhabitants at risk, we concluded that the rule of necessity applied, and the council could enter into one or more contracts with the co-op to stabilize the hillside. However, it was advised that the interested councilmember abstain from participating in the making of the contract or contracts. (*Dietrick* Advice Letter, No. A-15-174.)

# Recent Developments, Defenses and Strategies in Brown Act Litigation

**Wednesday, May 3, 2017 General Session; 3:15 – 4:45 p.m.**

**Thomas B. Brown, City Attorney, St. Helena**
**Stephen A. McEwen, City Attorney, Buellton, Assistant City Attorney, Atascadero and Hemet, Deputy City Attorney, Placentia**

## Notes:_____

# Recent Developments, Defenses and Strategies in Brown Act Litigation

Presented by:

**Thomas B. Brown**
**Stephen A. McEwen**

League of California Cities
City Attorney's Department
Spring Conference
San Francisco, California
May 2017

BURKE, WILLIAMS & SORENSEN, LLP

# Recent Developments, Defenses and Strategies in Brown Act Litigation

## I. Introduction

One of a city attorney's most important responsibilities is to help his or her client navigate the Ralph M. Brown Act. (Govt. Code § 54950 et seq.) The Brown Act protects the public's right to address local government on issues of public importance and ensures that, with certain exceptions, local legislative bodies conduct their meetings in an open and public manner.

Given its central role in local government, the Brown Act undergoes significant legislative and judicial scrutiny on an ongoing basis. Staying on top of the Brown Act's legislative amendments and judicial interpretations is essential in order to adequately advise municipal clients and avoid Brown Act lawsuits. This paper will outline the key Brown Act amendments from 2016 and the most recent court decisions regarding the Brown Act.

This paper will also review defenses and strategies that city attorneys should consider when evaluating a Brown Act lawsuit. Prevention is always the best solution when it comes to the Brown Act, but there are times when, despite our best efforts, litigation ensues. While the Brown Act's application is broad and its exceptions are narrow, there are a number of effective defenses and strategies upon which cities can rely when faced with a Brown Act claim. The recent cases that will be discussed below provide valuable guidance on these defenses and strategies.

## II. Brown Act Amendments

In 2016, the Legislature adopted three noteworthy Brown Act amendments:

### A. AB 1787 (Chapter 507, Statutes of 2016) – Govt. Code §§ 54954.3(b)(2), (3).

AB 1787 addresses how local agencies regulate and control public comment during the meetings of local legislative bodies. The Brown Act allows local agencies to adopt reasonable regulations regarding the amount of time that members of the public may have to address the legislative body. Many cities limit public comment to three to five minutes per speaker. There were questions, however, as to whether such a time limit should include the time necessary for someone to translate for a non-English speaker. Prior to AB 1787, the Brown Act was silent on this issue.

Under AB 1787, if a legislative body limits the time for public comment, it must provide at least twice the allotted time to a member of the public who uses a translator, to ensure that non-English speakers receive the same opportunity to directly address the body. However, if the legislative body uses a simultaneous translation equipment system to allow the body to hear the translated public testimony simultaneously, this provision is inapplicable.

### B. AB 2257 (Chapter 265, Statutes of 2016) – Govt. Code § 54954.2(a)(2).

Section 54954.2(a) requires that a local legislative body post its agenda at least 72 hours before a regular meeting in a "location that is freely accessible to members of the public and on the local agency's Internet Web site, if the local agency has one." AB 2257 adds several significant requirements for online agenda posting. After January 1, 2019, a legislative body of a city must post its meeting agendas on the local agency's primary website homepage accessible through a prominent, direct link. In addition, the online posting must be in an open format that is retrievable, downloadable, indexable, and electronically searchable by commonly used internet search applications. AB 2257 does not provide much guidance on how local agencies can comply with these requirements. However, the purpose of this legislation was to make sure that online agendas were not buried within a local agency's website or posted in a manner that was not "intuitively navigable by a site visitor." Cities should work with their IT specialists and err on the side of visibility and accessibility.

### C. SB 1436 (Chapter 175, Statutes of 2016) – Govt. Code § 54953(c)(3).

SB 1436 is yet another byproduct of the scandal involving the City of Bell. Under this legislation, local legislative bodies must publicly announce any recommended pay and benefit increases for executives before taking final action on the compensation.

## III. Judicial Decisions

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

**Key Holding: Compliance with the pre-litigation conditions in Government Code section 54960.2(a) was only required for lawsuits that seek to determine the Brown Act's applicability to past actions, not to lawsuit related to ongoing actions.**

The City of San Diego's regular council meetings take place weekly over the span of Monday and Tuesday. Beginning in 2001, San Diego published one consolidated agenda for each weekly meeting and provided for public comment on non-agenda items on Tuesday morning. In 2014, the Center for Local Government Accountability filed a petition for writ of mandate and complaint for declaratory and injunctive relief, claiming that the ongoing practice of providing a single public comment period during the two-day regular meeting violated Government Code section 54954.3(a). The trial court sustained San Diego's demurrer without leave to amend on the grounds that the plaintiff failed to submit a pre-filing cease and desist letter to San Diego under Government Code section 54960.2(a)(1), and that the action became moot after San Diego adopted an ordinance allowing for non-agenda public comment on both days of the regular meeting.

It was undisputed that the plaintiff did not submit a cease and desist letter prior to initiating its action against San Diego. The primary issue to be decided on appeal, therefore, was whether a cease and desist letter was necessary under Government Code section 54960. Section 54960 allows challenges by writ of mandate, injunction, or declaratory relief to determine the

Brown Act's applicability "to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of [the Brown Act] to past actions," subject to the filing preconditions set forth in Government Code section 54960.2. San Diego argued that the preconditions, which include the cease and desist letter requirement, applied to *all* types of lawsuits under section 54960, while the plaintiff argued that the preconditions only applied to lawsuits challenging past actions.

The Court of Appeal agreed with the plaintiff that compliance with the preconditions in Government Code section 54960.2(a) was only required for lawsuits that seek to determine the Brown Act's applicability to past actions. The Court of Appeal also determined that the plaintiff's lawsuit related to ongoing actions. The Court rejected San Diego's argument that the lawsuit only challenged the past action of adopting an ordinance regarding non-agenda public comment because the 2001 ordinance was not limited to a one-time effect. Finally, the Court concluded that San Diego's post-litigation ordinance providing for non-agenda public comment on both days of the regular meeting did not moot the litigation because it "did not equate to a change in the City's legal position." The Court of Appeal, therefore, reversed the judgment and remanded the matter to the trial court.

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

**Key Holding: City Council members' discussion of whether to place item on a future agenda fell within the Brown Act's listed exceptions to rule prohibiting discussion or action upon non-agenda items.**

Residential parking has long been a contentious issue in Culver City. In 1982, residents of Farragut Drive successfully petitioned Culver City to impose strict parking permit requirements on their street. The City Council subsequently adopted an ordinance that established a city-wide preferential parking program and preserved existing residential parking restrictions, including the Farragut Drive parking restrictions.

In 2014, members of a church located near Farragut Drive asked the city about relaxing the Farragut Drive parking restrictions, which were allegedly having a negative impact on church parishioners. After learning from city staff that there was no existing procedure for a non-resident to petition for a change in any residential parking restriction, a lawyer for the church wrote to a councilmember asking for assistance. At the next city council meeting, on August 11, 2014, during the portion of the meeting reserved for receiving and filing public correspondence, the councilmember announced that he had received the letter and asked for consensus to place the Farragut Drive parking restrictions on a future council agenda. A brief, six-minute discussion ensued regarding the nature of the item to be discussed; the council members discussed whether the issue to be agendized was an administrative appeal by the church or a complete review of the Farragut Drive parking restrictions. After receiving clarification from staff, the council agreed to place the Farragut Drive parking restrictions on a future agenda.

The Farragut Drive parking restrictions were placed on the city council meeting agenda for September 8, 2014. The September 8th discussion lasted approximately two and a half hours

and culminated in the city council asking city engineering staff to provide information at a future council meeting regarding the conduct of a parking impact study.

On October 20, 2014, several Farragut Drive residents submitted a "cease and desist letter" alleging that Culver City violated the Brown Act on August 11, 2014 by discussing the Farragut Drive parking restrictions. They characterized the September 8th city council discussion as the "fruit of a poisonous tree" and requested "that the Culver City Council [sic] cease and desist discussions and actions related to its meeting on August 11, 2014." After the City responded that no Brown Act violation occurred, the Farragut Drive residents filed a complaint seeking declaratory relief that the city and its council members violated the Brown Act on August 11, 2014 by discussing and taking action to agendize the Farragut Drive parking restrictions.

The trial court granted Culver City's special motion to strike under Code of Civil Procedure section 425.16 ("anti-SLAPP") and the Court of Appeal affirmed. The Court concluded that the lawsuit arose from the city council's exercise of its First Amendment rights and that the plaintiffs' claim sought personal relief (preventing any change to the Farragut Drive parking restrictions) such that the anti-SLAPP statute's public interest exception set forth in Code of Civil Procedure section 425.17 did not apply. The Court also concluded that there was no likelihood that the plaintiffs would succeed on the merits. The council members' discussion of whether to place the Farragut Drive parking restrictions on a future agenda fell within the Brown Act's listed exceptions to rule prohibiting discussion or action upon non-agenda items.

**C. *Cruz v. City of Culver City, et al*. (Los Angeles County Superior Court Case No. BC617228) ("*Cruz II*")**

**Key Ruling: Agenda description for an item relating to City's parking requirements satisfied the Brown Act because it described exactly what the city council actually did. Moreover, the plaintiffs failed to demonstrate prejudice in light of their active involvement at the City Council hearing on the matter.**

On April 15, 2016, the residents of Farragut Drive filed a second Brown Act lawsuit against Culver City. In March 2016, while the appeal in *Cruz I* was pending, the City revisited the Farragut Drive parking restrictions issue. On March 1, 2016, the City issued an "Official Courtesy Notification" to the residents of Farragut Drive regarding a continued discussion of the Farragut Drive parking restrictions. The notification provided the time and place of the meeting, explained how and when to obtain a copy of the staff report, explained how to submit written comments, and invited members of the public to participate in the meeting.

On March 10, 2016, the city published the agenda for the March 14th meeting. The March 14th regular meeting agenda described the Farragut Drive parking restrictions issue as follows:

> FOUR FIFTHS VOTE REQUIREMENT: (1) CONTINUED DISCUSSION OF THE EXISTING PERMIT PARKING RESTRICTIONS ON THE 10700 BLOCK OF FARRAGUT DRIVE; (2) CONSIDERATION OF THE REQUEST FROM GRACE

EVANGELICAL LUTHERAN CHURCH, (4427 OVERLAND AVENUE), TO CHANGE THE EXISTING FARRAGUT PARKING RESTRICTIONS; (3) CONSIDERATION OF A PARKING STUDY TO EVALUATE THE NEED FOR EXISTING FARRAGUT PARKING RESTRICTIONS AND, IF SUCH PARKING STUDY IS DIRECTED, (A) ADOPTION OF A RELATED RESOLUTION DIRECTING A PARKING STUDY, TEMPORARILY SUSPENDING THE EXISTING FARRAGUT PARKING RESTRICTIONS, AUTHORIZING TEMPORARY REMOVAL OF EXISTING PERMIT-ONLY PARKING RESTRICTION SIGNS; AND AUTHORIZING THE PRO-RATA REIMBURSEMENT OF THE COSTS OF PERMITS PREVIOUSLY ISSUED FOR THE 10700 BLOCK OF FARRAGUT DRIVE; (B) APPROVAL OF A PROFESSIONAL SERVICES AGREEMENT WITH KOA CORPORATION TO CONDUCT THE PARKING STUDY IN AN AMOUNT NOT-TO-EXCEED $35,428; AND (C) APPROVAL OF A RELATED BUDGET AMENDMENT (REQUIRES FOUR-FIFTHS VOTE); AND (4) DIRECTION TO THE CITY MANAGER AS DEEMED APPROPRIATE.

During the meeting, 13 citizens spoke either in support of or opposition to the Farragut Drive parking restrictions, including four of the named plaintiffs in the lawsuit and their legal counsel and his wife. At the conclusion of the ensuing city council discussion, the council voted to temporarily suspend the Farragut Drive parking restrictions and authorize a parking study.

In their complaint, the plaintiffs contended that there was no existing authority in the city's parking regulations that would have allowed any modification to the Farragut Drive parking restrictions without a petition initiated by the residents themselves. The plaintiffs argued, therefore, that the March 14th agenda description for the Farragut parking restrictions discussion violated the Brown Act's agenda requirement because it did not describe such a purported amendment to the city's parking regulations. The trial court rejected this argument and sustained the city's demurrer without leave to amend. The trial court held that the agenda described exactly what the city council actually did; a temporary suspension of the Farragut Drive parking restrictions for purposes of conducting a parking study to evaluate the efficacy of the 34-year old restrictions. In taking this action, the city council did not amend the existing regulations or take some discrete, unspecified action. The trial court concluded that the agenda described the "whole scope" of the action to be taken and, accordingly, more than satisfied the substantial compliance standard. The trial court also concluded that the plaintiffs had failed to demonstrate prejudice in light of the plaintiffs' active involvement in the city council hearing on the Farragut Drive parking restrictions.

**D. *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194**

**Key Holding: Town council violated the Brown Act "brief general description" agenda requirement by acting on an MOU and accepting a donation for a special election where that action was not listed in the meeting agenda.**

The plaintiff alleged that the Town of Apple Valley violated the Brown Act by failing to properly describe in the agenda certain actions to be taken at the town council's August 13, 2013 meeting. Agenda Item No. 16 was titled "Wal-Mart Initiative Measure" and described the

recommended action as "Provide direction to staff." No other information appeared on the agenda for this item. The agenda packet for this item, however, included three resolutions regarding a special election for a local initiative to enact a specific plan that would allow development of a shopping center and large retail store. At the meeting, 14 members of the public expressed their opposition to the initiative. The town council approved each resolution and an MOU that authorized the town's acceptance of a donation from Walmart to pay for the special election. The MOU was not included in the agenda packet for that meeting.

The initiative passed in a special election on November 19, 2013. A town resident subsequently filed a lawsuit, alleging that the town council's approval of the resolutions and MOU violated the Brown Act's agenda requirements. He claimed that he would have appeared at the August 13, 2013 meeting had the agenda more fully described the actions to be taken and he would have expressed his opposition to the resolutions and MOU. The plaintiff sought an injunction against any development in the specific plan area because the Brown Act violations rendered the approval of the resolutions and MOU null and void. The plaintiff also argued that the initiative violated article II, section 12 of the California Constitution because it specifically identified Walmart.

On the plaintiff's motion for summary judgment, the trial court concluded that the town's approval of the three resolutions and MOU on August 13, 2013 violated the Brown Act because these actions were not described in the meeting agenda. As to the resolutions, the trial court concluded that there was no prejudice because several members of the public commented on them at the public hearing. However, there was prejudice as to the MOU because it did not appear in the agenda packet and there were no public comments on the MOU. The trial court, therefore, declared the approval of the MOU invalid, void, and unenforceable. The trial court also concluded that the initiative violated the California Constitution and was unenforceable.

The Court of Appeal reversed the trial court's ruling on the constitutional issue, but affirmed the Brown Act ruling. Citing *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1175, the Court of Appeal concluded that the town council violated the Brown Act by acting upon the proposed MOU and accepting Walmart's donation to pay for the special election even though that action was not listed in the meeting agenda. The Court observed that "[n]o one at the meeting discussed the matter or commented on the MOU" and that Walmart "offered the gift to the Town the day after the agenda was posted." The Court concluded that "[t]his was troublesome as it is conceivable this was a major factor in the decision to send the matter to the electorate."

**E. *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637**

**Key Holding: City satisfied the Brown Act's "brief general description" agenda requirement because it gave notice it would consider a substantial development of a hotel; would share project TOTs; and referred to a report that the project would involve a subsidy by the city.**

Oceanside entered into an agreement with a developer to build a luxury hotel. Under the agreement, the city was initially obligated to pay the developer 100 percent of transient

occupancy tax (TOT) receipts generated by the hotel and, thereafter, smaller percentages of TOT receipts from the hotel, until the city's $11 million TOT obligation was satisfied. When the agreement was presented to the city council for approval, the council agenda stated that the council would consider:

- the developer's agreement to guarantee development of the subject property as "a full service resort;"

- an agreement "to provide a mechanism to share Transient Occupancy Tax (TOT) generated by the Project;" and

- a report, required by statute "documenting the amount of subsidy provided to the developer, the proposed start and end date of the subsidy, the public purpose of the subsidy."

A citizen's group filed a complaint for declaratory and injunctive relief and a petition for writ of mandate against the city. The complaint alleged, among other things, that the agenda did not comply with the Brown Act because it did not set forth the amount of the proposed subsidy. The trial court entered judgment in favor of the city and the Court of Appeal affirmed.

The Court of Appeal observed that a local agency can fulfill its agenda requirements under Government Code section 54954.2(a) by providing a "brief general description of each item of business to be transacted or discussed." The Court further observed "that an agency fulfills its agenda obligations under the Brown Act so long as it substantially complies with the statutory requirements." In this case, the city satisfied the Brown Act's agenda description requirement because it "expressly gave the public notice that it would be considering a fairly substantial development of publicly owned property as a luxury hotel; that the city would be sharing TOT's generated by the project; and, importantly, by express reference to the subsidy report, that the project, if approved, would involve a subsidy by the city." While the city could have included other details regarding the subsidy, the Brown Act did not require it to do so. The city complied with the Brown Act because it "gave the public fair notice of the essential nature of what the council would be considering."

**F. *Beland v. County of Lake* (2016) 2016 WL 230665 (unpublished)**

**Key Holding: County Board did not violate Section 54957 by engaging in closed session fact-finding or a hearing upon charges at which employee had a right to be present. Even when "complaints or charges" against an employee are considered at a closed session, notice is not required unless the session is a hearing under the Brown Act.**

This case involved a former county employee's petition for writ of administrative mandate, following his termination from his position with the Lake County Sheriff's Department. The petitioner asserted the board of supervisors conducted a "closed-door hearing held without notice to [him], and that doing so resulted in a void termination" and violated

Government Code section 54957. He claimed the board "engage[d] in its own fact-finding [and] ... its deliberations evolve[d] into a hearing upon charges" at which he had a right to be present.

The Court of Appeal disagreed. Citing *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876, 880, the Court concluded that there was no violation because the board did not hear charges against the employee in the closed session. Further, the Court reiterated that even when "complaints or charges" against an employee are considered at a closed-door session, notice is not required unless the session is a hearing under the Brown Act, citing *Bollinger v. San Diego Civil Service Com*. (1999) 71 Cal.App.4th 568. In sum, the board's closed-door session was regarding a personnel matter rather than "complaints or charges," and was a deliberation, not a hearing. Consequently, there was no Brown Act violation.

**G. *Fillmore Senior Center v. City of Fillmore* (2016) 2016 WL 3723913 (Cal.Super.) (Trial Court Order)**

**Key Ruling: Brown Act lawsuit to declare an action null and void was time barred by Section 54960.1, and City was not estopped from invoking limitations period by its denial that any violation had occurred.**

This case involved a claim of an unspecified Brown Act violation. The Superior Court granted Defendant City of Fillmore's motion for summary adjudication of the Brown Act cause of action. The allegations of the third cause of action established that any Brown Act violation occurred at the November 18, 2014 council meeting. Pursuant to Government Code section 54960.1, the plaintiff had no more than 135 days from the violation to file the action (i.e., 90 days to make a written demand to cure, 30 days for the city to take action or not, and 15 days after that for the plaintiff to file suit). The plaintiff did not file its Complaint until well after the lapse of that period. Accordingly, the Brown Act violation was time-barred.

The plaintiff argued that the city was estopped from relying on the limitations periods in section 54960.1 because the city's denial that a violation occurred was the equivalent of active concealment. The trial court rejected that argument: "[T]he mere fact that the City denies that it violated the Brown Act … does not mean it intentionally concealed a violation …."

**H. *Mark D. Kaye et al. v. City of St. Helena, et al.* (Napa County Superior Court Case No. 65665) (Trial Court Order)**

**Key Ruling: The trial court denied attorney's fees under Section 54960.5 because: the City did not violate the Brown Act's teleconference local quorum requirement; the Brown Act imposes no requirement for "quality connectivity" in teleconferencing; and the City in any event consistently agreed to cure any violation.**

This case involves the Brown Act's teleconference requirements, as well as its cure and correct and attorneys fee provisions.

A planning commission conducted a public hearing on a proposed land use development. Two of the five commissioners recused themselves from the hearing. One of the remaining three

commissioners participated by teleconference from her hotel in Alaska, although the telephone connection was poor, and the commissioner participating remotely expressed some difficulty hearing the proceedings. The hearing's conclusion, the commission voted three to zero to deny the use permit and design review for the project.

The applicant missed his deadline under the Municipal Code to appeal the matter to the city council. The applicant's attorney, however, submitted a letter claiming that the planning commission's action was null and void, because the commission violated the Brown Act in several respects, including:

- teleconferencing was improper because the Brown Act requires a majority of the entire Commission to be located inside St. Helena, and
- the City was required to provide adequate telephonic connectivity to allow the remote member to fully hear and understand the entire proceeding.

In a subsequent discussion with the city attorney, the applicant's attorney conceded that his sole interest was in being excused from mistakenly allowing the appeal deadline to lapse and that his client had no interest in pursuing his Brown Act claims if he could appeal the project's denial before the City Council. Following further discussions, the parties agreed in concept to a resolution under which the applicant would waive all Brown Act claims and the commission would vacate its decision, conduct another hearing, and render a new decision. During the discussions, the applicant changed attorneys. The new attorney reiterated a commitment to the same conceptual deal, but the parties are unable to agree on final terms.

Section 54960.1 specifies a 30-day period from the date of the demand for the legislative body to cure or correct the challenged action in asserted violation of the Brown Act, and a 15-day period from the lapse of the 30-day period for the challenger to file suit. During the time the attorneys were exchanging e-mails agreeing about the concept of the deal, the statutory time to cure and correct lapsed. The City agreed to extend the time to sue.

The applicant filed suit, seeking to have the commission's decision declared null and void, and seeking attorney's fees. The city then unilaterally undertook a "cure and correct," by vacating the previous decision and scheduling a new public hearing. The commission conducted the new hearing, at which the applicant appeared along with neighborhood opponents. The commission (with all three participating members local) again voted to deny the application. The applicant attempted to appeal the decision to the city council, but again missed one of the two applicable deadlines for appeal. The council denied the appeal. The applicant did not timely challenge the denial by writ of mandate.

Months passed, during which the applicant did nothing to prosecute his complaint. Thereafter, the applicant hires his third attorney, who filed a motion for attorney's fees in the Brown Act case. The City opposed the motion, which the Superior Court denied based on the following arguments:

**There Was No Brown Act Violation.** There was no Brown Act violation, as required for fees under section 54960.5. First, the Plaintiff moved for fees without first seeking by

motion or trial to secure an order or judgment establishing a Brown Act violation prior to filing a motion for fees. Even if he had done so, the Court agreed with the city that the plaintiff's fee motion failed to establish a violation, as follows:

- **A Quorum Of The Legislative Body Was Local Per Section 54953 (b) (3).**

The city argued, and the Court agreed, that because two members recused themselves, the "legislative body," as that term is used in section 54953(b)(3), was comprised solely of those three participating members. That being the case, two members constituted a majority of the legislative body, and those two members did participate from St. Helena.

The court also agreed that because the issue was raised as a violation of the Planning Commission's own bylaws, the court was bound to defer to the Commission's interpretation of the meaning of its own bylaws unless it is "clearly erroneous" (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1091; *see Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193), and presume its regularity and correctness. (Evid. Code § 664.)[1]

- **The Brown Act Imposes No "Adequate Connection" Requirement.**

The "adequate connection" argument invited the Court to invent an additional standard found nowhere in the Brown Act namely, that the member participating by teleconference must also be "adequately connected." The text of section 54953(b)(4) imposes no such subjective, qualitative requirement for connectivity, nor has any case suggested such a thing. The argument offered no explanation for who would be the judge of whether a connection is "sufficient," or what standard that person or entity would apply. Courts are not at liberty to independently enlarge the scope of the express terms of the Brown Act beyond the language used, nor enlarge upon its operation so as to embrace matters not specifically included. (See, e.g., *Coalition of Labor, Agriculture and Business v. County of Santa Barbara Board of Supervisors* (2005) 129 Cal.App.4th 205, 209-210 (the court declined to fill a perceived Brown Act omission because doing so would constitute "an unwarranted intrusion of the judiciary on the legislative branch.").)[2]

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[1] See, however, the following authorities suggesting that members who are recused are not counted toward a quorum: Opinion No. 10-901, 94 Ops. Cal. Atty. Gen. 100 (2011), 2012 Daily Journal D.A.R. 50; 2 CCR section 1807; Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 ADMIN. L. REV. 1111, 1186-87 (2000); *Chamber of Commerce of the U.S. v. NLRB*, - F. Supp. 2d -, 2012 WL 1664028, at *7-8 (D. D.C. 2012); *In re Shapiro*, 392 F.2d 397, 400 (3d Cir. 1968).

[2] The City also submitted a declaration from the Commissioner who had participated remotely stating that she has heard and understood substantially all of the proceedings, and was able to make an informed vote. But consider whether, apart from the Brown Act issue, a poor telephone connection deprives stakeholders such as the applicant of the right to have all decision makers fully hear and understand the evidence under constitutional and statutory due process and fair hearing principles. (See generally CEB, California Municipal Law Handbook, section 10.416, p. 1119.) Consider in this regard the decision and rationale in the unpublished *Lacy Street Hospitality Service, Inc. v. City of Los Angeles* (2004) 125 Cal. App. 4th 526, decertified from publication June 15, 2005, and the cases it cites. The *Lacy* Court concluded that the inattentiveness of decision-makers during a public hearing prevented them from satisfying fair process principles and overturned the decision. (Citing *Haas v. County of San Bernardino* (2002) 27 Cal. 4th 1017, 1024 ("due process requires fair adjudicators in administrative tribunals"); *Henderling v. Carleson* (1974) 36 Cal.App.3d 561, 566 (takes as a given that administrative decision-maker listens at hearing); *Chalfin v. Chalfin* (1953) 121 Cal.App.2d 229, 233 (fact finder must listen to the evidence before making a decision).)

- **Substantial Compliance.**

If there had been a violation, the City substantially complied with the teleconference rules, precluding a determination that the action was null and void. (Govt. Code § 54960.1.) Under the *Castaic* decision, there could be no Brown Act liability because the City made a "reasonably effective" effort at satisfying the teleconference rules.[3]

The City made several other arguments why fees should be denied even if the Court found a Brown Act violation. Having found no violation, the Superior Court did not rule on these arguments.[4]

**I. *The Alcove Unique Gifts v. Port San Luis Harbor District* (2016) 2016 WL 6270961 (Cal.Super.) (Trial Court Order)**

**Key Ruling: Trial court granted anti-SLAPP motion on Brown Act claim because plaintiff failed to satisfy Section 54960.1's pre-litigation requirement of a "cure and correct" demand.**

The Port San Luis Harbor District denied an extension of the plaintiff's retail concessions agreement. The plaintiff responded by suing the District, three Harbor Commissioners, and a District employee on various theories, including an alleged Brown Act violation. The individual defendants filed an anti-SLAPP motion. The trial court granted the motion to strike without leave to amend. The trial court concluded that the causes of action against the individual defendants arose from their actions as commissioners and employees in considering and deciding on whether to extend the plaintiff's contract, which was an issue of great public interest. The plaintiff could not demonstrate a probability of prevailing on any of its claims. With regard to the Brown Act claim, the court observed that the plaintiff had failed to provide notice to the District to cure and correct the alleged Brown Act violation.

**J. *City of Bell v. Avila* (2016) 2016 WL 8224341 (Cal.Super.) (Trial Court Order)**

**Key Ruling: Summary adjudication granted because City failed to satisfy Brown Act's "brief general description" agenda requirement for a resolution changing employee compensation.**

The City of Bell sought summary adjudication of its cause of action seeking a declaration that a 2008 resolution was void and invalid because it was not described properly on a city council meeting agenda. The resolution at issue was listed on the agenda as "Approval of Resolution No. 2008-05 Identifying the Administrative Regulations and Operating Procedures and Rescinding Resolutions." The city argued that this did not constitute a brief, general description because the action involved employee compensation. The Defendants did not oppose this argument and the trial court granted summary adjudication as to this cause of action.

[3] Section 54960.1 lists several Brown Act requirements, including teleconferencing under section 54953, that are subject to the substantial compliance standard.
[4] These arguments are addressed below.

## IV. Attorney General Opinions

### A. 99 Ops.Cal.Atty.Gen. 11 (2016)

**Key Ruling: The Brown Act's website posting requirement is not violated if website is inaccessible due to technical problems.**

The Brown Act requires that agendas be posted on a city's website (assuming it has one) 72 hours before the city council meeting (and meetings of certain other legislative bodies). (Govt. Code §§ 54954.2(a), (d).) This provision is not necessarily violated if the website experiences technical difficulties that cause the agenda to be inaccessible to the public for a portion of the 72 hours preceding the meeting.

## V. Litigation Defenses and Strategies

The cases described above cover a wide range of potential Brown Act issues and provide guidance on several key recurring issues. These cases also provide guidance on potential strategies for defending against and litigating Brown Act claims.

### A. The Pre-Litigation Requirements And Limitation Periods For Brown Act Lawsuits.

There are two types of Brown Act lawsuits that an interested person may bring against a local agency. Determining which type of lawsuit has been filed is critical to evaluating whether the plaintiff satisfied the applicable pre-litigation requirements and filed a timely complaint. A plaintiff's failure to comply with these requirements and limitations may provide you with an easy way out. The two categories of Brown Act lawsuits are as follows:

1. Government Code section 54960(a):

- Who may commence the action? District attorney or any interested person.
- What type of action? Mandamus, injunction, or declaratory relief.
- Purpose of action?
    - Stopping or preventing violations or threatened violations of the Brown Act by members of the legislative body of a local agency; or
    - to determine the applicability of the Brown Act to ongoing actions or threatened future actions of the legislative body; or
    - to determine the applicability of the Brown Act to past actions of the legislative body, subject to section 54960.2.
- Pre-litigation requirements. If the action seeks to determine the applicability of the Brown Act to *past actions*, the plaintiff must meet certain pre-litigation requirements set forth in section 54960.2:
    - the plaintiff must submit a cease and desist letter to the agency, clearly describing the past action and nature of the alleged violation, within nine months of the alleged violation.

    - The agency has 30 days to respond whether or not it will make an unconditional commitment to cease, desist from, and not repeat the past action.
- Limitations Period. If there is no unconditional commitment, the plaintiff must file the complaint within 60 days of receiving the agency's response or 60 days after the time period for the agency to respond expires, whichever is earlier.
- As noted above, the recent decision in *Center for Local Government Accountability v. City of San Diego, supra*, 247 Cal.App.4th 1146, held that the pre-litigation cease and desist demand requirement applies only to claims relating to past actions, and not "to ongoing actions or threatened future actions of the legislative body."
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2. Government Code section 54960.1:

- Who may commence the action? District attorney or any interested person
- What type of action? Mandamus or injunction (no declaratory relief)
- Purpose of action?
    - obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section.
- Pre-litigation requirements. The plaintiff must meet the following requirements:
    - The plaintiff must submit a written demand to cure or correct the alleged violation
    - The demand must clearly describe the challenged action of the legislative body and nature of the alleged violation
    - The demand must be made within 90 days from the date the action was taken unless the action was taken in an open session but in violation of the agenda posting and brief description requirements of section 54954.2, in which case the written demand shall be made within 30 days from the date the action was taken.
    - Within 30 days of receipt of the demand, the legislative body shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct or inform the demanding party in writing of its decision not to cure or correct the challenged action.
- Limitations period:
    - If the legislative body takes no action within the 30-day period, the inaction shall be deemed a decision not to cure or correct the challenged action, and the 15-day period to commence the action described in subdivision (a) shall commence to run the day after the 30-day period to cure or correct expires.
    - Within 15 days of receipt of the written notice of the legislative body's decision to cure or correct, or not to cure or correct, or within 15 days

of the expiration of the 30-day period to cure or correct, whichever is earlier, the demanding party shall be required to commence the action pursuant to subdivision (a) or thereafter be barred from commencing the action.

- Pleading requirements: "To state a cause of action, a complaint based on [section] 54960.1 must allege: (1) that a legislative body of a local agency violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action, plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not cure or correct the challenged action." (*Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116–111.)

3. Determining Whether Section 54960 or 54960.1 Applies.

In many situations, it will be relatively easy to determine which of sections 54960 (past or threatened or ongoing violations) or 54960.1 (cure or correct one past action) applies. The party bringing the lawsuit typically does, and should be required to clearly identify the applicable section in both the demand letter (if applicable) and the complaint. These requirements, however, are a potential trap for unwary plaintiffs. The city attorney, therefore, should carefully scrutinize the demand letter and the complaint for potential discrepancies that may open the door to a defense that the action is time-barred.

For example, in *Cruz v. Culver City*, the plaintiffs' pre-litigation demand letter and complaint did not indicate whether the plaintiffs were proceeding under section 54960 or section 5490.1. The demand letter, however, clearly sought to invalidate the city council's initial decision to place the Farragut Drive parking restrictions on a future agenda. The plaintiffs argued in their demand letter that the city council could not take any action regarding the Farragut Drive parking restrictions and that a mere discussion of the restrictions was the "fruit of a poisonous tree." The plaintiffs did not submit this demand letter within the 30-day time period required under Government Code section 54960.1 for actions taken in open session.

The city argued that the plaintiffs were necessarily proceeding under Government Code section 54960.1 and that there action, therefore, was time-barred (in addition to lacking any substantive merit). In addition, the city argued that an action under section 54960.1 requires a plaintiff to allege and show prejudice. (See discussion below.) The plaintiffs responded that they were proceeding under Government Code section 54960 because they were only seeking a declaration that the Brown Act applied to a past action by the council (the decision on August 8, 2014 to place the Farragut Drive parking restrictions on a future agenda).

The city relied on two decisions, one by the California Supreme Court and another by the Court of Appeal, to establish that section 54960 may not be used where the Brown Act plaintiff challenges a single past action that is unrelated to ongoing or threatened violations.

In *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, the Supreme Court evaluated a former version of section 11130 (a), as found in the Bagley Keene

Open Meeting Act (Govt. Code §11120, et seq.), which contained almost identical language as here, i.e., "any interested person may commence an action ... for the purpose of stopping or preventing violations or threatened violations of" the act "by members of" a "[governmental] body," or "to determine" the act's "applicability ... to actions or threatened future action." The issue before the Supreme Court was whether the right of action granted by Government Code section 11130 (a) extended only to present and future actions and violations and not to past ones. The Court concluded, "the provision's right of action extends only to present and future actions and violations and not past ones." (*Regents, supra*, 20 Cal.4th at p. 524.) The facts before the court involved a request by the plaintiff for relief including a declaration that the Regents violated the act by making a collective commitment or promise to approve certain controversial resolutions, prior to a noticed, open, public meeting. The challenged violation was a one-time event, and plaintiff did not show any continuing course of conduct. (*Id*. at pp. 515–516, 536.)

In reaching its conclusions, the *Regents* Court examined previous case law arising under the Brown Act, Government Code section 54960(a). The Supreme Court stated that the section extends to past actions and violations as well as present and future ones—but "only as to past actions and violations that are related to present or future ones." (*Regents, supra*, 20 Cal.4th at p. 526, fn. 6.)

In *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, the court followed Regents in a matter involving Government Code section 54960. It held that a claim under section 54960 was viable only when there is a showing of a pattern of past conduct that provided an evidentiary basis to support the allegation that the legislative body would continue violating the Brown Act. (*Shapiro, supra*, 96 Cal.App.4th at p. 915 ["so long as the allegations and proof of the legislative body's practices extend to 'past actions and violations that are related to present or future ones,' the Brown Act provisions are brought into play to authorize and justify injunctive relief"].)

The City argued that *Regents* and *Shapiro* were dispositive, and that section 54960 did not apply to the claim of a single violation of section 54954.2 (taking action on a matter that was not listed on the agenda) at the August 11, 2014 meeting.

While Appellants argued that legislation from 2012, SB 1003, undid *Regents* and *Shapiro*, the City made the case that that argument fails under the doctrine of legislative acquiescence. That doctrine relies upon the fact that the Legislature is presumed to be aware of judicial decisions and to have enacted or amended statutes in light of such knowledge. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1008.) "When a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 196.) In such instances, the "construction becomes as much a part of the statute as if it had been written into it originally." (*People v. Hallner* (1954) 43 Cal.2d 715, 720.) Thus, the Legislature is presumed to have been aware of the *Shapiro* decision when it adopted SB 1003 without undertaking to overrule it in any manner and deemed to have acquiesced in *Shapiro's* ruling.

In addition, the City pointed out that in enacting SB 1003 and section 54960.2, the Legislature created a two-part process that allows a plaintiff to demand that an agency correct an ongoing Brown Act violation by sending a cease and desist letter and a legislative body to respond by issuing an "unconditional commitment to cease, desist from, and not repeat" the conduct in the future. (Govt. Code § 54960.2(a)(1), (c)(1); see also Black's Law Dictionary (8th ed. 2004 ), p. 237, col. 1 [defining a "cease and desist letter" as "[a] cautionary notice sent to an alleged wrongdoer, describing the offensive activity and the complainant's remedies and demanding that the activity stop."].) The City argued that this process would be pointless in the context of a one-time past violation. There would be nothing to "cease and desist" from and an "unconditional commitment to cease, desist from, and not repeat" the non-existent conduct would be futile. (Civ. Code § 3532 ["The law neither does nor requires idle acts."].)

The trial court agreed with the city that only section 54960.1 applied, and therefore found the complaint to be both time-barred and subject to the prejudice defense. In reaching this conclusion, the trial court relied on the plaintiffs' 10-page demand letter "which challenges the City Council's actions and gives every appearance of seeking to have them nullified."

### B. Defenses Under Section 54960.1

#### 1. Substantial Compliance

In *San Diegans for Open Government v. City of Oceanside*, *supra*, 4 Cal.App.5th 637, the Court of Appeal recognized "that an agency fulfills its agenda obligations under the Brown Act so long as it substantially complies with statutory requirements." (*Id*. at pp. 642-643.) The substantial compliance standard is set forth in Government Code section 54960.1(d)(1) and provides cities with a very useful defense against certain alleged Brown Act violations.

The substantial compliance standard applies in the following circumstances:

- There is a proceeding under section 54960.1 to deem an action null and void.
- The action that allegedly violated the Brown Act was taken in substantial compliance with:
    - Section 54953 (requirement that meetings be open and public; teleconferencing rules; prohibition against secret ballots; teleconferencing rules for health authorities)
    - Section 54954.2 (agenda posting and agenda item description requirements)
    - Section 54954.5 (closed session description requirements)
    - Section 54954.6 (notice and hearing requirements for new or increased taxes or assessments)
    - 54956 (requirements for special meetings)
    - 54956.5 (requirements for emergency meetings)

The courts have held that **"**substantial compliance" means actual compliance in respect to the substance essential to every reasonable objective of the statute. (*Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1205.) Under this standard,

strict compliance is not required, and reviewing courts are to reject "hypertechnical" arguments that "elevate form over substance." (*Id.* at p. 1207.) There is no Brown Act violation where the agency has made "reasonably effective efforts" to comply. (*Id*. at p. 1206.)

With regard to agenda descriptions, *San Diegans for Open Government* demonstrates that a city may substantially comply with the "brief general description" requirement by giving "the public fair notice of the essential nature of what the council would be considering." Under this standard, the agenda should describe each action to be taken, but it does not have to contain details that are more appropriate for a staff report.

### 2. Certain other actions are protected under Section 54960.1.

In addition to the substantial compliance rule, actions that are alleged to violate sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 shall not be determined to be null and void if any of the following conditions exist:

- The action taken was in connection with the sale or issuance of notes, bonds, or other evidences of indebtedness or any contract, instrument, or agreement thereto.

- The action taken gave rise to a contractual obligation, including a contract let by competitive bid other than compensation for services in the form of salary or fees for professional services, upon which a party has, in good faith and without notice of a challenge to the validity of the action, detrimentally relied.

- The action taken was in connection with the collection of any tax.

- Where person alleging noncompliance with section 54954.2(a), section 54956, or section 54956.5, because of any defect, error, irregularity, or omission in the notice given, had **actual notice** of the item at least 72 hours prior to regular meeting or 24 hours prior to special meeting.

- An action alleged to have been taken in violation of sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 **has been cured or corrected** by a subsequent action of the legislative body, the action filed pursuant to subdivision (a) shall be dismissed with prejudice.

Establishing these defenses, for example that the Plaintiff had actual notice, or that the violation was cured, will generally require the introduction of facts that are not set forth in the complaint. Because a city may not object to a Brown Act complaint by a demurrer that relies on or introduces facts beyond the four corners of the complaint itself, cities might consider simultaneously filing an anti-SLAPP motion, which may properly be supported by declarations providing such evidence, perhaps from the City Clerk, showing that the Plaintiff had actual

notice and appeared at the meeting. We discuss the use of such anti-SLAPP motions, and their applicability to Brown Act cases, below.

### 3. The Requirement of Prejudice As A Prerequisite For Brown Act Lawsuits Under Section 54960.1.

In proceedings under section 54960.1 (to deem an action null & void), merely alleging a Brown Act violation is insufficient by itself to state a valid cause of action. The plaintiff must also plead and prove prejudice. "Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's decision, Brown Act violations will not necessarily invalidate a decision. [Appellants] must show prejudice." (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1410; *Galbiso v. Orosi Public Utilities District* (2010) 182 Cal.App.4th 652, 670-671; *North Pacifica LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416, 1433-1434 (decided under "identical" Bagley-Keene Act).) In a case alleging a violation of the Brown Act's agenda requirements, a plaintiff cannot establish prejudice simply by alleging that he or she was unable to participate in a public meeting. (See *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555-556.) Rather, the plaintiff must demonstrate that his or her attendance would have affected the result of the meeting in some fashion.

In Cohan, as one example, the Court of Appeal found that a city council violated section 54954.2 by adding an administrative appeal of a development project to an agenda. (*Cohan v. City of Thousand Oaks, supra*, 30 Cal.App.4th at p. 556.) The matter was discussed and continued to a duly noticed public hearing, at which time the city council rejected the project. (*Id*. at pp. 552-553.) The Court of Appeal held that there was no prejudice to the developer because the city council considered the merits of the project at the subsequent, noticed public hearing. The Court of Appeal observed that "only a few persons showed support for the project [at the duly noticed hearing] in comparison to the large number of opponents." (*Id*. at p. 556.) The Court of Appeal observed that it was "highly unlikely more persons would have attended the [prior meeting] to dissuade the Council from considering whether to appeal the decision than appeared to support the project on the merits." (*Ibid*.)

In *Hernandez v. Town of Apple Valley*, *supra*, 7 Cal.App.5th 194, by contrast, the Court concluded that because of an inadequate agenda description as to one particular decision (the MOU) the City made, there had been no meaningful opposition mounted to the decision. The Court concluded that this was sufficient to establish prejudice.

## D. Equitable and Other Principles Applicable To Brown Act Litigation.

- Courts adopt a flexible reading of the Brown Act where doing so is generally consistent with the purposes of the Brown Act. (*See Travis v. Board of Trustees* (2008) 161 Cal.App.4th 335, 346.)

- Courts will decline to engage in speculation about what might happen in other meetings were the City to push some imaginary Brown Act envelope. (*See, e.g., Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal.App.4th 109, 115 fn. 5.)

- Under principles of statutory construction, courts do not give the words of the Brown Act a literal meaning if to do so would result in an absurd result that was not intended. (*Chaffee v. San Francisco Public Library Com., supra*, 134 Cal.App.4th 109, 114.)

- Where the Brown Act creates a general rule without a limitation, courts are not at liberty to simply manufacture and insert one. (*Coalition of Labor, Agriculture and Business v. County of Santa Barbara Board of Supervisors, supra*, 129 Cal.App.4th 205, 209-210.)

### E. The Application of the Brown Act to Councilmember and/or Public Comment

Those portions of public meetings reserved for comments by council members or the public present special challenges for city attorneys. A simple comment could elicit follow-up questions and quickly evolve into a substantive discussion, which could violate the Brown Act. Section 52954.2(a)(2) provides that "[n]o action or *discussion* shall be undertaken on any item not appearing on the posted agenda." (Emphasis added.) City attorneys, therefore, must always be on guard against actions and discussions that are not described in a meeting agenda.

Government Code section 54954.2(a)(2) sets forth three exceptions to this prohibition:

- [M]embers of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3;

- [O]n their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities;

- [A] member of a legislative body, or the body itself, subject to rules and procedures of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda.

The Court of Appeal decision in *Cruz I* provides an example of how these exceptions apply. As noted above, *Cruz I* involved the following statements regarding a non-agenda item:

- A statement by a council member that he had received a letter from the church that was affected by the Farragut Drive parking restrictions. The council member's comment regarding the letter was a permissible, brief response to a statement made by a person exercising his public testimony rights. Notably, the trial court and court of appeal rejected the plaintiffs' contention that this exception only applied to people exercising their public testimony rights in person at the meeting. Under this exception, a council member can respond to written correspondence as well as oral comments.

- The council member asked that the issue be placed on a future agenda for discussion. This request fell within the exception that allows members of a legislative body to request staff to report back at a subsequent meeting.
- The mayor and another council member asked whether the issue to be agendized was the process for appealing parking district decisions or the Farragut Drive parking restrictions. These questions constituted permissible requests for clarification.
- The city engineer provided clarification as to the issue to be discussed. The engineer's response was a permissible, brief response to a question from the council.
- The council decided by consensus to place the Farragut Drive parking restrictions on a future agenda for discussion. Government Code section 54954.2(a)(2) expressly allows a legislative body to "take action to direct staff to place a matter of business on a future agenda."

The Court of Appeal rejected the plaintiffs' Brown Act claim because the discussion at issue was not "substantive and substantial." The Court observed that the council member "did no more than ask for clarification as to the appropriate avenue of response to the church's letter." The city engineer "answered those questions and advised the council that the matter could be placed on a future agenda, with all parties given notice and an opportunity to comment." Under these facts, all three statutory exceptions applied.

### F. Using The Anti-SLAPP Statute To Address Brown Act Claims.

In responding to a Brown Act lawsuit, a city attorney is not limited to a demurrer. Under appropriate circumstances, a city attorney may file an anti-SLAPP motion under Code of Civil Procedure section 425.16. Section 425.16 (b)(1) provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

#### 1. Two-Step Analysis: Arises From Protected Activity/Probability of Prevailing one the Merits

An anti-SLAPP motion requires a two-step analysis:

> (1) Has the moving defendant shown that that challenged cause of action arises from protected activity? (*Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315-316.) Section 425.16 (e) defines an act "in furtherance of a person's right of free petition or free speech in connection with a public issue" to include the following:[5]

[5] The scope and applicability of two of these four prongs are currently before the California Supreme Court in *Rand v. City of Carson*, Case No. S235735.

- any written or oral statement or writing made before a legislative proceeding or any other official proceeding authorized by law (Code Civ. Proc. § 425.16(e)(1));

- any written or oral statement or writing made in connection with an issue under review or consideration by a legislative body or in any other official proceeding (Code Civ. Proc. § 425.16(e)(2));

- any written or oral statement or writing made in a public forum in connection with an issue of public interest (Code Civ. Proc. § 425.16(e)(3)); or

- any other conduct taken to further the exercise of the constitutional right of petition or right of free speech in connection with a public issue (Code Civ. Proc. § 425.16(e)(4)).

(2) If the moving defendant makes the threshold showing, the court then decides whether plaintiff has demonstrated a "probability of prevailing" on the claim. (*Holbrook v. City of Santa Monica*, *supra*, 144 Cal.App.4th 1242, 1247.)

