2018 Spring Conference

City Attorneys' Department

Paradise Point
San Diego, California

May 2-4, 2018

Name: _____

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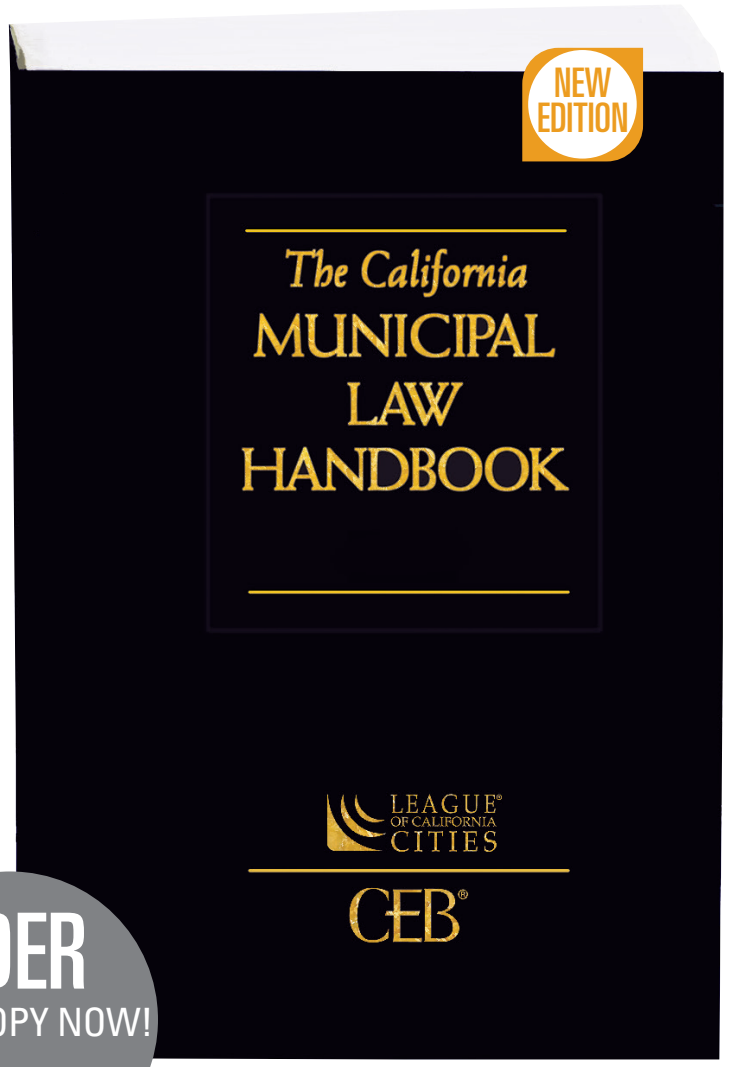

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2018 Spring Conference
City Attorneys' Department

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MCLE Information

The League of California Cities® is a State Bar-certified minimum continuing legal education (MCLE) provider. This activity is approved for 12 hours of MCLE credit, which includes 1 hour(s) of MCLE specialty credit for Recognition and Elimination of Bias sub-field credit.

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MCLE credit is being tracked through your registration for the conference and the receipt of your conference materials. At the time that you receive your conference materials, you will be required to verify your State Bar number and this will serve as proof of your attendance.

Certificate of Attendance

Certificates of attendance are available on the materials table at the back of the City Attorneys' session room until the conclusion of the conference. ***Please make sure you pick up your attendance certificate.*** You only need one attendance certificate for all of the City Attorney sessions at this conference.

Evaluations

PLEASE TELL US WHAT YOU THINK! We value your feedback. Hard copy evaluation forms for the MCLE-approved sessions are available at the tables located in the back of the room. An electronic version of the evaluation is available at http://www.cacities.org/caevaluations and will also be emailed after the conference. Please tell us what you liked, what you didn't, and what we can do to improve this learning experience.

2018 CITY ATTORNEYS' SPRING CONFERENCE

Wednesday, May 2 – Friday, May 4

Paradise Point, San Diego

2017-2018 City Attorneys' Department Officers

President: Christine Dietrick, City Attorney, San Luis Obispo
1st Vice President: Damien Brower, City Attorney, Brentwood
2nd Vice President: Celia Brewer, City Attorney, Carlsbad
Director: Michelle Marchetta Kenyon, City Attorney, Calistoga, Moraga, Pacifica, Piedmont and Rohnert Park

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Wednesday—May 2

10:00 a.m. – 6:30 p.m. **REGISTRATION OPEN**
Paradise Foyer

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

1:00 – 3:00 p.m. **GENERAL SESSION**
Paradise Ballroom

Moderator: Christine Dietrick, City Attorney, San Luis Obispo

Welcoming Remarks
Speaker: Mara W. Elliott, City Attorney, San Diego

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

A Practical Guide to Conducting In-House Workplace Investigations
Speakers: Margaret E. Long, County Counsel, Modoc and Trinity Counties, Assistant County Counsel, Alpine and Sierra Counties
David A. Prentice, City Attorney, Ione, County Counsel, Alpine and Sierra Counties

PERS' Path Forward: Risks, Opportunities and Options
Speakers: Jonathan V. Holtzman, Renne Public Law Group
Mary Beth Redding, Bartel Associates

Wednesday—May 2
(Continued)

3:15 – 4:45 p.m.

