General Municipal Litigation Update

2017 City Attorney's Department Conference

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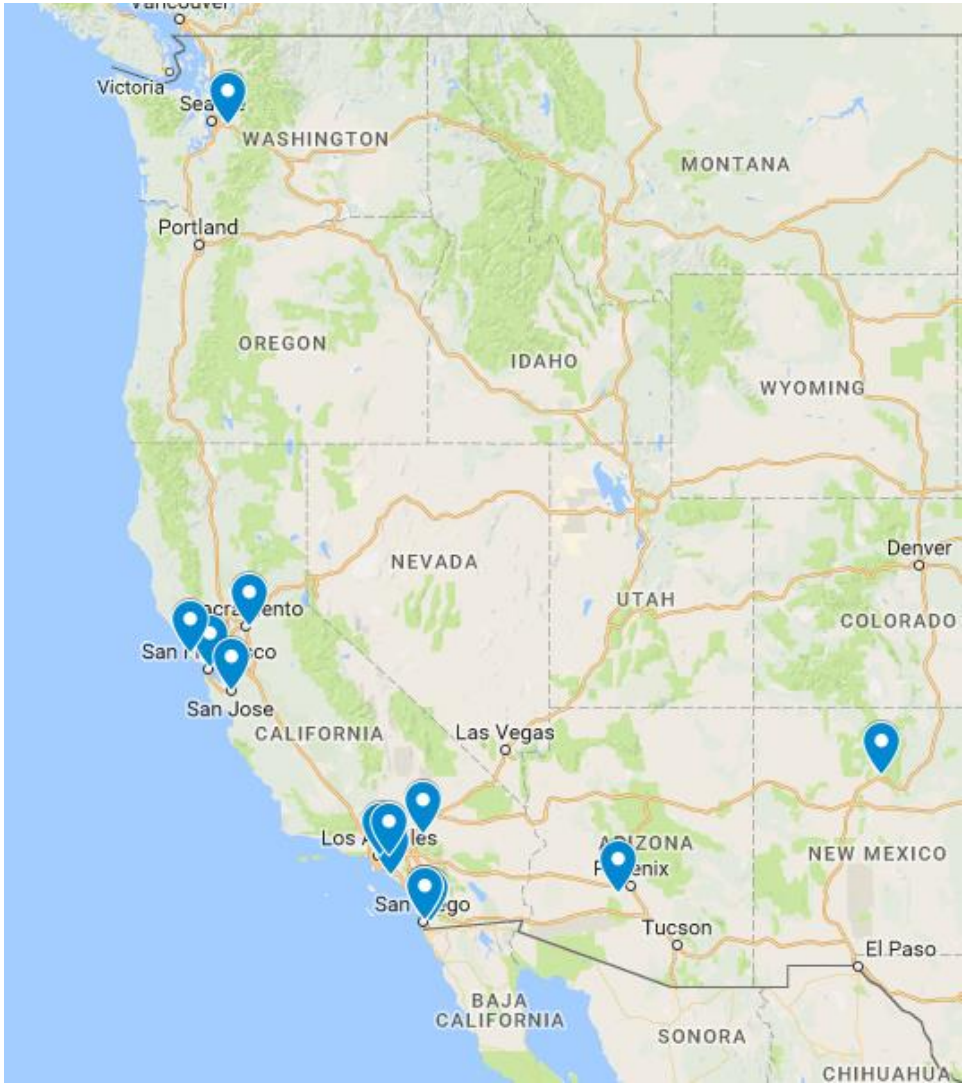
General Themes

General Municipal Litigation Update – May 2017

- 12-6 in favor of public entities
- 3-0 employment
- 4-0 torts
- 0-3 public records



Employment cases

- Retaliation (*Dinslage*)
- County attorney / free speech (*Brandon*)
- Airtime service credit purchase (*Cal Fire Local 2881*)

Dinslage v. City & County of San Francisco 5 Cal.App.5th 368 (2017)

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- Employee's opposition to relocation of classic car show "was not directed at the Department's employment practices"

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Brandon v. Maricopa County 849 F.3d 837 (9th Cir. 2017)

- County attorney worked in “special litigation” department
- Gave interview to local paper on leaked memo
- “I don’t know why they did what they did, and I’m sure they have their reasons”
- Brandon transferred to County Attorney’s office
- Terminated during probation for alercation with staff

Brandon v. Maricopa County (cont.)