The anti-SLAPP statute protects cities and city officials. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19.) It applies to lawsuits seeking declaratory relief for alleged Brown Act violations. (*Cruz v. City of Culver City* (2016) 2 Cal.App.5th 239; *Holbrook v. City of Santa Monica* (2004) 144 Cal.App.4th 1242.) "Under the First Amendment, legislators are 'given the widest latitude to express their views' and there are no 'stricter "free speech" standards on [them] than on the general public.'" (*Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252, 1261 [holding that a citizen's act of contacting a council member and the council member's act of talking with city staff were "petitions for grievances against the government protected by the First Amendment"].) Responding to inquiries on matters of public interest is a quintessential duty of elected officials. (*Manistee Town Center v. City of Glendale* (9th Cir. 2000) 227 F.3d 1090, 1093.)

*Holbrook* addressed the application of the anti-SLAPP statute to a claim that certain conduct at city council meetings violated the Brown Act. That case involved two council members who sued the city on the grounds that the city's practice of conducting long city council meetings violated various constitutional provisions. The trial court granted the city's special motion to strike and the Court of Appeal affirmed. The Court of Appeal concluded that the underlying complaint related broadly to oral statements at a public meeting in furtherance of issues of public importance. The Court of Appeal stated:

> "All four criteria [under section 425.16] are satisfied here. The City Council's exercise of its right of free speech in meetings … is the basis for the petition and complaint. Council members make oral statements before the other members of their legislative body and in connection with issues under review by the City Council. They make statements in a place open to the public or a public forum, in connection with issues of public interest. The public meetings, at which council

> members discuss matters of public interest and legislate, are conduct in furtherance of the council members' constitutional right of free speech in connection with public issues and issues of public interest. Under the First Amendment, legislators are given the widest latitude to express their views and there are no stricter free speech standards on [them] than on the general public. …The action arises directly from and is based on the City's exercise of its speech and petition rights." (144 Cal.App.4th at pp. 1247-1248.)

In *Cruz v. City of Culver City*, the city argued that the protected activities under the anti-SLAPP statute include specific oral statements and responses, such as those made by council members and staff during meetings. Specifically, a council member's request to agendize parking restrictions for a future discussion was an oral statement during a duly-authorized City Council meeting, as were the follow-up questions by the mayor and vice mayor. (Code Civ. Proc. § 425.16(e)(1).)

- In requesting a future agenda item on the parking restrictions, a council member made an oral statement in connection with an issue (preferential parking restrictions) under consideration or review by the city council. (Code Civ. Proc. § 425.16(e)(2).)
- Brief oral statements regarding the nature and scope of the future agenda item were made in a regular, open, and public city council meeting. (Code Civ. Proc. § 425.16(e)(3).)
- Finally, a council member's disclosure that he received an inquiry from a constituent about the city's parking restrictions and his request to place the issue on a future agenda was "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16(e)(4).)

### 2. Public Interest Exception to Anti-SLAPP Statute (Code Civ. Proc. § 425.17(b)

The *Cruz I* plaintiffs argued that they were exempt from the anti-SLAPP statute under the "public interest" exception created by Code of Civil Procedure section 425.17(b). Section 425.17(b) provides, in relevant part:

> Section 425.16 does not apply to any action **brought solely in the public interest or on behalf of the general public** if all of the following conditions exist: (1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public.... [¶] (2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons. [¶] (3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter. (Emphasis added.)

The *Cruz I* plaintiffs argued that the public interest exception applied because there was no direct prayer for personal relief. Rather, the plaintiffs argued, they were only seeking a declaration that the city violated the Brown Act in the past. As a result, their relief did not give them greater or different relief than it gave the public. The plaintiffs also argued that a judgment in their favor would provide a significant benefit to the public and private enforcement was necessary because no one else stepped up to challenge the city's action. The plaintiffs argued that the allegations of the complaint were irrelevant and the court should focus solely of the nature of the requested relief.

The Court of Appeal rejected the plaintiffs' argument and held that the plaintiffs had an individual stake in the outcome that defeats application of the public interest exception. In reaching this conclusion, the Court looked past the prayer for relief and considered the totality of the complaint to determine whether the allegations concerned the plaintiffs' personal, narrow interests. The allegations demonstrated that the lawsuit concerned the plaintiffs' personal interest in the preservation of a preferential parking district that excluded the general public and provided a private advantage to residents of a particular street. The Court stated:

> Distilled, plaintiffs alleged that the council had no authority to hear an appeal by the church regarding the Farragut Drive Parking restrictions, and asked the city to stop taking further actions in that regard. Keeping the parking restriction at status quo would directly benefit plaintiff Farragut Drive homeowners. In short, plaintiffs sought personal relief in the form of a halt to any attempts by the church to undo the long-standing parking restrictions. As a result, the public interest exception to the anti-SLAPP provisions does not apply.

The public interest exception analysis in *Cruz I* is significant because it supports the proposition that there does not have to be a direct link between the relief sought and a personal benefit in order to defeat the exception. Rather, a court can look at a party's motivation to evaluate whether the public interest exception applies. In *Cruz I*, the plaintiffs' personal interest in preserving the Farragut Drive parking restrictions was driving the lawsuit. A declaration that the city council violated the Brown Act by placing the Farragut Drive parking restrictions on a future agenda was consistent with the plaintiffs' theory that the city council should not have done anything that would impair the existing restrictions. The plaintiffs wanted to stop any council debate on the parking restrictions and keep the issue in the hands of the city engineer, who had previously refused to modify the restrictions. The public interest exception, therefore, did not apply.

### 3. *Cruz v. City of Culver City*: No Probability of Prevailing On the Merits Of The Brown Act Claim.

Once a defendant demonstrates that the complaint's claims fall within the purview of section 425.16, the complaint must be stricken unless the plaintiff establishes a reasonable probability of prevailing on the merits. (*Holbrook, supra,* 144 Cal.App.4th at p. 1247.) A plaintiff must produce "sufficient admissible evidence to establish the probability of prevailing on the merits of every cause of action asserted." (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721.) In addition to considering the substantive merits of

the plaintiff's claims, the court "must also consider all available defenses to the claims. (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1026.)

Because "meritless" SLAPP lawsuits seek to deplete "the defendant's energy" and drain "his or her resources," the Legislature sought "to prevent SLAPPs by ending them early and without great cost to the SLAPP target." Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation. (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 589.) In assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 614.) In attempting to establish the existence of a factual dispute, the opposing party may not rely upon the mere allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, or admissible discovery material, in support of its contention that the dispute exists. (*Nesson v. Northern Inyo County Local Hosp. Dist.* (2012) 204 Cal.App.4th 65, 77.)

The Culver City City Council's brief six-minute discussion directing staff to agendize the matter focused on what to place on the future agenda, not the merits of the future item. The City's conduct complied with the requirements of section 54954.2. The *Cruz* Court thus ruled that the plaintiffs had not met their burden of showing a probability that they would succeed on the merits.

#### 4. Pros and Cons of Using Anti-SLAPP For Brown Act Claims:

Anti-SLAPP motions are commonly joined with other motions, especially demurrers. (See, e.g., *Roberts v. Los Angeles County Bar Assoc.* (2003) 105 Cal.App.4th 604, 612.) Trial courts obviously have wide ranging discretion in determining how to manage such companion motions. One of the primary advantages to filing an anti-SLAPP motion is that the moving defendant is not limited to the allegations of the complaint and matters subject to judicial notice, as is the case with demurrers. Rather, a moving defendant can submit declarations and exhibits to support the anti-SLAPP motion. In many situations, this may increase your odds of defeating the case on the merits at an early stage. Keep in mind, however, that, unlike other successful moving defendants in anti-SLAPP cases, a defendant who succeeds on an anti-SLAPP motion in a Brown Act case is not entitled to attorney's fees, except for a "frivolous case"[6] as authorized by Section 54960.5. (Code Civ. Proc. § 425.16(c)(2) ["A defendant who prevails on a special motion to strike in an action … shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section …54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to … 54960.5, of the Government Code."].)

### G. Who can recover attorney's fees in a Brown Act case?

Under section 54960.5, a court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to sections 54960, 54960.1, or 54960.2 where it is found

[6] This is an exacting standard, as discussed below.

that a legislative body of the local agency has violated this chapter. Additionally, when an action brought pursuant to section 54960.2 is dismissed with prejudice because a legislative body has provided an unconditional commitment pursuant to paragraph (1) of subdivision (c) of that section at any time after the 30-day period for making such a commitment has expired, the court shall award court costs and reasonable attorney fees to the plaintiff if the filing of that action caused the legislative body to issue the unconditional commitment. The costs and fees shall be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency. Notably, section 54960.5 does not explicitly provide for a fee award when an agency agrees to cure and correct under section 54960.1.

A court may award court costs and reasonable attorney fees to a *defendant* in any action brought pursuant to section 54960 or 54960.1 where the defendant has prevailed in a final determination of such action and the court finds that the action was **clearly frivolous and totally lacking in merit**. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 [an action is objectively frivolous "when any reasonable attorney would agree that the appeal is totally and completely without merit."].) In *Flaherty*, the California Supreme Court articulated two standards to determine whether an appeal was frivolous. The objective standard looks at the appeal from a reasonable attorney's perspective. Fees are appropriate under this standard "when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Flaherty, supra*, 31 Cal.3d at p. 650.) The subjective standard considers the motives of the party or attorney. If the purpose of an appeal is "to harass the respondent or delay the effect of an adverse judgment," it is frivolous. (*Ibid*.) The objective and subjective standards are interrelated and "the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay." (*Id*. at p. 649.)

This is a very difficult (exacting) standard to meet. In *Cruz I*, the trial court denied the city's request for attorney's fees even though there was little dispute that the exceptions in section 54954.2(a) to the Brown Act's agenda requirement applied to the city council's action to agendize the Farragut Drive parking restrictions for a future meeting. Indeed, the Court felt compelled to deny the City's fee motion under the *Flaherty* line of cases, after having ruled that the Plaintiff's case was "**flawed at just about every level**" and the City's anti-SLAPP motion was "**meritorious at every level**."

### H. Limitations On The Recovery Of Attorney's Fees In Brown Act Cases.

- **Certain Fees Are Not Authorized By Section 54960.5**.

The Brown Act's fee statute, section 54960.5, on its face only allows fees in a claim under section 54960.2 for a failure to make an unconditional commitment to cease and desists. It does not similarly allow for fees for a failure to timely cure and correct under section 54960.1.

Where, as in section 54960.5, the Legislature has carefully employed a provision in one place and has excluded it in another, it should not be implied where excluded. The omission of such provision from a statute concerning a related subject shows that a different intention existed. (See, e.g., *In re Michael G.* (1998) 63 Cal.App.4th 700, 710; *Suman v. BMW of North*

*America, Inc.* (1994) 23 Cal.App.4th 1, 10–11; *City of Port Hueneme v. City of Oxnard* (1959) 52 Cal.2d 385, 395.)

- **No Fees May Be Awarded Where The Brown Act Lawsuit Was Pointless.**

Government Code section 54960.5 authorizes an award of attorney fees, in the trial court's discretion, to a successful Brown Act plaintiff. In considering whether to award attorney fees under section 54960.5, a trial court should consider among other matters the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686; *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1083.)

Trial courts are not obliged to award fees in every Brown Act case. Rather, courts must "thoughtfully exercise" their discretion by examining all the circumstances to determine whether an award of fees would be unjust. (*Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1324.) Courts have the discretion to deny successful Brown Act plaintiffs their attorneys' fees, where the defendant shows that special circumstances exist that would make such an award unjust. (*Los Angeles Times Communications, supra*, 112 Cal.App.4th at p. 1327; *Galbiso v. Orosi Public Utility Dist., supra*, 167 Cal.App.4th at p. 1083.) Such circumstances include, among other matters: (1) the lack of necessity for the lawsuit; (2) the lack of injury to the public; (3) the likelihood the problem would have been solved by other means; and (4) the likelihood of recurrence of the unlawful act in the absence of the lawsuit. (*Bell v. Vista Unified School Dist., supra*, 82 Cal.App.4th at p. 686; *Galbiso v. Orosi Public Utility Dist., supra*, 167 Cal.App.4th at p. 1083.)

- **Fees Are Not Appropriate Where Purely Personal Interests Are At Stake**.

Where a Brown Act case is so motivated by personal, financial interests, fees are not appropriate under section 54960.5. (*Bell v. Vista Unified School Dist., supra*, 82 Cal.App.4th 672, 691.)

- **A Plaintiff Can Be Estopped From Recovering Fees**

Plaintiffs can also be estopped from recovering fees, if, for example, they make representations and assurances that leads the city to defer action to commence a cure within the 30-day period. (See, e.g., *Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 917-918; *Doheny Park Terrace Homeowners Ass'n v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1090.)

In *Kaye v. St. Helena*, above, the plaintiff objected to and sought to exclude the city attorney's declaration describing his predecessors' representations and assurances. The trial court overruled the objection for three reasons:

First, Evidence Code section 1152(a) only precludes settlement discussions from being admissible to prove liability. Where the Ccity uses settlement communications as evidence of

the City's ongoing willingness to cure the claimed violation, and reasonableness of the plaintiff's fees request, not to establish the plaintiff's liability, they are admissible. (See, e.g., *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1023-24; *White v. W. Title Ins. Co.* (1985) 40 Cal.3d 870, 887.)

Second, because the plaintiffs referred to the communications in its moving papers and supporting declarations in arguing that the city overreached in seeking a broad waiver of the plaintiff's claims, the plaintiff waived any objection to the use and admission of the communications. (See, e.g., *Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946 ["[A] witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony."]; *People v. Robinson* (1997) 53 Cal.App.4th 270, 282–283.)

Third, such communications were relevant and admissible to prove that the plaintiff was estopped, by virtue of their repeated assurances of settlement, from asserting that the City's ultimate unilateral cure was untimely. (See e.g. *Flintkote Co. v. Presley of Northern California* (1984) 154 Cal.App.3d 458, 465.)

# Tips for Drafting Contracts

**Thursday, May 4, 2017 General Session; 9:00 – 10:30 a.m.**

**Daniel S. Hentschke, Attorney at Law**

## Notes:_____

# (Avoiding) The Pitfalls of Drafting ~~Ordinances~~Contracts – Predicting the Future and Avoiding Unintended Consequences

Daniel S. Hentschke
*League of California Cities*
*City Attorneys Department Spring Conference*
May 4, ~~2016~~2017

## Disclaimer

- Presentation represents views of the speaker and should not be construed as individual legal advice or to represent the views of any agency.
- Special thanks to my panel of expert advisers.

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## The Agenda

- Finding and identifying the pitfalls.
  - Tips for things to do when drafting contracts.
- Avoiding falling into the pit.
  - Tips for things to avoid doing when drafting contracts.
    - Drafting includes reviewing a contract prepared by someone else.
- Stating the obvious:
  - Have a good library of road maps helps.
    - Develop a good set of standard form contracts
      - If you want copies of mine, send me an email. danhentschke@gmail.com
    - Update them regularly
    - Be prepared to alter or abandon them when appropriate
  - Municipal Law Handbook has numerous helpful practice tips

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## Warning

- Rules of contract construction that apply to contracts between private parties apply equally to government contracts.
- Contract approval is a legislative act, but
  - the rules of contract interpretation, not statutory interpretation, apply to the interpretation of contracts
  - (e.g., the rule that gives some deference to a government agency in a legislative context does not apply to contract interpretation). Id. at 461

Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes (2010) 191 Cal. App. 4th 435, 458, 361

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## Ready? Let's go!


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## Understand the "project."

- Develop a clear understanding of the intended end result?
  - Don't travel alone.
    - (Rely on staff and others)
  - Plan your whole trip before you embark.
  - Try to insist on early participation in the project planning process.
  - Listen to but don't rely solely upon the advice of the technical experts.
- Identify the "deliverables."
- Listen to what management is saying.

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## Consider the (potentially)applicable legal authority.

- Substantive authorization.
  - Government Code
  - Public Contract Code
  - Charter
  - Municipal Code
  - Purchasing Ordinance/Resolution
- Substantive limitations.
  - See above (e.g., GC § 53069.85, PCC § 7203 (damages for delay) PCC §§ 9204, 20104.2 (payments and claims resolution)
  - Labor Code (e.g., prevailing wage laws)
  - Civil Code (e.g. § 2782 relating to indemnity)
  - Grant Requirements
- Develop a checklist of statutorily required contract provisions.
  - E.g. PCC §§ 7100 – 7203; Local Ordinance

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## Carefully review the scope of work.

- Is it clearly worded?
- Is it internally consistent?
- Is the scope of work consistent with the other "contract documents?"
  - Inconsistency often occurs when the General Conditions or Technical Specifications are cut and pasted by the design professional firm
  - Or when specifications are reused from other projects and not properly vetted or coordinated with the manufacturers or suppliers – e.g. "It worked ok last time."
- Are all the separate documents that constitute the Contract Documents clearly identified and is the priority of those documents clearly stated?
- Are the deadlines clear?
  - Are the consequences of failure to meet the deadlines clear?
- Are the deliverables clear?

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## Give same careful consideration to:

- The payment provisions
- Project schedule

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## Some thoughts on technical specs.

- Things can change rapidly in the construction world such as:
  - Technological advancements,
  - Software upgrades (which often occur during the course of a project),
  - Changes in a manufacture's relationships with subcontractors (e.g. a pump manufacturer that doesn't use a particular coating anymore - now it's something else that's more expensive. The specification was clear, but not based on reality. You don't find out until the middle of the contract because nobody checked. Now you're faced with the issue of whether to "stand on the contract" and hold the contractor accountable "because he bid it" or explain to management why we messed up the specification and need a change order.)

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## Some thoughts about deadlines

- Assuming everything will go perfectly is a bad idea.
- Keep the deadlines for key milestones and contract completion reasonable.
  - Delays during the design phase should not be deducted from the necessary construction period – they often are in order to meet an unrealistic project completion objective previously established.
  - The construction period needs to be a function of the necessary time to complete the project considering factors such as equipment procurement, environmental work restrictions and - how long it takes to build the components.
  - Include a reasonable amount of float for weather and unforeseen delays such as mistakes – assuming everything will go perfectly is a bad idea.

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## Enforcement of deadlines

- Never underestimate the value of a good contract manager.
- Liquidated Damages
  - If too low they will be inadequate to cover the most significant delay impacts. If too high the they will encourage an unwanted contingency in bids and spawn unwanted litigation
  - Liquidated damages provisions appropriately related to key milestones
    - If it's a $500/day delay – the LDs should be 500/day – not $10,000/day.
    - Avoid using LDs to punish contractors
  - Be clear as to what the liquidated damages are for and specifically what needs to be done to avoid them
- Remember the statutory limitations discussed previously.
  - E.g. CC § 1671, GC § 53069.85, PCC § 7203

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## Character of worker clauses

- Anti-harassment / anti-discrimination clauses / anti-aggressive behavior / drug-free workplace
- Especially important for contracts where work is performed on agency premises
- The agency should have the clear authority in the contract to require removal of anyone who violates workplace rules (and confidence to exercise the provision)
- Consider including provisions regarding persons who consistently behave in an unproductive or disruptive manner or who are incompetent to perform the job

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## Insurance and indemnity

- Avoid outdated, confusing or over-reaching indemnity language. The indemnity provision should be enforceable under CC § 2782
- Review the insurance provisions with the risk manager to assure they are appropriate for the particular scope of work and that the insurance is commercially available

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## Carefully consider definitions

- Are definitions necessary (remember the common meaning rule)?
  - If the common meaning of a word is too broad or too narrow, a definition may be required.
- If you do include definitions, use the defined terms and use them consistently.
- Make sure the definition is complete.
  - For example, if a defined term is intended to include some things but not others, make sure that the exclusions are stated in the definition.

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## Write clearly

- Use plain English, short sentences, and active voice.
- Use the Oxford comma.
- Since we're talking about mutual "promises" I personally prefer "will" over "must" and "must" over "shall."


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## Proof read (and then have someone else proof read too)!

- Don't rely on spell check.
  - Proof reading is more than just checking for spelling and grammar.
- Comprehensively review the entire contract
  - Are the sections and subsections correct?
  - Is the punctuation correct?
  - Are there any duplications?
  - Is the contract clear and complete?
  - Does it accurately describe the obligations of each party in language that ordinary people can understand?
  - Are the cross-references correct?
  - Are the exhibits correctly identified?
- Have staff review the agreement too.

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## Things to avoid

- Using a sample contract or standard form without adapting it to the current project – one size may not fit all
- Including (or excluding) provisions because of political expedience
- Including extraneous provisions
- Recitals in general and "whereas" clauses in particular, unless necessary to the interpretation of the contract.
- Ambiguity, legaleze, run-on sentences, the passive voice
- Failing to include staff at every stage of the process
- Failing to take your time

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## Some final thoughts

- A contract is only as good as:
  - The competency of the contractor – Do your due diligence and include appropriate qualification requirements and hold tight to them.
  - The agency's contract manager. Particularly the CM's ability to:
    - Conduct effective meetings,
    - Regularly and respectfully discuss difficult and awkward issues, and
    - Create an accurate project record.
- Consider establishing a formal contract review team
- Maintain a good working relationship with the contract manager
- Help manage expectations throughout the entire contract process

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# Take It or Leave It: Pitfalls and Challenges of IT Contracts

**Thursday, May 4, 2017 General Session; 9:00 – 10:30 a.m.**

**Margarita Gutierrez, Deputy City Attorney, City and County of San Francisco**
**Rosa M. Sanchez, Deputy City Attorney, City and County of San Francisco**

## Notes:_____

# Take It or Leave It: Pitfalls and Challenges of IT Contracts

Prepared by Deputy City Attorneys Margarita Gutierrez and Rosa M. Sánchez- Office of the San Francisco City Attorney.

Special Thanks to Spring Intern - Caitlin B. Wiley, Juris Doctor Candidate 2017 University of San Francisco School of Law, for her assistance with this paper.

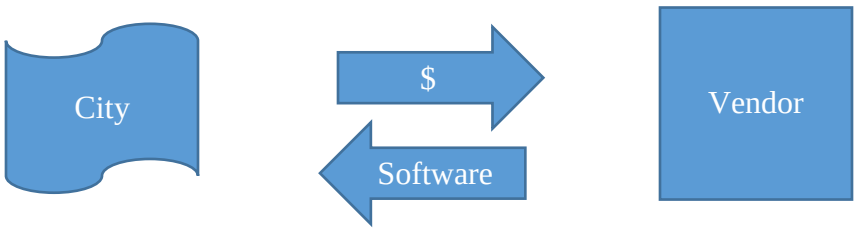
As technology evolves, so must city contracts that cover these transactions. As government attorneys, we need to understand the changing technology we are procuring for our cities in order to negotiate better contracts with these vendors.

The computing systems utilized by most cities from the 1960s through the 1980s involved multiple terminals that were networked to a mainframe located on city premises. During most of this time, the technology was maintained by in-house technology departments, and the information processing was tailored to each city department's individual needs. In the 1990s, the expansion of the internet brought about a new class of centralized computing, called Application Service Providers (ASP). These providers hosted specialized business applications with the goal of reducing costs. Now, hosted services have essentially extended the idea of the ASP model into a software as a service (SaaS) or a "Cloud" computing model.[1]

At its core, SaaS offers the ability to access specialized business applications over the Internet using connected devices. Due to budgetary constraints and the ubiquity of software as a service at much lower prices than an on-premises model, cities are looking more and more into moving their data from an in-house environment to a hosted environment. Following is a discussion of issues cities should consider when moving their data and information processing into the cloud environment.

**SAAS-CLOUD TRANSACTIONS**

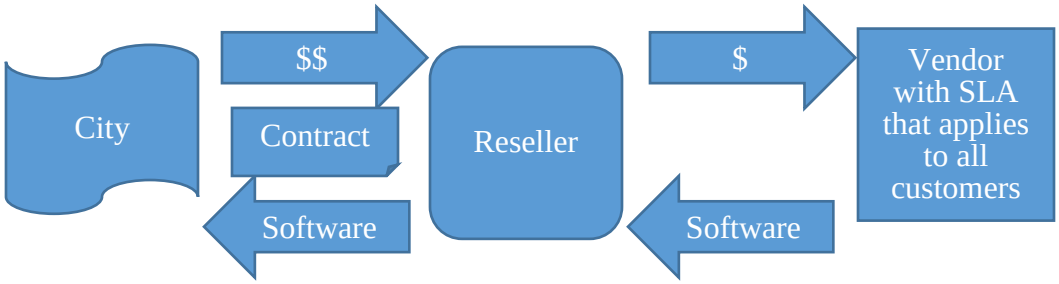
Before the development of the cloud, cities would negotiate directly with a software license vendor to purchase a product that would belong to the city. The city would continue to pay the vendor for maintenance over the life of the product in a series of term-limited agreements. It could include all of its requirements in one agreement with the vendor that would establish service levels, cost and quantities.




In a cloud subscription model, it is more likely that a city will enter into agreements with both a reseller and a vendor. Many technology companies, such as Microsoft and Salesforce, require city wide transactions be done through large account resellers ["LAR's"] and they will not

[1] The National Institute of Standards and Technology defines software as a service as "a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and releases with minimal management effort or service provider interaction."

contract directly with the cities. The vendor's service agreement may establish the minimum service requirements for all customers and the terms of use for the service. The reseller agreement will integrate the vendor's agreed upon terms and may add payment terms, insurance and additional city-mandated requirements.




Although the reseller may provide some additional services such as training for employees, a help desk, and a first point of contact in case of a problem with the service, the data processing is performed by the vendor. The starting point of such a transaction is figuring out each party's responsibility and how the data will flow. Although vendors will claim that service level agreements cannot be changed, some terms can be negotiated directly with the vendor, especially for large transactions. If a term cannot be changed with the vendor, the LAR may agree to provide an alternative through their agreement with the city. Cities should consider the following issues when negotiating a hosted software agreement.

1. **Sensitivity of data** – What type of data is being transmitted/processed and what applicable federal, state or local regulations apply? Agreements concerning data such as health information, personal identifiable information, credit card information, or whether a person is a public benefits recipient must reflect additional regulatory compliance requirements. For example, agreements that include storing health information should include a Health Insurance Portability and Accountability Act (HIPAA) BAA.[2] Similarly, additional requirements are likely necessary for agreements involving criminal justice information. Even agreements for word processing and email services such as Microsoft O365 agreements may require the inclusion of a BAA in order to protect all parties.

2. **On-line and hosting facility security.** What type of security measures are in place to make sure the city's data is protected and what encryption levels are being used? Is the data encrypted in transit and at rest? What physical security procedures does the hosting

[2] In general, a business associate is a person or organization, other than a member of a covered entity's workforce, that performs certain functions or activities on behalf of, or provides certain services to, a covered entity that involve the use or disclosure of individually identifiable health information. Business associate functions or activities on behalf of a covered entity include claims processing, data analysis, utilization review, and billing. *https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulation*

provider follow at its facilities to prevent unauthorized access? The vendor's employees should only access the city's data to the extent necessary to maintain the service.

3. **Ownership and location of data.** Is data ownership clearly defined in the agreement? Where will the data reside? Is the vendor requesting a perpetual license to use de-identified aggregate data to run analytics on the data traffic? Giving vendors the right to use de-identified aggregate data should be carefully considered because individual identities can be reassembled by sufficient manipulation of big data aggregated sets.

4. **Disaster recovery and location of the primary and back up data centers.** What is the vendor's data recovery plan and where is it in the agreement? Identify the location of primary and backup secondary centers, including the city and state, and ensure the agreement requirements flow down to the subcontractor(s). Furthermore, require prior notice and city approval of changes to subcontractors. Finally, consider whether the contract should require the data to remain in the United States to avoid, for example, falling under international data import/export laws. A helpful tool in these transactions is a data map which can help you understand whether subcontractors are involved and where the points of possible breach are.

5. **Availability of data**. The "uptime," or availability to the city's data, is one of the most important aspects of a hosting provider's performance measure. Does the city have 24-7 access to its data? Does, or should, the city keep a copy of the data in one of its own servers? If so, in what format? What happens if the vendor's primary data center is down and the city does not have access to its data for an extended period of time? Does the agreement address this concern by requiring that the secondary data center kick in within a specified period of time? The agreement should address the uptime the city expects through a service level agreement. Uptime is often measured in "nines."[3] Depending on the nines you agree to (99%, 99.9%, 99.99%, 99.999%, etc.) the city's access to its data might be reduced anywhere from 7 hours and 12 minutes in 30 days (for 99% availability) to 3 seconds in a 30 day period (99.9999% availability). No hosting provider can guarantee 100%, but the city should consider which nines are appropriate in each transaction depending on the data the city plans to store in the hosted environment.

6. **Termination provisions and vendor bankruptcy**. What happens if the city wants to change providers or end the service? What happens if the hosting provider declares bankruptcy? On termination or expiration of the agreement, the hosting provider should provide the city with a complete copy of the city's data in an agreed upon machine readable format within a specified timeframe, and require the hosting provider to certify in writing that it will purge all city data from the vendor's servers in a way that the data

[3] https://www.hostingmanual.net/uptime-calculator/#tab-id-1

cannot be recreated.[4] The agreement may require the vendor's assistance in the transition of the city's data to a new service provider, or in-house server. Vendors will most likely agree to assist in moving the data as long as it is at the city's expense. Termination provision can shift the expense of the data transition if the vendor is at fault for the termination.

7. **Audits**. What audit requirements are important to ensure that the vendor is satisfying compliance programs and confirm that management is executing oversight to assure privacy compliance? The city may require a third party auditor to perform a Statement on Standards for Attestation Engagements (SSAE)[5] audit on Controls at a Service Organization (SOC 1/2/3). Audits should be performed on a regular basis and a summary or copy of an SSAE 16 audit report provided to the city.[6] Additionally, agreements should include a city's right to perform an audit of the performance of the services.

8. **Records Retention Policy and Litigation Holds.** What is the city's records retention policy and will the hosting provider be required to comply with the policy? The agreement should address what the city expects the hosting provider do in the event of a litigation hold. At minimum, the agreement should provide that upon notice from the city of a duty to preserve, the provider must save a copy of all the relevant data as it exists up to that date. Suggested language is as follows: "Contractor shall retain and preserve City Data in accordance with the City's instruction and requests, including without limitation any retention schedules and/or litigation hold orders provided by the City to Contractor, independent of where the City Data is stored."

9. **Public Records Requests and/or Subpoenas.** Will the city have access to its data in such a way that searches can be run for existing records responsive to a records request? The agreement should also specify the process to be followed by the hosting provider if it receives a subpoena or other request for disclosure from a third party.

10. **Limitation on Click-Wrap Disclaimer.** The agreement should specify that even if the hosted application has a click-wrap agreement or privacy policy that must be clicked by the authorized user/end user as a condition to gain access to the hosted environment and application, the click-wrap agreement or privacy policy does not apply to the agreement. The agreement should state that only the written provisions of the parties' agreement

[4] Secure disposal shall be accomplished by "purging" or "physical destruction," in accordance with National Institute of Standards and Technology (NIST) Special Publication 800-88 or most current industry standard.

[5] http://ssae16.com/SSAE16_overview.html and http://www.aicpa.org/InterestAreas/FRC/AssuranceAdvisoryServices/Pages/SORHome.aspx

[6] SSAE 16 Audits: SOC 1 audit (financial institutions) or SOC 2/SOC 3 (data privacy)

apply to the city's designated users for access. In the event a click-wrap disclaimer/agreement is required for a specific agreement where end users must click through for access to the application, the agreement should state that the city has the right to review and approve such click-wrap disclaimer prior to its implementation.

11. **Disabling Code.** Computer instructions or programs, subroutines, code instructions, etc., may come with programs purporting to do a meaningful function, but designed to time-out or deactivate functions in the application or terminate the operation of the licensed program, or delete or corrupt data. The contract should prohibit the use of such disabling code by the vendor.

12. **Dispute Resolution/Venue.** The agreement should address the steps to be taken in the event of a dispute. Vendors might ask for the right to suspend their services in the event, for example, of a payment dispute. In most cases, this will not be an acceptable provision. Cities should contractually ensure that they will have access to their data at all times, even if a dispute arises with the vendor. Consider establishing the venue for any dispute that arises. The vendor's willingness to negotiate on this issue may be based on the amount of the agreement and the amount of business they do in the State of California.

## DATA BREACH CONSIDERATIONS AND REMEDIES

Defining the risks of and responsibility for breaches of data are a crucial element in the negotiation of a SaaS agreement. A wide range of state and federal laws cover data breaches. One important development affecting a city's SaaS agreements is the recent expansion of the California Information Practices Act (the Act) on January 1, 2017 to require breach notification by local agencies.[7] For this reason, the cost of notifying affected individuals has become a significant issue in these agreements.

1. **Data Breach.** The Act defines breach as, "unauthorized acquisition or "reasonable belief" of unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the agency.[8] The definition of data breach may be incorporated into vendor agreements as the triggering event for loss and response. As the data owner, the city is responsible for notifying affected individuals of the breach in, "the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement."[9] This makes it even more important to evaluate the costs of breach notification when

[7] *Cal. Civ. Code §1798.29(k)*
[8] *Cal. Civ. Code §1798.29 (a) & (f).*
[9] *Cal. Civ. Code §1798.29(a)*

negotiating a vendor SaaS agreement. At a minimum, contracts should require timely notice of a breach from vendors, and insurance that covers the costs of notification from resellers.

2. **Remedies.** Remedies for breach can be one of the most difficult areas of the agreement to negotiate. Cities can request complete unlimited liability (including incidental and consequential damages) and corresponding indemnities for security and privacy breaches, but the vendor is likely to seek a cap to its liability for privacy and security breaches, or any other type of breach. It is critical to understand the number of data records and nature of the data in order to develop appropriate insurance requirements, indemnification language (both general and for infringement), liquidated damages, and any limitation of liability clause, including carve outs. Where the vendor's liability for data breach is capped, it is advisable to negotiate a carve-out for damages arising out of the vendor's willful or reckless misconduct so that the cap will apply only to simple negligence.

3. **Insurance.** Cyber Insurance can help mitigate losses sustained from a data breach, but there is no standard policy language that applies in all cases. Unfortunately, a city's usual practice of requiring comprehensive general liability policies [CGL] for all city vendors may not be helpful in case of breach because these policies are unlikely to cover the cost of notifying affected individuals of a breach of their data, the associated fines or damages and/or malfunctioning systems.[10]

4. **Recovering damages.** Individuals affected by data breach have had a difficult time recovering damages. Because the costs of notification can be so significant, it is still important to carefully craft the cyber coverage to compensate for expenses related to investigation and notification. The SaaS agreement should clearly state how the parties will cooperate with law enforcement, and notify the affected parties. Ideally, the vendor would agree to pay for at least one or two year(s) of credit monitoring services for those affected by the data breach. The agreement should address details of responding to a breach. Which party may speak to the media about or comment on the breach? May a party do so without the approval of the other party? May it name the other party?

Because this is an emerging area of law, older agreements may not contain adequate provisions for data protection. It is a good practice to evaluate existing agreements to make sure you have insurance protection that follows the data and applies to the actual costs incurred for the breach. For example in *P.F. Chang's China Bistro, Inc. v. Federal Ins. Co,* P.F. Chang purchased cyber

[10] See, e.g.,. Zurich Am. Ins. Co. v. Sony Corp. of Am. 6 N.Y.S.3d 915 (N.Y. App. Div. 1st Dep't 2015).Holding that Zurich's CGL policy did not afford Sony coverage for the 2011 data breach of its PlayStation network because the third party hackers, and not Sony published the stolen information.

insurance policy marketed as, "a flexible insurance solution designed by cyber risk experts to address the full breadth of risks associated with doing business in today's technology-dependent world."[11] After 60,000 credit card records were breached, the chain looked to its insurer for reimbursement of the bank fees charged by its card processing agent. The court found that the charges were properly denied because the insurer "should not be liable for any Loss on account of any Claim, or for any Expense … based upon, arising from or in consequence of any … liability assumed by an Insured under any contract or agreement." [12]Essentially, since P.F. Chang's agreement with the card servicer addressed payment for fees assessed for fines, penalties and assessments, the insurer did not have to cover this expense. The decision is currently on appeal.

Although the value of the contract will impact your ability to negotiate the terms, cities have a great asset in these negotiations due to the nature of government contracting. While a vendor may claim the pricing information is confidential, the terms of the agreement will be publicly available, so your fellow City Attorneys may be your best resource. In most cases, a carefully carved out limitation of liability provision and language defining how your city's data can be processed and used is the key to these agreements.

RESOURCES

California Attorney General's List of State and Federal Privacy Laws
https://oag.ca.gov/privacy/privacy-laws

California Department of General Services
http://www.dgs.ca.gov/pd/Home/CloudComputing.aspx

NIST Publication
http://csrc.nist.gov/publications/PubsSPs.html#800-145
http://csrc.nist.gov/publications/nistpubs/800-88/NISTSP800-88_with-errata.pdf

SSAE Security Guidance
http://ssae16.com/SSAE16_overview.html

[11] *P.F. Chang's China Bistro, Inc. v. Federal Ins. Co.*, No. 2:15-cv-1322 (SMM), 2016 WL 3055111 (D. Ariz. May 31, 2016).
[12] *P.F. Chang's China Bistro, Inc.* 2016 WL 3055111 at *7.

# Front End First Aid: Critical Care for Public Works Documents

**Thursday, May 4, 2017 General Session; 9:00 – 10:30 a.m.**

**Clare M. Gibson, Assistant City Attorney, Hercules**
**Michael F. Rodriguez, City Attorney, Gonzales and Soledad**

## Notes:

# FRONT END FIRST AID:
# CRITICAL CARE FOR PUBLIC WORKS DOCUMENTS

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# FRONT END FIRST AID:
# CRITICAL CARE FOR PUBLIC WORKS DOCUMENTS

**By Clare M. Gibson**
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## Introduction

Infrastructure is a hot topic. Many California cities are fortunate enough to have funding and plans for new public works projects, but some are going out to bid for major infrastructure projects using outdated and flawed bid and contract documents. As explained in further detail below, the bid and contract documents are collectively referred to as the "front end" of a construction contract. Old or defective front end documents can lead to big problems on public works projects. Case law is replete with examples of public construction disputes that have turned—for better or for worse—on specific provisions in the front end documents. A single poorly-drafted provision or a critical omission can result in thousands of dollars in legal costs. Conversely, well-drafted front end documents can help avoid such liability in the first place.

But where to start? It can be a daunting problem to identify and correct potential problems based on the length and complexity of a front end template. The purpose of this paper is to provide practical tools for a city attorney with no special expertise in public contract or construction law to provide some immediate first aid for an outdated or problematic front end template.

## Front End Templates: The Bad News

Most cities maintain their own front end template which includes all of the bid and contract documents that will apply to *all* of its public works projects—as distinguished from the project-specific documents, like the technical specifications, that will vary from project to project.[1] These bid and contract documents are usually included in the front of a project manual (followed by the project specifications), hence the term "front end." A front end template will have fields or blanks to be completed for each specific project.

[1] A front end template will typically include all documents required for bidding (e.g., notice inviting bids, instructions for bidders, bid proposal form, bid schedule, subcontractor list form, non-collusion declaration, bid bond form, etc.), and all *generally applicable* contract and bond documents (e.g., the contract itself, general conditions, payment bond form, performance bond form, and warranty/maintenance bond form). These bid and contract documents are also referred to as the "Division 0" documents, based on the Construction Specifications Institute numbering conventions.

Often, while these templates may start out as a cohesive set of documents, over time they become a patchwork of inconsistent provisions cut and pasted from other source documents, even provisions based on statutes that do not apply to cities. Most of the time these well-intended "improvements" have been made by public works or engineering staff and consultants, and never reviewed by the city attorney's office. On the surface, these "Frankenstein front ends" might look fine, especially if added text is formatted to match the rest of the template, but may nevertheless contain provisions that can increase instead of reduce the city's risk exposure.

In addition, older templates are often not up-to-date on current legal requirements, do not comport with standard best practices, or are otherwise riddled with deficiencies that may operate to increase rather than limit risk exposure. Many are written in such dense legalese they are difficult to read or understand by laypersons and lawyers alike.

Even if a city attorney's office is aware that it should update the city's front end template, the overhaul may get back-burnered due to lack of time, resources, and expertise—or even due to a lack of awareness of the full scope of risk exposure. That's understandable. A complete front end template typically totals more than 100 pages and may be made up of a dozen or more constituent documents, all of which must work together, ideally without internal conflicts or inconsistencies. A comprehensive front end update is a time-consuming, tedious, and demanding project. So it is not surprising that front end updates get postponed year after year, especially if a city has been lucky enough to have escaped any major construction dispute—at least so far.

## First Aid Kit

The premise of this paper is that *some* updating is better than *no* updating. Even if an end-to-end overhaul is not within reach, some targeted updating may reduce overall risk exposure. Toward that end, this paper identifies ten frequently encountered problem areas and offers corresponding corrections (the "first aid") that a city attorney can use to address some of the more critical deficiencies, even on a limited budget and without special expertise in public contract and construction law. The ten problem areas discussed in this paper are:

1. Statutory Compliance
2. Superfluous Statements of Law
3. Incorporation of Third Party Documents
4. Use of Caltrans' Documents
5. Defined Terms
6. Indemnity Requirements
7. Order of Precedence
8. Internal Procedures
9. Internal Consistency
10. User Experience

For some front end templates, it may be that only a few of these problem areas are a relevant concern. For others, the full first aid kit may provide enough patching to postpone a comprehensive update—at least a little while longer. Each problem area is described briefly below, followed by practical recommendations for first aid. Many of these problem areas can be interrelated and even overlapping, as indicated by some of the internal cross-references.

**1. Statutory Compliance**

*The Problem:*

There are many front end templates that are currently in use for millions of dollars' worth of major public works projects, but that do not comply with changes in law, including both recent changes and changes that have been on the books for years now. The inherent risk exposure due to non-compliant contract documents can be substantial. Given that municipal public works contracts are governed by myriad statutes including provisions of the Public Contract Code, Labor Code, Civil Code, Government Code, and Business and Professions Code, and given that our legislature is routinely tinkering with all of these codes, it is not surprising that some changes in law may slip through the cracks.

*First Aid:*

One of the best ways to ensure that a front end template reflects current statutory requirements is to methodically cross-reference the items included in "The Contract Documents and Contract Provisions" in Chapter 7 of the most recent edition of *The Municipal Law Handbook.*[2]

While this list is an excellent starting point, it will not include changes in law that occurred after the last edition of *The California Municipal Law Handbook* went to print. For more recent changes, check end of year updates provided by the League of California Cities or other reliable sources. The one big change in law that arose after the 2016 edition was published was the addition of Public Contract Code section 9204, which imposes a new set of claim procedures for public works contracts entered into on or after January 1, 2017. If your front end template has not already been updated to comply with section 9204, this is probably the most important and immediate first aid that should be applied.

[2] City Attorneys' Dep't, League of Cal. Cities, *The California Municipal Law Handbook* (Cont.Ed.Bar 2016 ed.) §§ 7.36-7.75., pp. 782-792.

While it will require an additional investment of time, it is also advisable to methodically check every statutory reference cited in the front end documents. You may be surprised to find references to laws that have been repealed or to laws that do not apply to cities. It is not unusual to find references in municipal front end documents to provisions contained within sections 10100-19102 of the Public Contract Code, particularly in front end templates that are heavily based on Caltrans documents. But those provisions are from Part 2 of Division 2 of the Public Contract Code, and Part 2 applies only to the State and State agencies—not to cities.[3] Unless there is a very good reason to do so, statutes that do not apply to cities should not be incorporated or referenced in municipal front end documents.

You may also find that while a given statutory reference is correct and applicable to cities, the contract provision that includes the reference does not properly comply with the law, misstates the law, or is simply a superfluous statement of the law as discussed in the next section.

**2. Superfluous Statements of Law**

*The Problem:*

Some front end templates read more like a legal treatise than a contract because they include pages and pages with the full text of statutes or summaries of law. This may be intended as helpful information, but it can do more harm than good. There are a handful of statutes that dictate specific text to be included in a public construction contract,[4] but for the most part *complying* with a law does not require reprinting or restating the applicable statutes in the contract documents.

Apart from misguided intentions, superfluous statements of law are often inaccurate, either due to human error or due to later changes in the law. That can create problematic inconsistencies between the actual law and the law as stated in the contract. No good can come of that.

*First Aid:*

It should not be difficult to spot any copies of statutes or restatements of law by just leafing through a front end template. For copies of statutes, check the statute to find

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[3] Cities are subject to the *generally* applicable provisions in Division 1 of the Public Contract Code (sections 100-102), Part 1 of Division 1 (sections 1100-9204), and portions of Parts 3-5 of Division 1 (including, but not limited to, sections 20100-20104.70, 22000-22300); and to the *city-specific* provisions in sections 20160 et seq.

[4] For example, Public Contract Code section 7106, which requires that each bid be accompanied by a non-collusion declaration, specifies the text that must be used for the declaration. It *should* be copied verbatim.

out if it is truly necessary to include the language of the statute directly in the bid or contract documents. If not, eliminate any text that is not strictly necessary for statutory compliance.

For restatements of common law, such as legal standards for determining responsiveness and responsibility, evaluate the text to determine whether such restatements—regardless of accuracy—are necessary and appropriate. After all, the law applies whether or not it is described in the contract documents.

**3. Incorporation of Third Party Documents**

*The Problem:*

Often a document-preparer using a front end template for a particular project will incorporate documents prepared by third parties, such as technical reports, permits, and environmental documents. The intention is usually good: these documents may contain information or even requirements that are relevant to the project. However, wholesale incorporation of documents that were created by third parties can result in legally binding the city (and the contractor) to terms that were never intended to be contractually binding.

A classic example is incorporation of a geotechnical report with the intention of ensuring that the contractor is aware of the results of the geotechnical investigations, such as boring reports, soil analysis and water table levels. These reports often include design recommendations as well. If the design professional, for whatever reason, does not incorporate each and every design recommendation, this can create a conflict—even if just a perceived conflict—between the geotechnical report and the design documents. Contractors can and do exploit such inconsistencies by claiming that the project documents are inaccurate or ambiguous.

*First Aid:*

This problem can be avoided by creating provisions to enable the document-preparer to distinguish and separate documents that are properly incorporated into the legally binding contract documents from documents that are provided strictly for information. This can be done by including a provision to identify all documents that are provided "for reference only," and to clarify that intent, such as the following:

> "**For Reference Only.** Contractor is responsible for the careful review of any document, study, or report appended to the Contract Documents solely for informational purposes and identified as "For Reference Only." Nothing in any document, study, or report so appended and identified is intended to supplement, alter, or void any provision of the Contract Documents. However, Contractor is advised that City or its

representatives may be guided by information or recommendations included in such reference documents, particularly when making determinations as to the acceptability of proposed materials, methods, or changes in the Work. Contractor must promptly notify City of any perceived or actual conflict between the Contract Documents and any document provided For Reference Only."

It is generally a best practice to provide the contractor with as much relevant information as possible about matters such as site conditions that can materially bear on performance of the work. Often informational documents that are provided "for reference only" are included as appendices in the project manual to ensure the contractor has ready access to important information. But relevant information can be provided without incorporating it into the Contract Documents and making it legally binding on the city and contractor.

**4. Use of Caltrans' Documents**

*The Problem:*

Wholesale incorporation of Caltrans' Standard Specifications can be quite seductive, at least from a public works perspective. The 2015 edition is 1155 pages long, and packed with detailed requirements and provisions addressing earthwork, surfaces, sound walls, drainage, and many other technical matters. There are good reasons for cities to make use of these comprehensive specifications, particularly for horizontal projects (streets, undergrounding, etc.). However, the Caltrans Standard Specifications also include *General Provisions* in Division I of the Standard Specifications (Sections 1-9), which cover contractual matters like bidding, contract award, payment, dispute resolution, etc. Because of this, the Caltrans *General Provisions* can and do create substantial problems when fully incorporated into municipal public works front end documents.

First, this often results in direct conflicts and inconsistencies between the city's front end provisions and the Caltrans provisions, at least when they cover the same topic (like payment). But the problem is further exacerbated because many of the Caltrans provisions are based on Public Contract Code provisions that apply only to the State and State agencies, and are not based on the Public Contract Code provisions that apply to cities and other local agencies. (See Section 1, *Statutory Compliance*, above.)

In addition, the Caltrans provisions are the product of a politicized process that often results in provisions that tip heavily in favor of contractors rather than the awarding agency. For example, Caltrans allows a much higher rate of markup for time and materials work than is authorized by most cities or local agencies. That can significantly inflate change order costs.

*First Aid:*

To some extent these problems can be limited by a standard order of precedence clause that establishes a documentary hierarchy for resolving conflicting or inconsistent provisions. (See Section 7, *Order of Precedence*, below.) But even a well-crafted order of precedence will not eliminate Caltrans provisions that are neither conflicting nor inconsistent with the city's front end template, but are nevertheless undesirable.

Cities that routinely rely on Caltrans Standard Specifications should also include a provision in their front end documents that expressly *excludes* Caltrans' *General Provisions*. This can be accomplished by adding a provision such as the following to the contract or general conditions:

> "The 'General Provisions' of the Caltrans Standard Specifications, i.e., Sections 1 through 9, do not apply to these Contract Documents with the exception of specific provisions, if any, which are expressly stated to apply to these Contract Documents."

A provision such as this can avoid the costly problems that can arise from incorporating Caltrans' undesirable *General Provisions*. Not every requirement in the Caltrans' *General Provisions* is necessarily inapplicable or undesirable. Therefore, this catch-all provision preserves a city's flexibility to selectively incorporate particular requirements that it determines to be beneficial.

**5. Defined Terms**

*The Problem:*

Most front end documents include a list of definitions for capitalized defined terms. That's all good, but problems can arise when what should be a simple definition becomes weighted down with substantive terms. That can be problematic in two respects: 1) it makes for an overly complex definition, and 2) the substantive terms belong in the body of the agreement.

In the following example, the first sentence provides a perfectly serviceable definition for "Excusable Delay," but is followed by substantive provisions which should be included in the sections of the General Conditions pertaining to delay:

> "EXCUSABLE DELAY: A Delay for which Contractor may be entitled under the Contract Documents to an extension of time, but not compensation. *'Excusable Delay' means any delay to the path of activities that is critical to Substantial Completion of the Work within the Contract Time caused by conditions beyond the control or foreseeability, and without the fault or negligence of Contractor or its Subcontractors, such as, but not limited to:*

*war, embargoes, fire, unavoidable casualties, unusual delays in transportation, national emergency, and stormy and inclement weather conditions that are unusual and unseasonable and in which the Work cannot continue. Without limitation to the foregoing, the financial inability of Contractor or any Subcontractor or Sub-subcontractor, shall not be deemed conditions beyond Contractor's control or foreseeability. Contractor may claim an Excusable Delay only if all Work on a critically scheduled activity is stopped for more than six (6) hours of a normal eight (8) hour work day, or if three to six hours are lost in one work day, then it may be claimed for one-half day.*" (Emphasis added.)

Even if the substantive provisions included in a definition are great provisions, that's just not where they belong. All of the italicized text in the above definition should be with the substantive provisions governing delay, not tucked away in the definitions.

*First Aid:*

This is a relatively easy area to target for first aid. Simply read through the definitions and identify any portions of a definition that provide substantive provisions. These may be terms of prohibition, terms of mandate, or terms of limitation. Give critical scrutiny to any verbiage that goes beyond just explaining what the term *means*. Substantive terms should be cut and moved into the appropriate location within the body of the document.

**6. Indemnity Requirements**

*The Problem:*

For many years now, Civil Code section 2782 has provided that an indemnity requirement in a construction contract is "void and unenforceable" if:

- It requires a contractor to indemnify against another party's "sole negligence or willful misconduct" [subdiv. (a)]; or
- It requires a contractor to indemnify a public agency against its "active negligence" [subdiv. (b)].

Thus, to be enforceable, any indemnity provision in a public agency construction contract must expressly exclude a duty to indemnify against the agency's sole or active negligence and willful misconduct. Pretty simple. And yet, a truly surprising number of front end templates in active use by cities include broad indemnity provisions that are void and unenforceable because they omit these express exclusions. Often this comes as quite a surprise to the city attorney, and an unpleasant one at that.

*First Aid:*

Avoid an unpleasant surprise. Check the indemnity provision in your current front end template to make sure that it is enforceable under Civil Code section 2782. If it does not expressly exclude sole or active negligence and willful misconduct it is probably void and unenforceable. That's an easy fix.

Many indemnity provisions are prefaced with a caveat such as "to the full extent permitted by law," which effectively says "we want to be indemnified all the way up to, but not past the legal limitations." Such a caveat might not immunize an indemnity provision from being declared void for failure to expressly exclude sole or active negligence and willful misconduct—but it couldn't hurt.

It may be more effective to make sure that staff are trained to steer clear of any tampering with the indemnity provision and other "legal stuff" in the contract documents. (See Section 10, *User Experience*, below.)

**7. Order of Precedence**

*The Problem:*

Even if a front end template is carefully drafted and structured to avoid internal conflicts and inconsistencies, such conflicts and inconsistencies may nevertheless arise because 1) the document-preparer may add provisions that conflict with template provisions; or 2) third party documents are attached and incorporated.[5]

*First Aid:*

An order of precedence provision is essential for a front end template or any other complex contract that is made up of separate constituent documents. An order of precedence provision should include all of the documents contained in the template, and ideally provide for documents that might be attached on a per-project basis, such as Caltrans Standard Specifications or other third party documents.

Opinions vary—often vigorously—about which documents should take precedence over other documents. Here are some principles to consider in organizing an order of precedence:

- The core *contract* documents—typically the contract and general conditions, should take precedence over *bid* documents (the notice inviting bids, instructions to bidders, bid proposal, etc.). The bid documents, which apply

[5] See Section 10, *User Experience*, and Section 3, *Incorporation of Third Party Documents*, respectively, for further discussion.

to the bidders, are about what you *plan* to do, but the core contract documents, which apply to the selected contractor, contain the operative legal obligations including the price and time for completion.

- The attorney-approved front end documents should always take precedence over the technical specifications or any other documents that are prepared or provided by architects or engineers. Design professionals—with the best of intentions—will sometimes take it upon themselves to add legal terms or procedural requirements to the technical specifications, and their additions may directly conflict with terms in the front end template.

- The attorney-approved front end documents should also take precedence over documents provided or completed by a third party, such as bond forms from sureties, insurance certificates, or even the bid proposal submitted by the contractor. That may reduce or eliminate the risk of becoming bound by unacceptable terms that have been introduced by a third party.

- *Amending* documents must take precedence over *amended* documents. Thus, addenda take precedence over the bid documents they amend, and change orders take precedence over, well…everything else.

- Documents prepared by third parties that were not prepared specifically for the project should be at the bottom of the hierarchy.

This last principle can be tricky when you are drafting (or updating) a generic template and you cannot know in advance what documents might be attached and incorporated for particular projects in the future. Including a "catch-all" provision such as the following can help address this concern:

> "Any documents prepared by and on behalf of a third party, that were not prepared specifically for this Project, including, but not limited to, the Caltrans Standard Specifications or Caltrans Special Provisions."

A catch-all provision such as this at the *very bottom* of the order of precedence will provide some protection against later incorporation of documents prepared by other parties for other purposes. (See Section 3, *Incorporation of Third Party Documents*, above.)

**8. Internal Procedures**

*The Problem:*

Some front end documents try to double as an internal procedures manual by including statements about what the city will do or when the city will do it—as distinct from what

the *contractor* must do. This may be a well-intended effort to provide information, but it is still a very bad idea. The city may become legally bound by internal procedures that might otherwise be flexible. A classic example includes statements in the bid documents that if the bidder does X or does not do Y, its bid "will be rejected as nonresponsive." That effectively eliminates a city's ability to lawfully waive an immaterial bidding error. The cost consequences of forcing the city to accept a higher bid solely because of an otherwise waivable error in a low bid can be considerable.

Other examples include statements about when the city will review and return submittals. If the city misses its own self-imposed deadlines, it may provide support for a delay claim by the contractor. Statements of the city's internal procedures can become pitfalls when the city fails to follow its own stated procedures—which happens frequently when the stated procedures are more aspirational than actual.

*First Aid:*

Don't get verbally painted into a corner. Skim through your front end documents to look for provisions that appear to be internal policies or procedures, especially provisions that may bind the city to a particular course of action. Unless it is absolutely required by law or practical necessity to include a statement about what actions the city will affirmatively take or by when, leave internal procedures out of the front end documents. Keep them in internal policy or procedure manuals where they belong.

**9. Internal Consistency**

*The Problem:*

Achieving and maintaining internal consistency is an inevitable challenge with a front end template. A good order of precedence provision is essential to resolve issues of conflicting or inconsistent provisions between the different documents included in the project manual. (See Section 7, *Order of Precedence*, above.) But an order of precedence may not address other types of inconsistencies that can frequently arise in front end templates—particularly in Frankenstein front ends that have been patched together from various source documents.

For example, some front end templates actually include different—and disparate—terms for referring to the contracting agency all within a single template, including: "City," "County," "State," "District," "Owner," "Agency," "Port," and even "Tribe." Amusing perhaps, but not at all uncommon.

*First Aid:*

While a contract dispute is unlikely to turn on something that is an obvious error, such as referring to a city as a "Tribe," it may still be worthwhile to set aside a few hours to

methodically check for and correct such inconsistencies. Inconsistent or inappropriate terminology can serve as red flags for contract provisions that have been improperly imported from outside documents.

A targeted review can be performed by printing out a copy of the definitions as a reference for a page-by-page scan of the entire template, checking capitalized terms against the definitions. For each capitalized term that is not in the list of defined terms: 1) replace it with the correct term (or in some cases, add a new definition); and 2) review the entire provision to see if it really belongs in your front end. Revise or delete as needed.

**10. User Experience**

*The Problem:*

The tech term "user experience" recognizes that effectiveness of the most brilliant coding will depend on the ultimate end user. In the realm of front end templates, those end users—the document-preparers, public works staff, consultants, and the contractor—have one thing in common: they are all human.

Human error is a given. It's going to happen. Public works and engineering staff—even clerical staff—will take it upon themselves (always with the very best of intentions) to modify contract templates in ways that become quite problematic. And even if forms are locked for editing, document preparers will still make errors: entries may be incorrect, conflicting, or incomplete. There is no way to completely eliminate human error, but there are affirmative steps that can be taken to reduce or mitigate such errors.

In addition, the public works staff or consultants charged with managing a project and the contractor charged with constructing the project need to be able to find and understand the contract requirements on a day-to-day basis without having to call on legal counsel. Some front end documents read more like the *Magna Carta* than a 21st century contract. Making a front end template easier to read will make it easier for staff to administer the contract and for the contractor to comply with it.

*First Aid:*

Staff training is the first line of defense against human error, preferably on an annual basis to account for staff turnover and for the equally human tendency to forget prior instructions. Training does not have to be complicated: It can be a simple page-turn session with all staff who are involved in handling the front end documents to identify what items need to be filled in, how to complete those items, and what pitfalls to be wary of. A written guide for completing the front end template can also be useful…at least if the document-preparers actually use it.

The front end itself should be structured to minimize human error. It should be easy for the document preparer to locate the fields that must be completed. That can be accomplished by coding within the document, searchable markers such as angle brackets, or even highlighting. Even with a good search protocol, it is advisable to keep all to-be-completed fields clustered toward the beginning of a document where they are unlikely to be overlooked. For example, it is not a good idea to bury the field for the amount of liquidated damages on page 57 of the General Conditions. It can and will get overlooked. Similarly, avoid unnecessary duplications that can become traps for the unwary, such as having more than one place to enter the amount for liquidated damages. A busy document preparer might just enter one amount in one field and a different amount in another. It happens.

Any update—even a first aid patch job—can include efforts to improve user experience by making the front end documents easier to read, to understand, and to administer. When adding or rewriting provisions to the front end template, use concise plain English instead of gothic legalese as much as possible:

- Use "will" or "must" instead of the quaint, but potentially ambiguous "shall."[6]
- Use "the" instead of "said."
- Do not replace "use" with "utilize" just to make it sound fancier.
- Do not "call the Contractor's attention to…." Just plainly state what it is that the Contractor must do.

In other words, instead of the stilted "said Contractor shall utilize," just write "the Contractor will use." Eliminating pointless legalese will make your documents easier to read and understand by lawyers, laypersons…and even judges, if it comes to that.[7]

Updating the font and formatting can also contribute to more user-friendly front end documents. Some fonts are easier to read than others. Clear, clean fonts like Arial are easier on the eyes than more embellished fonts, such as Times New Roman (which is not very new at all). Using all-caps for emphasis is a bad idea, because it is more difficult to read all-caps than normal sentence case, AND IT COMES ACROSS AS SHOUTING. These are quick fixes that can be handled by administrative personnel.

Section numbering and headings make it much easier to find and to reference individual provisions. While that may seem obvious, many bid documents in current use are

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[6] *See* Bryan A. Garner, *The Elements of Legal Style* (2nd ed., 2002) p. 140 ("If you're using American English, you won't need *shall* much—except in posing playful questions such as, 'Shall we dance?' Stick to *will*.")

[7] In the author's opinion, there is simply no need for any document to begin with "Know all men by these presents…." It is useless and antiquated legal throat-clearing.

drafted without these. It is much easier to find and reference “Section 6 on Subcontractors” than it is to reference “the fifth full paragraph from the top on page 23, beginning with….”

Clarity and ease of use is not window-dressing. Being mindful of user experience will make for a better front end template for all end users.

## CONCLUSION

The ten sets of problems and solutions recommended above are not exhaustive; they do not contain the entire universe of potential problems or potential fixes for outdated or patched together front end documents. And they are no substitute for a cover-to-cover update of a front end template, or even replacing it with a well-designed up-to-date template. However, some updating is better than no updating. Any one or all of the approaches provided above can help to identify and reduce the legal exposure that may be lurking in your city’s front end template. Some of the first aid fixes will require no more than an hour or two, though the time required will depend on the condition of the template. The point is: this is do-able, even if it is on an incremental basis.

There are no bullet-proof construction contracts, but there is a continuum with “better” in one direction and “worse” in the other. Even baby steps can move your template in the right direction.

# General Municipal Litigation Update

**Thursday, May 4, 2017 General Session; 10:45 – Noon**

**Javan N. Rad, Chief Assistant City Attorney, Pasadena**

## Notes:

# General Municipal Litigation Update

Cases Reported from October 10, 2016
Through April 5, 2017

Javan N. Rad
Chief Assistant City Attorney
City of Pasadena

League of California Cities
2017 City Attorney's Spring Conference

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## IV. Public Records



## V. Finance



## VI. Miscellaneous

## I. Employment

***Dinslage v. City & County of San Francisco*, 5 Cal.App.5th 368 (2017)**

**Holding**: Employee's support of disabled community and opposing relocation of classic car show did not constitute protected activity under the Fair Employment & Housing Act.

**Facts:** Plaintiff, a 38-year Recreation and Parks Department employee, was one of 148 employees whose job classification was discontinued. Plaintiff applied for a new position with the department, but was not selected. Plaintiff retired and then filed suit, alleging age discrimination and retaliation for supporting and promoting the rights of the disabled community. Plaintiff argued (1) the department retaliated against him for supporting the rights of the disabled community; (2) he was not re-hired because he opposed the relocation of a classic car show, which donated monies for department activities for persons with disabilities; and (3) he spoke in opposition to eliminating what he viewed as a program benefiting the disabled community. The trial court granted summary judgment for the Defendants, and Plaintiff appealed.

**Analysis:** The Court of Appeal affirmed. The court found that Plaintiff's (1) advocacy for the disabled community; and (2) opposition to elimination of programs that benefit the community are not protected activities under the Fair Employment & Housing Act. In other words, Plaintiff's opposition "was not directed at the Department's employment practices." (emphasis in original)

***Brandon v. Maricopa County*, 849 F.3d 837 (9th Cir. 2017)**

**Holding:** Plaintiff's comments to newspaper reporter, suggesting she disagreed with settlement figures authorized by county representatives, is not considered protected speech.

**Facts:** Plaintiff, who had worked in the county attorney's office for several decades as a civil litigation attorney, took a job with the county's "special litigation" department to handle certain lawsuits. While in that department,

Plaintiff commented to a newspaper reporter on a lawsuit settlement, stating about the involved county officials, "I don't know why they did what they did, and I'm sure they have their reasons." The department was later disbanded, and Plaintiff was rehired by the county attorney by contract, which included a probationary period. Upon her return, Plaintiff was not assigned further cases which involved risk management, because of risk management officials' concern over Plaintiff's comments to the newspaper reporter. Plaintiff was terminated while on probation, on the stated grounds that she had an altercation with another staff member. Plaintiff filed suit, alleging a series of constitutional and state law claims. A jury returned a verdict in favor Plaintiff in the amount of one dollar ($1) on her free speech claim, over $600,000 on the state law claims, and over $300,000 in attorney's fees. The county defendants appealed.

**Analysis:** The Ninth Circuit reversed, finding in favor of the county defendants. As to the state law claims, the court found that asking for the removal of a lawyer "reasonably perceived as a liability to the county certainly cannot be considered an improper means for protecting the county's legitimate interests." The court also reversed on the Plaintiff's First Amendment claim, finding that the "only possible outcome" of the First Amendment analysis was that the Plaintiff's comments to the newspaper fell under her job duties, and was not constitutionally protected speech.

***Cal Fire Local 2881 v. California Public Employees' Retirement System*, 7 Cal.App.5th 115 (2016)**

**Holding:** Legislature's doing away of the option to purchase nonqualifying service credit (airtime) through the Public Employees' Pension Reform Act of 2013 (PEPRA) did not impair state employees' vested pension rights.

**Facts:** The option to purchase airtime service credit (i.e., additional years of service for calculating pension benefit) was available for CalPERS members from 2003 through 2012. In 2012, the Legislature enacted PEPRA which, among other things, gave eligible CalPERS members one last four-month window of opportunity to purchase airtime service credit. After that, the option would cease to exist. In 2013, after the expiration of time to purchase airtime service credit, state firefighters and their union filed suit, asserting the option to purchase airtime

was a vested contractual right, and was eliminated in violation of the Contracts Clause of the California Constitution. The trial court entered judgment against the Plaintiffs, finding that the elimination of the right to purchase airtime did not impair a pension right -- and, even if such a right were vested, the elimination of airtime was reasonable. Plaintiffs appealed.

**Analysis:** The Court of Appeal affirmed, finding the statute establishing the option to purchase airtime, Government Code Section 20909, and its legislative history, do not create a vested pension benefit. Rather, eligible CalPERS members may choose to pay for airtime, wholly distinct and apart from "their provision of labor for the state in exchange for compensation." And, even if the court accepted that the option to purchase airtime was an express vested right (it is not), it found the elimination of airtime was a reasonable modification – because the doing-away of airtime was intended to be a cost-neutral service credit, since employees are paid an amount equivalent to the increased benefit.

## II. Torts

***Ames v. King County*, 846 F.3d 340 (9th Cir. 2017)**

**Holding:** Deputy entitled to qualified immunity in rapidly-developing medical emergency exacerbated by the Plaintiff's resistance.

**Facts:** Plaintiff called 911 for an ambulance for her adult son, who lived in a converted garage, and who suffered from heart and lung problems from prior drug abuse. Plaintiff found (1) her son slumped over the couch, drooling, and incoherent; and (2) what appeared to be a suicide note. Deputies and firefighters/EMTs responded within four minutes of the 911 call. Plaintiff refused entry to the deputies, but the firefighters/EMTs (who entered) saw Plaintiff's son sitting in a chair, semi-conscious. One of the deputies then directed the emergency crew to withdraw from the apartment. Plaintiff (with the assistance of her neighbors) then placed her son in her pickup truck, to take him to the hospital. Over a 97-second period, a deputy engaged in a scuffle to seek to prevent Plaintiff from leaving, pulled Plaintiff out of the truck and to the ground, and slammed

Plaintiff's head into the ground three times, before Plaintiff was handcuffed. Plaintiff's son was taken to the hospital, and survived the overdose. Plaintiff filed suit on a number of Fourth Amendment claims under 42 U.S.C. Section 1983 (including lack of probable cause to arrest, unreasonable seizure, excessive force, and unlawful search of her truck), and the District Court denied the deputies motion for summary judgment. The deputies appealed.

**Analysis:** The Ninth Circuit reversed, finding the deputies were entitled to qualified immunity. The court found the government interest in subduing Plaintiff was substantial, based on the ongoing emergency exacerbated by Plaintiff's resistance. Additionally, the court found that Plaintiff presented an immediate danger to the deputy, in a rapidly-escalating situation, where Plaintiff admitted she "panicked." The court found that even if the deputy was mistaken in how much force was required, her actions did not violate clearly established law, when she was responding to this medical emergency.

The court also found that two other deputies did not violate the Fourth Amendment because of the "emergency doctrine," acting in their community caretaking capacities. The court found it reasonable to search the glove compartment of Plaintiff's truck (without a warrant or probable cause) to find out what drugs may have been used in the suicide attempt.

***White v. Pauly*, 137 S.Ct. 548 (2017) (*per curiam*)**

**Holding:** State police officer is entitled to qualified immunity in officer-involved shooting when there is no clearly established law particularized to the facts of the case.

**Facts:** Officers were responding to a call of suspected driving under the influence. The driver had left the scene, and two officers ultimately responded to the address associated with the vehicle's license plates - where the driver (Daniel) and his brother (Samuel) resided. When the two officers ultimately arrived, they found two houses at the address. The officers never identified themselves as state police. A third officer (White) then arrived, and heard the two brothers say they had guns. A few seconds later, Daniel fired two shotgun blasts while screaming loudly. A

few seconds after that, Samuel fired in Officer White's direction. Another officer fired back at Samuel but missed, and then Officer White shot Samuel, killing him. Samuel's estate and Daniel filed suit. As relevant here, the District Court and the Tenth Circuit denied Officer White's Motion for Summary Judgment on qualified immunity grounds, finding a warning was required before the armed confrontation. The U.S. Supreme Court granted certiorari to address whether Officer White violated clearly established law.

**Analysis:** The Supreme Court vacated the Tenth Circuit's opinion, finding the court misunderstood the "clearly established" analysis on a claim of qualified immunity. The Supreme Court, noting the unique facts and circumstances of this case, reiterated that "clearly established law should not be defined at a high level of generality." As applied here, the court concluded that it was not clearly established that an officer, who arrives late on the scene, is prevented from assuming "that proper procedures, such as officer identification, have already been followed."

***Leyva v. Crockett & Co., Inc.*, 7 Cal.App.5th 1105 (2017)**

**Holding:** Trail immunity bars suit by recreational trail user who, while hiking, was injured when struck by an errant golf ball from an adjacent golf course.

**Facts:** A privately-owned golf course granted the county two easements for a hiking and equestrian trail, running adjacent to the golf course. Four years later, while Plaintiff was walking with his wife along the trail, a golf ball struck him in the eye, causing him to lose 80 percent of his vision in that eye. The trail is separated from the golf course by a chain link fence and eucalyptus trees. The trail had no warning signs indicating golf is being played on the golf course, adjacent to where Plaintiff was struck. Prior to this incident, the golf course was not aware of prior injuries in that area of the trail. Plaintiff and his wife sued the golf course. The trial court granted summary judgment for the golf course, finding it was entitled to trail immunity under Government Code Section 831.4, which applies to public entities, as well as grantors of easements to public entities for, among other things, a recreational purpose.

**Analysis:** The Court of Appeal affirmed the finding of trail immunity for the golf course. The court concluded that the trail's location next to a golf course is an integral feature of the trail itself. The court also noted that if private landowners were required to incur the cost of erecting barriers to make trails "entirely safe," they may decline to grant public easements along golf courses, resulting in closure of such areas for public use.

***J.M. v. Huntington Beach Union High School Dist.*, 2 Cal.5th 648 (2017)**

**Holding:** Where application for leave to file a late claim is denied by operation of law, six-month limitation period to bring a petition in the superior court pursuant to Government Code Section 946.6 cannot be extended.

**Facts:** Plaintiff was injured in a high school football game, practiced several days later, and was later diagnosed with double concussion syndrome. He retained counsel, and presented a timely application to file a late claim. The school district took no action, and the application was deemed denied by operation of law. Ten and one half months after the denial by operation of law, Plaintiff petitioned the superior court for relief from the claim requirements. The trial court rejected Plaintiff's petition, noting it should have been filed no later than six months after the denial by operation of law, pursuant to Government Code Section 946.6. The Court of Appeal affirmed, and the Supreme Court granted review.

**Analysis:** The Supreme Court affirmed. The court noted that where a claimant does not file a timely petition with the superior court for relief from the claim requirements, the Legislature did not provide an opportunity for a further extension of an already-late claim. The court also rejected the Plaintiff's arguments for equitable estoppel and equitable tolling, "missing an easily ascertainable deadline that has been in place for over 50 years."

## III. Land Use / CEQA

***Union of Medical Marijuana Patients v. City of San Diego*, 4 Cal.App.5th 103 (2016) (review granted 1/11/17, S238563)**

**Holding:** Ordinance allowing medical marijuana dispensaries is not a project under the California Environmental Quality Act.

**Facts:** The city adopted an ordinance allowing medical marijuana dispensaries throughout the city. Staff concluded the ordinance was not a project, in presenting the ordinance to the City Council. The City Council did not perform any further review under CEQA, and approved the ordinance. Petitioner sued, arguing the ordinance was a project subject to CEQA, with the potential to result in environmental change because it (1) will require patients to drive across the city; (2) will cause development in certain areas of the city; and (3) could increase the indoor cultivation of marijuana. The trial court denied the petition, and Petitioner appealed.

**Analysis:** The Court of Appeal affirmed. First, the court rejected Petitioner's argument that any zoning ordinance is necessarily a project under CEQA, as a matter of law. The court found that Public Resources Code Section 21080(a) provided only an "illustration" of activities undertaken by a public agency -- and those activities may or may not be a CEQA project. Next, the court rejected Petitioner's argument that the ordinance was nevertheless a project because it may cause resulting physical change in the environment. Before the ordinance, there were no legal medical marijuana dispensaries in the city, so the ordinance should increase access to medical marijuana. Also, the court found it speculative to assume that new dispensaries will require new construction -- and if there were new construction, a conditional use permit would require CEQA review for the construction project, at that time.

***D'Egidio v. City of Santa Clarita*, 4 Cal.App.5th 515 (2016)**

**Holding:** Outdoor Advertising Act does not preclude counties from regulating billboards in unincorporated areas. The passage of time does not bar an action against an illegal billboard under doctrines of estoppel and laches, where billboard owner failed to show prejudice.

**Facts:** Plaintiffs' billboard, initially located in an unincorporated area, was modified in 1987 from a temporary subdivision sales sign to an outdoor advertising sign. Plaintiffs obtained a CalTrans permit for the billboard but no county permit. In 1990, the city annexed the area in which the property was located. In 2007, the city began asserting that the billboard was illegal, because it was not properly permitted as an outdoor advertising sign. In 2014, the city passed an ordinance that would require removal of all outdoor advertising signs in the city (including Plaintiffs' billboard) by 2019. Plaintiffs then filed a declaratory relief suit, alleging that the Outdoor Advertising Act (B&P Code Sections 5200 *et seq.*) precludes regulation by local ordinances with respect to a billboard placed in an unincorporated area at the time of its placement. The city filed a cross-complaint against Plaintiffs for, among other things, the maintenance of a public nuisance in violation of the municipal code. The trial court granted summary judgment for the city, finding that the Outdoor Advertising Act did not preclude the county from requiring Plaintiffs to obtain a permit when they changed the use of the sign in 1987, that the billboard is a prohibited use under the municipal code, and it constitutes a public nuisance. The court also awarded the city over $48,000 in attorney's fees in abating the nuisance. Plaintiffs appealed.

**Analysis:** The Court of Appeal affirmed for the city in all respects. After going through a detailed legislative history, the court held that the Outdoor Advertising Act does not preclude counties from regulating billboards in unincorporated areas. The court found that the 1987 modification of the sign's use violated the county code, so the use was an illegal use, not a legal non-conforming use. The court also rejected the Plaintiffs' argument that the city's 17-year delay in enforcing the municipal code (from 1990 to 2007) barred the city's action, through the doctrines of estoppel and laches because Plaintiffs showed no prejudice from the delay. The court also affirmed the attorney's fees award for the city's abatement of a nuisance,

which was authorized by the municipal code and Government Code Section 38773.5(b) (permitting cities to adopt an ordinance allowing for the recovery of fees to abate a nuisance).

***Real v. City of Long Beach*, ___ F.3d ___, 2017 WL 1160972 (9th Cir. 2017)**

**Holding:** Tattoo artist has standing to assert facial and as-applied challenges to city's zoning ordinances limiting tattoo shop uses, where Plaintiff expressed an intent to open a tattoo shop, but never applied, knowing he would be denied.

**Facts:** Plaintiff wished to open a tattoo shop in Long Beach, where tattoo shops may only operate in limited areas of the city, and a conditional use permit (CUP) is required. A CUP may only be issued if the city to find that the tattoo shop is not "detrimental to the surrounding community including public health, safety or general welfare, environmental quality or quality of life." Plaintiff (through his lawyer) sent the city a letter identifying three locations where he desired to open a tattoo shop, but the locations were not zoned to allow that use. Plaintiff did not apply for a CUP, but filed suit, instead. He alleged the city violated the First Amendment by (1) limiting permitted areas for tattoo shops; and (2) requiring tattoo shops to obtain a CUP that vests excessive discretion in city officials. At a bench trial, Plaintiff admitted he never applied for a CUP, as he knew he would be denied. After Plaintiff's testimony, the District Court entered judgment as a matter of law in favor of the city. The court found, among other things, that Plaintiff only brought an as-applied challenge, and he lacked standing because he did not apply for a CUP. Plaintiff appealed.

**Analysis:** The Ninth Circuit reversed, and remanded the case for the bench trial to proceed on both facial and as-applied challenges. First, the court concluded that, even though Plaintiff did not clearly state his claims to the District Court, he "plainly" asserted a facial challenge. The court further noted that evidence of harm (i.e., a denial) is not required either for a First Amendment challenge, nor a challenge to a licensing statute vesting excessive permitting discretion in the city. Second, the court held that Plaintiff had standing to bring an as-applied challenge to the city's zoning ordinances. The court found Plaintiff suffered an injury-in-fact because he alleged an intention to open a tattoo shop, and the city would take

action against Plaintiff if he opened without a CUP. Finally, the court found the Plaintiff raised cognizable claims against the zoning ordinances.

## IV. Public Records

### *City of San Jose v. Superior Court (Smith)*, 2 Cal.5th 608 (2017)

**Holding:** City employee communications on personal files, accounts, and devices may be subject to disclosure under the Public Records Act, where the communications pertain to public business.

**Facts:** Petitioner made a public records request for documents concerning redevelopment efforts in downtown San Jose, including emails and texts on private electronic devices used by the mayor, two councilmembers, and their staffs. In responding to the request, the city did not disclose communications made using personal accounts, taking the position that those communications were not public records. Petitioner filed suit, and the trial court ordered disclosure, and the Court of Appeal issued a writ petition (in favor of the city), reversing the trial court. The Supreme Court granted review.

**Analysis:** The Supreme Court held that city employees' writings about public business are not excluded from the Public Records Act simply because they were sent, received, or stored on a personal account. The court also noted that a city may "reasonably rely" on employees to search their own personal files, accounts, and devices for material that is responsive to a public records request. The court, recognizing city employees' privacy interests, provided some guidance on particular approaches and search methods that might be acceptable for employees' searches of their personal accounts.

### *Los Angeles County Board of Supervisors v. Superior Court*, 2 Cal.5th 282 (2016)

**Holding:** Invoices for legal services to government agencies are not categorically protected by the attorney-client privilege. While invoices for pending matters are

not disclosable, aggregate fees may be disclosable for closed (no longer pending) matters.

**Facts:** The ACLU and an individual made a public records request for invoices specifying amounts the county had been billed by outside law firms on nine lawsuits alleging excessive force against jail inmates. The county agreed to produce invoices for three lawsuits that had concluded. However, the county declined to provide invoices for the six remaining lawsuits, taking the position that the invoices disclose attorney strategy, tactics, thought processes, and analysis. The ACLU then filed suit. The trial court found the county failed to show the invoices were attorney-client privileged communications. The Court of Appeal granted the county's writ petition, finding the invoices were privileged, and therefore exempt from disclosure. The Supreme Court then granted review.

**Analysis:** The Supreme Court, in a 4-3 opinion, reversed and remanded, finding invoices for legal services transmitted by an outside law firm to a government agency are not categorically protected by the attorney-client privilege. The court held that "an invoice listing amounts of fees is not communicated for the purpose of legal consultation." However, detailed billing information, such as the nature or amount of work occurring, is "in the heartland" of the privilege. When a legal matter is pending and active, the court found the privilege applies to everything in the invoice, including the amount of aggregate fees. For example, "[m]idlitigation swings in spending . . . could reveal an impending filing . . ." However, the privilege may not apply for closed matters, as the fee totals "communicate little or nothing about the substance of legal consultation."

***City of Los Angeles v. Superior Court (Anderson-Barker)*, 9 Cal.App.5th 272 (2017)**

**Holding:** Civil Discovery Act applies to writ proceedings under the Public Records Act.

**Facts:** Petitioner made a public records request for (a) data recorded in a vehicle impound database maintained by a private organization of companies that have police garage (towing) contracts with the city; and (b) scanned information held by

a document storage company contracted by the private organization. The city declined to produce this information, stating it did not own the data, and could not get access without a search warrant. Petitioner filed suit against the city, and then submitted several forms of discovery to explore the city's defenses. The city objected, asserting one objection -- that discovery is not permitted in a Public Records Act writ proceeding. The trial court found that the proceeding was subject to the Civil Discovery Act, that the city waived all other objections, and the court sanctioned the city $5,560. The city sought writ relief with the Court of Appeal.

**Analysis:** The Court of Appeal, in what it conveyed was a matter of first impression, found that a Public Records Act writ proceeding is a "special proceeding of a civil nature," and thus subject to the Civil Discovery Act. However, the court pointed out that the issue in public records disputes is a narrow one -- whether a public agency has an obligation to disclose the requested records. Discovery should generally be limited to test the agency's duty to disclose, and courts should also balance the need for discovery with the need for an expeditious resolution of the public records dispute. The court reversed the sanctions award against the city, and allowed the city to assert additional objections to the discovery on remand.

## V. Finance

***Yagman v. Garcetti*, ___ F.3d ___, 2017 WL 242562 (9th Cir. 2017)**

**Holding:** City procedure to require drivers to deposit amount of parking citation to obtain administrative hearing does not violate driver's due process right.

**Facts:** Vehicle Code Section 40215 provides an administrative procedure to contest parking citations: (1) initial review; followed by (2) administrative hearing. The city's procedure requires drivers to deposit the ticket amount, or demonstrate an inability to pay, before they can obtain an administrative hearing. Plaintiff, who asked for a hearing on three parking citations, deposited the penalties, and prevailed at two of his three hearings. Plaintiff then filed a putative class action lawsuit, alleging a variety of 42 U.S.C. Section 1983 claims, including

due process. The District Court granted the city's motion to dismiss, with prejudice, and Plaintiff appealed.

**Analysis:** The Ninth Circuit affirmed. The court rejected the Plaintiff's procedural due process claim, which challenged the city's requirement that the ticket amount be deposited before an administrative hearing. The court found the private interest at stake was modest -- the largest ticket here was $73 -- especially since the deposit would be refunded after a successful challenge. Additionally, Plaintiff did not plead that the initial reviews (before the administrative hearing) were conducted unfairly. And finally, the court noted the city's interests served by the deposit requirement, such as promptly collecting parking penalties, and discouraging frivolous and dilatory challenges.

***In re Transient Occupancy Tax Cases*, 2 Cal.5th 131 (2016)**

**Holding:** Online travel companies are not required to collect and remit transient occupancy tax on their markup of a hotel room rate.

**Facts:** The City of San Diego's transient occupancy tax (TOT), established in 1964, is calculated as a percentage of the rent charged by the "operator" of the hotel. In recent years, visitors have booked hotels online through online travel companies (OTC). The city began auditing the OTCs, and assessed TOT against the OTCs. After an administrative hearing, a hearing officer found that the OTCs owed tax on their markup (of the hotel room rate). The OTCs filed suit. The trial court granted writ relief for the OTCs, and the city appealed. The Court of Appeal affirmed, and the Supreme Court granted review.

**Analysis:** The Supreme Court affirmed, finding the OTCs are not "operators" required to collect and remit TOT. As such, the court found that the only amount taxable is the wholesale room rate plus the hotel-determined markup (to set a minimum retail price for OTCs). The court rejected the city's argument that the OTC's markup (above the hotel-determined markup) was also taxable.

## VI. Miscellaneous

### *Drakes Bay Oyster Co. v. California Coastal Commission*, 4 Cal.App.5th 1165 (2016)

**Holding:** Due process rights not violated by commission staff that prosecuted underlying administrative proceeding when (1) administrative proceeding is no longer pending; (2) litigation over commission's decision is underway; and (3) commission staff participate in the litigation on behalf of the commission.

**Facts:** Plaintiff operated a mariculture facility in Point Reyes National Seashore. The Coastal Commission sought to address unpermitted development by the company at the facility, and commenced enforcement proceedings. Three enforcement staff (two staff counsel) advocated that the Coastal Commission issue certain orders, and the Commission did so. Plaintiff filed suit, and later sought to disqualify enforcement staff on due process grounds. The trial court denied the motion, and later ruled against the Plaintiff on the merits. The Plaintiff appealed.

**Analysis:** The Court of Appeal affirmed, finding the enforcement staff's participation in the litigation merely helps the Commission act as a party, and not as a decisionmaker in a quasi-judicial proceeding regarding Plaintiff's interests. The court found no due process right to have an agency remain impartial after it decides a matter, when the matter is in front of a different decision maker -- the superior court. Once litigation is filed, and administrative proceedings are no longer pending, the Coastal Commission and its enforcement staff share the same interest in defending the agency's decision.

### *Hernandez v. Town of Apple Valley*, 7 Cal.App.5th 194 (2017)

**Holding:** Description of agenda item violated the Brown Act when agenda (and agenda packet) made no mention of proposed agreement for town to accept gift from developer to pay for initiative measure.

**Facts:** The agenda for Town Council meeting read "Wal-Mart Initiative Measure" and had the recommendation for action "Provide direction to staff." There was no further information on the agenda on this item. During the meeting, the Town Council (1) adopted three resolutions calling for a special election on an initiative to adopt a specific plan, and to file rebuttal arguments for and against the initiative; and (2) adopted a memorandum of understanding (MOU) accepting a gift from Walmart to pay for the special election. While the agenda did not contain specific language about these proposed actions, the agenda packet contained information about the proposed resolutions (but not the MOU). Plaintiff, a town resident, brought suit for a violation of the Brown Act and California Constitution, article II, section 12 (in relevant part, prohibiting a ballot initiative from naming a private corporation from having a power or duty). The trial court granted Plaintiff's motion for summary judgment on both grounds, and the town and Walmart appealed.

**Analysis:** The Court of Appeal affirmed as to the Brown Act claim, and reversed as to the constitutional claim. The court noted the Walmart gift to pay for the special election was first offered to the town the day after the agenda was posted -- so there was no notice that the MOU (an item of business) was going to be voted on at the Town Council meeting. The court then found the initiative did not violate the California Constitution. The developer and owner within the specific plan still have the duty to obtain the proper permits and approvals, and the initiative did not assign that power to Walmart only.

***Brookside Investments, LTD v. City of El Monte*, 5 Cal.App.5th 540 (2016)**

**Holding:** City Council may validly place initiative measure on the ballot to repeal underlying voter-approved initiative, even when the underlying initiative limited City Council's ability to pass an ordinance within same subject matter.

**Facts:** In 1990, city voters approved a Mobilehome Tenant Rent Assistance Program (MTRAP) initiative, which provided for limited rent control at mobilehome parks, but otherwise guaranteed mobilehome park owners the sole right to establish rent prices. One provision of MTRAP prevented the City Council from passing any ordinance relating to mobilehome park rents, or expending any

city funds in connection with such ordinance. In 2012, the City Council approved a resolution calling a special election on a measure that would replace (and repeal) MTRAP. Leading up to the election, the city approved expenditures for the conduct of the election in the form of legal notices, translation services, and administering the election. The voters approved the initiative. Plaintiff, a large mobilehome park owner, brought suit, alleging the ordinance enacting the initiative violated MTRAP and the Elections Code. Plaintiff also alleged that the city improperly expended public funds to support the 2012 initiative. The trial court granted summary adjudication in favor of the city, and Plaintiff appealed.

**Analysis:** The Court of Appeal affirmed, in favor of the city. The court found that Election Code Section 9222 (providing that a city council-initiated measure may propose "the repeal, amendment or enactment" of an ordinance) did not prohibit the City Council from placing the 2012 initiative on the ballot. Next, the court found that MTRAP did not prevent the City Council from placing the 2012 initiative on the ballot. The City Council merely drafted and approved a resolution for voters to consider the measure. Finally, the court held that the city did not expend public funds in violation of MTRAP. The court noted the city's expenditures would have been incurred with any election, and were not prohibited by MTRAP.

# Public Law Specialty Certification Committee Report

**Thursday, May 4, 2017 General Session; 10:45 – Noon**

**Craig Labadie, Committee Chair, City Attorney, Albany**

## Notes:

**Law Offices of Craig Labadie**

# Memorandum

**TO:** City Attorneys Department Members

**FROM:** Craig Labadie, Albany City Attorney and Committee Chair

**DATE:** April 25, 2017

**RE:** **Public Law Specialty Certification Committee**

Earlier this year, the City Attorneys Department Officers authorized creation of an ad hoc committee to explore options for creating a certification program for municipal law practitioners. The committee's charge is described in greater detail in the attached memorandum from Department President Greg Stepanicich. Also attached is the committee roster.

As a preliminary step toward gauging member interest in creating a certification program and determining how such a program might be structured and administered, the committee recently circulated a member survey. The survey responses indicated support for creating a certification program and provided valuable input that will help to guide the committee's efforts if the determination is made to move forward.

At this stage of the process, the committee members would like to invite additional input from Department members. I will be providing a brief committee report during the Department business session on Thursday, May 4th at the City Attorneys Conference, followed by a concurrent group discussion beginning at 4:45 pm that day for those who would like to discuss this effort in a round-table format. Additionally, please feel free to contact any of the committee members directly to ask questions or express your views on this topic.

I'm looking forward to seeing many of you at the Conference.

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# MEMORANDUM

TO: Members of Ad Hoc Public Law Specialization Certification Committee

CC: Patrick Whitnell, General Counsel, City Attorneys Department

FROM: Greg Stepanicich, President, City Attorneys Department

DATE: January 18, 2017

SUBJECT: Charge for Ad Hoc Public Law Specialization Certification Committee

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## CHARGE FOR AD HOC PUBLIC LAW SPECIALIZATION CERTIFICATION COMMITTEE

### Purpose

The purpose of the Ad Hoc Public Law Specialization Certification Committee (the "Committee") is to explore possible options for establishing a public law specialization certification program with the end result being the establishment of a certification program that most benefits the members of the City Attorneys Department. This program would provide a public law certification for those Department members that meet specified criteria such as years of practice, completion of required educational courses, and passing a required written test. Periodic recertification likely would be a component of a specialization certification program.

The goals of the certification program would be to bring greater recognition to the complexities of our practice, promote and foster attorney proficiency and competency in our Department, and provide a reliable and useful benchmark for City Councils to determine the experience and knowledge of a City Attorney they wish to hire. The program also would provide special recognition to individual members of our Department who are certified.

### Background

There are existing models for the Committee to study such as the California State Bar Legal Specialization program and the International Municipal Lawyers Association ("IMLA") Fellows program. The State Bar has established eleven practice areas of specialization administered by the California State Bar Board of Legal Specialization. This Board both administers the certification requirements for established specialties and recommends to the Board of Governors new areas of specialization. Examples of existing practice areas that attorneys can be certified in are appellate law, criminal law, estate planning law, family law and taxation law. In order to be certified by the Board of Legal Specialization, an attorney must

specialize in the practice area for a specified number of years completing specialized tasks and meet educational requirements involving coursework in the Specialization. This coursework for appellate lawyers for example requires 45 hours of educational courses or activities. In addition, the Board of Legal Specialization administers a written examination for each Specialization that must be passed by the applicant. The certification lasts for five years and attorneys must recertify with additional courses to maintain their Specialization certification.

The State Bar also has approved eleven practice areas that may be certified by accredited national organizations such as the American Board of Certification and the National Board of Trial Advocacy. These national organizations establish their own certification requirements that include years of practice and successfully passing a written test.

In addition to being subject to the uncertainties of obtaining approval of the State Bar Board of Governors for a new Public Law Specialization, a challenge for this program is that the Public Law Section of the State Bar includes all lawyers representing government from the state to the local level. The knowledge requirements for lawyers at these different levels of government are very different and do not lend themselves to a common certification program. However, the criteria used by the State Bar Board of Legal Specialization can provide a useful guide for a certification program established by our Department.

The IMLA Fellows program is administered by the Board of Directors of IMLA. To become a certified Fellow, the applicant must meet the following requirements:

1. Member of IMLA.

2. Five years of practice in local government law.

3. Completion of a specified number of hours of local government law classes.

4. Successfully passing a take-home examination.

The certification as a Fellow lasts for five years and there is a process for recertification. This program seems to provide a good model for consideration that would be tailored to the standards we would like to achieve and the structure of our Department for implementation. The background discussion of the State Bar and IMLA certification programs is not intended to limit the certification programs to be studied by the Committee, and the Committee is encouraged to review any other relevant certification programs for attorneys.

## Questions to be Considered

We recommend that the following questions be considered by the Committee in addition to any other questions or inquiries that the Committee considers relevant:

1. Should a Public Law Specialization certification program be established?

2. Should the certification program be pursued as part of an existing attorney certification program such as the State Bar or should the program be an independent program established and administered by the City Attorneys Department?

3. How many years of practice as a City Attorney or Assistant City Attorney should be required?

4. Should the certification be available to public law attorneys who have not served as a City Attorney or Assistant City Attorney?

5. How many hours of local government law education should be required?

6. Should specialized classes be developed and required outside of the normal Department education programs?

7. Should a written test be required?

8. For how long should the certification last and what requirements should be established for recertification?

9. How will the program be administered? Would a new specialization certification committee be established?

10. What name should be given to the certification program?

## Timeline

We see the work of the Committee to be a two year effort with the following suggested benchmarks:

# MEMORANDUM



1. Committee Report delivered at Spring 2017 City Attorneys Conference that discusses the purpose and work of the Committee. At this time, we hope that the Committee will have narrowed down the possible options to a single concept that will be pursued for further study and development.

2. Department Officer approval of the concept delivered at the Spring Conference after receiving input on the concept from members of the Department.

3. Report delivered at the Fall 2017 Annual Conference on the proposed details of a certification program including certification criteria and method of program administration.

4. Department Officer approval of certification program after receiving input from members of the Department.

5. Implementation of certification program in the following year after the 2017 Fall Conference.

This proposed timeline is premised on the Department administering its own certification program. If a certification program is established as part of a program administered by another entity such as the State Bar, the approval and implementation dates are subject to the uncertainties of the approval process of the administering entity.