- Jury verdict in favor of Plainitff
  - $1 free speech + $638,148 on state law claims
  - $302,175 in attorney's fees
- Ninth Circuit reversed
  - Comments to newspaper "could not constitute protected citizen speech"
  - Plaintiff had a fiduciary duty to her client
  - Plaintiff merely disagreed with settlement figures
  - Comments to newspaper reflected poorly on client

Cal Fire Local 2881 v. CalPERS
7 Cal.App.5th 115 (2016) (rev. granted 4/21/17)

- "Airtime" – purchase up to five years of additional service credit
- 2012 – Public Employees' Pension Reform Act
  - > Prohibited purchase of airtime starting in 2013
- 2013 – Plaintiffs filed a petition for writ of mandate, arguing airtime was a vested right
- Trial court denied writ of mandate

Cal Fire Local 2881 v. CalPERS (cont.)

- Court of Appeal affirmed
  - > Text of airtime statute and legislative history do not create a vested pension benefit
  - > Airtime statute allows members to pay an amount for up to five years of service credit
    - Wholly distinct and apart from "provision of labor in exchange for compensation"
  - > Airtime intended to be cost-neutral – member pays full present value cost of increase in benefit
  - > Plaintiffs "have made no showing that . . . their right to a reasonable pension has been lost"

Tort cases

- Qualified immunity (*Ames*)
- Qualified immunity (*White*)
- Trail immunity (*Leyva*)
- Late claim petitions (*J.M.*)

Ames v. King County
846 F.3d 340 (9th Cir. 2017)

- Deputy Volpe arrived at same time as aid care of Lieutenant and two firefighter/EMTs
- Plaintiff refused entry to Deputy Volpe, who directed aid crew to leave apartment
- Plaintiff and neighbors carried Colin to pickup truck
- Deputy Volpe moved her truck to block Plainitff's truck
- 97 seconds elapsed during incident outdoors, Plaintiff suffered abrasions to right palm, with pain in various body parts
- Colin was ultimately treated and survived

Ames v. King County (cont.)

- District Court denied deputies' motion for summary judgment
- Ninth Circuit reversed
  - Deputy Volpe's use of force was objectively reasonable
  - Two deputies who searched Plaintiff's truck without a warrant were entitled to qualified immiunity under the "emergency doctrine"

White v. Pauly
137 S.Ct. 548 (2017) (*per curiam*)

- Officers responded to Pauly brothers' residence
- Two officers found two houses (not one house) at the address
  - Brothers never heard officers identify themselves as state police
- Officer White then arrived, and heard the two brothers say "we have guns"

White v. Pauly (cont.)

- A few seconds later, Daniel fired his shotgun twice, screaming loudly
- A few seconds later, Samuel pointed a handgun in Officer White's direction
  - > Another officer fired at Samuel and missed
  - > Four to five seconds later, Officer White shot and killed Samuel
- District Court denied Officer White's motion for summary judgment on qualified immunity grounds, finding a warning was required
- Tenth Circuit affirmed

White v. Pauly (cont.)

- Supreme Court vacated Tenth Circuit's opinion
  - > Tenth Circuit misunderstood the "clearly established" analysis
  - > Failed to identify a case where officer violated Fourth Amendment in similar circumstances as Officer White
    - "Clearly established" should not be defined "at a high level of generality"
- Justice Ginsburg's concurring opinion

Leyva v. Crockett & Co., Inc. 7 Cal.App.5th 1105 (2017)

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- Privately owned golf course granted County easements for hiking and equestrian trail
- Trail separated from golf course by chain link fence and eucalyptus trees
- No warning signs
- Plaintiff struck by errant golf ball

Leyva v. Crockett & Co., Inc. (cont.)

- Trial court granted summary judgment for golf course on trail immunity (Government Code Section 831.4)
- Court of Appeal affirmed
  - > Trail's feature next to golf course is integral feature of the trail itself
  - > Burden and expense of barrier from errant golf balls would chill private landowners from granting easements to public entities along golf courses, resulting in closure of such areas to public use

J.M. v. Huntington Beach Union HSD
2 Cal.5th 648 (2017)

- Plaintiff was injured in a high school football game
- Plaintiff retained counsel, and applied to file a late claim 358 days later
- School district took no action, thus denied by operation of law
- 10½ months later, Plaintiff petitioned the court for relief
- Trial court and Court of Appeal denied the petition

J.M. v. Huntingon Beach Union HSD (cont.)