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# Ad Hoc Public Law Specialization Certification Committee
# 2017

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# Shared Rides – City and California Public Utilities Commission Perspectives

**Thursday, May 4, 2017 General Session; 2:15 – 4:30 p.m.**

**Michael N. Conneran, Hanson Bridgett**
**Liane M. Randolph, Commissioner, California Public Utilities Commission**

**Notes:**

**City Attorneys Department**
**League of California Cities**
**Spring Conference**
**May 4, 2017**

# Limos and Taxis and Ubers, Oh My!
# An Overview of the Regulation of Private Ground Transportation in California

*by Michael N. Conneran*

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**Limos and Taxis and Ubers, Oh My!**
**An Overview of the Regulation of Private Ground Transportation in California**

*by Michael N. Conneran*

The last five years have witnessed a veritable revolution in the ground transportation industry with the advent of the "ridesharing" services provided by Uber, Lyft and similar firms. After these operations initially clashed with state and local regulators, the California Public Utilities Commission ("CPUC" or "Commission") promptly acted to establish clear guidelines for state regulation of what the CPUC has denoted as "Transportation Network Companies" or "TNCs." This allowed these companies to expand and prosper, although some would complain that this has been to the detriment of local taxi providers. This impact upon the locally-regulated taxi industry has led to legislative proposals that put in question the role of cities in the future regulation of private ground transportation in California.[1] The purpose of this paper is to explain the historic concepts that underlie the state and local regulatory landscape and provide guidance to practitioners advising cities regarding this fast-changing area.

As is typical with entrepreneurs in the "New Economy," who often feel that long-established rules interfere with innovation, the TNC industry has been notably dismissive of many regulatory barriers. In many cases they have ignored these constraints, which has led to front page legal disputes with state and local regulators. With their livelihoods on the line, taxi companies and their drivers have aggressively sought to protect their turf by seeking regulatory action to restrict or ban ridesharing operations, often turning to the local jurisdictions that regulate them in search of assistance. Much of this controversy, particularly in California, has focused on the legislative provisions that allocate regulatory responsibility to the state and to cities and counties. Thus, to fully understand the dynamics of this situation, we must first understand that regulatory framework. And in California, with its unique history, an examination of the historic genesis of the regulation of ground transportation is particularly helpful to gaining a full understanding of the regulation of these related industries.

## The History of State Regulation of Private Ground Transportation

For much of California's history, government has regulated the various forms of ground transportation, including railroads, trucks, taxis, limousines, buses and, most recently, ridesharing or "TNC" companies. The goals of these regulations have varied from ensuring public safety to providing rate regulation, but have also included elements of economic protectionism, if only to ensure an adequate supply of qualified providers of each mode. This regulation has occurred at different stages of the state's history, and has been imposed by differing levels of government: federal, state and local.

Following the Gold Rush, the efficiency and the power of the railroad quickly dominated California's economy. The ability of railroads to move people and goods quickly and economically in a vast and growing state provided great benefits to its residents. However, powerful men controlled those resources and soon wielded the power they provided for their own ends. The Big Four, Stanford, Crocker, Huntington and Hopkins, through their control of the Central and then Southern Pacific railroads, dominated the state for decades, controlling

[1] AB 650 (2016), which would have taken away the power of cities to regulate taxis, was vetoed by Governor Brown.

both elected and judicial power.[2] The state's citizens were eventually forced to take back their government through the exercise of citizen power, enacting reforms during the early part of the last century, including the powers of referendum and initiative. This history, and the political and regulatory structures that resulted from it, have left a lasting legacy upon the state and its transportation infrastructure.

After an 1876 law failed to establish an effective regulatory body to oversee railroads, the 1879 State Constitution, via Article XII, created a Railroad Commission, which consisted of three elected members with the power to establish rates.[3] The new Railroad Commission usually rubber-stamped the rates sought by the railroads and was generally viewed as ineffective.[4] And the first set of commissioners included two who were soon found to have been corrupted by railroad money. The Railroad Commission became more effective after legislation was adopted in 1911, establishing "the most comprehensive system of public utility regulation then in existence,"[5] allowing the Railroad Commission to end the extortionate and discriminatory rate practices that were then rampant. Indeed, the history of the CPUC that appears on its website[6] begins its narrative in 1911, citing the adoption of Proposition 16, which substantially revised Article XII.[7]

There have followed a series of legislative and initiative changes over the last century, including the enactment in 1946 of Proposition 17, which renamed the Railroad Commission as the California Public Utility Commission, and Proposition 12 in 1974, which repealed and reenacted all of Article XII. The CPUC is a unique entity in that it is established by the state Constitution, which confers upon it certain powers and allows for the Legislature to authorize additional ones.[8] The Public Utilities Code establishes special appellate procedures for challenging rulings of the CPUC, including potentially a direct request to the California Supreme Court for a writ of review.[9] It is also clear that Article XII confers power to the CPUC that

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[2] In fact, Leland Stanford, a Southern Pacific co-founder, Senator, and Governor of California, appointed Charles Crocker's brother, Edwin, to the California Supreme Court, where Crocker served while retaining his position as General Counsel to the Southern Pacific railroad. [DeBow and Syer, Power and Politics in California, (9th Ed.), p. 35.

[3] W. Bean, California, An Interpretive History, McGraw Hill, 1973, p. 240.

[4] Id. at 241.

[5] Id. at 318.

[6] http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/History/ABriefHistoryoftheCaliforniaPublicUtilitiesCommission8152014Final.pdf

[7] http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1797&context=ca_ballot_props

[8] Cal. Const. art. XII, §5 states: "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain."

[9] Public Utilities Code §1756:

(a) Within 30 days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, or at least 120 days after the application is granted if no decision on

(footnote continued)

preempts the regulations of cities with regard to the industries delegated to the CPUC to regulate: "[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission."[10]

In addition to regulating various transportation providers, the Commission now regulates private gas, water, communications, and electric utilities, as well as goods movers and other industries. Its fulfillment of those responsibilities has not been without controversy, and some recent legislative proposals have sought to reconsider its purpose and function. This paper will focus on the development of the Commission's regulation of private passenger transportation companies other than railroads and then examine the history and scope of city regulation of taxis. It will also provide suggestions to city attorneys who may be asked to address these issues in the future.

**State Regulation of Private Vehicular Transportation**

The CPUC's regulation of vehicular carriers began in 1917, with the passage of the Auto Stage and Truck Transportation Act. Since then, the Commission has regulated two major categories of passenger carriers, "passenger stage corporations" and "charter party carriers." Section 5353 exempts certain modes of transportation from regulation, including publicly-owned transit systems. The regulation of taxicabs is specifically excluded from the Commission's jurisdiction pursuant to Public Utilities Code §5353(g).

Passenger stage corporations (PSC) are private carriers that operate regularly scheduled routes between fixed locations for fixed fares, pursuant to a "certificate of public convenience and necessity" that must be issued by the Commission.[11] This type of carrier would include intercity bus operators (although interstate passenger stage operators like Greyhound are subject to federal regulation). Door-to-door shuttle services, where service begins and ends at fixed termini, are also regulated as passenger stage corporations.[12]

The other major category of private operators, "Charter Party Carriers," is addressed in PUC 5351 et seq., and is designated by the CPUC acronym of "TCP." Section 5351 states that "[t]he Commission may supervise and regulate every charter-party carrier of passengers in the State and may do all things, whether specifically designated in this part, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." There are a variety of subtypes of charter party carriers or limousines, which are designated by various letters (A, B, C, P, S, Z) indicating the type of certificate that is involved.[13] These include

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rehearing has been issued, any aggrieved party may petition for a writ of review in the court of appeal or the Supreme Court for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. If the writ issues, it shall be made returnable at a time and place specified by court order and shall direct the commission to certify its record in the case to the court within the time specified."

[10] Cal. Const. art. XII, §8.

[11] Public Utilities Code §1031 et seq.

[12] PUC Fact Sheet: http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Licensing/Passenger_Carriers/BasicInformationforPassengerCarriersandApplicants_Nov2014_11172014lct.pdf

[13] These subtypes are set forth in the Public Utilities Code, §§5371 et seq.

carriers that do not operate fixed-routes, with the clear distinction that their services must be prearranged, meaning that they are prohibited from accepting unarranged "hails" from individuals on the street. In fact, PUC regulations require that TCP's have a waybill in possession showing the details of the engagement. This requirement of "prearrangement" is the primary distinction between TCPs and taxis.[14]

**So What is an Uber or a Lyft?**

Into this existing framework of state regulation came the ridesharing companies, primarily Uber and Lyft.[15] The new companies made use of the networking ability of smartphones, as well as powerful software utilizing GPS technology, to create links between the drivers of private vehicles and passengers needing rides. The technology enabled passengers to be linked with a specific driver, whose location could be seen on an on-screen map and whose picture and vehicle could be shown in the phone app. It is reported that this industry was boosted by the needs of late-night bar patrons for a sober ride home, but soon the services became popular with many people, primarily young people in the technology industry, who lived in urban environments and didn't own or didn't want to use their own cars. In significant ways, this new "ridesharing" industry competed directly with taxicabs, who were often slow and unreliable in responding to telephone calls and were not always easily "hailed" from the curb. Payment was easy through a pre-entered credit card, eliminating the need for cash or time-consuming card processing at the end of the ride. One study found that TNC wait times were much shorter than those for taxis called via telephone.[16]

The appearance of these disruptive new entrants into the transportation business was not readily accepted by the taxi industry nor by some local regulators. In many locations, the operations were viewed as being unlicensed taxi operators, akin to illegal "gypsy" cabs or other types of marginal or illegal enterprises. Egged on by taxi operators, many cities, including Portland, Oregon and Austin, Texas, have resisted the "Uber invasion."[17] Yet, while there were some initial bumps in the road to their market entry into California, the prompt action of the CPUC to initiate a rulemaking process, which confirmed that these firms were subject to the Commission's regulation as charter party carriers, greatly smoothed their entrance into the California market. This exercise of jurisdiction by the Commission confirmed that local taxi regulations did not apply to TNCs. But the CPUC's actions have not always been met with approval by the taxi industry, which has seen a significant drop-off in its business.

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[14] Municipal Law Handbook §9.34. Cities are authorized to collect business license fees from TCPs, to regulate TCPs that serve municipally-owned airports and to inspect TCP waybills. Id. at §9.34, Code §5371.4. See also Borger and Moon, *Ride Sharing in the New Economy*, Western City Magazine, June, 2015 ("Borger and Moon").

[15] Another early firm, Sidecar, is no longer in business.

[16] Borger and Moon, supra, citing Rayle, Lisa et al., *App-Based, On-Demand Ride Services: Comparing Taxi and Ridesourcing Trips and User Characteristics in San Francisco*, University of California Transportation Center Working Paper (Aug. 2014) http://www.uctc.net/research/papers/UCTC-FR-2014-08.pdf

[17] The aggressive regulation of TNCs in some areas have reportedly resulted in the TNCs avoiding rides from city employees to avoid being cited for violating local law, a practice termed "greyballing." *How Uber Deceives the Authorities Worldwide*, New York Times, March 5, 2017.

**Rulemaking by the CPUC**

As in many jurisdictions, the initial entry of the ridesharing companies to California was met with controversy. The first action by the CPUC with regard to these firms was an enforcement action against Uber, Lyft and Sidecar for operating without obtaining authority from the CPUC. This initial action came in the form of a "cease and desist" letter that was issued in November, 2012, and which included a $20,000 fine for each operation. The position of Uber, and to an extent the other firms, was that they were not transportation companies at all and did not require licenses, but were merely technology firms operating an electronic platform that allowed private drivers and passengers to connect with each other to arrange rides. Uber's CEO, Travis Kalanick, claimed that Uber was operating legally and stated "[w]e will continue to work with the PUC and educate them on our innovative and legal technology platform so that we can ensure that innovative transportation options can flourish here in California."[18]

The CPUC subsequently entered into settlements with the three operators, allowing them to operate pending a rulemaking by the Commission to set rules for the new industry. The CPUC then initiated a formal rulemaking proceeding (the "Rulemaking") by adopting an "Order Instituting Rulemaking on Regulations Relating to Passenger Carriers, Ridesharing, and New Online-Enabled Transportation Services."[19] That initial order set forth a list of issues which were later addressed in a multi-phased series of decisions by the Commission in the Rulemaking that have established the baseline regulations for the new TNC industry. These included a variety of safety concerns and licensing issues, as well as insurance coverage requirements. Many parties then participated in the Rulemaking, providing a diverse range of comments to the Commission as to what the proper regulatory framework should include.

The Commission's first decision in the Rulemaking was issued in September, 2013 and was entitled: "Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry." This decision, in what was termed "Phase I" of the Rulemaking, clarified many issues regarding the ridesharing business, reserving certain others for later phases of the Rulemaking. One threshold issue was the determination of the proper terminology to use in referring to these new companies. The CPUC defined these firms as "Transportation Network Companies" or "TNCs." A TNC is "an organization whether a corporation, partnership, sole proprietor, or other form, operating in California that provides prearranged transportation services for compensation using an online-enabled application (app) or platform to connect passengers with drivers using their personal vehicles." [Emphasis added.][20] The decision avoided using the term "ridesharing," which was already a defined term

[18] *PUC fines 3 app-hailing taxi startups*, SF Gate, Nov. 14, 2012, accessed 3/11/17. Uber persisted with its position that it was only a technology platform, in part by pointing to its contract with licensed TCPs to provide rides, but the Commission found that a subsidiary, Raiser, Inc., was indeed using non-TCPs to carry passengers and instituted disciplinary action against that entity.

[19] The rulemaking was denoted as Commission proceeding No. R 12-12-011. Subsequent decisions in the Rulemaking are noted herein by their decision number (i.e. "Decision 13-09-045"). All of the decisions and other documents in the Rulemaking can be accessed via the Commission's website: https://apps.cpuc.ca.gov/apex/f?p=401:1:0::NO:RP by entering "r1212011" in the "proceeding number" field.

[20] Decision 13-09-045, p. 2. A very similar definition was later adopted by the Legislature as Public Utilities Code §5431(c).

in the Public Utilities and Vehicle Codes referring to work-related carpooling and similar activities.[21]

Perhaps most significantly, the 2013 decision ruled that TNCs were a subset of the category of charter party carriers, and therefore were subject to regulation by the CPUC and not by municipalities. The decision also established a series of rules and regulations for TNCs to follow, including requirements to obtain a license to operate from the CPUC, conduct a 19-point car inspection, obtain liability insurance for a minimum of $1 million per incident, establish a driver training program, and implement a zero-tolerance program for drugs and alcohol.

After the CPUC's 2013 decision, a taxi association, the Taxicab Paratransit Association of California (TPAC), sought a rehearing on specific questions relating to the distinctions between TNCs, now subject to the CPUC's jurisdiction, and taxis, which are not. The CPUC granted a limited rehearing and addressed specific issues regarding the Commission's jurisdiction over TNCs.[22] On rehearing, the Commission confirmed that TNCs do fall within the definition of a Charter Party Carrier (or TCP) under Public Utilities Code Section 5350. TPAC had argued that the CPUC, in deciding if TNCs were TCPs, should not have focused on whether the carriage was for compensation or was prearranged. The organization took specific exception to the Commission's finding on the issue of "prearrangement," which is a key factor in determining whether a driver transporting persons for hire is a taxi or a TNC. With regard to prearrangement, the decision relies on Section 5360.5, which holds that:

> (a) Charter party carriers of passengers shall operate on a prearranged basis within this state.
> (b) For the purposes of this section, "prearranged basis" means that the transportation of the prospective passenger was arranged with the carrier by the passenger, or a representative of the passenger, either by written contract or by telephone.

TPAC argued that, even if the Commission found that TNC's met the definition in Section 5360.5, TNCs nevertheless fell into the exemption under Section 5353 for local taxi regulation. TPAC argued further that the determination of what constitutes taxi service should be left up to local jurisdictions and should not be made by the Commission.[23] In response, the Commission noted that it had the power to determine whether TNCs are TCPs.[24] The Commission then engaged in a careful analysis of the issues raised by TPAC. TPAC relied on the Commission's decision in *Babaiean Transp. Co. v. Southern California Transit Co.* (1992) 45 Cal. P.U.C.2d 85, in which the Commission examined a TCP to see if it was illegally operating as a taxi service, since it painted its vehicles to look like taxis and provided mostly short run trips. The

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[21] Section 5353(h) exempts work-related transportation for the purpose of "ride sharing" from the Act, as follows:

"Transportation of persons between home and work locations or of persons having a common work-related trip in a vehicle having a seating capacity of 15 passengers or less, including the driver, which are used for the purpose of ridesharing, as defined in Section 522 of the Vehicle Code, when the ridesharing is incidental to another purpose of the driver."

[22] Decision 14-04-022.

[23] Id at p. 7.

[24] Ibid.

Commission distinguished that decision on it facts, also noting that the Commission was not bound by its own precedent in any event. It noted that, for many years, neither the Commission or the Legislature had tried to set a time constraint on prearrangement and noted that the Legislature in 2012 had specifically approved of electronic waybills.[25] TPAC had asserted that TNCs used taximeters, but the CPUC noted that many cities require such devices to be physically attached to the taxi vehicle, which on-line apps are not. With regard to the claim that cities should play a role in determining what is a TNC, the Commission noted that no local jurisdictions had claimed in the rulemaking that TNCs were taxicabs. Appeals to the courts of this order were unsuccessful.[26] The Commission's jurisdiction over TNCs was eventually confirmed by the passage of Assembly Bill (AB) 2293 (Bonilla), which was signed into law on September 17, 2014, and added §§5430 through 5443 to the Public Utilities Code.[27]

Subsequent decisions in the Rulemaking have addressed additional operational issues, as well as the specific status of various operators.[28] In addition, they have addressed additional legislative enactments. After the Legislature determined that the initial 2013 CPUC decision in Phase I did not go far enough to mandate insurance coverage, it enacted Public Utilities Code §5353. This statute was taken up by the Commission in Decision 14-11-043, which addressed concerns regarding insurance coverage for the three different periods in which TNCs operate—Period 1 (the time where the app is open but no ride match has occurred); Period 2 (the time when the ride is accepted but the passenger has not yet been picked up); and Period 3 (the time with the passenger in the vehicle).[29] TNCs must provide a minimum of $1 million in primary coverage during periods 2 and 3, and uninsured motorist coverage and underinsured motorist coverage during period 3. There are additional insurance requirements that apply to Period 1 and even provide for the sharing of liability if the driver is logged into more than one TNC while awaiting a ride.

In 2016, the Commission added requirements for vehicle inspections, proof of insurance, and recordkeeping relative to driver's licenses.[30] These decisions of the CPUC in the Rulemaking have now clarified many of the issues relative to the safety and operation of TNCs.

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[25] Public Utilities Code §5381.5

[26] *Taxicab Paratransit Assn. of Cal. v. Cal.P.U.C*., Third App. Dist. Case No. C076432, petn. denied August 22, 2014, Cal. Sup. Court Case No. S218427, petn. for writ of review denied, Nov. 12, 2014.; *DeSoto Cab. Co., Inc. v. Michael Picker et al,* (N.D. Cal. Case No. 15-cv-04375-EMC.

[27] "'Transportation network company' means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or any other entity, operating in California that provides prearranged transportation services for compensation using an online-enabled application or platform to connect passengers with drivers using a personal vehicle." Public Utilities Code §5431(c).

[28] These rulings can be found a the site listed in footnote 18, supra.

[29] There has long been questions regarding potential gaps in insurance coverage as a result of TNCs viewing their drivers as private parties. This included concerns that the private insurance companies providing coverage to drivers might deny claims under the drivers' policies on the basis that the vehicles were being put to commercial purposes.

[30] Decision 16-04-041.

As a result, TNCs can operate legally within California, provided they comply with the CPUC's regulations.

At present, the Commission is considering guidance as to the definition of the term "personal vehicle" as used in the earlier TNC decisions and in Public Utilities Code §5431(b), added by the Legislature in 2016 via AB 2763. Many taxi operators have commented on this issue, perhaps seeking to block TNC drivers from acquiring vehicles via lease or rental. According the statute, personal vehicle means:

> a vehicle that is used by a participating driver to provide prearranged transportation services for compensation that meets all of the following requirements:
> (1) Has passenger capacity of eight persons or less, including the driver.
> (2) Is owned, leased, rented for a term that does not exceed 30 days, or otherwise authorized for use by the participating driver.
> (3) Meets all inspection and other safety requirements imposed by the Commission
> (4) Is not a taxicab or limousine.

Given several of the comments on this issue, it appears that taxi operators, seeking to limit the expansion of TNCs, are going to focus personal vehicle issue, given recent programs of TNCs to assist their drivers in acquiring vehicles to operate. This may be the taxi industry's last battle in its losing war against the TNCs.

**A Brief History of Taxi Regulation**

The regulation of taxis far predates the advent of the automobile, reflecting the historic utility of being able to summon a ride on quick notice to get individuals to their destinations. In fact, in 1654, the City of London, through the "Lord Protector, with the consent of His Council," enacted "An Ordinance for the Regulation of Hackney-Coachmen in London and the places adjacent" which limited the number of coach operators, coaches and horses in London and delegated to the Court of Aldermen their supervision, including the right to make "rules and bye-laws for hackney-coachmen, subject to the approval of the Lord Protector."[31]

The distinction reflected in California law between hailed cabs and "prearranged" ones is common to many other jurisdictions and dates to the terminology used for horse-driven carriages.[32] The term "hackney carriages" is commonly used to describe the first category, while "vehicle for hire" or "livery vehicle" is used for the second.[33] A third, and in many places illegal, mode is the "jitney" or "shared taxi," a form of shared ride service with multiple customers going to potentially different locations. This form was pioneered in Los Angeles in the early 20th Century, particularly as a means for immigrants to obtain cheap transportation in areas not served by public buses.[34] It was attacked by the owners of trolley lines, who feared

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[31] http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp922-924

[32] Cooper, Munday and Nelson, Taxi! Urban Economies and the Social and Transport Impacts of the Taxicab (2010) p. 1.

[33] Ibid.

[34] Mahesh, *From Jitneys to App-based Ridesharing: California's "Third Way" Approach to Ride-for-Hire Regulation* (2015) 88 So.Cal.L.Rev. 965 ("Mahesh").

the threat of a low-cost alternative, but could also point to issues with a lack of licensing and insurance coverage.[35]

In California, the scheme of local taxi regulation has had a number of goals, some related to health and safety, others related to economics. As previously stated, local regulation is authorized by Government Code section 53075.5. In the area of safety, a fundamental municipal concern, cities will regulate taxis to assure a consistency of quality, both in the vehicles used and the drivers who drive them. Another is to ensure that fair charges are imposed and passengers are not subject to gouging or extortion. At the same time, a city may determine that it must limit the number of licensed taxis to ensure that adequate amount of business is available to support safe, well-trained drivers of vehicles that are clean and in a good state of repair. And it is not unheard of, particularly with regard to an industry that can generate protest actions by having dozens of cabs circle city hall with their horns blowing, that cities may enact economic regulations to protect the incomes of the cab companies. Obviously any such economic structure is substantially threatened by the advent of TNCs.

In no place has the conflict been as keen as in the City of New York, long known for its strict regulation of taxicabs. The authority to operate a taxi in New York City is designated by the possession of a city-issued medallion, which must be displayed on the hood of the car. The medallion system was established by the Haas Act of 1937, following a crippling taxi strike. At one time, a medallion was worth as much as $1 million, and there was an active market for the ownership and financing of the medallions, often by owners who did not themselves operate cabs.[36] Clearly, the advent of the ridesharing revolution has disrupted this economic system. Alluding to the California origin of the ridesharing industry, Evgeny Friedman, the largest medallion owner in New York, rued the collapse of the medallion market: "New York must stand up to the hostile takeover being attempted by a Mafia-like Silicon Valley, in conjunction with predator banks. If banks bail on this industry . . . one may see crisis amongst taxi owners and operators nationwide."[37]

**A View from the Taxi World**

As might be expected, the CPUC's rulings approving the operation of TNCs were not met with acclaim by the taxi industry: "You'd think if it looks like a duck and walks like a duck, it's probably a duck," William Rouse, general manager of Los Angeles Yellow Cab told NPR. "The PUC thinks it's probably a giraffe. I don't know." He added: "It's eating into our business. They're providing essentially the same service that we are without complying with all of the regulations that we have to comply with."[38]

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[35] This form of ridesharing has come back through new services operated by Uber and Lyft, Uberpool and Lyft Line, which use the computer platform to arrange low-cost rides for passengers willing to share a vehicle.

[36] *New York City's yellow cab crisis*, CNN Money, July 22, 2016 http://money.cnn.com/2015/07/21/news/companies/nyc-yellow-taxi-uber/

[37] *Investigators: Taxi king, already fined by TLC, wins court battle*, abc7nyc.com (8/12/16)

[38] http://www.wnyc.org/story/311452-california-theyre-not-taxis-theyre-transportation-network-companies/

In order to fully understand the regulatory landscape, let's take a look at what taxicabs need to comply with. Under Government Code Section 53075.5, cities are charged with the regulation of the taxicab industry. At a minimum, city regulations are to provide for the following:

> (1) A policy for entry into the business of providing taxicab transportation service. The policy shall include, but need not be limited to, all of the following provisions:
>
> (A) Employment, or an offer of employment, as a taxicab driver in the jurisdiction, including compliance with all of the requirements of the program adopted pursuant to paragraph (3), shall be a condition of issuance of a driver's permit.
>
> (B) The driver's permit shall become void upon termination of employment.
>
> (C) The driver's permit shall state the name of the employer.
>
> (D) The employer shall notify the city or county upon termination of employment.
>
> (E) The driver shall return the permit to the city or county upon termination of employment.
>
> (2) The establishment or registration of rates for the provision of taxicab transportation service.
>
> (3) (A) A mandatory controlled substance and alcohol testing certification program.

Taxis are operated through a variety of business models. Some are single owner-operators, some have employees who drive company-owned vehicles, while many own fleets of cars and license them to independent contractors, who must earn a certain amount each shift to offset the cost owed to the owner of the taxi for its use. Cities accomplish their supervision of taxis through differing mechanisms. Many have their own ordinances and programs that impose their regulatory scheme. In some instances, they band together with other cities (and sometimes counties) to form joint exercise of powers agencies to exercise their supervision of taxis in a coordinated fashion. This approach recognizes the fact that many taxi companies operate across city lines.[39]

Significantly, many cities have not limited themselves to the regulation of drivers or rates as required under the statute. They have enacted extensive regulations to require insurance coverage, but more importantly have attempted to regulate the market in ways to both ensure that an adequate number of taxis are available to meet the demand and to make sure that there are not so many taxis such that the operation is unprofitable and the quality of service is affected. In some instances, cities may have become almost anti-competitive in their regulation of taxis, if only to seek to insure a healthy taxi industry to serve its residents and visitors. But such local regulations are not effective against TNCs in California, much to the consternation of the taxi industry.

If their local taxi providers are being impacted by TNCs, one approach cities could consider would be to ensure that their ordinances are not in any way limiting the ability of taxis to compete with TNCs. As noted by Prof. Robert Cevero of the University of California, "[m]any of today's state and local regulatory frameworks carry forward legal and economic premises first

[39] In Orange County, for example, Orange County Taxi Administration Program (OCTAP ) is a JPA of certain cities and Orange County formed to coordinate the taxicab oversight, which is administered by the non-member Orange County Transportation Authority. Taxis in the San Diego are likewise administered by its transit agency, the San Diego Metropolitan Transit System, which regulates taxis in the cities of El Cajon, Imperial Beach, La Mesa, Lemon Grove, Poway, San Diego and Santee.

devised roughly [ninety-five] years ago."[40] While some of these ordinances reflect the requirements of state law, others may have outlived their usefulness and could be revised to lower regulatory barriers that disadvantage taxis. For example, while most TNCs, having made a long trip to deliver a passenger, can pick up another ride near the drop-off location to avoid an empty return journey; a taxi may be prohibited from doing so if not registered in the city where the pick-up would occur and may have to return to their locale empty. Cities could address this by allowing additional cab operators from adjoining cities to operate within their borders or by forming a regional regulatory agency that allowed operators to cross city lines and service multiple cities.

**Environmental Sustainability, Accessibility and Future Innovations**

One area that is not yet clear is whether the presence of TNCs helps or hurts the environment. In some ways, the availability of convenient, low-cost transportation reduces demands for private vehicles and may reduce the demand for parking. However, what is not known is whether the circling hordes of TNCs waiting to be summoned add to air and greenhouse gas pollution, as well as traffic congestion. In addition, it has been reported that some TNC drivers commute long distances to be able to operate in lucrative areas, thus adding a traffic burden on regional roadways. In the next few years, there may be determinations about these impacts, and potentially responses to them that may limit the number of vehicles in urban areas (via congestion pricing) or that require non-polluting vehicles. It should be noted that the initial decision in Rulemaking 12-12-011 found no need for a CEQA determination, yet a recent filing by the City and County of San Francisco in Phase III of that proceeding raised the issue of CEQA compliance again, citing the potential for increased traffic and emissions. It remains to be seen how the CPUC will react to this request.[41]

Another area of controversy is the perceived lack of TNC vehicles that are accessible to those in wheelchairs or otherwise requiring accommodations. While some TNCs have sought to add such vehicles to their services, taxi firms that are required by local ordinance to provide a minimum number of such vehicles have claimed that an unfair burden is placed on them. In some areas, TNCs are working to make accessible vehicles available.[42] It is not yet clear if more stringent accessibility requirements will be imposed on TNCs.

It is hard to ignore the fact that the TNCs are very interested in the development of autonomous vehicles and are in competition with each other and other companies to develop this technology. If implemented, it might mean that TNCs are able to operate their services without drivers, significantly reducing costs and putting more pressure on taxis, which may not be able to compete with the capital investment necessary to match this innovation.

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[40] Cevero, Robert, Paratransit in America: Redefining Mass Transportation p. 155, quoted in Mahesh.

[41] Reply Comments of SFMTA on Proposed Decision for Phase III.A Definition of Personal Vehicle, December 14, 2016.

[42] *Uber and Lyft Are Giving Subsidized Rides to Customers With Disabilities*, http://fortune.com/2016/09/18/uber-lyft-accessible/

## Conclusion

While the regulation of private transportation has a long history in our state and plays a crucial role in protecting the health and safety of consumers, the advent of TNCs has disrupted the established taxi industry. These changes have brought the CPUC-regulated charter party industry closer to the locally-regulated taxi industry. In fact, likely in response to the TNCs, taxi companies have created apps to allow them to be dispatched by smartphone technology and have improved their ability to process payment via credit card. So not only have the TNCs moved closer to operating like cabs, with the nearly instant ability to "prearrange," taxi companies have moved closer to TNCs, further blurring the lines.

It is therefore not surprising that both houses of the Legislature recently approved AB 650, which would have taken away the ability of cities to regulate the taxi industry altogether, consolidating it with state control over TNCs. The bill, which was strongly opposed by the League of California Cities, was ultimately vetoed by Governor Brown, who stated in his veto message "[t]he bill fundamentally alters the long-standing regulation of taxicabs by cities and counties and makes that the determination that this responsibility should be shifted to the state. I do not believe that such a massive change is justified."[43]

Cities have a significant interest in the healthy operation of an efficient taxi industry, and, lest they lose the ability to protect that interest, need to be watchful in the event of future attempts to consolidate control at the state level. That said, as taxis adopt features of the TNCs, the differences between taxis and TNCs may become so slight that a single regulatory scheme might be enacted. In that event, cities will need to be vigilant to make sure that changes in the regulation of the taxi industry adequately protect the interests of local residents and businesses who depend on these modes of transportation. The issues involved in the implementation of autonomous vehicles are obviously beyond the scope of this paper, but the message that the TNC industry is both innovative and fast-moving and will continue to push the boundaries of traditional regulations cannot be underemphasized. We are clearly not yet at the end of the road.

[43] Governor's veto message to Assem. on Assem. Bill 650, (Sept. 28, 2016).

# Residential Rental Regulation Issues

**Thursday, May 4, 2017 General Session; 2:15 – 4:30 p.m.**

**Andrea S. Visveshwara, Assistant City Attorney, Emeryville**
**Kevin R. Heneghan, Senior Counsel, Policy, Airbnb**

**Notes:**

*Emerging Issues in the Enforcement of Short-Term Rental Regulations*

By

Kevin Heneghan and Andrea Visveshwara[1]

League of California Cities
City Attorneys' Spring Conference
May 3-5, 2017

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Short-term residential rentals have existed for decades, primarily in popular tourist destinations, such as coastal communities. Although online companies, such as HomeAway, provided a venue to advertise short-term rentals, it was Airbnb's business model of facilitating short-term rentals that has brought short-term rentals to more communities; and in all communities, has allowed more individuals to enjoy the financial benefits of hosting a short-term rental. As cities struggle with the impacts from the growing popularity of short-term rentals, cities are adopting ordinances to regulate or to prohibit short-term rentals. They also are exploring how companies, like Airbnb, HomeAway or VRBO (collectively "Online Platforms"), could or should play a role in facilitating compliance with the applicable short-term regulations. This article provides an overview of the interaction between cities and Online Platforms over issues of enforcement of regulations and collection of transient occupancy tax,[2] exploring how cities' regulation of a matter that traditionally has been governed by state law may conflict with federal laws, such as the Communications Decency Act and Stored Communications Act, and how Airbnb has created the Voluntary Collection Agreement as a tool to use with cities to work through some of the potential conflicts.

*Cities May Regulate Short-Term Rentals as a Land Use*

There is well-established case law providing cities with the authority to regulate short term rentals as a land use matter. *Ewing v City of Carmel by the Sea*[3] upheld the city's ordinance prohibiting short term rentals in areas zoned for single family residences, which was intended to preserve the residential character of the city's neighborhoods. The owners of a short-term rental challenged the ordinance, arguing that the ordinance was arbitrary and capricious because 1) home occupation uses, which created the same parking and traffic impacts, were allowed in the zone and 2) transient use longer than 30 days i.e., long term rentals, were allowed.

The court rejected plaintiffs' arguments, and instead, focused on the short term rental impact to the residential character of the neighborhood. The court specifically found that the residential character of a neighborhood is threatened when a significant number of homes are occupied by short-term tenants, which could impact the stability of a community.[4] With respect to the plaintiffs' argument regarding the distinction between home occupations and short term rentals, the court was not persuaded by the fact that the two uses may create similar parking and traffic impacts.[5] Instead, the court focused

[2] For general reference, see Rusin, T. and Visveshwara, A. (2015 August). Home Sharing in the New Economy. *Western City.*
[3] (1991) 234 Cal.App.3d 1579, 1589.
[4] *Id.* at 1591.
[5] *Id.* at 1592-93.

on the impact to the residential character of the neighborhood and found that the distinction was reasonable because home occupations strengthened the community by fostering residents' talents in contrast to short term rentals, which the court already found threatened the stability of a community.[6] With respect to drawing the line at prohibiting rentals of less than 30 days, the court found that it was reasonable for the Council to discourage short term rentals, but to allow month to month tenancies for longer term tenants who may contribute to the community.[7]

Cities may continue to regulate problematic behavior, but ordinances that regulate solely the conduct of the guests of short term rentals, as opposed to other neighborhood residents, may present challenges. For example, *College Area Renters and Landlord Association v. City of San Diego*[8] held that the city's zoning ordinance regulating the number of residents age 18 or older in non-owner occupied residences violated the California Constitution's Equal Protection principles because there was no rational basis to distinguish between overcrowded homes that were owner occupied and overcrowded homes filled with tenants – both created the same impacts that the City was attempting to mitigate. The court cautioned: "In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users."[9]

Thus, regulations of short-term rentals should address the land use impacts associated with such use and ensure that regulations governing personal conduct apply equally to guests of short term rentals and the neighborhood's residents. Common impacts include: deterioration of residential character of neighborhood, loss of housing stock, parking, traffic, noise, and safety. However, the impacts, and the ways to mitigate those impacts, differ from jurisdiction to jurisdiction, and therefore, there is no one model ordinance. Attached is a chart which provides links to information regarding regulatory approaches from cities throughout California.

*Regulating Online Platforms that Facilitate Short-Term Rentals*

Communications Decency Act

Given the challenge and cost of enforcement, and the data that platforms collect on hosts and guests, cities are exploring how such platforms might facilitate their enforcement efforts. In developing ordinances regulating short-term rentals and enforcing regulations, a key decision is whether the city will regulate only the underlying short-term rental activity or will also try to impose liability on platforms that somehow

[6] *Id.* at 1593.
[7] *Id.* at 1593.
[8] (1996) 42 Cal.App.4th 543, 521-22.
[9] 42 Cal.App.4th at 521.

participate in short-term rental transactions. If a city attempts to impose liability on a platform for short-term rental activity, the city must be mindful of the application of Section 230 of the Communications Decency Act ("CDA") to Online Platforms. The CDA prohibits "treat[ing]" websites that host or distribute third-party content, like Online Platforms, "as the publisher or speaker of any information provided by another information content provider," and immunizes them from liability under any "inconsistent" state or local law.[10]

A fundamental purpose of Congress in passing the CDA was to shield website operators from compulsory obligations to screen user content, and instead to provide them with the incentive to build innovative online platforms while having the flexibility to experiment with and develop tools to address undesirable content without fear of legal retribution.[11] The scope of this immunity is broad, and applies regardless of whether a website may know that third parties are using its services to create or post unlawful content.[12] Since its passage in 1996, the CDA has functioned as the bedrock upon which online services, such as eBay, Amazon, Yelp, and craigslist, have founded and built their operations. Thus, as discussed below, an ordinance which attempts to punish Online Platforms for failing to verify and screen third-party listings, and for publishing unverified listings may conflict with, and be preempted by, the CDA.

Airbnb, Inc. v. City and County of San Francisco

Several California cities recently have adopted ordinances attempting to impose liability on platforms for facilitating listings which might violate local law and these ordinances have been the subject of litigation. Most notably, the City and County of San Francisco adopted an ordinance in June 2016, which attempted to hold platforms criminally and civilly liable for publishing, and for failing to screen and remove their users' advertisements of rentals that lack City-issued permits.

In June 2016, Airbnb and HomeAway filed suit in federal court seeking to enjoin the enforcement of the ordinance on the grounds that the ordinance violated the CDA, as well as the First Amendment, and the Due Process Clause of the Fourteenth Amendment.[13] Prior to the hearing on the preliminary injunction, the City requested a stay and the Board of Supervisors amended the ordinance in attempt to overcome the legal challenge. More specifically, the City amended the ordinance to impose penalties

[10] 47 U.S.C. §§ 230(c)(1), (e)(3); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).
[11] 47 U.S.C. §§ 230(b)(1), (2), (4).
[12] *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009).
[13] *Airbnb, Inc., v. City and County of San Francisco,* N.D. Cal., Case no. 3:16-CV-03615.

on a platform which provides "booking services" in connection with a short-term rental of a unit lacking a permit rather than merely the advertisement of an unpermitted unit. The City's position is that the amended ordinance does not violate the CDA because the ordinance no longer imposes liability on a platform based on content provided by third party hosts, but rather imposes liability on platforms for providing booking services for an illegal short-term rental. Airbnb and HomeAway renewed their challenge after the passage of the amendments. In November 2016, the court denied the Online Platforms' request for an injunction, concluding that the CDA did not preempt the ordinance. The court subsequently issued a temporary restraining order prohibiting the City from enforcing the ordinance against the Online Platforms because the City lacked a mechanism to provide platforms with the information regarding registered units which the platforms needed to comply with the law. The court ordered the parties to mediation and mediation continues.

Airbnb, Inc. v City of Anaheim

Likewise, the City of Anaheim adopted an ordinance in July, 2016, which attempted to hold platforms criminally and civilly liable for publishing, and for failing to screen and remove, their users' advertisements of rentals that lack City-issued permits or are otherwise not compliant with "any" City law or regulation, including building codes. The ordinance provided the City Attorney with the ability to determine whether the ordinance violated state or federal laws and, if so, to suspend the application of the ordinance. Again, Airbnb and HomeAway filed suit to enjoin the enforcement of the ordinance on similar grounds to the San Francisco case.[14] Shortly after the filing of the lawsuit, the Anaheim City Attorney reviewed the ordinance and concluded, presumably based on the CDA claims made in the case, that the ordinance should not be applied to Airbnb, HomeAway, and other Online Platforms and that no penalties will be issued against Online Platforms under the ordinance.

Airbnb, Inc. v. City of Santa Monica

Lastly, the City of Santa Monica adopted an ordinance in 2015 which attempted to hold platforms liable for publishing advertisements of rentals that lack City-issued permits. Airbnb and HomeAway filed suit in September 2016 seeking to enjoin the enforcement of the ordinance on similar grounds to the San Francisco and Anaheim cases.[15] As in the San Francisco case, Santa Monica requested a stay and amended the ordinance to impose liability on platforms for completing booking transactions. The parties then set a revised briefing schedule for a new motion for preliminary injunction. Shortly before the platforms were to file their motion, Santa Monica proposed that the parties stay proceedings pending the outcome of the San Francisco case, including a potential

[14] *Airbnb, Inc. v. City of Anaheim, C.D. Cal.,* Case no. 8:16-cv-01398.
[15] *Airbnb, Inc. v. City of Santa Monica,* C.D. Cal., Case no. 2:16-cv-06645.

decision on an appeal to the Ninth Circuit. The City's proposal was agreed to and the ordinance is not being enforced.

The outcome of the San Francisco and Santa Monica cases will likely have a large impact on whether cities in California can impose liability on Online Platforms for third-party listings that do not comply with local laws. The cases, and possible appeals to the Ninth Circuit, will likely be concluded by the end of 2018. A city, which is considering adopting an ordinance which imposes liability on Online Platforms, may want to consider the status of this litigation before moving forward with adopting such an ordinance.

*Compelling Online Platforms to Disclose Transaction Data*

To enforce short-term regulations, cities also are turning to platforms to obtain evidence of the transaction through their legislative subpoena power. For general law cities, the authority to issue a legislative subpoena within the context of an investigation (i.e., pre-litigation) is found at Government Code sections 37104-37109. For charter cities, the authority to issue legislative subpoenas is derived from California Constitution Article XI, sections 3(a) and 4(e) and the city's charter may also address issuance of subpoenas.[16]

Cities may be tempted to impose obligations on platforms to share data. Requiring an Online Platform to share data regarding its customers implicates the Stored Communications Act (SCA), a federal law which was enacted "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies."[17] Under the SCA, "a provider of remote computing service or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity," without a subpoena or other legal process.[18] More specifically, the "SCA clearly prohibits communications providers from disclosing to the government basic subscriber information—including a customer's name [and] address …—without a subpoena."[19] Indeed, "[t]hat Congress intended [the SCA] to

[16] Please see Rusin, T., et al., *supra,* Home Sharing in the New Economy. *Western City* for further information about issuing legislative subpoenas for short term rental enforcement actions.
[17] Senate Report No. 99–541, at 1–2 (1986).
[18] 18 U.S.C. §§ 2702(a)(3), (c)(1); 2703(c).
[19] *Telecomms. Regulatory Board of Puerto Rico v. CTIA*, 752 F.3d 60, 68; see 18 U.S.C. § 2702(a)(3) (ECS "shall not … divulge a record or other information pertaining to a subscriber to or customer of such service ... to any governmental entity" without legal process).

restrict the ability of a service provider to turn over even a list of customers to a governmental entity" is "abundantly clear."[20]

Many Online Platforms probably qualify as a provider of a remote computing services and a provider of an electronic communication service within the meaning of the SCA. Likewise, a city would be considered a "governmental entity" under the SCA. As a result, any ordinance which would purport to require a hosting platform to disclose its customers' names without a subpoena or other legal process could be preempted by the SCA.

Several cities have adopted ordinances which require platforms to share data without a subpoena or legal process. San Francisco adopted an ordinance in June 2016 which required platforms to turn over user data on a monthly basis. As discussed above, San Francisco amended the law, after Airbnb and HomeAway filed suit, to remove the data sharing provision and instead created a process by which the Office of Short Term Rentals could issue an administrative subpoena to obtain information from platforms. Because the data sharing provision was removed, the court never issued an order regarding whether the data sharing provision violated the SCA. However, in an unrelated case regarding tax obligations, HomeAway attempted to use the SCA as a defense to a request from San Francisco's Treasurer/Tax Collector for user information.[21] In this case, the trial court determined that HomeAway did not qualify as a provider of remote computing services or as a provider of an electronic communication services; the case is currently on appeal. More recently, a federal court in Portland enjoined data sharing provisions adopted by the City of Portland after concluding that HomeAway was a provider of a remote computing services and electronic communication services.[22]

As with the litigation over platform liability issues described above, the case law regarding the ability of a city to require Online Platforms to share data is evolving. Again, if a city is considering adopting an ordinance, which imposes data sharing obligations on Online Platforms, it should analyze whether the SCA preempts the ordinance and consider the status of the San Francisco and Portland cases.

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[20] *Id.* At 67.
[21] *In Re: City and County of San Francisco et. al*., San Francisco Superior Court, CPF-16-515136.
[22] *HomeAway.com, Inc. v. City of Portland*, U.S. District Court, D. Or., Case no. 3:17-cv-00091.

*Airbnb's Voluntary Collection Agreements Facilitating TOT Collection*

Short-term rentals also have the potential to generate revenue pursuant to a transient occupancy tax ordinance. Revenue and Taxation Code section 7280, et seq., authorizes cities to levy a tax on the "privilege of occupying a room or rooms" including that in a house, provided the period of occupancy is for less than 30 days. Accordingly, many cities have adopted transient occupancy tax ("TOT") ordinances. In general, a city's TOT ordinance should apply to a short-term rental in a residence, in addition to short-term rentals in a hotel or motel, but the city's ordinance should be reviewed carefully to determine applicability.[23] Assuming the TOT ordinance is applicable, cities may want to consider ensuring short-term rental regulations limit stays to less than 30 days to ensure TOT generation.

Although some hosts of short-term rentals are accustomed to collecting and remitting TOT, hosts who offer short-term rentals through Online Platforms without the use of a professional property manager may struggle with remitting TOT. It can be difficult for cities to collect TOT from these hosts.

To address this challenge, Airbnb developed a tool, the Voluntary Collection Agreement (VCA), to ensure that TOT is collected and remitted while relieving hosts of tax filings and cities of the burden of collection and enforcement. When a city signs a VCA with Airbnb, Airbnb collects appropriate local taxes from guests as part of their booking transactions and remits the tax revenue directly to the city on behalf of the short-term rental hosts. A VCA is a legally binding agreement between Airbnb and a taxing authority for the former to contractually assume the tax collection and remittance obligations of hosts for booking transactions completed on the Airbnb platform. Under the VCA, Airbnb registers as a taxpayer, remits the collected tax, and files a single tax return.

In determining whether to enter into the a VCA, cities will need to weigh the benefit of Airbnb's cooperation in facilitating TOT collection against the concessions made by the city entering into the VCA. One of the first steps is to consider how many short-term rentals are in the city's market, and how many of those short-term rentals use Airbnb as a platform. A provision of Airbnb's VCA requires cities to waive and release "any and all actions, causes of action, indebtedness, suits, damages or claims arising out of or relating to payment of and/or collection of TOT or other tax indebtedness, including but not limited to, penalties, fines, interest or other payments relating to TOT on any transaction prior to the effective date of the VCA. The statute of limitations for instituting

[23] See e.g., *In re Transient Occupancy Tax Cases,* 2 Cal. 5th 131 (2016).

an action to collect TOT is 4 years.[24] Therefore, cities should consider the fiscal impact of waiving outstanding TOT, prior to entering into the VCA.

In addition, cities should consider the likelihood and frequency of their TOT audits, and how that may interplay with enforcement actions in their jurisdictions. A provision of the VCA requires the city to agree that it will only audit Airbnb once per any consecutive 48-month period (4 years), and that the audit, and any subsequent assessment based on the audit, will be limited to a consecutive 12-month period. The city also agrees that it will not seek personally identifiable information relating to a host or a guest until the city has conducted an audit of Airbnb. The practical effect of these two provisions is to discourage seeking information related to specific hosts from Airbnb.

*Conclusion*

In sum, there is inherent tension between the state law that cities use to regulate short-term rentals, and the federal laws that Online Platforms rely upon to shield themselves from certain liabilities. How courts will resolve this tension is to be determined. Until there is published appellate case law providing clear guidance, cities should be mindful of short-term regulations that may apply to Online Platforms.

## Regulatory Approaches to Short-Term Rentals in Various California Cities

[24] See Revenue and Taxation Code, § 7283.51.

Below are links to information regarding regulatory approaches to short-term rentals in various California cities:

| City | Link |
|---|---|
| Aliso Viejo | Ordinance |
| Anaheim | Ordinance |
| Arroyo Grande | Ordinance |
| Berkeley | March Ordinance |
| Big Bear Lake | Current Code |
| Buellton | Ordinance |
| Capitola | Ordinance |
| Carlsbad | Ordinance |
| Carmel-by-the-Sea | Ordinance |
| Carpinteria | City Page |
| Cathedral City | City Page |
| Chula Vista | Code |
| City of Napa | Ordinance |
| Coronado | Ordinance |
| Dana Point | Ordinance |
| Danville | Ordinance |
| Desert Hot Springs | Ordinance |
| Encinitas | Ordinance |
| Eureka | Ordinance |
| Fort Bragg | Code |
| Goleta | Ordinance |
| Hermosa Beach | City Page |
| Indio | City Page |
| La Quinta | Ordinance |
| Laguna Beach | CC Report |
| Mammoth Lakes | Ordinance |
| Manhattan Beach | City Page |
| Mill Valley | Ordinance |
| **City** | **Link** |

| | |
|---|---|
| Monterey | Ordinance |
| Ojai | City page |
| Pacific Grove | City page |
| Palm Desert | Ordinance |
| Palm Springs | Ordinance |
| Palos Verdes Estates | Ordinance |
| Petaluma | City Page |
| Piedmont | Staff Report |
| Rancho Mirage | Ordinance |
| Redding | City Page |
| Sacramento | City Page |
| Saint Helena | Code |
| San Clemente | City Page |
| San Francisco | City Page |
| San Jose | San Jose Ordinance |
| San Juan Capistrano | Ordinance |
| Santa Barbara City | City Page |
| Santa Cruz | Ordinance |
| Santa Monica | City Page |
| Sausalito | Ordinance |
| Solana Beach | City Page |
| Sonoma | Current Code |
| South Lake Tahoe | Ordinance |
| Sunnyvale | Ordinance |
| Temecula | Ordinance |
| Tiburon | Ordinance |
| Truckee | City Page |
| West Hollywood | City Page |

# Municipal Tort and Civil Rights Litigation Update

**Friday, May 5, 2017 General Session; 9:00 – 10:15 a.m.**

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

**Notes:**

# Municipal Tort and Civil Rights Litigation Update

**for**

**The League of California Cities**

**City Attorneys' Spring Conference**

**May 5, 2017**

**Presented by**

**Deputy City Attorney Walter C. Chung**

**Office of the San Diego City Attorney**

## 1. *Estate of Diaz v. City of Anaheim,* 840 F.3d 592 (9th Cir. 2016)

### LEGAL ISSUE

City of Anaheim police officer Nicholas Bennallack shot and killed Manuel Diaz during an encounter in July 2012. Diaz's estate and mother filed suit against the officer and the City, under § 1983, but lost. The issue was whether Plaintiffs should receive a new trial because the district court abused its discretion by failing to bifurcate liability from compensatory damages.

### FACTUAL BACKGROUND

While on routine patrol in gang territory one afternoon, Officers Bennallack and Heitmann drove their unmarked black Crown Victoria into an alley in the City of Anaheim. They were not responding to a call or plea for help, though Bennallack had arrested a man for gun possession there two weeks earlier.

In the alley, Bennallack saw Diaz and another man standing near a parked vehicle, with a third man inside. Bennallack neither recognized Diaz nor saw anything in his hands. However, Bennallack thought that criminal activity was afoot, and that Diaz was a gang member, based on his experience in the area and how Diaz was dressed.

Shortly after the officers drove into the alley, and before they said anything to Diaz, Diaz ran away. The officers pursued on foot. Officer Heitmann stated he saw Diaz clutching an object near his waist before he took off, but Bennallack—the shooter—did not. While initially hoping to have a consensual conversation with Diaz, once the chase began Bennallack intended to arrest Diaz for violation of Penal Code section 148.

As the officers chased Diaz, they could not see his hands. Based on how Diaz's arms were not "pumping" as expected and the outward position of his elbows, Bennallack stated he thought Diaz's hands were in his waistband. Both officers said that Diaz looked back at them while he was running away, which they took as his attempt to "acquire a target."

The officers yelled commands such as "stop," "get on the ground," and "show me your hands," but Diaz kept running, and eventually went through a gate into a courtyard. He then slowed down and witnesses disagreed about his movements at this point. As Diaz started to turn, Bennallack stated that he saw a black cloth object going over a fence close to Diaz. Bennallack stated that he believed Diaz had a gun in a "low-ready" position in front of his body, ready to fire. According to Bennallack, as Diaz turned and

Bennallack saw the object in the air, he fired twice. Bennallack did not give a lethal force warning. Both shots struck Diaz and he died shortly thereafter at a nearby hospital. Officers found a black cellphone and a narcotics pipe nearby. No firearm was recovered from the scene.

## PROCEDURAL BACKGROUND

Diaz's estate and his mother brought suit against the City of Anaheim and Officer Bennallack. The mother sought only non-economic damages, i.e., her loss of Diaz's love, companionship, comfort, care, assistance, protection, society, and moral support.

A number of Plaintiffs' claims were disposed of by stipulation and the district court's partial grant of Defendants' motion for summary judgment. By the time of trial, Plaintiffs' remaining claims included two claims under § 1983 for excessive force and unreasonable detention under the Fourth Amendment and one claim for battery under California law.

The parties filed a number of motions *in limine* relating to Diaz's gang membership. After a six-day trial, the jury deliberated for less than two hours before returning a verdict that Officer Bennallack did not use excessive or unreasonable force.

## NINTH CIRCUIT DECISION

The Ninth Circuit held that the district court abused its discretion in failing to bifurcate the issue of liability for damages from compensatory damages. The error was harmful, and the court reversed the judgment and remanded for a new trial.

### 1. Gang Affiliation and Drug Use

The failure of the district court to bifurcate opened the door to the admission of "unduly prejudicial evidence" of gang membership and drug usage on the part of Diaz. There was wide-ranging testimony from Defendants' gang expert on matters that had been barred by the court's previous rulings. Over repeated objections, photographs featuring Diaz's tattoos, of him posing with guns and throwing gang signs, and another with a gun pointed to his head were introduced. The expert expounded on the activities and customs of violent gangs.

However, Officer Bennallack did not know about and had not seen any of the photographs introduced at trial when he shot Diaz. Officer Bennallack never suggested that he thought Diaz may have been intoxicated, and he did not know Diaz was a gang

member. As a result, according to the Ninth Circuit, "the jury was exposed to a copious amount of inflammatory and prejudicial evidence that was wholly irrelevant to liability, and of limited relevance even to damages."

### 2. Excessive Force Claim

Plaintiffs also appealed the district court's denial of their motion for judgment as a matter of law on their excessive force claim. The Ninth Circuit held that the district court correctly ruled that this question was one for the jury and that while Plaintiffs presented substantial evidence that the force was unreasonable, Defendants also presented substantial evidence to support their position. According to the court, taking the evidence in the light most favorable to Defendants, "these facts do not warrant judgment for Plaintiffs as a matter of law."

The court determined that when each of the *Graham*[1] factors is analyzed, the record does not permit only one reasonable conclusion contrary to that of the jury.

## CONCLUSION

The Ninth Circuit acknowledged that "[p]olice shootings are often the most difficult—and divisive—cases that our legal system and society encounter. Wrapped in strong emotion and often opaque case law, they can perplex even the most experienced trial judges, like the judge in this case. To avoid the runaway case—like this one, where the Defendants and their witnesses repeatedly overstepped the judge's rulings—courts should use bifurcation to corral lawyers and witnesses, so the jury hears only evidence relevant to the issues at hand.

In this case, the sole question for the jury was whether Officer Bennallack acted lawfully when he shot Diaz. Because the jury heard considerable and inflammatory evidence that had nothing to do with that question," the Court reversed and remanded the case for a new trial.

[1] Courts must consider the three factors established in *Graham v. Connor* (1989) 490 U.S. 386: (1) the severity of the suspect's alleged crime; (2) the threat posed by the suspect to the officers and the public; and (3) whether the suspect was actively resisting or evading arrest. (*Id.* at 396.)

## 2. *People v. Sibrian,* 3 Cal.App.5th 127 (CA Court of Appeal, First Appellate Dist., 2016)

### LEGAL ISSUE

Did the trial court err, (1) in allowing expert testimony on excessive force, and, (2) in precluding defense counsel from questioning one of the officers involved in his arrest about a civil lawsuit pending against that officer?

### FACTUAL BACKGROUND

A Sheriff's sergeant observed Defendant Sibrian commit traffic violations - failing to stop at two red lights and a stop sign. When the sergeant turned on the emergency lights of his patrol car to initiate a traffic stop, Defendant, at essentially the same moment, pulled over on his own because he had arrived at his house. The sergeant ordered Defendant to get out of his car, but he refused.

The sergeant testified that he knew the neighborhood as he had responded to numerous calls of criminal activity in the area. He drew his firearm at low ready and ordered Defendant to show his hands. Defendant stuck both hands out the driver's side window. Defendant was "slurring and rambling." The sergeant could not understand him and believed he might be intoxicated. When a cover deputy arrived, the two officers opened the driver's side door and ordered Defendant "at least five or six times" to get out, but he refused.

The cover deputy struggled with Defendant for a few seconds, while telling him to stop resisting and get out of the car. Then he delivered a "closed fist strike" to Defendant's right eye. When Defendant continued his refusal to move from his vehicle, the deputy punched him in the right eye a second time.

The deputy retrieved his Taser and told Defendant to stop resisting or he would be tased. Defendant grabbed the Taser and the deputy tased him in the stomach. By this time, other deputies had arrived and they were able to get Defendant under control and handcuffed. During the struggle Defendant and two deputies were injured. The district attorney charged Defendant with a single count of resisting an officer by the use of force or violence.

## PROCEDURAL BACKGROUND

Defendant was charged with "knowingly resisting, by the use of force or violence, [an executive officer, in the performance of his [or her] duty" in violation of Penal Code section 69. At the trial, the prosecution called several deputies who testified that when they arrived, Defendant was "aggressive" and was "actively resisting." He continued to struggle and kick after he was pulled from the car.

The prosecution also called a senior inspector with the district attorney's office, whom the trial court permitted to testify as an expert in the area of law enforcement training, tactics, and procedures regarding the use of force. He testified, among other things, that police officers have a responsibility to enforce the law, and when "they encounter resistance, they're not expected to retreat, they're expected to ensure compliance." The expert testified to the amount of force officers could use if a suspect refused to stop and step out of his car, including the use of distraction strikes and the Taser.

The jury found Defendant guilty as charged. He stated that he planned to file a lawsuit against one of the deputies who participated in his arrest. Defendant appealed from his conviction.

## DECISION OF CALIFORNIA COURT OF APPEAL

On appeal, Defendant contended that the trial court erred two ways. First, by allowing expert testimony on excessive force. Second, in precluding Defendant's counsel from questioning one of the officers involved in his arrest about a pending civil lawsuit against the officer.

The Court of Appeal found both of Defendant's arguments unpersuasive and affirmed the conviction.

### a. Allowing Expert Testimony on the Use of Force

Defendant maintained that the issue of whether the officers used excessive force was not a proper subject for expert testimony under Evidence Code section 801. Alternatively, Defendant contended that the trial court should have excluded the testimony under Evidence Code section 352 as unduly prejudicial. The Court of Appeal disagreed.

According to the court, "expert testimony will be excluded *only* when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry

is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." *People v. McAlpin,* 35 Cal. 3d 1289, 1300 (1991). Experts may be permitted to testify even when jurors are not wholly ignorant about the subject of the testimony. "Rather, the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury." *People v. Prince,* 40 Cal. 4th 1179, 1222, (2007). "The facts of every case will determine whether expert testimony would assist the jury." *Allgoewer v. City of Tracy,* 207 Cal. App.4th 755, 765 (2012).

In this case, according to the court, a key issue for the jury was whether the officers acted lawfully in the manner in which they detained and arrested defendant. Expert testimony could be of some assistance as jurors would not necessarily know about the need for escalating force to a noncompliant suspect or the potential continued danger posed by a suspect after he has been thrown to the ground. The expert in this case "was not called to give his opinion on the legal question of whether the officers used excessive force, but to explain law enforcement tactics and training in the use of force. In fact, the trial court expressly barred [the expert] from rendering any opinion on whether the arresting officers' use of force was reasonable."

Because the Court of Appeal could not say that the expert's testimony "would add nothing at all to the jury's common fund of information," it could not say that the trial court abused its discretion in deeming it admissible in this criminal prosecution.

### b. Precluding Questioning on Pending Lawsuit Against One of the Deputies

During the trial, defense counsel notified the court that she wanted to impeach one of the deputies with questions about a civil lawsuit against him. In that case, the deputy used a Taser on a pretrial detainee who later died. Counsel asserted that there was no one living who could explain what happened "because the person was dead." She therefore asked leave to ask the deputy questions regarding his use of the Taser in that other incident.

The trial court determined that the fact that an unrelated civil lawsuit was pending was not relevant and, in any event, if there was a witness to the alleged excessive force, that witness could testify. The Court of Appeal affirmed.

## 3. *A. K. H. v. City of Tustin,* 837 F.3d 1005 (9th Cir. 2016).

### LEGAL ISSUE

Was summary judgment, based on qualified immunity, properly denied to a police officer who fatally shot a suspect during an investigative stop?

### FACTUAL BACKGROUND

On December 17, 2011, Hilda Ramirez called 911. She reported that her ex-boyfriend, Benny Herrera, had "jacked [her] phone." Ramirez stated that she was not hurt, that she did not need paramedics and that her children were "fine." Initially, Ramirez told the 911 police dispatcher that Herrera stole her phone by grabbing it from her hand. A short time later, Ramirez changed her story and said that, while the two were arguing about her phone, Herrera "did end up hitting [her] in the head."

Ramirez told the police dispatcher that Herrera had not used a weapon to take her phone, that Herrera did not carry any weapons, and that he had not been violent with her before. Ramirez told the dispatcher that after the phone incident, Herrera was walking down El Camino Real towards Red Hill. She explained that because he did not have a car and had no friends in the area, he was probably trying to catch a bus back to his home.

The dispatcher sent out a general call to Tustin police officers. The dispatcher initially reported:

> [A] DV [domestic violence] just occurred.… The RP [reporting party] states her ex-boyfriend, Benny Herrera, male Hispanic, 31 years, 5'8", thin build, bald head, black hooded sweatshirt was inside her apartment, took, her cell phone, he left. He is now walking on El Camino Real towards Red Hill.

The dispatcher updated the officers by reporting that Herrera was not known to carry weapons, was a member of the Southside Gang and that there was a possibility a $35,000 traffic warrant was out for Herrera's arrest. The dispatcher also reported that Herrera was on parole for a narcotics offense.

The first officer to spot Herrera was Officer Brian Miali who was driving a large SUV. As Ramirez had reported, Herrera was walking down El Camino Real. He was walking on the right shoulder of the road in the same direction as traffic. On Herrera's immediate

right was a high wall, preventing him from escaping to the right. As he came up to Herrera, the officer turned on the red lights of his SUV. Herrera put his right hand in his sweatshirt pocket and started alternatively to skip, walk, and run. As Herrera did so, he moved away from the right shoulder toward the middle of the road. The officer drew his gun and opened his driver's side door while driving forward slowly. Herrera kept ahead of the SUV, sometimes at distances of less than ten or fifteen feet. Using the loudspeaker of his SUV, the officer told Herrera three times to "get down." Herrera did not comply. He stayed on his feet and continued to move down the road at about the same speed as the SUV.

Officer Osvaldo Villarreal was driving on El Camino Real behind the first officer. He positioned his patrol vehicle beside Herrera to "box" Herrera in and cut off his avenue of escape. Officer Villarreal held his gun in his hand. His front passenger window was open. As Herrera moved toward Officer Villarreal, Villarreal pulled up beside Herrera. Villarreal immediately shouted, "Get your hand out of your pocket." Herrera removed his right hand from his sweatshirt pocket in an arching motion over his head. Just as Herrera's hand came out of his pocket, Officer Villarreal fired two shots in rapid succession. He did not give any warning that he would shoot, and the first officer later stated that he was not expecting the shots. Both officers admitted that they never saw anything in either of Herrera's hands.

Officer Villarreal testified in his deposition that he shot Herrera because he "believ[ed] that he had a weapon and he was going to use that weapon on [him]." He testified that Herrera's right hand was "concealed" in his sweatshirt pocket. He also testified that there was something in there that appeared to be "heavy," and that Herrera " charged [him] or shortened the distance to the passenger window "very quickly." Officer Villarreal said that probably "three to five seconds" passed between when he commanded Herrera to remove his hands from his pocket and when he shot. However, the recording from Villarreal's dashboard camera showed that the command and the shots were almost simultaneous, separated by less than a second. The total elapsed time from when the first officer first encountered Herrera to when Villarreal shot him was less than a minute.

## PROCEDURAL BACKGROUND

Relatives of Herrera filed suit under § 1983 against Officer Villarreal and the City of Tustin alleging, among other things, that Villarreal used excessive force against Herrera. Villarreal moved for summary judgment based on qualified immunity. The district court denied the motion and Officer Villarreal brought an interlocutory appeal.

## NINTH CIRCUIT DECISION

The Ninth Circuit concluded that based on the totality of the circumstances, and balancing the interests of the two sides, viewing the evidence in the light most favorable to the plaintiffs, "the intrusion on Herrera's interests substantially outweighed any interest in using deadly force. Therefore, according to the court, Officer Villarreal's fatal shooting of Herrera violated the Fourth Amendment.

The court also concluded that Villarreal violated clearly established Fourth Amendment law when he shot and killed Herrera. Therefore, Officer Villarreal was not entitled to qualified immunity.

The court analyzed the *Graham v. Connor* factors in determining that Officer Villarreal used excessive force when he shot Herrera. No serious crime was involved, there was no indication that a weapon was involved, and even if Herrera was "actively resisting," or "attempting to evade" an investigatory stop, he never attempted to cross the road and flee, as he continued to move at about the same speed as the first officer.

Most importantly, according to the court, "Officer Villarreal escalated to deadly force very quickly." Villarreal commanded Herrera to take his hand out of his pocket immediately upon driving up beside him. Villarreal then shot him as he was taking his hand out of his pocket. Less than a second elapsed between the command to take his hand out of his pocket and Villarreal shooting him. Villarreal neither warned Herrera that he was going to shoot him, nor waited to see if there was anything in Herrera's hand.

The Ninth Circuit emphasized that in this case it was undisputed that Herrera was unarmed. Villarreal never saw a gun, Herrera's ex-girlfriend had reported to the police dispatcher that Herrera did not carry weapons, and the only "heavy" object in Herrera's sweatshirt pocket was a cell phone. Accordingly, Officer Villarreal could provide no articulable basis for his belief that Herrera was armed except to say that Herrera had one hand "concealed."

## 4. *Mendez v. County of Los Angeles,* 815 F.3d 1178 (9th Cir. 2016)

### LEGAL ISSUE

In a § 1983 action, are sheriff's deputies entitled to qualified immunity for violating the knock-and-announce rule if the law at the time was not clearly established?

### FACTUAL BACKGROUND

Two Los Angeles County Sheriff's Department deputies, Christopher Conley and Jennifer Pederson, were part of a team of twelve police officers that responded to a call from a fellow officer who believed he had spotted a wanted parolee named Ronnie O'Dell entering a grocery store. Before that day, Conley and Pederson did not have any information regarding O'Dell. Conley testified that at the time of the search he knew nothing about O'Dell's "criminal past" and that he didn't recall being given information that O'Dell was armed and dangerous. Pederson testified that the only information she was given about O'Dell was that he was a parolee at large. The officers searched the grocery store for O'Dell but did not find him. The officers then met behind the store to debrief.

During this debriefing, a deputy received a tip from a confidential informant that a man fitting O'Dell's description was riding a bicycle in front of a residence owned by a woman named Paula Hughes. The officers "developed a plan" in which some officers would proceed to the Hughes house. However, because the officers believed that there was a possibility that O'Dell already had left the Hughes residence, other officers would proceed to a different house on the same street. Conley and Pederson were "assigned to clear the rear of the Hughes property for the officers' safety and cover the back door of the residence for containment." The officers were told that a male named Angel (Mendez) lived in a shack in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez). Pederson heard that announcement, but Conley testified that he did not recall it.

Conley and Pederson arrived at the Hughes residence along with three other officers. They did not have a search warrant to enter Hughes' property, but were directed to proceed to the back of the Hughes residence through the south gate. Once in the backyard, the deputies came across three storage sheds and opened each of them, finding nothing. During this time, other officers (led by a sergeant) banged on the security screen outside Hughes's front door and asked Hughes to open the door. She refused to open the door after being told the officers did not have a warrant. The sergeant then heard someone running inside the residence, who he assumed was

O'Dell. The officers retrieved a pick and ram to bust open Hughes's door, at which point Hughes opened the front door. Hughes was handcuffed, and placed in the backseat of a patrol car. The officers did not find anyone in the house.

Deputy Pederson then received approval from the sergeant "to clear the backyard" and Conley and Pederson proceeded through the backyard toward a 7 x 7 x 7 shack made of wood and plywood. The shack was surrounded by an air conditioning unit, electric cord, water hose, and a clothes locker. The deputies did not knock and announce their presence at the shack and "they did not feel threatened." Conley opened the shack's door and pulled back a blanket used as a curtain to insulate the shack. The deputies then saw the silhouette of an adult male holding what appeared to be a rifle pointed at them. Conley yelled "Gun!" and both deputies fired fifteen shots in total. Other nearby officers ran back toward the shots and one officer shot and killed a dog.

Both Mendezes were injured by the shooting. Mr. Mendez required amputation of his right leg below the knee, and Ms. Mendez was shot in the back. At the time of the shooting, Mendez was holding only a BB gun that he kept by his bed to shoot rats that entered the shack; here, as the door was opening, he was in the process of moving the BB gun so he could sit up in bed.

## PROCEDURAL BACKGROUND

The Mendezes sued Deputies Conley and Pederson under § 1983, alleging a violation of their Fourth Amendment rights. After a bench trial, the district court held that the warrantless entry into the shack was a Fourth Amendment search and was not justified by exigent circumstances or another exception to the warrant requirement. The court held that the deputies did not use excessive force, but the deputies were liable for the shooting under the Ninth Circuit's "provocation rule" articulated in *Alexander v. City & County of San Francisco,* 29 F.3d 1355 (9th Cir. 1994). The court denied qualified immunity to the deputies and awarded roughly $4 million in damages for the shooting.

The deputies filed an appeal contending that the district court erred in denying them qualified immunity.

## NINTH CIRCUIT DECISION

The Ninth Circuit held that the deputies violated the Fourth Amendment when they failed to knock at the shack before making entry but that the deputies' shooting of the Mendezes itself was not unconstitutional excessive force under the Fourth Amendment and *Graham v. Connor.* However, because the deputies entered the shack without a

warrant and failed to comply with the knock and announcement rules, which proximately caused the Mendezes' injuries, liability found by the district court was proper.

### a. Entry Into the Shack

The deputies initially argued that they did not "search" the shack within the meaning of the Fourth Amendment when Conley opened the door. The Ninth Circuit disagreed, pointing out that the law was clearly established that a "search" occurs when the government invades an area in which a person has "a reasonable expectation of privacy." *Katz v. United States,* 389 U.S 347, 361 (1967). This includes the "area immediately adjacent to a home, known as the curtilege." Here, according to the court, the four factors used by the courts to determine whether an area lies within the curtilege were satisfied. Further, the deputies knew that the Mendezes lived in the structure described as a "dilapidated" "shack." Thus, the Ninth Circuit concluded that the district court correctly determined that the deputies conducted a "search" within the meaning of the Fourth Amendment under clearly established law when they entered the shack.

### b. Qualified Immunity

The deputies argued that they were entitled to qualified immunity because a reasonable officer could have thought that exigent circumstances justified the search. The court did not agree. The exigent circumstances exception encompasses situations in which police enter without a warrant "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury," while "in hot pursuit of a fleeing suspect," or "to prevent the destruction of evidence." *Kentucky v. King,* 563 U.S. 452, 459-462 (2011).

According to the court, the fact that the deputies suspected O'Dell to be in the shack was not, by itself, sufficient to justify the warrantless search. Thus, the hot pursuit doctrine here does not justify the deputies' search of the shack, as there was no immediate or continuous pursuit of O'Dell. Therefore, the court held that the deputies violated clearly established Fourth Amendment law when entering the shack without a warrant.

### c. Knock-and-Announce

The Ninth Circuit also held that the deputies violated the law when they failed to knock and announce their presence at the shack before they entered it. However, according to the court, the law was not clearly established in 2010 when the incident occurred that the deputies needed to announce their presence again before entering the shack in the curtilage. Therefore, the court held that the deputies were entitled to qualified immunity.

In the absence of clearly established law that squarely governed the knock-and-announce factual situation in this case, the Ninth Circuit held that qualified immunity was appropriate on this claim only.

### d. Protective Sweep

The deputies argued that their search of the shack was a lawful protective sweep. According to the court, to justify a protective sweep, police must identify "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." The court noted that there is both a split between the circuits and a split within the Ninth Circuit as to whether a protective search may be done "where officers possess a reasonable suspicion that their safety is at risk, even in the absence of an arrest." The court assumed without deciding that the protective sweep doctrine could apply here. However the court determined that the deputies did not have the requisite suspicion of danger to justify either a protective sweep of the shack or a search based on exigent circumstances.

## CONCLUSION

According to the court, under the situation in this case where Mendez was holding a gun when the deputies barged into the shack unannounced, the shooting was reasonably foreseeable. The Ninth Circuit affirmed the district court's award of damages based on the provocation doctrine. "[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." *Billington v. Smith,* 292 F.3d 1177, 1189 (9th Cir.2002)

In other words, under basic notions of proximate cause, the deputies were liable for the shooting as a foreseeable consequence of their unconstitutional entry into the shack even though the shooting itself was not legally an unconstitutionally excessive use of force.

## 5. *Newbaker v.City of Fortuna,* 842 F.3d 1108 (9th Cir. 2016)

### LEGAL ISSUE

Is summary judgment based on qualified immunity appropriate in a § 1983 police deadly force case when the ultimate question of fact turns on the officer's credibility and the officer's credibility is genuinely in doubt?

### PROCEDURAL BACKGROUND

Maxwell Soeth, a police officer in Fortuna, California, fatally shot Jacob Newmaker during an attempted arrest. According to Officer Soeth, Newmaker was standing upright after he grabbed Soeth's police baton and was swinging the baton violently toward Sergeant Charles Ellebrecht when he was shot. According to Soeth, Newmaker then fell to the ground and Soeth shot him again as Newmaker was getting up and again swinging the baton.

Newmaker's parents filed suit under § 1983 against the City of Fortuna, Officer Soeth, and Sergeant Ellebrecht. Plaintiffs alleged that Soeth used unconstitutionally excessive force by striking Newmaker multiple times with his police baton and then fatally shooting him. The district court granted summary judgment in favor of Officer Soeth concluding that the officer was entitled to qualified immunity. According to the district court, based on Soeth's testimony that Newmaker had taken his police baton, the trial court concluded that "it was reasonable for Officer Soeth to conclude that Newmaker might use the baton in a dangerous way against Ellebrecht merely by virtue of having it in his possession".
Plaintiffs appealed the grant of summary judgment.

### NINTH CIRCUIT DECISION

The Ninth Circuit held that the district court erred in granting summary judgment based on qualified immunity to Officer Soeth. According to the court, "summary judgment is not appropriate in § 1983 deadly force cases that turn on the officer's credibility that is genuinely in doubt."

#### a. Evidence in the Record

##### i. Officer Soeth's Deposition's Testimony

Officer Soeth presented the following testimony in his deposition: Officer Soeth testified in essence that while working off and on during the night he had contact with Newmaker. Newmaker told Soeth that unidentified people had chased him down an alley and that he was afraid. Newmaker asked for a ride from the police station, but Soeth refused and Newmaker left. Newmaker was acting strangely and Soeth thought he might be mentally impaired or on drugs.

About two hours later, while in a patrol car, Officer Soeth encountered Newmaker on a street corner in Fortuna. Newmaker was fully clothed, wearing a jacket, but shoeless. Soeth followed Newmaker to his mother's house and left after it was determined that there were no outstanding warrants.

At about 6:00 a.m. that morning, Officer Soeth received a call at the station about a male subject "banging on the doors and windows of an occupied dwelling." Soeth went to investigate while Sergeant Ellebrecht spoke to the caller, who reported that the subject had left on a bicycle. The caller stated that the subject had said his "skin was crawling" and "[t]hat he was in contact with radiation." Soeth encountered Newmaker on a bicycle at an intersection. Soeth attempted a stop, but Newmaker rode away.

After about two blocks, Newmaker got off his bicycle and started running. Soeth got out of his patrol car and pursued on foot. Newmaker turned around and came back toward Soeth. Soeth ordered Newmaker to get on the ground but Newmaker responded by lying on the hood of a parked car. When Newmaker did not comply with the orders to show his hands, Soeth physically forced him to the ground. Officer Soeth used his Taser in "drive" mode" to stun Newmaker in the lower back. Soeth stated that Newmaker grabbed the Taser with one hand and Soeth's leg with the other. Soeth stepped back and Newmaker got up and ran away. Soeth again pursued Newmaker on foot. At some point, Newmaker had lost his pants. He was now naked from the waist down and wearing only a t-shirt. He had no weapon.

### ii. Evidence Conflicting with Officer Soeth's Deposition Testimony

The day after the shooting, Officer Soeth and Sergeant Ellebrecht were interviewed by a D.A. investigator, accompanied by a detective from the Police Department. Before the interview, the officers had viewed the dashboard camera video. According to the Ninth Circuit, only after Soeth and Ellebrecht received suggestions from the D.A. investigator did the two officers arrive at the version of events they ultimately presented to the district attorney.

The video also shows Soeth hitting Newmaker about five times with his baton while still on the sidewalk. (During his deposition, Soeth stated that he hit Newmaker two times.) During the deposition of Soeth taken approximately one year after the incident, and after viewing the video, Soeth stated he was of the belief that Soeth fired two shots at a time that Newmaker was swinging the baton "violently" towards Ellebecht". The D.A. investigator suggested, however, that Newmaker might have fallen to the ground after the first shot and when he attempted to get back up, Soeth fired again in an upward angle. Ellebrecht stated that that version was possible. The video also shows that Ellebrecht succeeded in handcuffing Newmaker's right wrist and the officers dragging Newmaker off the sidewalk onto the street behind a parked car that cannot be seen in the video.

### iii. The Autopsy Report

According to the Ninth Circuit, the report from the autopsy performed on Newmaker's body was in conflict with the officers' version of events. When the D.A. investigator initially interviewed the two officers, no autopsy had been performed. An autopsy performed three days later showed that two bullets killed Newmaker. They both entered his lower back and traveled at thirty degree angles upward toward his chest.

The video from Sergeant Ellebrecht's dashboard camera and Officer Soeth's own statements make plain that Soeth was standing upright, holding his gun at about chest level, when he shot Newmaker. Soeth claimed that he fired the first shot when Newmaker was standing upright, swinging the baton violently toward Ellebrecht, and the second shot as Newmaker was getting up off the ground, again swinging the baton. According to the court, the autopsy report contradicts Soeth's testimony.

## CONCLUSION

The Ninth Circuit concluded that the version of events offered by Officer Soeth and Sergeant Ellebrecht to the district court was "materially contradicted by evidence in the record." "Their versions of events changed over time." The version they presented to the district court was suggested to them by the D.A. investigator. A reasonable jury could conclude that the officers were wrong when they claimed that Newmaker grabbed the baton.

Because this case "requires a jury to sift through disputed factual contentions—including whether the officers were telling the truth about when, why, and how Soeth shot Newmaker,"—the Ninth Circuit held that summary judgment was inappropriate.

## 6. *Hughes v. Kisela*, 841 F.3d 1081 (9th Cir. 2016)

### LEGAL ISSUE

Could a jury find that a police officer, who shoots a person *carrying* a knife in a non-*threatening* manner, acted lawfully?

### FACTUAL BACKGROUND

After hearing a report of a person hacking at a tree with a large kitchen knife, three members of the University of Arizona Police Department responded to the scene. Upon their arrival, the officers saw Plaintiff Amy Hughes carrying a large kitchen knife. The officers were told by the reporting party that the person with the knife had been acting erratically.

The following events occurred in less than one minute:

(i) Soon after the three officers arrived, Amy Hughes emerged from her house carrying a large kitchen knife. Sharon Chadwick was standing outside the house in the vicinity of the driveway. According to Ms. Chadwick's affidavit, Ms. Hughes's demeanor immediately prior to the shooting was composed and non-threatening as she exited the house and holding the knife down to her side with the blade pointing backwards.

(ii) As Ms. Hughes approached Ms. Chadwick, the officers each drew their guns and yelled numerous times for Ms. Hughes to drop the knife. Ms. Hughes did not drop the knife and continued to move toward Ms. Chadwick. Officer Kisela recalls seeing Ms. Hughes raise the knife as if to attack. The other two officers stated that they did not see Ms. Hughes raise the knife.

(iii) A chain link fence at the edge of the property prevented the officers from getting any closer to the two women. Because the top of the fence obstructed his aim, Officer Kisela dropped down and fired four shots through the fence. Each of the shots struck Ms. Hughes, causing her to fall at Ms. Chadwick's feet. Her injuries were not fatal.

### PROCEDURAL BACKGROUND

Ms. Hughes brought suit against Officer Kisela, under § 1983, claiming excessive force in violation of her constitutional rights. The district court granted summary judgment in

favor of Officer Kisela, concluding that his actions were reasonable and that he was entitled to qualified immunity.

## NINTH CIRCUIT DECISION

The Ninth Circuit reversed the decision of the trial court granting summary judgment to Officer Kisela and remanded for a jury to determine whether Officer Kisela's use of deadly force was lawful. The court undertook an evaluation under *Graham v. Connor,* 490 U.S. 386, 397 (1989), of the severity and extent of the force used by asking "whether the officer's actions were 'objectively reasonable' in light of the facts and circumstances confronting him." According to the court, the three basic *Graham* factors, namely: (1) the severity of the crime at issue, (2) whether the suspect actively resisted arrest or attempted to evade arrest by flight, or whether, (3) the suspect posed an immediate threat to the safety of officers or third parties, operated in favor of Ms. Hughes in this case.

However, the factors identified in *Graham* are not exclusive. When assessing an officer's use of force, a court must examine "the totality of the circumstances and consider 'whatever specific factors may be appropriate in a particular case," whether or not listed in *Graham. Franklin v. Foxworth,* 31 F.3d 873, 876 (9th Cir.1994).

Other relevant factors may include the availability of less intrusive force, whether proper warnings were given, and whether it should have been apparent to the officer that the subject of the force was mentally ill.

The courts have held that officers need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within a range of reasonable conduct. *Scott v. Henrich, 39* Fed. 3d 912 (9th Cir. (1994).

## CONCLUSION

In this case, the Ninth Circuit concluded, that viewing the facts in the light most favorable to Ms. Hughes, the record did not support Officer Kisela's perception of an immediate threat. According to the court, the fact a person may be armed, standing alone, might not pose an immediate threat justifying the use of deadly force. In some situations, however, "a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat. *George v. Morris,* 736 F.3d 829, 838 (9th Cir. 2013.)"

The Ninth Circuit concluded that the facts, viewed in Ms. Hughes's favor, showed the following: the police shot a woman who was committing no crime, the woman was

holding a kitchen knife, the woman did not immediately comply with police orders to drop the knife, the woman was approaching another person and the woman may have been acting erratically. Under these circumstances, according to the court, “a rational jury—accepting the facts in the light most favorable to plaintiff—could find that she had a constitutional right to walk down her driveway holding a knife without being shot. In other words, a rational jury could find that Ms. Hughes did not present an immediate threat to the safety of the officers and others and that Officer Kisela’s response was unreasonable.

The court noted that it has held repeatedly that “the reasonableness of force used is ordinarily a question of fact for the jury. This is such a case. Material questions of fact, such as the severity of the threat, the adequacy of police warnings, and the potential for less intrusive means are plainly in dispute.” “It is evident that the question whether the force used here was reasonable is a matter that cannot be resolved in favor of the defendants on summary judgment.”

Thus, if the less intrusive means that could have been used before employing deadly force, the case becomes one that a jury must decide. A trial judge cannot decide it as a matter of law.

## 7. *Cooper v. Brown*, 844 F. 3d 517 (5th Cir. 2016)

### GENERAL BACKGROUND

This case involved the constitutional use of a police canine as a use of force. The case arose out of the United States Court of Appeals for the Fifth Circuit (affecting Louisiana, Mississippi, and Texas), but the case is persuasive, has been published and may be cited in other federal circuit courts, such as the Ninth Circuit.

### FACTUAL BACKGROUND

One night in April 2013, police officer Michael Pressgrove pulled Jacob Cooper over on suspicion of driving under the influence. Believing that Cooper was intoxicated, the officer administered a portable breath test and returned to his patrol vehicle. Cooper panicked and fled on foot into a residential neighborhood where he hid inside a small wood-fenced area used to store trash between two houses.

Because there was a passenger in his squad car and DUI is a misdemeanor offense, the officer decided not to pursue Cooper. Instead, he radioed for backup. Lynn Brown was one of the officers to respond, arriving with his police dog, Sunny, a Belgian Malinois. He testified that he did not request a K-9 unit and testified that although he did not know whether Cooper was armed, he had no reason to believe that Cooper had a weapon.

Upon entering the residential neighborhood with Officer Brown, Sunny located Cooper in his hiding place and bit him on the calf. It was undisputed that Sunny continued biting for one to two minutes, and that during that time, Cooper did not attempt to flee or to strike Sunny. Officer Brown instructed Cooper to show his hands and to submit to him. At the time of that order, Cooper's hands were on Sunny's head. Brown testified that he could see Cooper's hands and could appreciate that he had no weapons. Officer Brown then ordered Cooper to roll onto his stomach. He complied, and Brown handcuffed him. However, Brown did not order Sunny to release the bite until after Brown had finished handcuffing Cooper.

As a result of the bite, Cooper suffered years of severe pain from lower-leg injuries that required multiple surgeries, including reconstruction and skin grafts.

### PROCEDURAL BACKGROUND

Cooper sued Officer Brown under § 1983, alleging that Brown's use of force was objectively unreasonable under the Fourth Amendment. After discovery, Cooper moved for partial summary judgment as to Brown's individual liability, and Officer Brown moved for summary judgment on the basis of qualified immunity. The district court granted Cooper's motion and denied Officer Brown's motion. The court determined that Officer Brown's use of the police dog was objectively unreasonable given that Cooper was not actively resisting arrest and was suspected of only a misdemeanor. It further decided that Cooper's right was clearly established at the time of the alleged incident.

Officer Brown appealed the denial of summary judgment based on qualified immunity to the Court of Appeals for the Fifth Circuit.

## DECISION OF COURT OF APPEALS

The Court of Appeals affirmed the order of the district court denying summary judgment to Officer Brown based on qualified immunity. According to the Court of Appeals, the undisputed facts establish that Brown's use of force was objectively unreasonable in violation of the Fourth Amendment and that the law in the Fifth Circuit was clearly established. Thus, the Court of Appeals affirmed the order of the district court denying summary judgment to Officer Brown based on qualified immunity.

### a. *Graham v. Connor,* 490 U.S. 386 (1989)

The court determined that the application of the *Graham* factors established that Officer Brown's conduct was "objectively unreasonable." According to the court, DUI is a "serious offense," so the first factor favors Officer Brown. However, no reasonable officer could conclude that Cooper posed an immediate threat to Brown or others. Cooper was not suspected of committing a violent offense. Brown could see Cooper's hands and knew that he had no weapon. Thus, the second factor weighs strongly for Cooper.

On the third factor, no reasonable officer could believe that Cooper was actively resisting arrest or attempting to flee or to strike Sunny. The only act of "resistance," according to the court, was Cooper's failure to raise and show his hands, as ordered by Officer Brown, because they were on Sunny's head and visible to Officer Brown. At that point, according to the court, "Cooper's failure to raise his hands can hardly be characterized as 'active resistance,' but even if it was, any 'resistance' ended quickly." Officer Brown ordered Cooper to roll onto his stomach and Cooper complied with that order. Brown ordered Sunny to release the bite on Cooper once Cooper was handcuffed.

Based on the undisputed evidence in the record, the court concluded that under the facts in this case which included: Officer Brown's use of force by permitting his canine to remain on the bite for one-to-two minutes, during which time Cooper did not attempt to flee or to strike Sunny, at the time Officer Brown instructed Cooper to show his hands and to submit to him, Brown could see that Cooper's hands were on Sunny's head and Brown could appreciate that he had no weapon. Officer Brown then ordered Cooper to roll onto his stomach. He complied and Officer Brown handcuffed him. Officer Brown did not order Sunny to release the bite until after he had finished handcuffing Cooper.

According to the Fifth Circuit, under the alleged facts in the record, a reasonable jury could find that Officer Brown used excessive force by allegedly failing to release Sunny off the bite earlier. Permitting a dog to continue biting a compliant and non-threatening arrestee is objectively unreasonable.

### b. Qualified Immunity

The first part of qualified immunity provides governmental officials with immunity from suit "insofar as their conduct does not violate statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan,* 555 U.S. 223, 231 (2009). The second part of the qualified immunity inquiry is whether the constitutional right was "clearly established" at the time of the violation. This does not mean that a case directly on point is required. Rather, "existing precedent must have placed the statutory or constitutional question beyond debate."

The Fifth Circuit held that Cooper's right was clearly established. According to the court, in the Fifth Circuit, case law "makes certain that once an arrestee stops resisting, the degree of force an officer can employ is reduced." Thus, Officer Brown had "fair warning" that excessive duration of the bite and improper encouragement of a continuation of the attack by officers could constitute excessive force.

## CONCLUSION

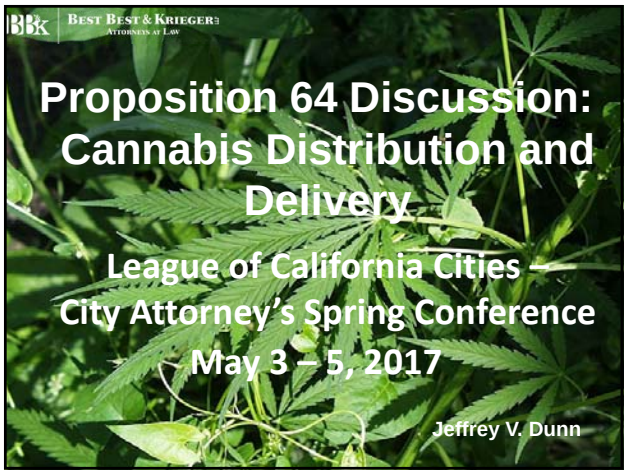
The court concluded that "Brown subjected Cooper to a lengthy dog attack that inflicted serious injuries, even though he had no reason to believe that Cooper posed a threat, and without first attempting to negotiate. And he continued applying force even after Cooper was actively complying with his orders."

# Proposition 64 Discussion / Cannabis Distribution and Delivery

**Friday, May 5, 2017 General Session; 9:00 – 10:15 a.m.**

**Jeffrey V. Dunn, Best Best & Krieger**

## Notes:_____




## Proposition 64 Discussion: Cannabis Distribution and Delivery

League of California Cities
City Attorney's Spring Conference
May 3 – 5, 2017

PRESENTED BY

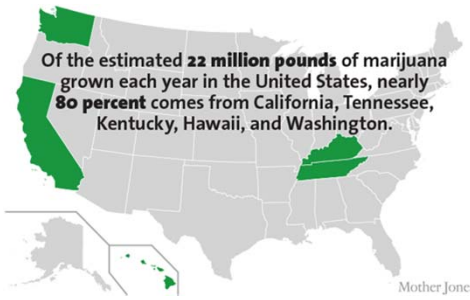
Jeffrey Dunn



BEST BEST & KRIEGER

## PROPOSITION 64: ADULT USE OF MARIJUANA ACT


BEST BEST & KRIEGER



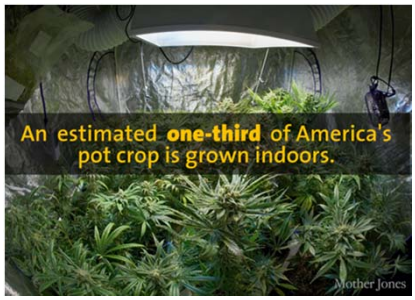


Trespass grows accounted for **72 percent** of outdoor plants seized in California in 2013.

**Nearly half** of the cannabis eradicated by law enforcement nationwide was on public or tribal land.

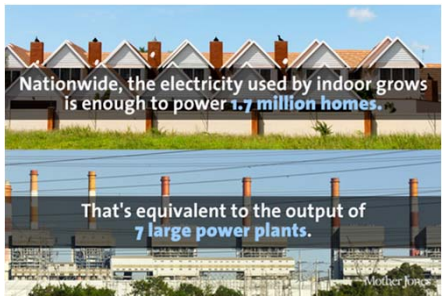
Mother Jones


During California's growing season, outdoor grows consume roughly 60 million gallons of water a day—50 percent more than is used by all the residents of San Francisco.
Mother Jones


An estimated one-third of America's pot crop is grown indoors.
Mother Jones


An indoor grow module accommodating 4 plants sucks as much electricity as 29 refrigerators.
Mother Jones


In California, indoor marijuana grows account for about 9 percent of household electricity use.
Mother Jones


Nationwide, the electricity used by indoor grows is enough to power 1.7 million homes.
That's equivalent to the output of 7 large power plants.
Mother Jones


For every pound of pot grown indoors, 4,600 pounds of $CO_2$ goes into the atmosphere.
Mother Jones


The energy needed to produce a single joint

is enough to produce 18 pints of beer

and creates emissions comparable to burning a 100-watt lightbulb for 25 hours.

Mother Jones

## Proposition 64: The City Attorney's Ethical Obligations

**Existing ethical rules and proposed legislation for attorneys advising clients on marijuana cultivation, distribution and use.**

**"It is the duty of an attorney to . . . support the Constitution and laws of the United States and of this state."**

Business and Professions Code section 6068, subdivision (a).

**"A member shall not advise the violation of any law . . . unless the member believes in good faith that such law . . . is invalid."**

**Rule 3-210 of the Rules of Professional Conduct**

**"The city attorney shall advise the city officials in all legal matters pertaining to city business.**

Government Code section 41808

**"The city attorney shall frame an ordinance or resolution required by the legislative body."**

Government Code section 4102

**Ethical Principles for City Attorneys**[1]
*Adopted October 6, 2005*
*City Attorneys Department Business Session*

- **Fundamental Principles**
  - **Principle 1 (Rule of Law).** As an officer of the courts and local government, the city attorney should strive to defend, promote and exemplify the law's purpose and intent, as determined from constitutional and statutory language, the case law interpreting it, and evidence of legislative intent. As an attorney representing a public agency, the city attorney should promote the rule of law and the public's trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations.
    - ***Explanation.*** *The city attorney's advice and actions should always proceed from the goal of promoting the rule of law in a free, democratic society. Because the public's business is involved, within the city organization the city attorney should consistently point out clear legal constraints in an unambiguous manner, help the city to observe such constraints, identify to responsible city officials known legal improprieties and remedies to cure them, and if necessary, report up the chain of command to the highest level of the organization that can act on the client city's behalf.*

[1]When used in this document, the term "city attorney" refers to all persons engaged in the practice of municipal law. This includes attorneys in firms that provide legal services to cities on an ongoing basis that are the functional equivalent to services provided by assistant or deputy city attorneys (for example, on redevelopment and personnel issues).

**City Attorney Ethical Principles**
*Adopted October 6, 2005*
*https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/City-Attorney-Ethics-Resources/Ethical-Principles-for-City-Attorneys*

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## Examples

1. The city attorney should give advice consistent with the law and the policy objectives underlying those laws, but may consider and explain good faith arguments for the extension or change of a legal principle.
2. The city attorney should not attempt to justify a course of action that is clearly unlawful. Where the city attorney's good faith legal assessment is that an act or omission would be clearly unlawful, the city attorney should resist pressure to be "creative" to come up with questionable legal conclusions that will provide cover for the elected or appointed public officials to take actions which are objectively unlikely to be in conformance with the legal constraints on the city's actions.