- Supreme Court affirmed denial of petition
  - > Legislature did not provide an opportunity for a <u>further</u> extension of already-late claim
  - > No equitable tolling where "missing an easily ascertainable deadline that has been in place for over 50 years"

Land Use and CEQA cases

- Medical marijuana dispensaries (*Union of Medical Marijuana Patients*)
- Billboards (*D'Egidio*)
- Tattoo shops (*Real*)

Union of Med. Mj. Patients v. City of San Diego 4 Cal.App.5th 103 (2016) (rev. granted 1/11/17)

General Municipal Litigation Update – May 2017

- Medical marijuana dispensary zoning ordinance is not a project under CEQA

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

- 1987 – Plaintiff modified billboard to outdoor advertising sign, but obtains no County permit
- 1990 – City annexed area of billboard
- 2014 – City passed ordinance requiring removal of billboards by 2019
- Plaintiffs filed suit, alleging Outdoor Advertising Act precludes local regulation in unincorporated area
  - City cross-complained for public nuisance
- Trial court granted summary judgment for City
- City awarded over $48,000 in attorney's fees on public nuisance claim

- Outdoor Advertising Act does not preclude County regulation in unincorporated areas
- 1987 modification (without County permit) was illegal – not legal non-conforming use
- Plaintiffs not prejudiced by City's delay in enforcing code
- Attorney's fees award affirmed

Real v. City of Long Beach 852 F.3d 929 (9th Cir. 2017)

- Plaintiff wished to open tattoo shop
- Tattoo shops only allowed in limited areas of City, and conditional use permit is required
- Plaintiff's attorney sent letter to City identifying three locations where he desired to open, and then filed suit (but did not apply for a CUP)
- After Plaintiff's testimony at trial, District Court entered judgment in favor of the City

Real v. City of Long Beach (cont.)

- Ninth Circuit reversed, remanding for bench trial on both facial and as-applied challenges
  - > Plaintiff "plainly" asserted a facial challenge
  - > Plaintiff has standing to bring as-applied challenge to zoning ordinances
    - Injury-in-fact because he intended to open a tattoo shop if he opened without CUP

Public Records cases

- Personal files, accounts, and devices (*City of San Jose*)
- Legal services invoices (*Los Angeles County Board of Supervisors*)
- Civil Discovery Act (*City of Los Angeles*)

City of San Jose v. Superior Court (Smith) 2 Cal.5th 608 (2017)

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- City employee communications pertaining to City business may be subject to disclosure under the Public Records Act even if stored on a personal electronic device or in a personal account inaccessible by the City

L.A. County Board of Supervisors v. Sup. Ct. 2 Cal.5th 282 (2016)

- Public records request for invoices from outside law firms on nine use of force/jail lawsuits
- County agreed to produce invoices for three lawsuits that concluded
- County declined to provide invoices for six remaining (and still pending) lawsuits
- Trial court found County failed to show invoices were attorney-client privileged communications
- Court of Appeal found all invoices were privileged

L.A. County Board of Supervisors v. Sup. Ct. (cont.)

- Supreme Court (in a 4-3 opinion) found invoices are not categorically protected by the attorney-client privilege
  - > When legal matter is pending and active, privilege applies to everything in the invoice, including aggregate fees
  - > Privilege may not apply for fee totals of closed matters, as fee totals "communicate little or nothing about the substance of legal consultation"

City of L.A. v. Superior Court (Anderson-Barker) 9 Cal.App.5th 272 (2017)

- Public records request for data relating to vehicle impounds
- City declined to produce the information, stating it did not own the data, and could not get access
- Requestor brought writ proceeding under Public Records Act, and propounded discovery
- City argued discovery was not permitted
- Trial court found the proceeding was subject to Civil Discovery Act

City of L.A. v. Superior Court (cont.)