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## Examples (continued)

3. The city attorney's guiding principle in providing advice and services should be sound legal analysis. The city attorney should not advise that a course of action is legal solely because it is a common practice ("everyone else does it that way"), a past practice ("we have always done it that way"), or because the risk of suit or other consequence for action is considered low.
4. The city attorney's advice should reflect respect for the legal system.

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## Examples (continued)

5. If the city has made a decision that the city attorney believes may be legally harmful to the city, the city attorney should encourage the city to take any necessary corrective action but do so in a way that minimizes any damage to the city's interests.
6. The city attorney should be willing to give unpopular legal advice that meets the law's purpose and intent even when the advice is not sought but the legal problem is evident to the attorney.

## GOVERNMENT CODE SECTION 37100

"The Legislative Body (City Council ) may pass ordinances *n*ot in conflict with the Constitution and the laws of the State or the United States." (Emphasis added.)

**CALIFORNIA SUPREME COURT**
**COMMITTEE ON JUDICIAL ETHICS OPINIONS**
350 McAllister Street, Room 1144A
San Francisco, CA 94102
(855) 854-5366
www.JudicialEthicsOpinions.ca.gov

**CJEO Formal Opinion 2017-010**
***[Issued April 19, 2017]***

**On April 19, 2017, the California Supreme Court's Committee on Judicial Ethics issued an opinion advising judges that any interest in a business that involves medical or recreational marijuana is incompatible with a judge's obligation to follow the law. The drug remains illegal under federal law despite California voters approval of Proposition 64.**

## EXTRAJUDICIAL INVOLVEMENT IN MARIJUANA ENTERPRISES

- **Question Presented**
  - The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question: "Is it ethical under the California Code of Judicial Ethics for a judicial officer to have an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana?"[1]

[1]The relatively recent enactment of state medical and recreational marijuana laws, and the conflict with federal law, presents a myriad of issues related to marijuana. However, for purposes of this opinion, the committee addresses only the question presented.

## Summary of Conclusions

- An interest in an enterprise involving the sale or manufacture of marijuana that is in compliance with state and local law is still in violation of federal law pursuant to the Controlled Substances Act. (21 U.S.C. §§ 801-904.) A violation of federal law violates a judge's explicit obligation to comply with the law (canon 2A) and is an activity that involves impropriety or the appearance of impropriety (canon 2). Moreover, such extrajudicial conduct may cast doubt on a judge's capacity to act impartially. (Canon 4A(1).) Therefore, the committee advises that a judicial officer should not have an interest in an enterprise that involves the sale or manufacture medical or recreational marijuana.

**The Committee said a judge's involvement in a marijuana business could also cast doubt on the judge's ability to act impartially, particularly in marijuana-related cases.**

## "An attorney is an officer of the court."

*Ruszovan v. Ruszovan* (1969) 268 Cal.App.2d 902

## Federal Law

- **Controlled Substances Act**
  - Marijuana used for any purpose is a federal crime; Schedule I Drug.
- Aiding and abetting liability;
- Any distribution of marijuana in any premises is illegal.

## *Gonzales v. Raich* (2005) 545 U.S. 1

- Federal law enforceable despite Compassionate Use Act or Medical Marijuana Program
- No federal medical necessity defense
- Commerce Clause gives Congress power to regulate controlled substances including marijuana for all purposes

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**AN ANALYTICAL FRAMEWORK FOR PROP 64 ISSUES: INTERPLAY BETWEEN FEDERAL, STATE, AND LOCAL LAWS**

- Federal Situation
  - Illegal – Schedule 1 Controlled Substances Act
  - DOJ memos re Enforcement Priorities
    - Sale/Distribution to Minors
    - Interstate Commerce
    - Use of revenues for other illegal activity
    - Trafficking of other illegal substances
    - Violence and firearm use
    - Driving under the influence
    - Cultivation and use on public/Federal land

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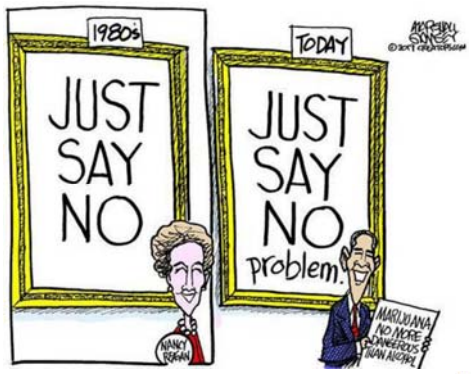


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## *2008*

- *Ross v. Raging Wire Telecommunications* (2008) 42 Cal.4th 920
  - No duty to accommodate an employee's use of marijuana under the Compassionate Use Act.
  - **No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users (see *Gonzales v. Raich*, *supra*, 545 U.S. 1, 26–29).**

## Cities and counties are not preempted by state law from enacting ordinances regulating the location of marijuana distribution facilities.

*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729

## Medical Marijuana Regulation and Safety Act

- This legislation protects local control in the following ways:
- **Dual licensing:** A requirement in statute that all marijuana businesses must have both a state license, and a local license or permit, to operate legally in California. Jurisdictions that regulate or ban medical marijuana will be able to retain their regulations or ban.

## Medical Marijuana Regulation and Safety Act

- **Effect of Local Revocation of a Permit or License:** Revocation of a local license or permit terminates the ability of a marijuana business to operate in that jurisdiction under its state license.

## Medical Marijuana Regulation and Safety Act

- **Enforcement:** Local governments may enforce state law in addition to local ordinances, if they request that authority and if it is granted by the relevant state agency.

## Medical Marijuana Regulation and Safety Act

- **State law penalties for unauthorized activity:** Provides for civil penalties for unlicensed activity, and applicable criminal penalties under existing law will continue to apply. With certain exceptions, expressly protects local licensing practices, zoning ordinances, and local actions taken under the constitutional police power.

## Cities and counties are not preempted by state law from regulating outdoor cultivation of marijuana.

*Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940
and
*Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975


## CURRENT LEGAL FRAMEWORK: INTERPLAY BETWEEN FEDERAL, STATE, AND LOCAL LAWS

- **2015 Medical Marijuana Regulation and Safety Act**
  - Regulation of medical uses
  - AB 266: "Bureau of Medical Cannabis Regulation"
    - Internet system for licensing and movement
  - AB 243, SB 643: Various state agencies have regulatory responsibilities
    - Food and Agriculture: cultivation
    - Public Health: manufacture, testing, production, labeling
    - Fish and Wildlife/State Water Board: pesticides, water quality
  - A total of 17 different licenses beginning January 2018
  - Preserves municipal regulatory authority and allows for local taxes

## AN ANALYTICAL FRAMEWORK FOR PROP 64 ISSUES

- **2016 Adult Use of Marijuana Act (Prop 64)**
  - Recreational use purported "legalized" but regulated to convince Federal Government to not enforce the Controlled Substances Act
  - Nov. 8, 2016, passed by 56 percent
  - Allows personal use by persons 21 years or older
  - Allows possession of 1 ounce (or 8 grams concentrate)
  - Indoor cultivation: 6 plants per residence

**AN ANALYTICAL FRAMEWORK FOR PROP 64 ISSUES: INTERPLAY BETWEEN FEDERAL, STATE, AND LOCAL LAWS**

- **2016 Adult Use of Marijuana Act (Prop 64)**
  - State and local taxes and fees
    - State excise tax of 15 percent
    - State cultivation tax of 9.25 percent on flower
    - State cultivation tax of 2/75 on plant
    - Creates Division 10 of the Bus. & Prof. Code for licensing
  - Local taxes, licensing and permitting

**AN ANALYTICAL FRAMEWORK FOR PROP 64 ISSUES: INTERPLAY BETWEEN FEDERAL, STATE, AND LOCAL LAWS**

- **2016 Adult Use of Marijuana Act (Prop 64)**
  - Implementation
    - Nov. 9, 2016: Personal use/cultivation
    - Jan. 1, 2018: State Commercial Licensing
    - 2017: Local Licensing and Permitting
    - Need both State and local licenses/permits to legally operate
    - Priority: those in good standing by Jan. 1, 2016

## PUBLIC SAFETY RISKS AND ISSUES RELATING TO MARIJUANA-INDUSTRY ACTIVITIES

- **Cultivating/Growing Marijuana**
  - Water, heat, humidity, energy/electricity/wiring, mold, wood rot, ventilation and electrical access, pollution from hydroponics waste, insecticides
- **Alternative Marijuana Products**
  - Explosion risks
- **Security Concerns**
  - Safes, cash, valuables, arms

## AN ANALYTICAL FRAMEWORK FOR PROP 64 ISSUES: INTERPLAY BETWEEN FEDERAL, STATE, AND LOCAL LAWS

- **Local Regulation**
  - Zoning restrictions allowed
    - Distribution facilities: The City of Riverside decision
    - Cultivation: County of Fresno and Live Oak decisions

**AN ANALYTICAL FRAMEWORK FOR PROP 64 ISSUES: INTERPLAY BETWEEN FEDERAL, STATE, AND LOCAL LAWS**

- **2016 Adult Use of Marijuana Act (Prop 64)**
  - Local Control
    - Local governments can ban:
      - Recreational retailers
      - Medical dispensaries or other distribution facilities
      - Delivery: origination or termination but not intra jurisdictional transportation
      - Out-door cultivation
      - Other state-licensed business under Business &Professions Code, Div. 10
  - "Reasonable Regulation"

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## Cannabis
## Tuesday, April 25, 2017

## Assembly Bills

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## AB 6 (Lackey R) Driving under the influence: drugged driving task force.

- **Current Text:** Amended: 3/21/2017
- **Current Analysis:** 04/03/2017 Assembly Appropriations *(text 3/21/2017)*
- **Status:** 4/20/2017-Read third time. Passed. Ordered to the Senate. In Senate. Read first time. To Com. on RLS. for assignment.
- **Is Urgency:** N
- **Summary:** Existing law specifies the duties and powers of the Commissioner of the California Highway Patrol. This bill would require the commissioner to appoint, and serve as the chairperson of, a drugged driving task force, with specified membership, to develop recommendations for best practices, protocols, proposed legislation, and other policies that will address the issue of driving under the influence of drugs, including prescription drugs. The bill would also require the task force to examine the use of technology, including field testing technologies, to identify drivers under the influence of drugs. The bill would require the task force to report to the Legislature its policy recommendations and the steps that state agencies are taking regarding drugged driving. The bill would require these provisions to be implemented to the extent specified funding is made available.
- **Laws:** An act to add Section 2429.7 to the Vehicle Code, relating to driving under the influence.

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## AB 64 (Bonta D) Cannabis: medical and nonmedical.

- **Current Text:** Amended: 4/5/2017
- **Current Analysis:** 04/17/2017 Assembly Business And Professions *(text 4/5/2017)*
- **Status:** 4/19/2017-From committee: Do pass and re-refer to Com. on APPR. (Ayes 14. Noes 0.) (April 18). Re-referred to Com. on APPR.
- **Is Urgency:** N
- **Summary:** (1)Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA), authorizes a person who obtains both a state license under MCRSA and the relevant local license to engage in commercial medical cannabis activity pursuant to those licenses, as specified. Under MCRSA, responsibility for the state licensure and regulation of commercial medical cannabis activity is generally divided between the Bureau of Marijuana Control (bureau) within the Department of Consumer Affairs, which serves as the lead state agency and administers provisions relating to the transportation, storage unrelated to manufacturing activities, testing, distribution, and sale of medical cannabis; the Department of Food and Agriculture, which administers provisions relating to the cultivation of medical cannabis; and the State Department of Public Health, which administers provisions relating to the manufacturing of medical cannabis. This bill would specify that licensees under the MCRSA may operate for profit or not for profit. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Sections 19334, 26055, 26070, 26151, 26152, 26153, 26154, and 26200 of, to add Sections 14235.5 and 19322.5 to, and to add Article 12 (commencing with Section 19349) to Chapter 3.5 of Division 8 of, the Business and Professions Code, to amend Section 11362.775 of the Health and Safety Code, to amend Section 34019 of the Revenue and Taxation Code, and to amend Sections 23152, 23153, and 23222 of the Vehicle Code, relating to cannabis, and making an appropriation therefor.

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## AB 76 (Chau D) Adult-use marijuana: marketing.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:** 04/21/2017 Assembly Privacy And Consumer Protection *(text 3/28/2017)* **Status:** 4/19/2017-Coauthors revised.
- **Is Urgency:** N
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), approved by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, transport, storage, manufacturing, testing, processing, sale, and use of marijuana for nonmedical purposes by people 21 years of age and older. The AUMA prohibits any advertising or marketing placed in broadcast, cable, radio, print, and digital communications from being displayed unless at least 71.6% of the audience is reasonably expected to be 21 years of age or older. This bill would prohibit an operator, as defined, of an Internet Web site, online service, online application, or mobile application from marketing or advertising any marijuana, marijuana product, or marijuana business to a person who is under 21 years of age if the operator has actual knowledge that a person under 21 years of age is using its Internet Web site, online service, online application, or mobile application, and if the marketing or advertising is specifically directed to that person based upon information specific to that person, including, but not limited to, the person's profile, activity, address, or location. The bill would prohibit an operator of an Internet Web site, online service, online application, or mobile application from knowingly using, disclosing, compiling, or allowing a third party to use, disclose, or compile, the personal information of a person under 21 years of age with the actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising marijuana, marijuana products, or marijuana businesses to that person under 21 years of age. Existing law prohibits an operator of an Internet Web site, online service, online application, or mobile application directed to minors from marketing or advertising certain products or services, including any instrument or paraphernalia that is designed for the smoking or ingestion of tobacco or any controlled substance. This bill would additionally prohibit an operator of an Internet Web site, online service, online application, or mobile application directed to minors, from marketing or advertising any marijuana, marijuana product, marijuana business, or marijuana-related instrument or paraphernalia on its Internet Web site, online service, online application, or mobile application. AUMA authorizes the Legislature to amend the act to further the purposes and intent of the act with a 2 / 3 vote of the membership of both houses of the Legislature, except as provided. This bill would declare that its provisions further specified purposes and intent of AUMA.
- **Laws:** An act to amend Section 22580 of, and to add Section 26151.5 to, the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 1:30 p.m. - State Capitol, Room 126 ASSEMBLY PRIVACY AND CONSUMER PROTECTION, CHAU, Chair

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## AB 171 (Lackey R) Medical Cannabis Regulation and Safety Act: licensure: reporting.

- **Current Text:** Introduced: 1/17/2017
- **Current Analysis:** 04/24/2017 Assembly Business And Professions *(text 1/17/2017)*
- **Status:** 3/27/2017-Referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA), authorizes a person who obtains both a state license under the MCRSA and the relevant local license to engage in commercial medical cannabis activity pursuant to those licenses, as specified. The act authorizes a licensing authority, as defined, to issue a state license to qualified applicants engaging in commercial cannabis activity, subject to certain procedures and requirements. A licensing authority may deny an application for a state license, or issue a conditional license, if certain conditions apply. That act also requires each licensing authority to prepare and submit to the Legislature an annual report on the authority's activities, and to post the report on the authority's Internet Web site. The licensing authority is required to include various information in that report, including, among others, the number of state licenses issued by that authority. This bill would also require a licensing authority to include in its annual report the number of conditional licenses issued.
- **Laws:** An act to amend Section 19353 of the Business and Professions Code, relating to cannabis.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

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## AB 175 (Chau D) Adult-use marijuana: marketing: packaging and labeling.

- **Current Text:** Introduced: 1/17/2017
- **Current Analysis:** 04/21/2017 Assembly Health *(text 1/17/2017)*
- **Status:** 4/18/2017-From committee: Do pass and re-refer to Com. on HEALTH. (Ayes 11. Noes 3.) (April 18). Re-referred to Com. on HEALTH.
- **Is Urgency:** N
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of marijuana for nonmedical purposes by people 21 years of age and older. Under existing law, the Bureau of Marijuana Control is responsible for licensing and regulating retail sales, distribution, and transportation, and the State Department of Public Health is responsible for licensing and regulating manufacturers. AUMA places restrictions on the packaging and labeling of marijuana and marijuana products, including that the packaging be resealable, child resistant, and not made attractive to children. This bill would require a manufacturer, prior to introducing an edible marijuana product into commerce in California, to submit the packaging and labeling to the bureau for approval and would require the bureau to determine whether the packaging and labeling are in compliance with the requirements of prescribed provisions of AUMA, including the requirements that the packaging be child resistant and not attractive to children, as specified. The bill would authorize the bureau to charge a manufacturer a fee for the determination, in an amount no greater than the amount required to cover the actual and reasonable costs of administering the approval program. This bill contains other related provisions and other existing laws.
- **Laws:** An act to add Section 26121 to the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 1:30 p.m. - State Capitol, Room 4202 ASSEMBLY HEALTH, WOOD, Chair

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## AB 238 (Steinorth R) Nonmedical marijuana: manufacturing: volatile solvents in residential structures.

- **Current Text:** Amended: 4/18/2017
- **Current Analysis:**
- **Status:** 4/19/2017-Re-referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), added by Proposition 64 at the November 8, 2016, statewide general election, licenses and regulates commercial marijuana activity, including manufacturing marijuana products. AUMA provides for 2 licensing categories of manufacturers, including Level 2 manufacturers who use volatile solvents. Under AUMA a manufacturing Level 2 licensee is required to enact sufficient methods or procedures to capture or otherwise limit risk of explosion, combustion, or any other unreasonably dangerous risk to public safety created by volatile solvents. This bill would prohibit a manufacturing Level 2 licensee from manufacturing marijuana products using volatile solvents in a residential structure or on residential property. The bill would declare that its provisions implement specified substantive provisions and are consistent with and further the intent of the act. This bill contains other existing laws.
- **Laws:** An act to amend Section 26105 of the Business and Professions Code, relating to marijuana.

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## AB 259 (Gipson D) Medical cannabis and nonmedical marijuana: California residency requirement for licensing.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:** 04/24/2017 Assembly Business And Professions *(text 3/28/2017)* **Status:** 3/29/2017-Re-referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), added by Proposition 64 at the November 8, 2016, statewide general election, authorizes a person 21 years of age or older to possess and use specified amounts of marijuana. AUMA provides for the licensing and regulation of cultivation, manufacture, distribution, testing, and retail sale of nonmedical marijuana and nonmedical marijuana products. Until December 31, 2019, AUMA requires a person to demonstrate continuous California residency from or before January 1, 2015, in order to be issued a license for commercial nonmedical marijuana activity. AUMA authorizes legislative amendment of its provisions with a 2/3 vote of both houses, without submission to the voters, to further its purposes and intent. This bill would require a person to demonstrate 3 years of continuous California residency prior to the date of application before being issued a license under either AUMA or MCRSA. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Sections 19322 and 26054.1 of the Business and Professions Code, relating to cannabis.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

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## AB 350 (Salas D) Marijuana edibles: appealing to children.

- **Current Text:** Introduced: 2/8/2017
- **Current Analysis:**
- **Status:** 3/27/2017-Referred to Com. on HEALTH.
- **Is Urgency:** N
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of marijuana for nonmedical purposes by people 21 years of age and older. AUMA prohibits marijuana products that are designed to be appealing to children or easily confused with commercially sold candy or foods that do not contain marijuana. This bill would specify that a marijuana product is deemed to be appealing to children or easily confused with commercially sold candy if it is in the shape of a person, animal, insect, fruit, or in another shape normally associated with candy, but would not prohibit a licensee from making an edible marijuana product in the shape of the licensee's logo. This bill contains other related provisions and other existing laws.
- **Laws:** An act to add Section 26131 to the Business and Professions Code, relating to marijuana.
- **Calendar:** 5/9/2017 1:30 p.m. - State Capitol, Room 4202 ASSEMBLY HEALTH, WOOD, Chair

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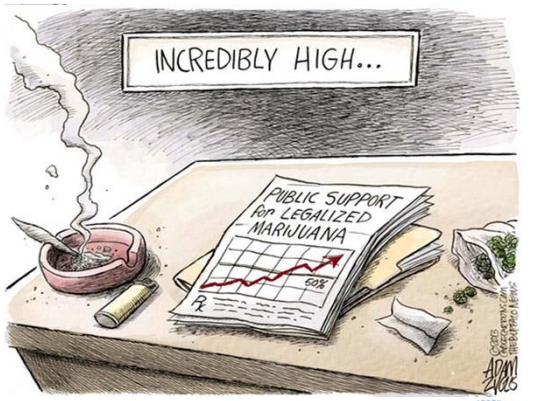


## AB 389 (Salas D) Marijuana: consumer guide.

- **Current Text:** Introduced: 2/9/2017
- **Current Analysis:** 04/24/2017 Assembly Business And Professions *(text 2/9/2017)*
- **Status:** 3/27/2017-Referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** The Medical Cannabis Regulation and Safety Act (MCRSA) provides for the licensure and regulation of medical marijuana. The Control, Regulate and Tax Adult Use of Marijuana Act of 2016 (AUMA), an initiative measure enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, authorizes the consumption of nonmedical marijuana by persons over 21 years of age and provides for the licensure and regulation of certain commercial nonmedical marijuana activities. AUMA establishes the administrative and enforcement responsibilities of the Bureau of Marijuana, within the Department of Consumer Affairs, and the Director of Consumer Affairs with regard to both AUMA and MCRSA. This bill would require the bureau, by July 1, 2018, to establish and make available on its Internet Web site a consumer guide to educate the public on the regulation of medical and nonmedical marijuana.
- **Laws:** An act to add Chapter 2.5 (commencing with Section 26025) to Division 10 of the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

## AB 416 (Mathis R) Cannabis.

- **Current Text:** Introduced: 2/9/2017
- **Current Analysis:**
- **Status:** 2/10/2017-From printer. May be heard in committee March 12.
- **Is Urgency:** N
- **Summary:** The Compassionate Use Act of 1996, an initiative measure enacted by the approval of Proposition 215 at the November 5, 1996, statewide general election, exempts from specified criminal penalties the possession or cultivation of medical marijuana by a patient or primary caregiver for the patient's personal medical purposes. The Medical Cannabis Regulation and Safety Act (MCRSA) authorizes a person who obtains both a state license under the MCRSA and the relevant local license to engage in commercial medical cannabis activity pursuant to those licenses, as specified. This bill would state the intent of the Legislature to enact legislation relating to CBD-enriched cannabis. This bill contains other existing laws.
- **Laws:** An act relating to cannabis.

## AB 420 (Wood D) Marijuana and medical cannabis: advertisements: license number disclosure.

- **Current Text:** Introduced: 2/9/2017
- **Current Analysis:** 04/17/2017 Assembly Business And Professions *(text 2/9/2017)*
- **Status:** 4/19/2017-From committee: Do pass and re-refer to Com. on APPR. (Ayes 15. Noes
- 0.) (April 18). Re-referred to Com. on APPR.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA), authorizes a person who obtains both a state license under MCRSA and the applicable local license to engage in commercial medical cannabis activity pursuant to those licenses, as specified. This bill would require an advertisement for the sale of medical cannabis or medical cannabis products to identify the MCRSA licensee responsible for its content by including, at a minimum, the license number of the MCRSA licensee. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Section 26151 of, and to add Section 19327.3 to, the Business and Professions Code, relating to marijuana.

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## AB 729 (Gray D) Nonmedical marijuana: licensee regulation.

- **Current Text:** Introduced: 2/15/2017
- **Current Analysis:**
- **Status:** 3/27/2017-Referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** (1)Existing law, the California Uniform Controlled Substances Act, makes various acts involving marijuana a crime except as authorized by law. Existing law, the Control,
- Regulate and Tax Adult Use of Marijuana Act (AUMA), added by Proposition 64 at the November 8, 2016, statewide general election, authorizes a person 21 years of age or older to possess and use specified amounts of marijuana. AUMA also authorizes a person who obtains a state license under AUMA to engage in commercial marijuana activity, which does not include commercial medical cannabis activity, pursuant to that license and applicable local ordinances. AUMA prohibits a licensee from engaging in specified nonmedical marijuana commercial activities with a person under 21 years of age. AUMA generally divides responsibility for the state licensure and regulation of commercial marijuana activity among the Bureau of Marijuana Control (bureau) within the Department of Consumer Affairs, the Department of Food and Agriculture, and the State Department of Public Health, and requires those state licensing authorities to begin issuing licenses by January 1, 2018. AUMA authorizes legislative amendment of its provisions with a 2/3 vote of both houses of the Legislature, to further its purposes and intent. AUMA also authorizes the Legislature by a majority vote to amend certain provisions of the act to implement specified substantive provisions, provided that the amendments are consistent with and further the purposes and intent of the act. This bill would require a licensing authority to suspend a license for a 3rd or subsequent violation of the prohibition on engaging in nonmedical marijuana commercial activities with a person under 21 years of age if the violation occurs within 36 months of the initial violation. The bill would authorize a licensing authority to revoke a license for a 3rd violation of that provision that occurs within any 36-month period. The bill would specify that these provisions do not limit the authority and discretion of a licensing authority to revoke a license prior to a 3rd violation when the circumstances warrant that penalty. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Sections 26031, 26054, 26070, 26140, and 26152 of, and to add Sections 26036.1, 26141, and 26142 to, the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

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## AB 823 (Chau D) Edible marijuana products: labeling.

- **Current Text:** Amended: 3/15/2017
- **Current Analysis:** 04/21/2017 Assembly Health *(text 3/15/2017)*
- **Status:** 3/27/2017-From committee: Be re-referred to Com. on HEALTH. Re-referred. (Ayes 11. Noes 0.) (March 27). Re-referred to Com. on HEALTH.
- **Is Urgency:** N
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by an initiative statute at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of marijuana for nonmedical purposes by people 21 years of age and older, including edible marijuana products. Existing law requires an edible marijuana product that is in solid form to be delineated or scored into standardized serving sizes if the marijuana product contains more than one serving. This bill would require each single serving of an edible marijuana product to be stamped, marked, or otherwise imprinted directly on the product with a universal symbol, to be designed by the Bureau of Marijuana Control. The bill would specify the required size and visibility of the universal symbol. This bill contains other existing laws.
- **Laws:** An act to amend Section 26130 of the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 1:30 p.m. - State Capitol, Room 4202 ASSEMBLY HEALTH, WOOD, Chair

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## AB 844 (Burke D) California Marijuana Tax Fund: funding for support system navigation services: minimum performance standards.

- **Current Text:** Introduced: 2/16/2017
- **Current Analysis:** 04/21/2017 Assembly Health *(text 2/16/2017)*
- **Status:** 3/27/2017-Referred to Com. on HEALTH.
- **Is Urgency:** N
- **Summary:** (1)Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative statute approved by the voters at the November 8, 2016, statewide general election as Proposition 64, among other things, establishes the California Marijuana Tax Fund as a continuously appropriated fund consisting of specified taxes, interest, penalties, and other amounts imposed by AUMA. AUMA requires, after other specified disbursements are made from the fund, the Controller to disburse funds to the Governor's Office of Business and Economic Development, also known as GO-Biz. AUMA requires GO-Biz, in consultation with other specified state entities, to administer grants to qualified community-based nonprofit organizations to support job placement, mental health treatment, substance use disorder treatment, system navigation services, legal services, and linkages to medical care, as specified. This bill would amend AUMA by requiring applicants for grants to support system navigation services, as described in AUMA, to meet specific minimum performance standards as a condition of grant eligibility, including, among other standards, operate 24 hours per day, 7 days a week, and 365 days a year. This bill contains other related provisions and other existing laws.
- **Laws:** An act to add Section 11761 to the Health and Safety Code, relating to marijuana.
- **Calendar:** 4/25/2017 1:30 p.m. - State Capitol, Room 4202 ASSEMBLY HEALTH, WOOD, Chair

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## AB 845 (Wood D) Cannabidiol.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:** 04/14/2017 Assembly Health *(text 3/28/2017)*
- **Status:** 4/19/2017-From committee: Do pass and re-refer to Com. on APPR. (Ayes 14. Noes 0.) (April 18). Re-referred to Com. on APPR.
- **Is Urgency:** Y
- **Summary:** Existing law, the California Uniform Controlled Substances Act, classifies controlled substances into 5 designated schedules, with the most restrictive limitations generally placed on controlled substances classified in Schedule I, and the least restrictive limitations generally placed on controlled substances classified in Schedule V. Existing law places marijuana in Schedule I. Cannabidiol is a compound found in marijuana. This bill, if one of specified changes in federal law regarding the controlled substance cannabidiol occurs, would provide that a physician who prescribes and a pharmacist who dispenses a product composed of cannabidiol, in accordance with federal law, is in compliance with state law governing those acts. The bill would also provide that upon the effective date of one of those changes in federal law regarding cannabidiol, the prescription, furnishing, dispensing, transfer, possession, or use of that product in accordance with federal law is for a legitimate medical purpose and is authorized pursuant to state law. This bill contains other related provisions and other existing laws.
- **Laws:** An act to add Section 11150.2 to the Health and Safety Code, relating to controlled substances, and declaring the urgency thereof, to take effect immediately.
- **Calendar:** 4/26/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY APPROPRIATIONS, GONZALEZ FLETCHER, Chair

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## AB 903 (Cunningham R) California Marijuana Tax Fund: California Highway Patrol.

- **Current Text:** Amended: 4/19/2017
- **Current Analysis:** 04/24/2017 Assembly Public Safety *(text 4/19/2017)*
- **Status:** 4/20/2017-Re-referred to Com. on PUB. S.
- **Is Urgency:** N
- **Summary:** (1)Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative statute approved by the voters at the November 8, 2016, statewide general election as Proposition 64, among other things, establishes the California Marijuana Tax Fund as a continuously appropriated fund consisting of specified taxes, interest, penalties, and other amounts imposed by AUMA. AUMA requires, after other specified disbursements are made from the fund, the Controller to disburse the sum of $3,000,000 annually to the Department of the California Highway Patrol beginning fiscal year 2018–2019 until fiscal year 2022–2023, and requires the department to use those funds to, among other things, establish and adopt protocols to determine whether a driver is operating a vehicle while impaired and setting forth best practices to assist law enforcement agencies. This bill would amend AUMA by requiring the department to additionally use its annual appropriation from the fund to study the viability of standards for marijuana impairment and coordinate with research organizations within the state to accomplish, establish, and adopt these protocols and studies. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Section 34019 of the Revenue and Taxation Code, relating to marijuana, and making an appropriation therefor.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 126 ASSEMBLY PUBLIC
- SAFETY, JONES-SAWYER, Chair


## AB 948 (Bonta D) Marijuana: taxation: electronic fund transfer.

- **Current Text:** Amended: 3/29/2017
- **Current Analysis:** 04/14/2017 Assembly Revenue And Taxation *(text 3/29/2017)*
  **Status:** 4/17/2017-VOTE: Do pass as amended and be re-referred to the Committee on [Appropriations]
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA), establishes a program for the licensing and regulation of medical cannabis. Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act of 2016 (AUMA), added by the approval of Proposition 64 at the November 8, 2016, statewide general election, provides for the licensure and regulation of certain commercial nonmedical marijuana activities. This bill would authorize the board to exempt a person required to pay taxes imposed by AUMA, whose estimated tax liability under that law averages $20,000 or more per month, from the requirement to remit amounts due by electronic funds transfer if the board deems it necessary to facilitate collection of amounts due. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Sections 6479.3 and 34013 of the Revenue and Taxation Code, relating to marijuana.

## AB 963 (Gipson D) Taxation: marijuana.

- **Current Text:** Amended: 4/5/2017
- **Current Analysis:** 04/21/2017 Assembly Revenue And Taxation *(text 4/5/2017)*
- **Status:** 4/18/2017-From committee: Do pass and re-refer to Com. on REV. & TAX. (Ayes 9. Noes 1.) (April 18). Re-referred to Com. on REV. & TAX.
- **Is Urgency:** N
- **Summary:** (1)The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative measure approved as Proposition 64 at the November 8, 2016, statewide general election, commencing January 1, 2018, imposes an excise tax on the purchase of marijuana and marijuana products, as defined, and a separate cultivation tax on marijuana that enters the commercial market, and requires revenues from those taxes, interest, penalties, and other related amounts to be deposited into the California Marijuana Tax Fund, which is continuously appropriated for specified purposes pursuant to a specified schedule. AUMA provides for the administration of both taxes by the State Board of Equalization (board) and requires persons required to be licensed involved in the cultivation and retail sale of marijuana or marijuana products to obtain a separate permit from the board. Under AUMA, a violation of provisions relating to these taxes is a crime unless otherwise specified. This bill would provide for the suspension or revocation of those permits, would authorize the board to deny an application for a permit if the applicant had previously been issued a permit that was suspended or revoked, among other reasons, and would set forth the process for appealing permit suspensions, revocations, and application denials. The bill would also impose specific criminal penalties, including fines and imprisonment, for certain violations of the provisions relating to the cultivation and excise taxes on marijuana. By modifying the scope of a crime and imposing new crimes, the bill would impose a state-mandated local program. As revenues from the fines imposed by the bill would be deposited into the California Marijuana Tax Fund, a continuously appropriated fund, this bill would make an appropriation. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Sections 6592, 6901, 34010, 34011, 34012, 34013, 34014, 34015, 34016, 34018, and 34019 of, to add Sections 6369.6, 6471.5, 34011.51, 34011.52, 34011.53,
- 34011.54, 34011.55, 34011.56, 34011.57, 34013.1, 34013.2, 34014.1, 34016.05, 34016.1, 34016.11, 34016.12, 34016.13, 34016.14, and 34016.15 to, and to add Article 1.7 (commencing with Section 6480.50) to Chapter 5 of Part 1 of Division 2 of, the Revenue and Taxation Code, relating to taxation, and making an appropriation therefor.


## AB 1002 (Cooley D) Center for Cannabis Research.

- **Current Text:** Amended: 4/19/2017
- **Current Analysis:** 04/24/2017 Assembly Business And Professions *(text 4/19/2017)*
- **Status:** 4/20/2017-Re-referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** (1)Existing law authorizes the creation by the University of California of the California Marijuana Research Program, the purpose of which is to develop and conduct studies intended to ascertain the general medical safety and efficacy of administering marijuana as part of a medical program and, if found valuable, to develop medical guidelines for the appropriate administration and use of marijuana. Existing law authorizes the program to conduct focused controlled clinical trials on the usefulness of marijuana on specified conditions, including cancer and glaucoma. This bill would rename the program the Center for Cannabis Research and would expand the purview of the program to include the study of naturally occurring constituents of cannabis and synthetic compounds that have effects similar to naturally occurring cannabinoids. The bill would authorize the program to cultivate cannabis to be used exclusively for research purposes and to contract with a private entity to provide expertise in cultivating medical cannabis. The bill would also authorize the controlled clinical trials to focus on examining testing methods for detecting harmful contaminants in marijuana, including mold and bacteria. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Sections 2525.1 and 19354 of the Business and Professions Code, to amend Section 11362.9 of the Health and Safety Code, and to amend Section 34019 of the Revenue and Taxation Code, relating to cannabis.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

## AB 1090 (Cunningham R) Marijuana use: location restrictions.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:** 04/21/2017 Assembly Health *(text 3/28/2017)*
- **Status:** 3/29/2017-Re-referred to Com. on HEALTH.
- **Is Urgency:** N
- **Summary:** The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative statute enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, authorizes a person 21 years of age or older to possess and use specified amounts of marijuana. AUMA specifies that this authorization is not construed to permit a person to smoke marijuana or marijuana products within 1,000 feet of a school, day care center, or youth center while children are present at those locations. AUMA also specifies that possessing, smoking, or ingesting marijuana or marijuana products in or upon the grounds of a school, day care center, or youth center while children are present is not permitted. AUMA makes a violation of these location restrictions punishable as an infraction or a misdemeanor, as specified. AUMA authorizes the Legislature to amend its provisions with a 2/3 vote of each house of the Legislature, provided that the amendments are consistent with and further the purposes and intent of the act. This bill would prohibit the possession, smoking, or ingesting of marijuana around a school, day care center, or youth center, as specified, regardless of whether children are present. By expanding the scope of a crime, this bill would impose a state-mandated local program. This bill contains other existing laws.
- **Laws:** An act to amend Section 11362.3 of the Health and Safety Code, relating to marijuana.
- **Calendar:** 4/25/2017 1:30 p.m. - State Capitol, Room 4202 ASSEMBLY HEALTH, WOOD, Chair


## AB 1096 (Bonta D) Marijuana: agreements with tribal governments.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:**
- **Status:** 4/19/2017-In committee: Set, first hearing. Hearing canceled at the request of author. **Is Urgency:** N
- **Summary:** The Compassionate Use Act of 1996, an initiative measure enacted by the approval of Proposition 215 at the November 5, 1996, statewide general election, allows the use of marijuana for medical purposes. The Medical Marijuana Regulation and Safety Act, enacted by the Legislature, provides for the state licensure and regulation of commercial medical cannabis activities by the Department of Consumer Affairs, the Department of Food and Agriculture, or the State Department of Public Health, as specified. This bill would authorize the Governor to enter into agreements concerning medical and recreational marijuana with a federally recognized sovereign Indian tribe, as defined. The bill would authorize these agreements to include provisions regulating the activities of a licensee operating on and off the land of a federally recognized sovereign Indian tribe. The bill would require these agreements to include a provision requiring an individual conducting marijuana business activity on tribal land to meet the state and local licensure requirements, as specified, that are required of a licensee operating within the jurisdiction of the local government in which the tribal land is located. The bill would authorize the Governor to delegate the authority to negotiate agreements to the Director of the Bureau of Marijuana Control. This bill contains other existing laws.
- **Laws:** An act to add Chapter 22 (commencing with Section 26212) to Division 10 of the Business and Professions Code, relating to marijuana.

## AB 1135 (Wood D) California Marijuana Tax Fund.

- **Current Text:** Introduced: 2/17/2017
- **Current Analysis:** 04/14/2017 Assembly Health *(text 2/17/2017)*
- **Status:** 4/19/2017-From committee: Do pass and re-refer to Com. on APPR. (Ayes 13. Noes 0.) (April 18). Re-referred to Com. on APPR.
- **Is Urgency:** N
- **Summary:** Existing law establishes the California Marijuana Tax Fund, which is funded by the taxes paid on nonmedical marijuana, to be used for specified purposes. Existing law, after other specified disbursements, requires the Controller to disburse 60% of the remaining funds to the State Department of Health Care Services for use for specified purposes, including prevention and early intervention services to recognize and reduce risks related to substance use and early signs of problematic use and substance use disorders. This bill would require the State Department of Public Health and the State Department of Education to establish an inclusive public stakeholder process to seek input from stakeholders to determine a disbursement formula for the funds provided to the State Department of Health Care Services from the California Marijuana Tax Fund and would require the findings of the stakeholder meetings to be given to the State Department of Health Care Services and considered by that department when determining funding priorities for those moneys.
- **Laws:** An act to add Section 34019.2 to the Revenue and Taxation Code, relating to marijuana.

BBK BEST BEST & KRIEGER ATTORNEYS AT LAW

## AB 1159 (Chiu D) Marijuana: legal services.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:**
- **Status:** 3/29/2017-Re-referred to Com. on JUD.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act, establishes a program for the licensing and regulation of medical cannabis. Existing law authorizes a city, county, or city and county to adopt an ordinance that establishes additional standards, requirements, and regulations for local licenses and permits for commercial medical cannabis activity and provides that statewide standards, requirements, and regulations are the minimum standards for licensure. The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative measure enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, authorizes the consumption of nonmedical marijuana by persons over 21 years of age and provides for the licensure and regulation of certain commercial nonmedical marijuana activities. This bill would provide that medical cannabis or commercial marijuana activity conducted in compliance with state law and any applicable local standards and regulations is a lawful object of a contract, is not contrary to an express policy or provision of law or to good morals, and is not against public policy. Existing law grants a lawyer's client a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and lawyer, as defined, if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder, or the person who was the lawyer at the time of the confidential communication, as specified. Existing law excepts communications from the privilege if the services of the lawyer were sought or obtained to enable or aid anyone to commit, or plan to commit, a crime or fraud. This bill would provide that the above exception does not apply to legal services rendered in compliance with state or local laws on medical cannabis or adult use of marijuana and that confidential communications provided for the purpose of rendering those services are confidential communications, as specified. This bill contains other existing laws.
- **Laws:** An act to add Section 1550.5 to the Civil Code, and to amend Section 956 of the Evidence Code, relating to marijuana.

BBK BEST BEST & KRIEGER ATTORNEYS AT LAW

## AB 1244 (Voepel R) Consumer product safety: butane gas.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:**
- **Status:** 3/30/2017-Re-referred to Com. on P. & C.P. pursuant to Assembly Rule 96.
- **Is Urgency:** N
- **Summary:** Existing law prohibits the distribution or sale of certain products, or products containing certain chemicals which are hazardous to the health or safety of consumers. This bill would prohibit the distribution or sale of any butane gas or product containing butane gas which does not have an odorant added.
- **Laws:** An act to add Article 6 (commencing with Section 108670) to Chapter 5 of Part 3 of Division 104 of the Health and Safety Code, relating to consumer product safety.

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## AB 1254 (Wood D) Production or cultivation of a controlled substance: civil and criminal penalties.

- **Current Text:** Amended: 3/21/2017
- **Current Analysis:** 04/21/2017 Assembly Water, Parks And Wildlife *(text 3/21/2017)* **Status:** 3/22/2017-Re-referred to Com. on W.,P., & W.
- **Is Urgency:** N
- **Summary:** (1)Existing law makes a person found to have violated specified provisions of law generally protecting fish and wildlife, water, or other natural resources in connection with the production or cultivation of a controlled substance liable for a civil penalty in addition to any penalties imposed by any other law. Existing law authorizes the imposition of larger fines on a person who violates one of these provisions on specified types of public or private land or while the person was trespassing on public or private land than on a person who violates one of these provisions on land that the person owns, leases, or otherwise uses or occupies with the consent of the landowner. With respect to a violation that occurs on land that a person owns, leases, or otherwise uses or occupies with the consent of the landowner, existing law makes each day that a violation occurs or continues to occur a separate violation. This bill would also make each day that a violation occurs or continues to occur on the specified types of public or private land or while the person was trespassing on public or private land a separate violation. This bill contains other existing laws.
- **Laws:** An act to amend Section 12025 of the Fish and Game Code, and to amend Section 1847 of the Water Code, relating to controlled substances.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 444 ASSEMBLY WATER, PARKS AND WILDLIFE, GARCIA, Chair

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## AB 1410 (Wood D) Taxation: marijuana cultivation tax.

- **Current Text:** Amended: 4/4/2017
- **Current Analysis:** 04/21/2017 Assembly Revenue And Taxation *(text 4/4/2017)*
- **Status:** 4/5/2017-Re-referred to Com. on REV. & TAX.
- **Is Urgency:** N
- **Summary:** The Control, Regulate and Tax Adult Use of Marijuana Act, an initiative measure approved as Proposition 64 at the November 8, 2016, statewide general election, on and after January 1, 2018, imposes a cultivation tax, which the State Board of Equalization administers and collects pursuant to the Fee Collection Procedures Law, on all harvested marijuana that enters the commercial market upon all persons required to be licensed to cultivate marijuana pursuant to that act and the Medical Cannabis Regulation and Safety Act. The Control, Regulate and Tax Adult Use of Marijuana Act requires, on or before the last day of the month following each quarterly period, a tax return for the cultivation tax for the preceding quarterly period to be filed with the State Board of Equalization by each person required to be licensed for cultivation under that act and the Medical Cannabis Regulation and Safety Act. Under existing law, a violation of provisions relating to the cultivation tax is a crime unless otherwise specified. This bill, at the time that any payment or consideration is tendered to the taxpayer, or at the time of completion of all quality assurance, inspection, and testing or when that quality assurance, inspection, and testing should have been completed, whichever is earlier, would instead authorize, if requested by the taxpayer, a person required to be licensed as a distributor under the act and the Medical Cannabis Regulation and Safety Act to collect the cultivation tax from the taxpayer and give to the taxpayer a receipt in the manner and form prescribed by the board, except as specified. By expanding the application of the Fee Collection Procedures Law, which imposes criminal penalties for various acts, this bill would impose a state-mandated local program. This bill would provide that the tax that the person required to be licensed as a distributor collected, and any amount unreturned to the taxpayer which is not tax but was collected from the taxpayer under the representation by the person required to be licensed as a distributor that it was tax, constitute debts owed to the state by the person required to be licensed as a distributor. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Sections 34012, 34014, and 34015 of, and to add Section 34012.5 to, the Revenue and Taxation Code, relating to taxation.

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## AB 1527 (Cooley D) State and local marijuana regulatory agencies: employees.

- **Current Text:** Introduced: 2/17/2017
- **Current Analysis:** 04/24/2017 Assembly Business And Professions *(text 2/17/2017)*
- **Status:** 3/27/2017-Referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** Existing law, the California Uniform Controlled Substances Act, makes various acts involving marijuana a crime except as authorized by law. Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA), authorizes a person who obtains both a state license under MCRSA and an authorization under the relevant local license regulations to engage in commercial medical cannabis activity pursuant to those licenses, as specified. MCRSA generally divides responsibility for the state licensure and regulation of commercial medical cannabis activity between the Bureau of Marijuana Control (bureau) within the Department of Consumer Affairs, which serves as the lead state agency and administers provisions relating to the transportation, storage unrelated to manufacturing activities, testing, distribution, and sale of medical cannabis; the Department of Food and Agriculture, which administers provisions relating to the cultivation of medical cannabis; and the State Department of Public Health, which administers provisions relating to the manufacturing of medical cannabis. MCRSA specifies that criminal penalties continue to apply to an unlicensed person engaging in cannabis activity in violation of MCRSA. This bill would prohibit a former employee of the bureau, a licensing authority, the panel, or a local jurisdiction who had specified regulatory or licensing responsibilities from being employed by a person or entity licensed under AUMA or MCRSA for a period of one year from the last date of employment by the bureau, licensing authority, panel, or local jurisdiction. The bill would prohibit a person or entity licensed under AUMA or MCRSA from employing a former employee of the bureau, a licensing authority, the panel, or a local jurisdiction who had specified regulatory or licensing responsibilities within one year of the last date of employment by the bureau, licensing authority, panel, or local jurisdiction. The bill would authorize the bureau or the licensing authority to suspend immediately the license of a licensee who violates this provision and to investigate and determine whether to revoke the license and whether to bar the licensee, or any person or entity acting as an agent of the licensee, from obtaining a license in the future. The bill would specify that a violation of these employment restrictions is not a crime. This bill contains other related provisions and other existing laws.
- **Laws:** An act to add Sections 19302.3, 19328.3, 26012.3, 26041.3, and 26052.3 to the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

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## AB 1578 (Jones-Sawyer D) Marijuana and cannabis programs: cooperation with federal authorities.

- **Current Text:** Amended: 4/17/2017
- **Current Analysis:** 04/21/2017 Assembly Floor Analysis *(text 4/17/2017)*
- **Status:** 4/20/2017-Read second time. Ordered to third reading.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA) provides for the licensure and regulation of medical cannabis, which responsibility is generally divided between the Bureau of Marijuana Control within the Department of Consumer Affairs, the Department of Food and Agriculture, and the State Department of Public Health. The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative measure enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, provides for the licensure and regulation of commercial nonmedical marijuana activities, which responsibility is also generally divided between those same state entities. Existing law requires the State Department of Public Health to establish and maintain a voluntary program for the issuance of identification cards to qualified patients who have a physician's recommendation for medical marijuana. Existing law requires the counties to process applications and maintain records for the identification card program. This bill would prohibit a state or local agency, as defined, from taking certain actions without a court order signed by a judge, including using agency money, facilities, property, equipment, or personnel to assist a federal agency to investigate, detain, detect, report, or arrest a person for commercial or noncommercial marijuana or medical cannabis activity that is authorized by law in the State of California and transferring an individual to federal law enforcement authorities for purposes of marijuana enforcement.
- **Laws:** An act to add Section 11362.6 to the Health and Safety Code, relating to marijuana.
- **Calendar:** 4/27/2017 #41 ASSEMBLY THIRD READING FILE - ASSEMBLY BILLS

## AB 1606 (Cooper D) Edible marijuana products.

- **Current Text:** Amended: 4/20/2017
- **Current Analysis:** 04/24/2017 Assembly Business And Professions *(text 4/20/2017)*
- **Status:** 4/24/2017-Re-referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of marijuana for nonmedical purposes by people 21 years of age and older. AUMA prohibits the sale of marijuana or marijuana products unless a representative sample of the marijuana or marijuana product has been tested by a certified testing service to determine specified facts, including whether the chemical profile of the sample conforms to the label and whether the presence of contaminants exceeds specified levels. Existing law requires destruction of harvested batches whose testing samples indicate noncompliance with health and safety standards promulgated by the State Department of Public Health, unless remedial measures can bring the marijuana or marijuana products into compliance. This bill would additionally require the certified testing service to test for uniform disbursement of cannabinoids throughout the product and the accuracy of the labeled dosage. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Section 26101 of the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

## AB 1627 (Cooley D) Adult Use Marijuana Act: testing laboratories.

- **Current Text:** Introduced: 2/17/2017
- **Current Analysis:** 04/24/2017 Assembly Business And Professions *(text 2/17/2017)*
- **Status:** 3/27/2017-Referred to Com. on B. & P.
- **Is Urgency:**
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of marijuana for nonmedical purposes by people 21 years of age and older. Under existing law, the Bureau of Marijuana Control is responsible for licensing and regulating retail sales, distribution, and transportation, and the State Department of Public Health is responsible for licensing and regulating testing laboratories. Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA), regulates the cultivation, distribution, and use of cannabis for medical purposes. Under that act, the Bureau of Marijuana Control is responsible for licensing and regulating retail sales, distribution, transportation, and testing laboratories. This bill would transfer the regulation of testing laboratories under AUMA from the State Department of Public Health to the bureau. AUMA authorizes the Legislature to amend, by a majority vote, certain provisions of the act to implement specified substantive provisions, provided that the amendments are consistent with and further the purposes and intent of the act. This bill would declare that its provisions implement specified substantive provisions of AUMA. The bill would also declare that its provisions further specified purposes and the intent of that act.
- **Laws:** An act to amend Sections 26001, 26012, 26100, 26101, and 26104 of the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

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## AB 1652 (Kalra D) Cannabis: distribution and transportation: evaluation.

- **Current Text:** Amended: 3/28/2017
- **Current Analysis:**
- **Status:** 3/29/2017-Re-referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act, establishes a program for the licensing and regulation of medical cannabis. Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act of 2016, added by an initiative statute at the November 8, 2016, statewide general election, authorizes the possession and use of marijuana by persons 21 years of age and over and provides for the licensure and regulation of certain commercial nonmedical marijuana activities. This bill would require the Legislative Analyst's Office to evaluate the existing framework of medicinal cannabis and nonmedical marijuana. The bill would require the Legislative Analyst's Office, in consultation with stakeholders, to report to the Legislature by June 1, 2018, on whether additional changes are necessary to help alleviate the unlawful commercial distribution and transportation of medical cannabis and nonmedical marijuana.
- **Laws:** An act to add and repeal Section 11362.6 of the Health and Safety Code, relating to cannabis.

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## AB 1686 (Gloria D) Nonmedical marijuana and medical cannabis: licenses: application: labor peace agreement.

- **Current Text:** Amended: 4/3/2017
- **Current Analysis:** 04/24/2017 Assembly Business And Professions *(text 4/3/2017)*
- **Status:** 4/17/2017-From committee: Be re-referred to Com. on B. & P. Re-referred. (Ayes 9. Noes 0.) (April 17). Re-referred to Com. on B. & P.
- **Is Urgency:** N
- **Summary:** The Medical Cannabis Regulation and Safety Act (MCRSA) requires a person to obtain both a local and state license to engage in commercial medical cannabis activities, but authorizes, until January 1, 2018, a facility or entity that is operating in compliance with local laws to continue in operation until its application for licensure is approved or denied. MCRSA generally divides responsibility for the state licensure and regulation of commercial medical cannabis activity among the Department of Consumer Affairs, the Department of Food and Agriculture, and the State Department of Public Health. The Control, Regulate and Tax Adult Use of Marijuana Act of 2016 (AUMA), an initiative measure approved as Proposition 64 at the November 8, 2016, statewide general election, authorizes a person who obtains a state license under AUMA to engage in commercial marijuana activity, which does not include commercial medical cannabis activity, pursuant to that license and applicable local ordinances. AUMA generally divides responsibility for the state licensure and regulation of commercial marijuana activity among the Department of Consumer Affairs, the Department of Food and Agriculture, and the State Department of Public Health and requires those state licensing authorities to begin issuing licenses by January 1, 2018. AUMA authorizes the Legislature to amend its provisions with a 2/3 vote of both houses to further its purposes and intent. MCRSA requires an applicant for a MCRSA license with 20 or more employees to provide the licensing authority with a statement that the applicant will enter into, or demonstrate that it has already entered into, and abide by the terms of a labor peace agreement. MCRSA requires an applicant for a MCRSA license to provide the licensing authority with a statement, signed by the applicant under penalty of perjury, that the information provided is complete, true, and accurate. AUMA requires an applicant for an AUMA license to comply with these requirements. This bill would require that the statement relating to the labor peace agreement be signed, notarized, and submitted electronically. This bill would declare that its provisions implement specified substantive provisions of AUMA. The bill would also declare that its provisions further specified purposes and intent of that act.
- **Laws:** An act to amend Section 19322 of the Business and Professions Code, relating to marijuana.
- **Calendar:** 4/25/2017 9 a.m. - State Capitol, Room 4202 ASSEMBLY BUSINESS AND PROFESSIONS, LOW, Chair

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## SB 65 (Hill D) Vehicles: alcohol and marijuana: penalties.

- **Current Text:** Amended: 4/17/2017
- **Current Analysis:** 04/24/2017 Senate Public Safety *(text 4/17/2017)*
- **Status:** 4/17/2017-From committee with author's amendments. Read second time and amended. Re-referred to Com. on PUB. S.
- **Is Urgency:** N
- **Summary:** Existing law makes it an infraction to drink any alcoholic beverage while driving a motor vehicle upon any highway or on other specified lands. Existing law also prohibits a driver or passenger from drinking any alcoholic beverage while in a motor vehicle upon a highway, and makes a violation of this provision punishable as an infraction. This bill would instead make drinking an alcoholic beverage or smoking or ingesting marijuana or any marijuana product while driving, or while riding as a passenger in, a motor vehicle being driven upon a highway or upon specified lands punishable as an infraction. This bill would authorize a court to order a defendant to attend and complete a state-licensed driving-under-the-influence program in addition to those penalties. This bill would also provide that a person under 21 years of age who has any detectible quantity, as defined, of delta-9-tetrahydrocannabinol in his or her body would be subject to the same license suspension, except as specified.
- **Laws:** An act to amend Sections 13388, 13557, 23136, 23220, and 23221 of the Vehicle Code, relating to vehicles.
- **Calendar:** 4/25/2017 8:30 a.m. - Room 3191 SENATE PUBLIC SAFETY, SKINNER, Chair


## SB 148 (Wiener D) State Board of Equalization: counties: cannabis-related business: cash payments.

- **Current Text:** Amended: 4/5/2017
- **Current Analysis:** 04/24/2017 Senate Appropriations *(text 4/5/2017)*
- **Status:** 4/24/2017-April 24 hearing: Placed on APPR. suspense file.
- **Is Urgency:** N
- **Summary:** (1)Existing law, the Compassionate Use Act of 1996, an initiative measure enacted by the approval of Proposition 215 at the November 5, 1996, statewide general election, exempts from specified criminal penalties the possession or cultivation of medical marijuana by patients and primary caregivers. The Control, Regulate and Tax Adult Use of Marijuana Act of 2016 (AUMA) an initiative measure enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, provides for the licensure and regulation of commercial adult marijuana activities by various state agencies. The Medical Cannabis Regulation and Safety Act (MCRSA) provides for the licensure and regulation of commercial medical cannabis activity by various state entities. This bill would enact the Cannabis State Payment Collection Law and would authorize the State Board of Equalization or a county to collect cash payments from cannabis-related businesses for a state agency that administers fees, fines, penalties, taxes, or other charges payable by a cannabis-related business, if that state agency has entered into an agreement with the board or county. This bill would require a county to collect only if both the board of supervisors of the county and the county tax collector or county treasurer-tax collector approves of entering into an agreement with a state agency to make those collections. The bill would similarly authorize the board to enter into an agreement with a county to collect cash payments from cannabis-related businesses for fees, fines, penalties, taxes, or other charges that are payable to the county. The bill would require the agreement to include specified provisions, including that the board or county transmit the collected moneys to the Treasurer to be deposited in the State Treasury to the credit of the funds or accounts in which the fees, fines, penalties, taxes, or other charges are otherwise required by law to be deposited, as specified. This bill contains other related provisions and other existing laws.
- **Laws:** An act to add Section 15630 to the Government Code, and to amend Sections 6479.3 and 34015 of, to add Sections 7204.5 and 7270.10 to, to add Part 13.5 (commencing with Section 31001) to Division 2 of, and to repeal the heading of Part 13.5 (commencing with Section 31020) of Division 2 of, the Revenue and Taxation Code, relating to cannabis, and making an appropriation therefor.

## SB 162 (Allen D) Marijuana and medical cannabis: marketing.

- **Current Text:** Amended: 4/19/2017
- **Current Analysis:** 04/13/2017 Senate Business, Professions And Economic Development *(text 3/28/2017)*
- **Status:** 4/19/2017-Read second time and amended. Re-referred to Com. on APPR.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act (MCRSA), authorizes a person who obtains both a state license under MCRSA and the applicable local license to engage in commercial medical cannabis activity pursuant to those licenses, as specified. This bill would prohibit medical cannabis and nonmedical marijuana licensees from advertising using branded merchandise, as specified. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Section 26151 of, and to add Article 12 (commencing with Section 19349) to Chapter 3.5 of Division 8 of, the Business and Professions Code, relating to marijuana.

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## SB 175 (McGuire D) Marijuana: county of origin: marketing and advertising.

- **Current Text:** Amended: 3/16/2017
- **Current Analysis:** 04/19/2017 Senate Floor Analyses *(text 3/16/2017)*
- **Status:** 4/20/2017-Read third time. Passed. (Ayes 36. Noes 4.) Ordered to the Assembly. In Assembly. Read first time. Held at Desk.
- **Is Urgency:** N
- **Summary:** The Medical Cannabis Regulation and Safety Act (MCRSA) provides for the licensure and regulation of medical marijuana, for which responsibility is generally divided between the Bureau of Marijuana Control within the Department of Consumer Affairs, the Department of Food and Agriculture, and the State Department of Public Health. The Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), an initiative measure enacted by the approval of Proposition 64 at the November 8, 2016, statewide general election, provides for the licensure and regulation of commercial nonmedical marijuana activities, for which responsibility is also generally divided between those same state entities. Both MCRSA and AUMA prohibit the use of the name of a California county in the labeling, marketing, or packaging of medical marijuana products or nonmedical marijuana products unless the marijuana contained in the product was grown in that county. This bill would specify that those prohibitions also apply to the advertising of marijuana and include the use of any similar sounding name that is likely to mislead consumers as to the origin of the product. This bill contains other related provisions and other existing laws.
- **Laws:** An act to amend Sections 19332.5 and 26063 of the Business and Professions Code, relating to marijuana.

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## SB 311 (Pan D) Medical cannabis and nonmedical marijuana: testing by a licensee.

- **Current Text:** Introduced: 2/13/2017
- **Current Analysis:** 04/19/2017 Senate Floor Analyses *(text 2/13/2017)*
- **Status:** 4/20/2017-Read third time. Passed. (Ayes 34. Noes 6.) Ordered to the Assembly. In Assembly. Read first time. Held at Desk.
- **Is Urgency:** N
- **Summary:** Existing law, the Medical Cannabis Regulation and Safety Act and the Adult Use of Marijuana Act, requires all cultivators, manufacturers, and licensees holding a producing dispensary license in addition to a cultivation or manufacturing license to send all medical cannabis, medical cannabis products, marijuana, and marijuana products cultivated or manufactured to a distributor for presale quality assurance and inspection by a distributor and for a batch testing by a testing laboratory prior to distribution to a dispensary or retailer. Existing law authorizes a licensee to perform testing on the licensee's premises for the purposes of quality assurance of the product in conjunction with reasonable business operations. This bill would also authorize a licensee to perform testing on the licensee's premises of cannabis or cannabis products obtained from another licensee for the purpose of quality assurance. The bill would specify that onsite testing does not exempt the licensee from the existing requirements of quality assurance testing by a distributor and testing laboratory. **Laws:** An act to amend Section 19326 of the Business and Professions Code, relating to cannabis and marijuana.

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## SB 663 (Nielsen R) Packages and labels of marijuana or marijuana products: children.

- **Current Text:** Introduced: 2/17/2017
- **Current Analysis:** 04/19/2017 Senate Floor Analyses *(text 2/17/2017)*
- **Status:** 4/20/2017-Read third time. Passed. (Ayes 39. Noes 0.) Ordered to the Assembly. In Assembly. Read first time. Held at Desk.
- **Is Urgency:** N
- **Summary:** (1)Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted by the voters at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of marijuana for nonmedical purposes by people 21 years of age and older. AUMA prohibits a marijuana product from being appealing to children or easily confused with commercially sold candy or foods that do not contain marijuana. AUMA requires, prior to delivery or sale at a retailer, marijuana and marijuana products to be labeled and placed in a resealable, child resistant package, and prohibits packages and labels from being attractive to children. This bill would specify that a package or label of marijuana or marijuana products is deemed to be attractive to children if the package or label has specific characteristics, including, among others, resembling any candy, snack food, baked good, or beverage commercially sold without marijuana. This bill contains other related provisions and other existing laws.
- **Laws:** An act to add Section 26123 to the Business and Professions Code, relating to marijuana.

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## SB 698 (Hill D) Driving under the influence: alcohol and marijuana.

- **Current Text:** Amended: 4/17/2017
- **Current Analysis:** 04/24/2017 Senate Public Safety *(text 4/17/2017)*
- **Status:** 4/17/2017-From committee with author's amendments. Read second time and amended. Re-referred to Com. on PUB. S.
- **Is Urgency:** N
- **Summary:** Existing law makes it a crime for a person who has 0.08% or more, by weight, of alcohol in his or her blood to drive a vehicle. Existing law establishes a rebuttable presumption that the person had 0.08% or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08% or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within 3 hours after the driving. This bill would make it a crime for a person who has between 0.04% and 0.07%, by weight, of alcohol in his or her blood and whose blood contains any controlled substance or 5 ng/ml or more of delta-9-tetrahydrocannabinol to drive a vehicle. The bill would make a first violation punishable as an infraction and would make subsequent violations punishable as a misdemeanor. This bill contains other related provisions and other existing laws.
- **Laws:** An act to add Section 23152.1 to the Vehicle Code, relating to driving under the influence.
- **Calendar:** 4/25/2017 8:30 a.m. - Room 3191 SENATE PUBLIC SAFETY, SKINNER, Chair

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## SB 794 (Stern D) Edible marijuana products: labeling and packaging.

- **Current Text:** Amended: 3/29/2017
- **Current Analysis:** 04/20/2017 Senate Business, Professions And Economic Development *(text 3/29/2017)*
- **Status:** 4/7/2017-Set for hearing April 24.
- **Is Urgency:** N
- **Summary:** Existing law, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), enacted as an initiative statute at the November 8, 2016, statewide general election, regulates the cultivation, distribution, and use of marijuana for nonmedical purposes by individuals 21 years of age and older, including edible marijuana products. Existing law requires an edible marijuana product that is in solid form to be delineated or scored into standardized serving sizes if the marijuana product contains more than one serving. This bill would additionally require each single serving of an edible marijuana product to be stamped, marked, or otherwise imprinted directly on the product with a universal symbol that is designed by the Bureau of Marijuana Control. The bill would specify the required size and visibility of the universal symbol. The bill would require edible marijuana products to be sold in packaging that is tamperproof, child resistant, and, if the product contains more than one serving, resealable. AUMA authorizes the Legislature to amend, by a 2/3 vote, certain provisions of the act, provided that the amendments are consistent with, and further the purposes and intent of, the act. This bill would declare that its provisions further specified purposes and the intent of the act.
- **Laws:** An act to amend Section 26130 of the Business and Professions Code, relating to marijuana.

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## SJR 5 (Stone R) Federal rescheduling of marijuana from a Schedule I drug.

- **Current Text:** Amended: 3/30/2017
- **Current Analysis:** 04/05/2017 Senate Floor Analyses *(text 3/30/2017)*
- **Status:** 4/6/2017-Read. Adopted. (Ayes 33. Noes 1.) Ordered to the Assembly. In Assembly. Held at Desk.
- **Is Urgency**:
- **Summary**: This measure would request that the Congress of the United States pass a law to reschedule marijuana or cannabis and its derivatives from a Schedule I drug to an alternative schedule and that the President of the United States sign such legislation.
- **Laws**: Relative to federal rescheduling of marijuana from a Schedule I drug.

## The 2017-18 Budget: Overview of Governor's Cannabis-Related Trailer Bill Legislation

LEGISLATIVE ANALYST'S OFFICE

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## BACKGROUND

☑ **Medical Cannabis Regulation and Safety Act (MCRSA) Passed by Legislature in 2015**

- Implemented via Chapters 688, 689, and 719 of 2015 (AB 243, Wood; AB 266, Bonta; and SB 643, McGuire, respectively) and subsequently modified in 2016 by budget trailer legislation, Chapter 32 of 2016 (SB 837, Committee on Budget and Fiscal Review).
- Created a new regulatory structure for the licensing and enforcement of medical cannabis industry, including cultivators, product manufacturers, distributors, testing laboratories, and dispensaries (retailers).
- Assigned regulatory authority to a new bureau within the Department of Consumer Affairs (bureau) and several state departments, including the California Department of Food and Agriculture (CDFA), the Department of Public Health (DPH), and the Board of Equalization.

## LEGISLATIVE ANALYST'S OFFICE
## BACKGROUND (cont'd)

☑ **Proposition 64 Passed by Voters in November 2016**

- Legalized the use of cannabis for nonmedical purposes by adults age 21 and over.
- Created a new regulatory structure for the licensing and enforcement of nonmedical cannabis similar in many ways to the one created for medical cannabis under MCRSA.

## LEGISLATIVE ANALYST'S OFFICE
## BACKGROUND (cont'd)

☑ **Some Key Differences Exist Between MCRSA and Proposition 64**

- ***Vertical Integration.*** MCRSA generally limits a medical cannabis licensee to holding state licenses in no more than two categories. In contrast, Proposition 64 generally allows a nonmedical cannabis licensee to hold licenses in more than two categories.
- ***Independent Distribution.*** Distributor licensees under MCRSA generally are required to be independent entities that do not hold licenses in other license categories. In contrast, distributor licensees under Proposition 64 generally can hold licenses in other license categories.
- ***Verification of Local Permits.*** MCRSA requires state license applicants to provide proof of a local permit or other permission to operate. In contrast, Proposition 64 prohibits the state from requiring applicants to provide proof of a local permit or other permission to operate. (However, Proposition 64 prohibits the state from issuing a license if it is in conflict with local ordinances or other laws.)

## LEGISLATIVE ANALYST'S OFFICE
## BACKGROUND (cont'd)

☑ **Some Changes to Proposition 64 Can Be Made by the Legislature . . .**

- Proposition 64 allows for modifications to the framework of nonmedical cannabis regulation by a majority vote of the Legislature. Modifications to most of Proposition 64's other provisions, such as those related to taxation and criminal offenses, require a two-thirds vote of the Legislature.
- Under the measure, any legislative changes must be consistent with the proposition's stated intent and further its purposes.

## LEGISLATIVE ANALYST'S OFFICE
## BACKGROUND (cont'd)

☑ **…And Others May Require Voter Approval**

- Changes to Proposition 64 not consistent with its stated intent would have to be approved by voters.
- In some cases, it may be unclear whether specific changes to Proposition 64 would be considered consistent with the measure's intent.

## LEGISLATIVE ANALYST'S OFFICE
## BACKGROUND (cont'd)

☑ **Cannabis Continues to Be Illegal Under Federal Law**

- Under federal law, it is illegal to possess or use cannabis, including for medical use.
- In recent years, the U.S. Department of Justice has chosen not to prosecute most cannabis users and businesses that follow state and local cannabis laws if those laws are consistent with federal priorities, such as preventing cannabis from being taken to other states.
- However, this federal policy could change in the future, which might affect the state's ability to effectively implement regulations on cannabis.

## LEGISLATIVE ANALYST'S OFFICE
## Overview of Governor's Budget Trailer Legislation

☑ **Intended to Reconcile Differences Between Proposition 64 and MCRSA**

- In April 2017, the Governor released trailer bill legislation (TBL) that creates a single regulatory structure for medical and nonmedical cannabis.
- The legislation generally uses Proposition 64 as its foundation, but includes significant provisions from MCRSA. Also, the legislation makes various other policy choices that were not included in either Proposition 64 or MCRSA.
- Includes provisions related to (1) the structure of the cannabis industry, (2) the local permitting process, (3) administrative flexibility, (4) roles and responsibilities of various state agencies, (5) reporting and oversight, as well as (6) various other policy choices.

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## Overview of Governor's Budget Trailer Legislation (cont'd)

☑ **LAO Overarching Comments**

- In general, we find that the concept of aligning MCRSA and Proposition 64 makes sense. However, the Legislature will want to closely evaluate the specifics of the choices made by the administration to ensure that it has provided clear rationales for these changes and that they are consistent with legislative priorities for the regulation of cannabis.
- The Legislature will also want to consider whether proposed changes to Proposition 64 might require voter approval, as well as keep in mind that cannabis remains illegal under federal law.
- We are still in the process of reviewing this recently released language. On the following pages, we outline some of the key choices included in the language and provide some initial thoughts to help guide the Legislature.

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## Structure of the Cannabis Industry

☑ **Proposed TBL Would Affect Industry Structure**

- ***Allows for Vertical Integration, Including Self-Distribution.*** Generally allows for entities to hold multiple license types, with the exception of testing laboratories (consistent with Proposition 64).
- ***Does Not Require California Residency.*** Does not require California residency to obtain or renew a license. (MCRSA did not include a residency requirement. Proposition 64 included a residency requirement through December 31, 2019.)
- ***Prohibits Medical and Nonmedical Activities From Occurring on Same Premises.*** Generally prohibits medical and nonmedical commercial activities from occurring on the same premises (not included in Proposition 64 or MCRSA).

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## Overview of Governor's Budget Trailer Legislation (cont'd)

☑ **Proposed TBL Would Affect Industry Structure (cont'd)**

- ***Limits Number of Medium-Sized Cultivation Licenses.*** Tasks CDFA with limiting the number of medium-sized cultivation licenses, defined as (1) canopy size between 10,000 square feet and 22,000 square feet for indoor or mixed-light grows or (2) up to one acre for outdoor grows (consistent with MCRSA).
- ***Defines Ownership.*** Defines an owner as someone with an ownership interest of 20 percent or more or who otherwise participates in the direction, control, and management of the business (consistent with Proposition 64; MCRSA included a lower ownership threshold). Requires disclosure of a complete list of every person with a financial interest in the entity applying for the license (not included in Proposition 64 or MCRSA).
- ***Market Factors.*** Does not include language from Proposition 64 that requires licensing agencies to consider certain factors when making licensing decisions, such as monopoly power, perpetuation of an illegal market, underage use, or excessive concentration (consistent with MCRSA). Instead, licensing agencies would be required to submit a report in 2023 that identifies any statutory or regulatory changes necessary to address these factors.

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## Overview of Governor's Budget Trailer Legislation (cont'd)

☑ **Analyst's Comments**

- ***Generally Limit Restrictions on Industry Structures.*** In general, greater restrictions on how industries are structured increases costs and can negatively affect competition. Therefore, we generally favor imposing those restrictions only when there is a compelling reason to do so—for example, for health and safety concerns.
- ***Some Choices on Industry Structure Appear Reasonable . . .*** Some of the administration's key choices related to the structure of the industry appear reasonable to us. For example, we generally do not find a compelling reason to prevent entities from holding multiple license types, such as for cultivation, distribution, and retail sale. Additionally, we do not see a strong rationale for only allowing California residents to apply for licenses, which is generally not the practice for other industries.
- ***. . . But Other Choices Raise Possible Concerns.*** We find that other key choices raise potential concerns. For example, it is not clear to us that the state should prohibit medical and nonmedical activities from occurring on the same premises. The administration indicates that this prohibition would help protect medical licensees from federal enforcement. However, to the extent that licensees are concerned about federal enforcement, they can voluntarily choose to operate only in the medical market or to segregate their medical and nonmedical activities. Additionally, we do not find a compelling reason to limit the number of licenses issued for medium-sized grows, particularly in the long term.

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## Local Permitting Process

☑ ***TBL Proposes to Change How State Will Verify Licensee Compliance With Local Laws.*** To address the difference in the verification of local permits discussed above, the administration proposes a multi-prong approach (described below). The proposed changes are different from both MCRSA and Proposition 64.

- ***Creates Incentives for Local Governments to Establish Permit Systems Through California Environmental Quality Act (CEQA).*** Creates a CEQA exemption for local governments that adopt ordinances or regulations related to cannabis regulation under certain circumstances. (CEQA is a state environmental law that requires state and local agencies to analyze and publicly disclose potential environmental impacts resulting from their discretionary decisions and adopt feasible measures to mitigate those impacts.)
- ***Requires License Applicant Compliance With CEQA.*** In cases where local governments do not have permitting systems for cannabis but allow for cannabis activities, requires license applicants to comply with CEQA.
- ***Requires Certain Information From Local Jurisdictions.*** Requires local jurisdictions to provide the state with copies of ordinances related to commercial cannabis activity and local contact information.

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## Local Permitting Process (cont'd)

☑ **Analyst's Comments**

- ***Goal Makes Sense, but Questions on Approach Remain.*** It is important for licensing agencies to have access to the necessary information to determine whether applicants are operating in compliance with local ordinances and other laws. The administration takes an indirect approach to addressing this issue. We still have questions about (1) whether this approach will effectively address the identified issue; (2) how the proposed process will work in practice; and (1) whether the approach is the best way to address this issue or whether another, potentially more direct, approach would be preferable.

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## LEGISLATIVE ANALYST'S OFFICE
## Administrative Flexibility

☑ ***Proposed TBL Would Provide State Agencies Greater Discretion in Some Areas.*** As described below, the TBL would leave some details to be defined in regulations rather than through statute.

- ***Omits Some Language.*** Removes certain language from Proposition 64 such as the definition of volatile solvents (the use of which can raise safety concerns) and requirements that packaging disclose product potency as well as the solvents, pesticides, and fertilizers used in cultivation (MCRSA did not include this language).
- ***Fails to Provide Key Details in Some Areas.*** For example, it does not define premises. (Premises was not defined in either MCRSA or Proposition 64, but is of greater importance under the proposed TBL, which generally prohibits medical and nonmedical activities from occurring on the same premises). Additionally, it provides the bureau with new authority to allow a grace period before contaminant testing is required, but does not specify the length of that grace period.

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## LEGISLATIVE ANALYST'S OFFICE
## Administrative Flexibility (cont'd)

☑ **Analyst's Comments**

- ***Key Policy Choices Should Be Made Through Legislation Rather Than Regulations.*** Any details that have important policy implications—such as the definition of premises or important labeling requirements—should be defined in statute rather than left to regulations.

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## LEGISLATIVE ANALYST'S OFFICE
## Roles and Responsibilities of Various State Agencies

☑ **TBL Proposes to Modify Various State Agency Responsibilities**

- ***Nonmedical Cannabis Testing Laboratories.*** Transfers authority over these laboratories from DPH to the bureau (consistent with medical cannabis).
- ***Audit Responsibilities.*** Transfers the responsibility for conducting specified performance audits under Proposition 64 from the Bureau of State Audits to the Office of State Audits and Evaluations(OSAE) within the Department of Finance (these audits are not required under MCRSA).
- ***Appeals Process.*** Specifies that appeals of licensing decisions are heard by an appeals panel (consistent with Proposition 64; appeals panel not provided in MCRSA). Also, specifies that appeals of panel decisions be made directly to the Court of Appeals or Supreme Court (rather than trial courts, as envisioned in Proposition 64).

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**Roles and Responsibilities of Various State Agencies (cont'd)**

☑ **TBL Proposes to Modify Various State Agency Responsibilities (cont'd)**

- ***Microbusinesses.*** Adds requirement that CDFA and DPH review microbusiness license applications in addition to the bureau (not included in Proposition 64 or MCRSA). Microbusinesses can engage in cultivation of less than 10,000 square feet, distribution, certain manufacturing, and retailing.
- ***Appellations.*** Requires CDFA to create an appellation program, which allows licencees to market their products as originating from a certain region. (Proposition 64 required the bureau to conduct this function and MCRSA permitted but did not require CDFA to conduct this function.)

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**Roles and Responsibilities of Various State Agencies (cont'd)**

☑ **Analyst's Comments**

- ***Some Choices on State Agency Responsibilities Seem Reasonable . . .*** It appears that some of the administration's choices regarding departmental responsibilities make sense. For example, it is reasonable to transfer the authority of nonmedical cannabis testing laboratories from DPH to the bureau, consistent with the Legislature's transfer of authority over medical cannabis testing laboratories in the 2016-17 trailer legislation. Additionally, it may make sense to transfer the authority over appellations from the bureau to CDFA, which has more expertise with agricultural products.
- ***. . . But in Some Cases, Administration Should Provide Clearer Rationale.*** In other cases, the administration should provide a clearer rationale for the proposed choice. For example, the administration has not provided a compelling rationale for transferring the responsibility for performance audits from the Bureau of State Audits to OSAE.

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## Reporting and Oversight Provisions

☑ **Proposed TBL Would Affect Reporting and Oversight**

- ***Annual Reporting.*** Begins required reporting in 2023 and specifies that reporting is required to include certain information such as the amount of funds spent, the number of licenses issued, and the license processing time (date and specifics of reporting generally consistent with MCRSA). Also, specifies that the first report shall identify statutory or regulatory changes to achieve certain goals such as preventing monopoly power, the perpetuation of an illegal market, and underage use (not included in MCRSA or Proposition 64).
- ***Audit Timing.*** Specifies that required performance audits of the bureau shall be conducted on a triennial rather than annual basis, as required by Proposition 64. (MCRSA did not include an auditing requirement.)

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## Reporting and Oversight Provisions (cont'd)

☑ **Analyst's Comments**

- ***Reporting Should Commence No Later Than 2019.*** In our view, the administration should begin reporting key information starting no later than 2019 (covering 2018). Reporting is important in the first several years of implementation when the Legislature and stakeholders will want to closely monitor progress and determine whether changes need to be made to improve aspects of cannabis regulation, particularly given the increased complexity of regulating both medical and nonmedical cannabis

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## Various Other Policy Choices

☑ **Proposed TBL Would Implement Various Other Policy Choices**

- ***Modifies Environmental and Other Provisions From 2016-17 Trailer Legislation.*** Includes various environmental-related and other provisions adopted as part of 2016-17 TBL.
- ***Eliminates Medical ID Cards.*** Eliminates the state medical ID program. Makes the medical identification program at the county level optional. (MCRSA and Proposition 64 included a state medical ID program.)

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## Various Other Policy Choices (cont'd)

☑ **Analyst's Comments**

- ***Reasonable to Include Provisions in Chapter 32 . . .*** The Legislature made various changes to MCRSA in 2016-17 TBL, such as the addition of various provisions related to the environment. Since the Legislature has recently approved these policy choices for medical cannabis, it appears reasonable to generally apply them to nonmedical cannabis as well.
- ***. . . But Trade-Offs Exist Associated With Eliminating State Medical ID Cards.*** The administration indicates that it is eliminating state medical ID cards because the cards have not been widely used in the past. We note that the elimination of this program would shift the responsibility for issuing medical ID cards from the state to the counties on a voluntary basis. Additionally, the elimination of state medical ID cards could have some potential effects on state and local sales tax revenues. This is because medical cannabis users would be exempted from sales tax by presenting a physician recommendation rather than a medical ID card (which is more difficult to obtain than a physician recommendation).

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## The California Supreme Court has granted review in *Union of Medical Marijuana Patients, Inc. v. City of San Diego*

"The City of San Diego did not have to conduct an environmental analysis prior to enacting a ordinance regulating the establishment and location of medical marijuana consumer cooperatives because the ordinance did not have a potential for resulting in a reasonably foreseeable indirect physical change in the environment from increased traffic, building development or indoor cultivation of marijuana and thus was not a project within the meaning of the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq.; [2]-The enactment or amendment of a zoning ordinance will not constitute a project unless it also may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."


08/30/2016 11:25

Thank you for attending.

Tim Cromartie
Jeffrey V. Dunn

# Labor and Employment Litigation Update

**Friday, May 5, 2017 General Session; 10:30 a.m. – 12:15 p.m.**

**Stacey N. Sheston, Best Best & Krieger**

## Notes:_____

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## WAGE & HOUR

### TEXAS DISTRICT COURT RULING STAYS THE IMPLEMENTATION OF THE DEPARTMENT OF LABOR'S NEW OVERTIME RULE

*Nevada v. United States DOL* (2016) U.S. Dist. LEXIS 162048.

On November 22, 2016, the U.S. District Court of the Eastern District of Texas issued a preliminary injunction prohibiting the Department of Labor (DOL) from enforcing its new overtime regulations that increase the salary threshold for employees to qualify as exempt under the white-collar exemptions. The new rule was scheduled to take effect on December 1, 2016, but the status of the rule and its application are now uncertain. Under the new rule, employees must be paid a minimum annual salary of $47,476 in order to meet the salary threshold for exempt status from overtime pay requirements—more than doubling the previous salary level of $23,660; this salary level will also be adjusted automatically every three years.

The issuance of the preliminary injunction was a victory for the numerous plaintiffs involved in the lawsuit seeking to invalidate the DOL's new regulations, which included a number of states and various business advocacy groups. The District Court agreed with the plaintiffs' argument that doubling the salary level necessary for the overtime exemption gave the required salary level aspect of the exemption test an unfair amount of weight relative to the "salary basis" and "duties test" prongs, which is inconsistent with the language of the Fair Labor Standards Act. The District Court further found that permitting the new overtime rule to take effect would irreparably harm the state plaintiffs and that there was no harm in delaying the implementation of the new rule. For now all employers can do is simply wait anxiously while the DOL decides how to proceed.

## DISCRIMINATION/HARASSMENT

### TERMINATION FOR AN ACTIVITY THAT WAS ARGUABLY A PERMITTED AND ACCEPTED PRACTICE MAY NOT PROVIDE LEGITIMATE, NON-PRETEXTUAL BUSINESS REASON WARRANTING SUMMARY JUDGMENT ON GENDER DISCRIMINATION CLAIM

*Mayes v. WinCo Holdings, Inc*., 846 F.3d 1274 (9th Cir. 2017).

Katie Mayes worked at WinCo as a "Person in Charge" and she had a leadership role on the store safety committee. In her PIC capacity, she supervised night shift freight crew employees tasked with stocking shelves with new freight that sometimes required them to stay beyond their normal shifts. Mayes testified that, as a way to motivate the crew and boost morale, the former general manager gave her permission occasionally to take them cakes from the store bakery. She was to record the cakes in the in-store use log, and she did so. Several employees gave declarations stating that this was a common, accepted practice. In 2011, the bakery department instructed Mayes to take cakes only from the "stales" cart, which usually went to a food bank because the store could no longer sell them. They further told Mayes she did not need to log these "stales" because they had already been removed from the store inventory and tracked as lost product. In 2011, the then-store manager (Steen) − who had criticized Mayes (but not a male coworker) because she had children and could not stay late or come in on her days off − initiated a loss

prevention investigation against her and a co-worker regarding the cakes. (Steen had also allegedly stated previously that she did not like it that "a girl" was running the freight crew and that a man "would be better" as chair of the safety committee.) Mayes was fired for theft and dishonesty, and because the "gross misconduct" definition in WinCo's personnel policies included theft and dishonesty, WinCo denied Mayes COBRA benefits. She was replaced by a male worker with only one month of freight crew experience and no WinCo supervisory experience. Mayes sued alleging gender discrimination under Title VII and state law, as well as a claim for denial of COBRA benefits. WinCo successfully sought summary judgment on grounds that it acted for legitimate business reasons that Mayes had failed to show were pretextual.

The Ninth Circuit reversed, finding Mayes had presented direct evidence of discriminatory animus on the part of a manager who either participated in or made the decision to fire her. Further, multiple employees testified that is was a common, accepted practice – as opposed to an offense punishable by termination − for PIC's to take the stale cakes to the employees. That WinCo purportedly fired Mayes for following such a "common" and believed-to-be-authorized practice was deemed substantial and specific evidence that WinCo's proffered explanation was not believable.

## DISABILITY/FAMILY MEDICAL LEAVE

### COURT CONSIDERS WHAT CONSTITUTES A "DISABILITY" UNDER FEHA AND WHAT IS ADEQUATE "NOTICE" BY AN EMPLOYEE UNDER CFRA

*Soria v. Univision Radio Los Angeles, Inc.*, 5 Cal.App.5th 570 (2016).

Sofia Soria was an on-air radio personality host for Univision Radio Los Angeles, which hosted a midday radio show. She was diagnosed with a small tumor in her esophagus and stomach and worked for years without any issues until it was determined that the tumor had grown and she needed surgery. She consulted with several doctors regarding surgery and during this time, Soria missed work or arrived late approximately nine times due to doctor appointments related to her tumor. On each occasion, Soria notified her supervisors in advance and was granted time off from work. It was undisputed that she had no physical symptoms or impact from the tumor that resulted in an inability to perform her job duties. She claimed that she did have conversations with her supervisors about her tumor and the need for surgery and that she requested medical leave from work in order to undergo surgery to remove her tumor. Soria's supervisor claimed that she had not been told about the tumor or that the leave was for surgery. The supervisor further claimed that Soria's request was denied for work-related reasons. Shortly thereafter her employment was terminated and Univision claimed it was due to various performance issues, including tardiness and lack of preparation.

Soria filed a lawsuit against her former employer for disability discrimination, failure to provide reasonable accommodation, failure to engage in the interactive process under FEHA, and interference and retaliation under CFRA, among other claims. The trial court granted summary judgment for Univision on all claims finding that Soria did not have a physical disability or medical condition entitling her to protection, that Univision had shown a valid reason for her termination, and that Soria did not meet the CFRA requirements for requesting leave.

The Court of Appeal reversed the trial court's finding, holding that triable issues of material fact still existed that needed resolution. The court considered whether Soria was "disabled" even though her tumor did not arguably interfere with her work. The court concluded that it was a "disability" because she needed medical treatment for it and that this required time off for appointments, which interfered with work, which is a "major life activity" under FEHA. Further, her termination could have been based on discrimination because she allegedly disclosed her condition to her supervisor, her need for leave for surgery was close to the time of her termination, and her tardiness had been an issue for many years without it being documented. In addition, Soria arguably had provided sufficient information of the need for leave and then it was up to her employer to determine the extent of time needed for her leave under CFRA.

The was appellate court found that absences caused solely by medical appointments (rather than incapacity from an underlying medical condition) may constitute a limitation on a major life activity and therefore a finding of a disability for purposes of FEHA. Moreover, failure of an employee to specify the duration of leave does not obviate an employer's responsibilities under CFRA as both are significant.

## OPPOSING EMPLOYER ACTIONS DIRECTED AT GENERAL PUBLIC NOT PROTECTED ACTIVITY

David Dinslage worked for San Francisco's Recreation and Parks Department organizing programs for the disabled. As part of a large-scale restructuring of the Department's recreation programs, Dinslage's job classification was eliminated and he (along with several other employees) was laid off. Dinslage publicly criticized the Department and claimed that the Department's actions in eliminating programs were discriminatory to the disabled community. He applied for a new position created as part of the restructuring, made it to the second round of interviews, but ultimately was not selected.

Dinslage sued San Francisco for age discrimination, retaliation, and harassment under FEHA. With respect to his retaliation claim, Dinslage argued that his employment was terminated, in part, because of his expressed opposition to Department actions that discriminated against people with disabilities. The Court of Appeal held that Dinslage's advocacy for the disabled community and his opposition to Department policies were not protected activity. Since Dinslage did not oppose an unlawful employment practice under FEHA, he did not engage in any protected activity and therefore did not have a viable retaliation claim. "For protection under the 'opposition clause,' an employee must have opposed an employment practice made unlawful by the statute." A claim of retaliation under FEHA cannot be premised on an employer's conduct towards the general public. Rather, it must involve opposition to a specific employment practice. *Dinslage v. City and County of San Francisco*, 5 Cal.App.5th 368 (2016).

## CALIFORNIA FAMILY RIGHTS ACT CONTAINS "REASONABLENESS" COMPONENT WITH RESPECT TO HOW AN EMPLOYEE MAY EFFECTIVELY REQUEST PERSONAL MEDICAL LEAVE

*Bareno v. San Diego Community College Dist*., 7 Cal.App.5th 546 (2017).

Secretary Leticia Bareno was disciplined in 2006 by her employer, the San Diego Community College District, due to significant attendance problems. In 2012, she received first a counseling memo and later a written reprimand for attendance and poor performance. In early 2013, she was to be suspended for three days for similar issues. Immediately following the suspension, on February 25, she called in sick because she required medical treatment and accompanying leave from work, and she requested medical leave from her supervisor because she was "sick, depressed, stressed and had to go to the hospital." Bareno provided medical certification for this request for leave. While out, she also emailed about her wish to appeal the suspension. The return to work date passed, but Bareno continued to be absent from work the week of March 4. On March 8, a human resources official sent a certified letter informing her that her absences constituted a voluntary resignation effective March 11, and indicating she could request a meeting with her supervisor within five days of the mailing of the letter. In fact, Bareno had e-mailed her supervisor on March 1 with a recertification of her need for another week of medical leave (and an email was produced), but the College claimed that Bareno's supervisor did not receive any such request from Bareno. She emailed two more work status reports from her provider and extended her leave until April 1. Bareno picked up mail from her P.O. Box on March 18 and found the letter of termination. She immediately phoned the HR representative who told her he could not speak with her because she was no longer an employee. Bareno set up a meeting with the chancellor and human resources and presented all of her documentation, arguing that she had been on medical leave since February 25, but the college rejected her position.

Bareno sued, alleging that in effectively terminating her employment, the College retaliated against her for taking medical leave in violation of the California Family Rights Act (CFRA). The College successfully moved for summary judgment, arguing that Bareno had not shown that she properly requested the leave or that the doctor's note met CFRA requirements. Bareno appealed.

The Court of Appeal reversed finding that there was triable issues of material fact in dispute and that the record was capable of supporting a judgment in facor of Bareno. The appellate court held that Bareno did provide sufficient notice of her need for CFRA-protected leave. CFRA is silent with respect to how unforeseeable leaves may be requested, but the regulations say verbal notice may be sufficient if the employee communicates "as soon as practicable" with an underlying reason that may be CFRA-qualifying. The burden is then on the employer to inquire further by requesting certification. "CFRA and its implementing regulations clearly contain a reasonableness component with respect to an employee's request for personal medical leave."

## PAST POLICY AND PRACTICE OF ASSIGNING INJURED WORKERS TO TEMPORARY LIGHT DUTY POSITIONS RESULTS IN FINDING THAT SIMILAR ACCOMMODATION FOR TRAINEES IS NOT UNREASONABLE

*Atkins v. City of Los Angeles*, 8 Cal.App.5th 696 (2017).

Five LAPD police academy recruits suffered temporary injuries while training at the academy. At the time they were injured, the Department had been assigning injured recruits to light-duty

administrative positions indefinitely until their injuries healed or they became permanently disabled. The Department ended this practice while the plaintiffs were still recuperating from their injuries. Rather than allowing them to remain in their light-duty assignments, the Department asked them to resign or the Department would terminate them, unless they could get immediate medical clearance to return to the Academy. None of the recruits was able to obtain the necessary clearance, and the Department terminated or constructively discharged all of them. The five recruits brought this action, and the jury found for the plaintiffs, finding that the City unlawfully discriminated against the plaintiffs based on their physical disabilities, failed to provide them reasonable accommodations, and failed to engage in the interactive process required by FEHA.

The City appealed, arguing that the plaintiffs were not "qualified individuals" under FEHA because they could not perform the essential duties of a police recruit with or without a reasonable accommodation, and that the City was not required to accommodate the plaintiffs by making their temporary light-duty positions permanent or by transferring them to another job with the City. With respect to the plaintiffs' claim for failure to engage in the interactive process, the City argued that because there were no open positions available for the plaintiffs, the City did not have to continue the required interactive process.

The Court of Appeal agreed that the plaintiffs were not "qualified individuals" under FEHA for purposes of their discrimination claim but concluded that they satisfied this requirement for their failure to accommodate claim. The court determined that requiring the City to assign temporarily injured recruit officers to light-duty administrative assignments was not unreasonable as a matter of law in light of the City's past policy and practice of doing so. Because the court affirmed City's liability on this basis, it did not reach the City's challenge to the verdict on the plaintiffs' claim for failure to engage in the interactive process.

## PUBLIC AGENCY

### Discipline

**COURT FINDS THAT EMPLOYEE'S CLAIM IS BARRED BASED ON HIS INTENTIONAL FAILURE TO PARTICIPATE AND ATTEND EVIDENTIARY HEARING ON HIS TERMINATION**

*Thaxton v. State Personnel Board*, 5 Cal.App.5th 681 (2016).

Plaintiff Kevyn Thaxton was employed as a corrections officer by the Department of Corrections and Rehabilitation (CDCR). Shortly after Thaxton was dismissed from his position, he filed an appeal with the State Personnel Board. Because Thaxton did not appear during his evidentiary hearing with the State Personnel Board, the board dismissed his case. Shortly thereafter, Thaxton filed a petition with the trial court to review his case. The trial court ordered that Thaxton be reinstated to his former position and receive back pay. CDCR challenged the trial court's order, arguing that Thaxton's claim was properly dismissed by the board when he failed to personally attend his own evidentiary hearing. The court on appeal decided that Thaxton's failure to personally appear at the evidentiary hearing constituted a failure to proceed with the case. Based on this, his failure to authorize his attorney to accept service of subpoena on his

behalf, and failure to explain the circumstances that led to his lack of attendance, the court found that Thaxton's behavior indicated that he was purposely avoiding service of a subpoena with the intent to deprive his employer of its statutory right to examine him. The court determined that Thaxton's behavior evidenced a purposeful avoidance of the law and that he would not be allowed to invoke the hearing process when he had prevented his employer from exercising its right to cross-examine him.

**AN OFFICER MUST FACE PUNITIVE OR DISCIPLINARY ACTION TO CLAIM A VIOLATION OF POBRA**

*Perez v. City of Westminster*, 5 Cal.App.5th 358 (2016).

Brian Perez was an officer on the SWAT Team of the Westminster Police Department. Perez was initially given a notice of his employer's intent to terminate his employment, but after the Chief of Police determined that the allegations against Perez could not be sustained, Perez was not fired. Although Perez was not fired, he was removed from the SWAT Team and was not assigned any trainees as a field training officer. Perez sued the City for a violation of his rights under POBRA. Although Perez was removed from the SWAT Team and not assigned any additional trainees, the court found that he was not subject to punitive action within the meaning of POBRA. The court found that the SWAT Team and training officer positions were collateral assignments, not formal, full-time assignments. Moreover, the court noted that two months after the decision was made not to terminate Perez, he received a scheduled pay raise. The pay increase was not consistent with an adverse employment action. Therefore, because Perez did not face any punitive employment action, his rights did not vest under POBRA and he was not entitled to claim any of its protections.