- Court of Appeal agreed that the proceeding was subject to Civil Discovery Act
- Discovery generally limited to test agency's duty to disclose – narrow issue
- Courts should balance need for discovery with need for expeditious resolution of public records dispute

Finance cases

- Parking appeals (*Yagman*)
- Hotel tax from online bookings (*In re Transient Occupancy Tax Cases*)

Yagman v. Garcetti 852 F.3d 859 (9th Cir. 2017)

- Two-step administrative process to contest parking tickets
  - > Initial review / administrative hearing
- City procedure required drivers to deposit ticket amount before administrative hearing
- Plaintiff deposited penalties, prevailed at 2 of 3 hearings, and then filed class action lawsuit alleging due process violation

Yagman v. Garcetti (cont.)

- District Court granted City's motion to dismiss
- Ninth Circuit affirmed
  - > Private interest at stake was modest ($73 ticket)
  - > Deposit would be refunded after successful challenge
  - > City interests served by deposit
    - Promtply collecting parking penalties
    - Discouraging frivolous and dilatory challenges

In re Transient Occupancy Tax Cases 2 Cal.5th 131 (2016)

General Municipal Litigation Update – May 2017

- San Diego's transient occupancy tax (TOT) is calculated as a percentage of the rent charged by the "operator" of the hotel
- Transactions at issue – hotels only remit TOT on wholesale price, resulting in underpayment of TOT

	Online Travel Company (OTC) position
Hotel charges OTC "wholesale" price	TOT paid
Hotel-determined markup ("rate parity") – requires OTC to sell at minimum price	TOT not paid
OTC charges customer retail price	TOT not paid

In re Transient Occupancy Tax Cases (cont.)

- City audited OTCs, and assessed TOT against the OTCs
- Hearing officer found OTCs owed TOT on markups
- Trial court and Court of Appeal found OTCs did not owe TOT

In re Transient Occupancy Tax Cases (cont.)

- Supreme Court affirmed, but agreed with San Diego's argument, in part
- OTCs are not operators required to collect and remit TOT
- But hotel (as an "operator") could potentially owe TOT on hotel-determined markup ("rate parity" provision)

In re Transient Occupancy Tax Cases (cont.)

	OTC position	**Supreme Court**
Hotel charges OTC "wholesale" price	TOT paid	Hotel collects TOT
Hotel-determined markup ("rate parity") – requires OTC to sell at minimum price	TOT not paid	Hotel could collect TOT
OTC charges customer retail price	TOT not paid	OTC not operator

Miscellaneous cases

- Due process in administrative proceedings (*Drakes Bay*)
- Brown Act agenda description (*Hernandez*)
- Initiative to repeal prior initiative (*Brookside Investments, LTD*)

Drakes Bay Oyster Co. v. Cal. Coastal Comm'n 4 Cal.App.5th 1165 (2016)

- Coastal Commission sought to address unpermitted development by Plaintiff, and commenced enforcement proceedings
- Enforcement staff advocated that the Coastal Commission issue certain orders, which were issued
- Plaintiff filed suit, and sought to disqualify enforcement staff on due process grounds
- Trial court denied disqualification motion

Drakes Bay Oyster Co. v. Cal. Coastal Comm'n (cont.)

- Court of Appeal affirmed
- Litigation in front of a different decision-maker (Superior Court – not the Commission)
- Once litigation is filed, and the administrative proceedings were no longer pending, Commission staff share the same interest in defending the agency's decision

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

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- "Wal-Mart Initiative Measure" insufficient agenda description under Brown Act, where City also considered proposed agreement to accept gift from supercenter developer to pay for initiative measure

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Brookside Investments, LTD v. City of El Monte 5 Cal.App.5th 540 (2016)

- 1990 – voters approved Mobilehome Tenant Rent Assistance Program (MTRAP) intiative – prevented City Council from
  - > Passing ordinance relating to mobilehome park rents
  - > Expending City funds in connection with ordinance
- 2012 – City Council approved resolution calling special election on measure that would replace/repeal MTRAP
  - > Voters approved initiative
- Plaintiff alleged ordinance enacting initiative violated MTRAP and Elections Code

Brookside Investments v. City of El Monte (cont.)

- Trial court granted summary adjudication in favor of the City, and Court of Appeal affirmed
- Elections Code did not prohibit City Council from placing 2012 inititative on the ballot
- MTRAP did not prohibit City Council from placing 2012 inititative on the ballot
  - > City Council merely drafted and approved resolution for voters to consider the initiative
- City did not expend public funds in violation of MTRAP
  - > Expenses would have been incurred with any election