## Peace Officers' Procedural Bill of Rights

**DISCLOSURE OF A PEACE OFFICER'S PERSONNEL RECORDS NOT LIMITED TO SITUATIONS WHERE THE OFFICER OBSERVED OR PARTICIPATED IN MISCONDUCT**

*Riske v. Superior Court*, 6 Cal. App. 5th 647 (2016).

While working as a detective for LAPD, Robert Riske reported two colleagues for filing false police reports. He later testified against them in an administrative hearing that resulted in their termination. A number of Riske's coworkers thereafter referred to him as a "snitch" and refused to work with him. He applied for 14 Detective I and II positions, but lost out to allegedly less qualified candidates. He sued for retaliation (as a whistleblower) and filed a *Pitchess* motion seeking production of all documents submitted by the successful candidates for the relevant positions and all documents relied on by the Department to select those officers for the positions. The City produced some documents, including rating sheets and ranking matrices used by the Department's decision makers for each position, but nothing from the selected candidates' confidential personnel files. Riske asserted the documents he sought were necessary to show the City's stated business reason for its promotion decisions—the successful candidates were more qualified than Riske—was pretext for retaliation. The City opposed the motion, claiming the officers' personnel records were not subject to discovery because the officers were innocent third

parties who had not witnessed or caused Riske's injury. The superior court agreed and denied Riske's motion.

Riske filed a petition for writ of mandate, which the appellate court granted and ordered the records produced. The statutory scheme governing the discovery of peace officer personnel records is not limited to cases involving officers who either witnessed or committed misconduct. If a plaintiff can demonstrate the officer's personnel records are material to the subject matter of the litigation, the records must be produced by the custodian of records and reviewed by the court at an in camera hearing in accordance with the statutory procedures to assess the discoverability of the information contained in them. The court must then order production of those records that are relevant and not otherwise protected from disclosure.

## Public Employment Relations Board

### CITY COULD NOT REFUSE CONSENT TO A "MODIFIED SHOP" ELECTION BASED ON LEGAL POSITION THAT UNION'S PROPOSED MODIFIED SHOP STRUCTURE FAILED TO COMPLY WITH MMBA

During negotiations for a successor MOU, the employee association proposed a "modified" agency shop arrangement that would require new employees hired on or after a specified date to either join the union or pay a service fee. The District rejected this proposal on grounds that Gov't Code section 3502.5 does not authorize such an arrangement. The following year the association requested the MOU be reopened to implement the proposed modified shop arrangement, and the District again rejected the request. Later that same year the association served a petition for an agency shop election seeking the same modified shop arrangement, and when the District refused to consent to an election, the association filed an unfair practice charge. PERB's administrative law judge concluded (after hearing) that the District had violated section 3502.5 by refusing to participate in a properly petitioned-for agency shop election and that the District had offered no valid defense. The Board adopted the ALJ's decision, and the District petitioned for extraordinary relief under section 3509.5(b).

The Court of Appeal agreed, finding that the language of section 3502.5 encompasses agency shop arrangements that apply to either all or some unit employees. Thus the District wrongfully withheld its consent to the holding of an election for a modified agency shop. *Orange County Water District v. Public Employment Relations Board*, 8 Cal. App. 5th 52 (2017).

# Implicit Bias Gone Explicit – Managing the Public Workplace in a Changing Environment

(MCLE Specialty Credit for Recognition and Elimination of Bias in the Legal Profession and Society)

**Friday, May 5, 2017 General Session; 10:30 a.m. – 12:15 p.m.**

**Suzanne Solomon, Liebert Cassidy Whitmore**

**Notes:**

# League of California Cities
# City Attorneys' Spring Conference

# Implicit Bias Gone Explicit – Managing the Public Workplace in a Changing Environment

**Friday, May 5, 2017**

**Prepared by:**

**Suzanne Solomon**
**Partner, Liebert Cassidy Whitmore**

## I. Introduction

Incivility in American culture, political and otherwise, seems to be at an all-time high. A New York Times article cited various sources for its conclusion that "a culture of nastiness has metastasized in which meanness is routinely rewarded, and common decency and civility are brushed aside."[1] People's "increasingly digitized existence and engagement with their phones,"[1] social media, internet bullying and trolling, reality television, and the 24-hour news cycle all likely have contributed to this state of affairs. In a survey conducted by an author who studies and consults on civility in the workplace, more than half of the respondents cited being "overloaded" as the cause of their own uncivil behavior, and more than 40% said they had "no time to be nice."[2] The 2016 United States presidential election was indisputably one of the most uncivil elections in recent history, with political speech at times seeming indistinguishable from hate speech.

Not surprisingly, these uncivil behaviors—rudeness, lack of tolerance, disrespect, personal attacks—are showing up more frequently in the workplace. Whether these events are happening intentionally, or because employees are simply not valuing civility and lacking self-awareness, public employers need to understand and manage this trend, without running afoul of laws protecting free speech or political activity.

## II. A Cultural Shift Away From Civility

An October 2016 survey conducted by Zogby Analytics found that Americans believed the 2016 Presidential election was the most uncivil in recent American politics.[3] The survey, which asked the same set of questions that had been posed in 2010, showed that people were more likely to find certain types of rude behavior acceptable in 2016 than they were in 2010.[2] For example, in 2010, 86% of respondents believed it was not acceptable to shout over someone you disagree with during an argument; in 2016, only 65% considered that unacceptable. In 2010, 73% of respondents believed it was not acceptable to question someone's patriotism because they have a different opinion; in 2016, only 52% believed considered that unacceptable. In 2010, 89% of respondents said that commenting on another's race or ethnicity in a political engagement was wrong; in 2016, only 69% of respondents believed that. The same trend occurred for belittling or insulting someone: in 2010, 89% of respondents considered that inappropriate, while in 2016, 74% of respondents had that view.

The above-cited survey was not a partisan survey. Nor is incivility limited to one side of the political aisle, or any other identifiable segment of society. Sociological studies have shown that when people are exposed to rude behavior in any form (even if they are not the target), it has a subconscious effect and can shape the person's judgments and decisionmaking.[4] Some readers may have noticed that the 2016 presidential election had an effect on their own conduct in terms of how civilly they expressed themselves about the election, either outside, or at, the workplace.

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[1] "Culture of Nastiness," New York Times, February 18, 2017.
[2] Christine L. Porath, "No Time to Be Nice at Work
[3] "2016 Presidential Campaign Reveals Chilling Trend Lines for Civility in U.S. Politics," Zogby Analytics.com, published Monday, 17 October 2016.
[4] Foulk, Erez, and Woolum, "Catching Rudeness is like Catching a Cold," cited in Mastering Civility, by Christine Porath, at page 42.

Did you find yourself making personal, belittling comments about the candidate you did not vote for?

As this article is being published in Spring 2017, hate crimes are on the rise, according to several sources. FBI data reports that hate crimes rose nationwide from 5,479 in 2014 to 5,850 in 2015.[5] The biggest increase was in anti-Muslim hate crimes, which rose by 67% in 2015. The Southern Poverty Law Center, which tracks hate crimes, counted 1,094 reports of harassment and intimidation between November 9, 2016 and December 12, 2017.[6] Psychological research has established that people are more likely to express explicit bias if they believe the bias is socially acceptable.[7]

As we appear to be moving towards a more polarized, more uncivil society, employers are more likely to be confronted with uncivil behavior in the workplace, including arguably political speech and perhaps overt expressions of explicit bias and other types of speech that have previously been considered taboo in the workplace.

## III. Legal Parameters of Regulating Employee Conduct

A public employer's first step in managing employee behavior is to determine what rule, policy or law provides good cause to regulate unacceptable or disruptive conduct. Because most public employees (after passing a probationary period) have a property interest in their jobs and therefore cannot be disciplined without just cause and due process, the employer who is contemplating serious discipline must have in mind an agency rule or policy that prohibits the employee's conduct. The employer must also make sure that a contemplated adverse action is not based on protected speech or other protected activity. The following laws either enable employers to regulate employee conduct or provide limits of such employer decisions.

### A. Anti-Discrimination Laws

Several federal and state laws protect employees and job applicants from harassment, discrimination, and retaliation in the workplace.[8] Under these laws, it is illegal to take an adverse action because of membership in any of these protected statuses or engagement in protected activity, and illegal to create a hostile work environment because of membership in a protected status.

- Race or Color;
- National Origin or Ancestry;
- Religious Creed;
- Physical or Mental Disability;
- Medical Condition;

[5] www.FBI.gov/news/stories/2015-hate-crime-statistics-released.
[6] "The Scope of Hate in 2016," New York Times, December 28, 2016.
[7] Allport, G.W. (1954) The Nature of Prejudice. Cambridge, MA: Perseus Books
[8] 42 U.S.C. § 2000e et seq.; Title VII of the Civil Rights Act of 1964 (Title VII); Age Discrimination in Employment Act of 1967 (ADEA); Americans with Disabilities Act of 1990 (ADA); California Fair Employment and Housing Act (FEHA).

- Marital Status;
- Sex (including pregnancy, childbirth);
- Gender (including gender identity, gender expression, and transgender);
- Age (40 and above);
- Sexual Orientation;
- Genetic information;[9]
- Opposition to Unlawful Harassment;
- Association with a person that has any of the protected characteristics; and
- Perception that a person has any of the protected characteristics.[10]

To the extent that uncivil behavior, or abusive, explicitly biased conduct occurs in the workplace, these laws provide just cause for the employer to impose discipline and otherwise regulate the behavior. To be legally actionably, harassment must be offensive both to the actual employee and to a reasonable person standard, and must be either severe or pervasive. Many agencies have "zero-tolerance" anti-harassment policies that are actually more strict than the law, and prohibit any conduct that meets the policy's definition, regardless of whether it is either severe or pervasive.

### B. California Unruh Act

The California Unruh Act provides that all persons have "a right to be free from any violence, or intimidation by threat of violence… because of political affiliation" or other enumerated protected statuses such as sex, sexual orientation, race, religion, national origin and disability.[11]

### C. California Labor Code

The California Labor Code prohibits an employer from having any policy that forbids or prevents employees from "engaging in or participating in politics," and from "controlling, directing, or tending to control or direct the political activities or affiliations of employees."[12]

### D. First Amendment

Speech by public employees at work is afforded greater protection than that of private sector employees. In *Pickering v. Board of Education*,[13] the U.S. Supreme Court made it clear that public employers generally cannot stifle the First Amendment rights their employees would otherwise enjoy as citizens in commenting on matters of public interest. However, the Court also recognized that public employers have an interest in the effective and efficient fulfillment of their responsibilities. Therefore, a public employer's ability to maintain workplace efficiency must be balanced against a public employee's interest as a citizen in commenting upon matters

[9] Under Gov. Code, § 12926, subd. (g)(1).
[10] Gov. Code, §§ 12926, 12940, subd. (a),(h); 42 U.S.C. § 2000e et seq.; 29 U.S.C. § 621 et seq.; 42 U.S.C. § 12101 et seq.
[11] Civ. Code, § 51.7(a).
[12] Lab. Code, § 1101(a), (b).
[13] 391 U.S. 563 (1968).

of public concern. *Pickering* served as a springboard from which significant First Amendment analysis has developed over the past 40 years.

Using *Pickering* and its progeny, the federal Ninth Circuit Court of Appeal has established a five-factor analysis to determine whether public employee speech is protected by the First Amendment. The following factors must be analyzed in sequence and an employee will prevail on a First Amendment claim only if a court resolves all of the questions in the employee's favor:

- Did the employee speak on a matter of public concern?
- Did the employee speak as a private citizen or as a public employee pursuant his or her professional responsibilities?
- Was the employee's protected speech a substantial or motivating factor in the adverse employment action?
- Did the public employer have an adequate justification for treating the employee differently from other members of the general public?
- Would the public employer have taken the adverse employment action even absent the protected speech?[14]

### 1. Matter of Public Concern?

Whether speech is a matter of public concern depends on the *content, form, and context* of a given statement.[15] The "greatest single factor" in making this determination is the "content of the speech."[16] Speech involves a matter of public concern when it relates to "any matter of political, social, or other concern to the community"[10] or is relevant to the public's evaluation of the performance of governmental agencies.[17] Speech relating to the functioning of government is also a matter of inherent public concern.[18] Conversely, speech that deals with individual disputes and grievances, or internal office affairs (when it is not relevant to the public's evaluation of a government agency's performance) is generally not of public concern and not protected.[19] As to "form," when speech is conveyed through "internal employee grievances which were not disseminated to the public" this "cuts against a finding of public concern."[11] As to the consideration of "context," courts seek to decipher "the point of the speech."[20] The inquiry questions whether the "speech 'seek[s] to bring to light actual or potential wrongdoing or breach

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14 *Eng v. Cooley*, (9th Cir. 2009) 552 F.3d 1062, 1070, cert. den. by (2010) 130 S.Ct. 1047.

15 *Connick v. Myers* (1983) 461 U.S. 138, 147-148 [103 S.Ct. 1684].

16 *Desrochers v. City of San Bernardino* (9th Cir. 2009) 572 F.3d 703, 710.

17 *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 973-74.

18 *Johnson v. Multnomah County, Or*. (9th Cir. 1995) 48 F.3d 420, 425 cert. den. by (1995) 515 U.S. 1161 [115 S.Ct. 2616].

19 *McKinley v. City of Eloy* (9th Cir.1983) 705 F.2d 1110, 1114; *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 973.

20 *Chateaubriand v. Gaspard* (9th Cir.1996) 97 F.3d 1218, 1223.

of public trust,' or is . . . animated instead by 'dissatisfaction' with one's employment situation."[11]

### 2. Speaking as Private Citizen or Public Employee?

Statements are made in an employee's capacity as a citizen if the employee had "no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform."[21] When a public employee directs his or her speech outside the public agency itself, either to an elected official or an independent agency, this will often mean the speech is outside the scope of "official duties" and hence potentially subject to First Amendment protection. Courts often find public employee speech to a newspaper or other media organization outside of "official duties." Such speech would rarely be required by job duties.

### 3. Do Agency Interests Outweigh Employee's Free Speech Rights?

If an employee can prove the first two factors of the employee speech analysis, and can prove that the protected speech was a substantial motivating factor for an adverse action, the burden then shifts to the employer to show that its legitimate administrative interests outweigh the employee's First Amendment interests. This portion of the analysis is often referred to as the *Pickering* balancing test and asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[22] One pertinent consideration includes "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[23]

### 4. Would Employer Have Reached the Decision Anyway?

If a public employer is unsuccessful in proving that its administrative interests outweigh an employee's First Amendment rights, it still may prevail if it can show that it would have reached the same adverse employment decision even in the absence of the employee's protected conduct. This question relates to, but is distinct from, the employee's burden of showing that the protected conduct was a substantial or motivating factor. It asks whether the adverse employment action was based on protected and unprotected activities, and if the agency would have taken the adverse action if the proper reason (i.e., adverse action for unprotected activities) alone had existed. [9]

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21 *Posey v. Lake Pend Oreille School Dist. No. 84* (9th Cir. 2008) 546 F.3d 1121, 1127 n.2; *Freitag v. Ayers* (9th Cir. 2006) 468 F.3d 528, 544, cert. den. by (2007) 549 U.S. 1323 [127 S.Ct. 1918].

22 *Garcetti v. Ceballos* (2006) 547 U.S. 410, 418 [126 S.Ct. 1951].

23 *Rankin v. McPherson* (1987) 483 U.S. 378 [107 S.Ct. 2891], rehg. den., (1987) 483 U.S. 1056 [108 S.Ct. 31] *U.S. Dept. of Justice, I.N.S. Border Patrol, El Paso, Tex. v. Federal Labor Relations Authority* (1992) 955 F.2d 998.

For example, in *Bodett v. CoxCom*, the Ninth Circuit Court of Appeal upheld the termination of an employee who repeatedly advised an openly gay female subordinate that she should not date other women.[24] The employee claimed that her speech was protected by the First Amendment, but the Court found that it did not matter because the speech violated the employer's harassment policy. Thus, the employer had a legitimate business reason for her termination.

### E. Bullying and Other Abusive Conduct

Workplace bullying is not illegal—yet. It has recently received greater media and legislative attention as a potentially growing area of concern in the workplace, state- and nationwide. In 2014, AB 2503 required employers to include, in the anti-harassment training that they are already required to provide to supervisors, a component about preventing "abusive conduct." That requirement went into place on January 1, 2015. AB 2503 defines abusive conduct as follows:

> …[C]onduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance. A single act does not constitute "abusive conduct," unless especially severe and egregious."[25]

Even though abusive conduct as defined above is not illegal, the law requires employers to train supervisors about preventing it. Bullying may nonetheless lead to claims and complaints of protected status harassment because the bully's motivations are not always clear. The definition is very similar to what is commonly understood as bullying, which can include, in addition to the above examples, isolating or excluding someone, persistent teasing, or spreading malicious rumors.

## IV. Managing the Workplace

### A. A Case in Point

At what point does an employee's workplace expression of his or her political or social views--for example about race, national origin, sexual orientation—cease being protected speech and start creating a hostile work environment? A California case involving employee speech criticizing affirmative action programs (before Proposition 209, which outlawed affirmative action programs) shows that even courts sometimes have difficulty drawing this line. *Department of Corrections v. State Personnel Bd. (Wallace).*[26]

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[24] *Bodett v. CoxCom, Inc.* (9th Cir. 2004) 366 F.3d 736.

[25] Cal. Gov. Code 12950.1(g)(2).

[26] (1997) 59 Cal.App.4th 131 [69 Cal.Rptr.2d 34].

In that case, the California Department of Corrections and Rehabilitation (CDCR) terminated the employment of Wallace, a correctional sergeant, for comments he made to a subordinate employee, Picone, about the CDCR's affirmative action program. Under that program, the CDCR appointed certain Hispanic officers to one-year temporary terms as sergeants, even though they had not scored high enough on the promotional exam to receive such a position on a permanent basis. This created resentment among other employees who believed that the positions should go to people who had scored high enough on the promotion list to be promoted. Sometimes those one-year terms were extended. Officer Picone had taken the promotional exam, had scored too low to be in reach of a promotion, and was appointed to a one-year term as a sergeant under the affirmative action program. She then was appointed for a second one-year term, and had a particularly coveted assignment as the Investigative Gang Sergeant working second watch (6 a.m. to 2 p.m.), which was a highly desired watch.

Sergeant Wallace had been trying to get a second watch position for some time, in order to spend more time with his son, but he did not have enough seniority to get one. Other, Hispanic sergeants with less seniority were able to get such positions. When Wallace asked management about this, he was told that CDCR wanted minority females on the second watch positions to increase their visibility and demonstrate the agency's commitment to affirmative action.

While Officer Picone was serving her second one-year term as a sergeant, she chose not to take the sergeant's promotional exam. When her second one-year term ended, she reverted back to her officer position. Some employees (not Picone) believed that Picone had been "shafted," and should have received a promotion despite not taking the exam. Other employees, including Wallace, did not agree that Picone should have received a promotion and instead believed that she had been given undeserved preferential treatment in the first place based on her gender and race. Wallace expressed these opinions to others, also stating that he considered Picone a "lop" (prison slang to describe a poor performer) who had not deserved to wear the stripes in the first place. These comments got back to Picone, who was hurt by them, as she thought she had a good relationship with Wallace.

The conversation she had with Wallace about what she had heard was the basis for Wallace's termination. She approached him and asked to speak with him privately (at the end of her shift), which they did, moving to an area of the facility where no staff or inmates were present. She told him she had heard that he was talking bad about her and that she wanted it to stop. Wallace lost his temper, slapped the wall with his hand and said in a low voice, "I am tired of this Hispanic shit; us white guys are tired of being looked over." He told Picone he was sick and tired of "hearing about poor fucking Picone getting shafted." He was irate and clenching his teeth. Picone, stunned, told him he needed to stop talking like that or it was going to get him in trouble. She also told him she understood how he felt because her husband was a Caucasian officer for another laws enforcement agency, and that while the affirmative action program was not always fair, minorities had endured a lot. Picone started crying. Wallace also had tears in his eyes and seemed to be out of control. He grabbed Picone's shirt lapel and started shaking her, saying, "Do you understand what I'm saying? Do you understand what I'm feeling? We're sick and tired of it." He let go of her lapels after a few seconds.

Picone, who was still crying, asked Wallace to walk out of the facility with her so that the inmates would not see her crying. He did so, shielding her from the view of the inmates and other staff. At this point, Wallace had calmed down, but he told her that it was her own fault that she had not taken the sergeant's exam the second time and scored higher. She replied by telling him that she was not asking for sympathy and was trying to lie low and do her job and that she could not help how others felt.

Later that evening, Wallace asked another sergeant to call Picone at home and ask her if she willing to talk to him, and she was. Wallace called her and said, "What we talked about, you were right; but I am still entitled to my own opinion." Picone laughed and said, "Is that an apology?" The conversation then ended.

After the incident, Picone asked for a job change, which she did not get. She then requested and received a transfer to another facility. At Wallace's termination appeal hearing, she testified that the incident with Wallace had caused her to have reservations about working with him because she felt that his statements expressed hatred of her because of her race. (She did not file an internal discrimination complaint against him, but did file a DFEH charge.)

The CDCR charged Wallace with inefficiency, inexcusable neglect, intemperance, discourteous treatment of another employee, willful disobedience, unlawful discrimination and other failure of good behavior bringing discredit to the institution. Wallace appealed his termination to the State Personnel Board, overturned the termination and reduced it to a 30-day suspension. The Board sustained only the charges of discourteous treatment and other failure of good behavior, finding that the content of Wallace's statements was constitutionally protected but the manner in which he had delivered the statements was not.

The CDCR sought a writ of administrative mandamus from the Superior Court. The Superior Court concluded that the Board erred in finding that any part of Wallace's conduct was protected by the First Amendment. The Superior Court held that the Board's legal analysis was flawed and that their decision had "the potential of signaling to all disgruntled state workers an 'open season' on minority subordinates, to unleash venomous epithets under the guise of protected speech." The Superior Court concluded that Wallace's conduct had created an unlawful hostile work environment.

Wallace appealed. The Court of Appeal reversed, holding that the State Personnel Board had struck the proper balance of Wallace's freedom of expression interests and the CDCR's interests in regulating the workplace. The Court of Appeal held that the statements themselves were protected, but the physical conduct was subject to discipline and a 30-day suspension was appropriate. One justice dissented, disagreeing with each element of the majority opinion.

The Court found that Wallace's speech involved a matter of public concern: affirmative action. The Court rejected CDCR's argument that the speech was merely about a personal grievance, stating that "the fact that Wallace had been personally disadvantaged by the [affirmative action program] does not alter the fact preferential treatment in public employment on the basis of race, sex, ethnicity or national origin is not only a basis for personal grievance but, transcendentally, a matter of intense public concern." (Among other things, the Court cited

Proposition, 209, which had recently passed, but after the events upon which the case was based.) The Court also rejected CDCR's argument that Wallace's speech met the definition of "fighting words," which have no First Amendment protection. The Court asserted that Wallace's statements were not critical of Picone personally or her conduct, but were directed at the CDC and its policy. The Court also found that although Wallace had grabbed Picone's collar and shaken her for a few seconds, "this cannot reasonably be interpreted as an attempt to harm her physically."

Having found that Wallace's speech was protected, the court next balanced the CDCR's interest in promoting harmony and efficiency in the workplace against Wallace's interest in free expression. The Court concluded that Wallace's statements caused no actual harm to the CDCR because the Picone-Wallace conversation was private and not overheard by anyone, because it was not a "surprise" to Picone that Wallace opposed the affirmative action program, and because she told him that she understood his feelings and that her spouse was a Caucasian officer at another agency. The Court of Appeal did not believe that Wallace's statement engendered disharmony among employees, and instead found that the affirmative action program itself engendered disharmony among employees. The Court held that the State Personnel Board had struck the right balance between the CDCR's and Wallace's interests, and that it was appropriate to consider the content of Wallace's statement separately from the manner in which it was made

Finally, the court held that Wallace's statement had not created a hostile work environment, but in doing so the Court examined only the content of his statement, not his physical conduct. The Court asserted that "Except for the fact Picone is Hispanic, there is nothing in Wallace's statements which would suggest they were an attack on her personally rather than the CDCR's affirmative action program." The court said that because Picone initiated the conversation, and chose the time and place for it, and it lasted only a few minutes, the event was not severe or pervasive. In doing this analysis, the Court did not consider the undisputed fact that Wallace had grabbed Picone's shirt collar, shaken her by it, slapped the wall, was irate and clenched his teeth.

The dissent argued that Wallace's statements should not be "dissected" from the manner in which those statements were delivered. The dissent argued that Wallace's actions created a hostile work environment; the opinion challenged the majority's assertions that Wallace's statements were not an attack on her personally. Wallace was higher in rank, had told others she was a "lop" and didn't deserve her stripes in the first place. Plus, when she asked him to stop talking like that, he became angry and slapped the wall. Moreover, the incident so upset Picone that she asked for another assignment and was ultimately transferred because she felt that Wallace would not back her up if an urgent, dangerous situation arose at the facility. The dissent argued that the incident, though not pervasive, was severe, citing many cases holding that a single instance of harassing conduct may create an actionable hostile work environment.

Next, the dissent argued that even if Wallace's words could be considered separately from his conduct, the statement, "I am tired of this Hispanic shit," spoken in that time, place and manner, were not protected by the First Amendment because they were "extremely derogatory, directly referring to Picone's ethnicity, and when spoken by a superior officer in a quasi-military organization, carry an implicit threat to make her life at work miserable." The dissent further

stated, "There is a difference between an academic discussion regarding affirmative action and a verbal and physical tirade by a superior officer against a female, Hispanic, lower [ranking] officer in a quasi-military organization, accompanied by a use of force." The dissent also argued that more deference should have been granted to the CDCR's perception of the potential disruptiveness because the case involved correctional officers in a state prison, "where close working relationships are essential to fulfilling the public responsibilities." The dissent concluded that the Superior Court had made the correct ruling and applied the proper standards.

### B. Drawing the Line Between the First Amendment and Illegal Harassment

This author believes that the dissent got it right in *Wallace*. And that the majority opinion is a product of its time (1997). The majority opinion created a fiction of considering the speech in a vacuum, and ignoring the undisputed fact that Wallace did make negative statements to Picone about the fact that her race and gender entitled her to something he could not obtain. Taking the majority's analysis to its logical conclusion, it would allow any hostile statement to be made about a protected status, as long as it somehow referenced a matter of "public concern," without analyzing the rest of the context, or the impact of that statement on the hearer. The majority's analysis would not prohibit a statement along the lines of "This Equal Employment Opportunity shit has got to stop. There are too many Mexicans in this country and in this agency. We white guys are feeling like it's time to make America great again." This statement, made by a Caucasian male employee to a Hispanic co-worker, clearly is a negative statement about a protected status. The fact that it also happens to reference current events does not render it protected speech. Although this statement alone, without any touching or violence or threat of violence would probably not meet the legal standard of being either severe or pervasive, it would certainly be prohibited by a "zero-tolerance" anti-harassment policy, and the employer with such a policy should take corrective action in a situation like this.

Rare will be the case where negative statements in the workplace that are directed to protected statuses escape regulation because they are protected speech. While agencies should certainly conduct a legal analysis to make sure that constitutional protections do not attach to the speech, there is no "but I was discussing current events" exception to the anti-discrimination laws. So, for example, employees cannot simply repeat offensive statements made by public figures, or play movies or other media at work that contain offensive content direct to protected statuses, or access and share (on employer-owned devices) websites containing offensive content. Employee A's First Amendment rights at work are limited by Employee B's right to come to work and not be subjected to hostile remarks based on protected statuses. To the extent that social media postings have an impact on the agency in this regard, the agency may be able to regulate it, but only if sufficient nexus exists to justify an infringement on employees' First Amendment rights. In those situations it is particularly critical to for attorneys to conduct a legal evaluation because the analysis is very fact-based.

## V. Concrete Actions to Create a Culture of Civility

Fundamental to creating a culture of civility is a commitment at the highest level of management that such conduct will not be tolerated. Agencies should consider taking the following steps.

- The agency's leaders should model civility and realize that everything they do in the workplace sends a message about the organization's culture. For example, taking phone calls and/or checking emails during meetings and not listening to what others are saying sends a message, whether intended or not.
- Create a comprehensive Code of Conduct that defines professional behaviors and unacceptable behaviors and includes policies and procedures for response.
- Managers and Human Resources staff should understand that both an anti-harassment policy and an agency's catchall rule requirement courteous treatment of others are valid grounds for discipline.
- Managers and Human Resources staff should understand the difference between a zero-tolerance policy (which prohibits *any* instance of harassing conduct), and the legal standard (which outlaws conduct only when it reaches the "severe or pervasive" threshold).
- Agencies should discipline staff who violate engage in discourteous or destructive behavior toward co-workers.
- Agencies should establish as a job expectation/performance standard respectful, civil behavior, and make sure this standard is tracked in formal, written performance evaluations.
- Managers should receive training on how to have difficult conversations, and how to manage conflicts among subordinates.
- Upper level managers must hold accountable lower-level managers who do not effectively manage conflicts among their subordinates.
- Managers and Human Resources should consult legal counsel regarding the potential First Amendment implications of disciplining employees on protected speech.


# Speaker Biographies

**Sukhi Brar**

Senior Commission Counsel Sukhi K. Brar has been with the Fair Political Practices Commission (FPPC) for over 10 years. As a Senior Commission Counsel she develops public policy and provides expert knowledge on all areas covered by the California Political Reform Act, including conflicts of interest, gifts, campaign finance, and revolving door laws. She regularly drafts regulations interpreting provisions of the Act and has drafted hundreds of advice letters to public officials. She has also drafted and advocated for numerous political reform related legislative proposals before the California Legislature and has extensive experience working with nonprofits and other citizens' groups interested in developing political and ethical reform. During her two years with the FPPC Enforcement Division, she oversaw the administrative investigation and prosecution of dozens of cases involving violations of the Political Reform Act.

**Celia Brewer**

CELIA A. BREWER – City Attorney, City of Carlsbad  Celia A. Brewer's more than two decade long career in public service has included work on some of the San Diego region's most complex and high profile land use and environmental projects. Brewer is currently city attorney for the City of Carlsbad, where she was a key member of the team that negotiated a historic agreement with NRG Energy and SDG&E to remove the aging power plant from the city's coast. In this role Brewer also led the city's legal strategy in response to the use of the citizen initiative process to gain approval of a proposed open space and retail plan that drew statewide and national attention. Prior to joining the City of Carlsbad in 2003, Brewer served as the interim Port attorney and assistant Port attorney for the San Diego Unified Port District. Here she was a key adviser on the Port's efforts to remove the South Bay Power Plant from the San Diego Bay waterfront. As assistant general counsel to the San Diego County Water Authority, she worked on a number of innovative water supply and diversification strategies, including finalizing issues concerning the lining of the All American Canal.  Brewer began her public service career in Solana Beach, first as deputy city attorney and eventually as city attorney, where she helped resolve issues related to moving the railroad tracks below street level, a project which improved safety and helped revitalize this small coastal city. In addition to working for public agencies, Brewer was in private practice representing municipalities, special districts and nonprofit organizations. Brewer is a member of the League of California Cities Legal Advocacy Committee and has twice been president of the City Attorneys Association of San Diego County. A passionate advocate for people with spinal cord injuries, Brewer serves on the advisory board of the Southern California Chapter of United Spinal Association, is a Christopher Reeve Foundation certified peer mentor and a member of the UCSD satellite fundraising team for the "Swim With Mike" scholarship fund for physically challenged athletes. Brewer currently lives in Cardiff with her teen age daughter and is writing her first book, an inspirational account of her son's triumph over a life changing injury.

**Thomas B. Brown**

Mr. Brown is a partner of the firm and the City Attorney for the City of St. Helena. He served for 12 years as the City Attorney for the City of Napa, prior to which he served as Senior Deputy City Attorney for the City of Berkeley. Mr. Brown represents both public agency and private clients. His practice focuses on all aspects of municipal law. He has extensive experience advising clients and litigating in land use, zoning and planning, the California Environmental Quality Act ("CEQA"), real property entitlements, police power, charter cities, municipal taxation, Brown Act, Public Records Act, code enforcement, intergovernmental relations, grand juries, elections, initiatives, and referenda. Mr. Brown was a visiting professor at Sonoma State University where he taught "California Land Use Law." He is a past President of the City Attorneys Department of the League of California Cities.

**Walter C. Chung**

Mr. Chung is a Lead Deputy City Attorney for the City of San Diego. Mr. Chung has handled complex litigation cases for the City of San Diego, both at the trial and appellate levels. Beginning in 2006, when Mr. Chung first started working for the City of San Diego, he has handled all of their pension related litigation. The City has prevailed on nearly all of the pension litigation. Due to the City's success in the pension cases, in 2011, Mr. Chung was named by the Los Angeles and San Francisco Daily Journal as one of the top twenty five municipal lawyers in the state. Before coming to work for the City of San Diego, Mr. Chung worked in both private law firms and as an in-house counsel. Mr. Chung also serves on the League's Legal Advocacy Committee.

**Michael Conneran**

Michael N. Conneran is a partner is the San Francisco law firm Hanson Bridgett LLP. He specializes in the representation of public agencies in a variety of matters involving transportation, real estate and environmental law. Michael serves as General Counsel for the Livermore Amador Valley Transit Authority, the Western Contra Costa Transit Authority, and the Measure J Traffic Congestion Relief Agency. He negotiated some of the first agreements with ridesharing firms on behalf of transit agencies. He has also assisted in forming non-profit corporations to operate employer-funded shuttle programs. Michael led the legal effort for the acquisition of real property required for the extension of the BART system to the San Francisco International Airport. Michael received his A.B. degree from the Woodrow Wilson School of Public and International Affairs at Princeton University and his J.D. from Hastings College of the Law where he was Note Editor of the Hastings Law Journal.

**Jeffrey Dunn**

Jeffrey V. Dunn represents cities and other public agencies in complex litigation matters. He has been recognized by one of California Lawyer magazine Attorneys of the Year for 2014, the Daily Journal's Top 20 Municipal Attorneys in 2013 and Top 25 Municipal Attorneys in 2011. He was also recognized as one of California's Top 100 Attorneys by the Daily Journal in 2013 and 2016. Jeff gained national recognition for his successful representation in one of the most controversial issues facing California cities and counties — municipal regulation of marijuana distribution facilities. He was trial and appellate counsel in key published decisions affirming local government's authority to protect public safety and local land use authority, including the unanimous decision by the California Supreme Court in City of Riverside v. Inland Empire Patients' Health and Wellness Center (2013) 56 Cal.App.4th 729. He discussed this subject on the NBC Nightly News, in the Washington Post and in other national and local television, radio and print media.

**Catherine C. Engberg**

CATHERINE C. ENGBERG Catherine Engberg joined Shute, Mihaly, & Weinberger in 2002 after completing a clerkship with the Honorable Barry Ted Moskowitz, United States District Court Judge for the Southern District of California. Ms. Engberg is a partner at the firm. Her practice includes municipal law, CEQA compliance and litigation, local initiatives and referendums, eminent domain, real estate transactions, and general plan and zoning law. Ms. Engberg has served as acting City Attorney to both the City of Orinda and City of Saratoga, assisting City staff and officials with a wide array of legal matters. She regularly advises clients regarding open meeting laws, conflicts of interest, and public records. Ms. Engberg has litigation experience in both state and federal court regarding constitutional, CEQA, land use, and election law matters. She has advised several public agencies in connection with updates to their general plans, housing elements and related CEQA documentation. Ms. Engberg routinely represents community groups in administrative proceedings and CEQA litigation over major infrastructure and residential projects. Ms. Engberg is a member of the firm's initiative and referendum committee. She has drafted numerous ballot measures on behalf of community groups, including two countywide initiatives to ban fracking. Ms. Engberg recently authored an amicus brief on behalf of the Colorado PTA in the 10th Circuit Court of Appeals in the case Kerr v. Hickenlooper, in support of plaintiffs' challenge the voter-enacted Colorado Taxpayers Bill of Rights. Ms. Engberg also advises cities with respect to the processing of local initiatives, referenda, and recall campaigns. Ms. Engberg represents the Sacramento Area Flood Control Agency with respect to right of way acquisition related to the Natomas Levee Improvement Program. She has extensive trial and appellate litigation experience in right of way and eminent domain matters. Ms. Engberg has published in the Stanford Law Review and the Stanford Environmental Law Journal on topics of ranging from citizen initiatives to legal issues regarding the decommissioning of dams. She has led CEQA, open government, and election law workshops sponsored by the Planning and Conservation League, Sierra Club and Friends of Harbors Beaches and Parks. Ms. Engberg routinely presents on land use and housing issues. In November 2016, Ms. Engberg presented to the Livable Communities Advisory Team, AARP, on the topic of "CEQA Pros and Cons" and engaged in a discussion of challenges that restrict affordable housing production. In the fall of 2014, Ms. Engberg spoke at the Southern California County Counsels' Association Meeting on a panel entitled "Fracking: Discussion of Legal Issues Facing Local Governments." Ms. Engberg received her law degree, with distinction, from Stanford Law School in 2001 and her undergraduate degree from Stanford University in 1995. Prior to attending law school, she worked as an environmental engineer and is a licensed Professional Civil Engineer. In her spare time, Ms. Engberg serves on the Kensington Municipal Advisory Council, which provides recommendations on planning, design review and land use issues in her local community.

**Clare M. Gibson**

Clare M. Gibson is a partner at Jarvis Fay Doporto & Gibson, LLP, an Oakland-based law firm dedicated to local government law. She received her law degree from the University of California at Berkeley School of Law (Boalt Hall). Clare has devoted most of her career to advising cities and other public agencies throughout California on public contracts, bidding and construction law and is a leading practitioner in this area. She actively supports the League's mission by submitting amicus curiae briefs on behalf of the League, and also by assisting with analysis of and responses to pending or proposed legislation affecting public contracts.

**Ginetta Giovinco**

Ginetta is a shareholder in the Litigation and Coastal Law Departments at Richards, Watson & Gershon, APC. Ginetta specializes in land use, including both advisory work and litigation, with an emphasis on matters involving the California Environmental Quality Act (CEQA) and the California Coastal Act. Ginetta has obtained several published appellate court decision victories. Ginetta also has experience litigating in a wide variety of other contexts on behalf of public agencies, and has handled lawsuits involving breach of contract claims, civil rights claims, mobilehome park conversions, quiet title actions, and public finance validation matters. She also regularly advises public agencies on CEQA compliance in connection with the processing of initial studies, negative declarations, and environmental impact reports

**Margarita Gutierrez**

I counsel City Deparments on technology related matters primarily focused on the licensing and acquisition of cloud service contracts. I have negotiated the City's agreements with major technology vendors and their reseller partners including Microsoft, AT&T, ESRI, and Adobe. Before becoming an advice attorney on the City's Energy and Telecom Team, I was a trial lawyer with the City for over a decade. Prior to joining the City Attorney's Office, I worked at Morrison and Foerster in San Francisco for one year. I received my J.D. from the University of San Francisco in 1993 and my B.A in Religious Studies from Brown University in December 1987.

**Kevin Heneghan**

Kevin Heneghan is a Senior Policy Counsel at Airbnb, Inc. where he supports the company's Policy and Communications teams. Kevin provides advice on various regulatory, legislative, and policy issues, analyzes legislation and legal risks, and represents Airbnb in discussions with legislators and regulators regarding proposed and existing regulations affecting Airbnb. Prior to joining Airbnb, Kevin was a Partner at Hanson Bridgett LLP where he advised business entities, candidates, elected officials, labor unions, trade associations, and independent expenditure committees on a wide range of campaign finance, lobbying and governmental ethics law issues. Kevin has served as campaign counsel for candidates for statewide office, several State Legislators, and numerous elected officials in San Francisco. In addition, he has advised clients involved in initiatives and referenda at the state and local level, and represented clients in enforcement actions before the Fair Political Practices Commission and the San Francisco, Oakland and San Diego Ethics Commissions. Kevin received his B.A., with honors, from La Salle University, and his J.D. from the University of California, Hastings College of the Law.

**Daniel S. Hentschke**

Dan Hentschke has been a member of the City Attorney's Department for almost 4 decades. He served as a Deputy City Attorney for San Diego under John Witt, Assistant City Attorney for Carlsbad under Vince Biondo, as contract City Attorney for the Cities of Oceanside, Solana Beach, and San Marcos, while also providing special counsel services to numerous other cities and special districts. He also served for many years as the General Counsel for the San Diego County Water Authority. Dan was a President of the City Attorney's Department and has been a frequent contributor to the Leagues on-going activities on behalf of its members throughout California.

**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.

**Whitman F. Manley**

Whit Manley is an attorney at Remy Moose Manley LLP, a Sacramento-based law firm focusing on the California Environmental Quality Act and other state and federal laws related to land use and the environment.

**Stephen A. McEwen**

Stephen A. McEwen is a partner with Burke, Williams & Sorensen, LLP. Mr. McEwen currently serves as the City Attorney for the City of Buellton. He is also Assistant City Attorney for the cities of Hemet and Atascadero.

**Rebecca L. Moon**

Rebecca Moon, a Senior Assistant City Attorney with the City of Sunnyvale, graduated from Hastings Law School in 1993 and started her career doing civil litigation at an insurance defense firm in the City of San Jose. Ms. Moon joined the City of Sunnyvale in 2001 and over the years has had the opportunity to experience most aspects of municipal law including land use and planning, public safety, code enforcement, risk management, human resources, parks and recreation, and claims and litigation.

**Javan N. 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.

**Liane Randolph**

California Public Utilities Commissioner Liane Randolph Professional bio October 2016 Commissioner Liane Randolph was appointed to the CPUC by Governor Jerry Brown in January 2015. She formerly served as Deputy Secretary and General Counsel at the California Natural Resources Agency and was appointed to that position by Governor Brown in May 2011. Commissioner Randolph is an expert in government and administrative law. She was formerly an attorney at the law firm of Pillsbury Winthrop Shaw Pittman. Commissioner Randolph served as Chair of the California Fair Political Practices Commission (FPPC) from 2003 to 2007. As Chair of the FPPC, Commissioner Randolph managed a staff of 70 in the implementation and enforcement of California's Political Reform Act. Prior to her service at the FPPC, Commissioner Randolph practiced municipal law and previously served as City Attorney for the Cities of San Leandro and Suisun City on a contract basis. Commissioner Randolph obtained her law degree from the University of California, Los Angeles, where she also earned a B.A. in History. At the CPUC, Commissioner Randolph is presently assigned to 73 proceedings spanning the electricity, gas, telecommunications, and water industries, including the Integrated Resource Plan proceeding established per Senate Bill 350. Her interests and portfolio at the CPUC generally focus on planning, infrastructure and governance.

**Ann Ravel**

Ann M. Ravel was nominated to the Federal Election Commission by President Barack Obama on June 21, 2013. After her appointment received the unanimous consent of the United States Senate, Ms. Ravel joined the Commission on October 25, 2013. She served as Chair of the Commission for 2015 and Vice Chair for 2014 before leaving in 2017. Previously, Ms. Ravel served as Chair of the California Fair Political Practices Commission (FPPC), to which Governor Edmund G. Brown, Jr. appointed her. At the FPPC, Ms. Ravel oversaw the regulation of campaign finance, lobbyist registration and reporting, and ethics and conflicts of interest related to officeholders and public employees. During her tenure at the FPPC, Ms. Ravel was instrumental in the creation of the States' Unified Network (SUN) Center, a web-based center for sharing information on campaign finance. Before joining the FPPC, Ms. Ravel served as Deputy Assistant Attorney General for Torts and Consumer Litigation in the Civil Division of the United States Department of Justice. Ms. Ravel also worked as an attorney in the Santa Clara County Counsel's Office, ultimately serving as the appointed County Counsel from 1998 until 2009. Ms. Ravel represented the County and its elected officials, provided advice on the state Political Reform Act, and initiated groundbreaking programs in elder abuse litigation, educational rights, and consumer litigation on behalf of the Santa Clara County government and the community. Ms. Ravel has served as an elected Governor on the Board of Governors of the State Bar of California, a member of the Judicial Council of the State of California, and Chair of the Commission on Judicial Nominees Evaluation. In 2014, she was named a California Attorney of the Year by California Lawyer magazine for her work in Government law, and in 2007, the State Bar of California named Ms. Ravel Public Attorney of the Year for her contributions to public service. Ms. Ravel received her B.A. from the University of California, Berkeley and her J.D. from the University of California, Hastings College of the Law. Ms. Ravel is the daughter of a Latin American immigrant mother and an American father. She was raised in Latin America before her family settled in the San Francisco Bay area, which she considers home.

**Rachel Richman**

Ms. Richman is a partner with Burke, Williams & Sorensen, LLP who joined the firm in 2000 and has focused her legal practice on the representation of cities and public entities. Ms. Richman is the City Attorney for the City of Rosemead; Assistant City Attorney for the City of Alhambra, Assistant City Attorney for the City of Santa Clarita and is the legal counsel to the Santa Clarita Mobile Home Rent Adjustment Appeal Board. She is also the former City Attorney to the City of Arvin in Kern County.

**Michael Rodriquez**

Michael F. Rodriquez has been a municipal lawyer since 1998, and City Attorney for the City of Gonzales and the City of Soledad for over 20 years. He received his law degree from the University of California at Berkeley School of Law (Boalt Hall). Mike's general municipal practice includes specialization in the areas of labor and employment law and land use.

**Rosa M. Sánchez**

Rosa M. Sánchez is a deputy city attorney in the San Francisco City Attorney's Office, assigned to the Construction and Public Contracting Team. She counsels various City departments on technology (traditional software), on-line hosted (software as a service) and professional services procurements and negotiates such contracts on behalf of City departments. Before becoming a transactional attorney, she was an advice attorney to the City's public protection departments. She received her J.D. from Loyola University, Chicago, School of Law, and a B.A. in Psychology from the University of California, Berkeley.

**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 2015, 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 Snow**

David Snow, AICP, is a shareholder in the Public Law Department at the law firm of Richards|Watson|Gershon. Dave specializes in advising public agencies on CEQA and land use matters. Dave joined RW&G in 2001 with over 10 years of local government experience including serving as the Deputy Director of Planning for the City of Rancho Palos Verdes while attending Loyola Law School, Los Angeles. Currently he serves as the City Attorney for the City of Yucaipa, Assistant City Attorney in Beverly Hills, and special counsel to many other public agencies throughout California. Dave is a member of the American Planning Association California Chapter's Amicus Committee, and previously served two terms as APA California's Vice President of Policy and Legislation.

**Suzanne Solomon**

Suzanne Solomon is an experienced trial lawyer who has represented public entities, private companies and individuals in a wide range of employment disputes for over 20 years. At Liebert Cassidy Whitmore, Suzanne's litigation practice focuses on defense of single- and multi-plaintiff employment claims for discrimination, retaliation, harassment, violation of wage and hour laws, due process, First Amendment retaliation, and numerous other tort and statutory employment law claims. Suzanne has tried cases before judges and juries in both state and federal courts. She also has extensive experience representing law enforcement agencies, including winning summary judgment of discrimination claims made against Police Departments and command staff. Suzanne has also handled appellate matters in state and federal courts, including a case of first impression in the Ninth Circuit Court of Appeals regarding the criteria courts may use in deciding whether to grant interlocutory review of class certification decisions. Suzanne regularly advises governmental agencies on all aspects of employment law, including employee discipline, leave laws, Americans with Disabilities Act compliance, and investigating and responding to discrimination complaints. Her practice has included developing and presenting management training on such subjects as due process, reasonable accommodation, privacy, and prevention of discrimination.

**Andrea S. Visveshwara**

Andrea Visveshwara currently serves as the Assistant City Attorney for the City of Emeryville. She began her career as a municipal lawyer in the public law section of McDonough, Holland & Allen, PC, and then served as an assistant city attorney for the cities of San Luis Obispo and Petaluma. Prior to her career as a municipal attorney, she represented plaintiffs in civil rights cases at small firms in Washington, D.C., and Mill Valley, CA.

**Jack Woodside**

Undergraduate study at University of California at Berkeley Graduated from McGeorge School of Law in 1997 Associate at Porter Scott Deputy Attorney General in Government Law Section from 2001-2012 Senior Commission Counsel at FPPC from 2012-present

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