GENERAL SESSION
Paradise Ballroom

Moderator: Michelle Marchetta Kenyon, City Attorney, Calistoga, Moraga, Pacifica, Piedmont and Rohnert Park

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

Navigating Pitfalls Under Government Code Section 1090 When Contracting Consultants
Speakers: James C. Harrison, Remcho, Johansen & Purcell
Margaret R. Prinzing, Remcho, Johansen & Purcell

Developments in Campaign Finance: How to Update Your City's CFRO
Speakers: Karen A. Getman, Remcho, Johansen & Purcell
Lisa A. Vidra, Senior Deputy Attorney, Culver City

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 of the League of California Cities®
Paradise Ballroom

Facillitator: Lauren B. Langer, Assistant City Attorney, Lomita, Hermosa Beach and West Hollywood

6:30 – 8:00 p.m.

EVENING RECEPTION - Marina Mixer
Paradise Terrace

Thursday—May 3

7:30 a.m. – 4:00 p.m. **REGISTRATION OPEN**
Paradise Foyer

7:30 – 8:50 a.m. **NETWORKING BREAKFAST**
Sunset Pavilion

9:00 – 10:30 a.m. **GENERAL SESSION**
Paradise Ballroom

Moderator: Damien Brower, City Attorney, Brentwood

The California Voting Rights Act: Recent Legislation & Litigation Outcomes
Speakers: Youstina N. Aziz, Richards, Watson & Gershon
Douglas Johnson, President, National Demographics Corporation
James L. Markman, City Attorney, Brea, La Mirada, Rancho Cucamonga and Upland

Ballot Box Planning and Finance
Speakers: Michael G. Colantuono, City Attorney, Auburn and Grass Valley
Kevin D. Siegel, Burke, Williams & Sorensen
Marc L. Zafferano, City Attorney, San Bruno

10:45 a.m. – Noon **GENERAL SESSION**
Paradise Ballroom

Moderator: Celia Brewer, City Attorney, Carlsbad

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

City Trees and Urban Forests: Understanding Inverse Condemnation Liability
Speakers: Robert C. Ceccon, Richards, Watson & Gershon
Ann Sherwood Rider, Assistant City Attorney, Pasadena

12:15 – 1:45 p.m. **NETWORKING LUNCHEON**
Sunset Pavilion

Thursday—May 3
(Continued)

2:00 – 3:30 p.m.

GENERAL SESSION
Paradise Ballroom

Moderator: Christine Dietrick, City Attorney, San Luis Obispo

Department Business Meeting and Colleague Recognition
- *President's Report – Christine Dietrick*
- *Colleague Recognition – Department Officers*
- *Director's Report – Michelle Marchetta Kenyon*
- *CitiPAC Update – Mike Egan*

KEYNOTE SPEAKER
Congressman Scott Peters, 52nd Congressional District

Social Media Challenges: Applying Existing Case Law to New Technology
Speakers: Deborah J. Fox, Principal and Chair of First Amendment Practice Group, Meyers Nave Riback Silver & Wilson
David Mehretu, Meyers Nave Riback Silver & Wilson

3:45 – 5:15 p.m.

GENERAL SESSION
Paradise Ballroom

Moderator: Celia Brewer, City Attorney, Carlsbad

Issues of Local Control and Wireless Telecommunication Facilities
Speakers: Gail A. Karish, Best, Best & Krieger
Robert ("Tripp") May III, Telecom Law Firm

Latest Developments in Cannabis Regulation
Speakers: Tim Cromartie, Senior Advisor, HdL Companies
Jeffrey V. Dunn, Best Best & Krieger

5:30 p.m.

NO FORM 700 MEET UP
Barefoot Grill

Friday—May 4

7:00 a.m. – 7:45 a.m. **FUN RUN –** *Sponsored by Best Best & Krieger*
Meet in front of the Conference Center at 6:45 a.m.

7:30 a.m. – 10:30 a.m. **REGISTRATION**
Paradise Foyer

7:30 a.m. – 8:50 a.m. **NETWORKING BREAKFAST**
Sunset Pavilion

9:00 a.m. – 10:15 a.m. **GENERAL SESSION**
Paradise Ballroom

Moderator: Damien Brower, City Attorney, Brentwood

Land Use and CEQA Litigation Update
Speaker: Sabrina V. Teller, Remy Moose Manley

Municipal Water Reuse in an Increasingly Complex Regulatory Environment
Speakers: Stephanie O. Hastings, Brownstein Hyatt Farber Scheck
Dylan K. Johnson, Brownstein Hyatt Farber Scheck

10:30 a.m. – 12:15 p.m. **GENERAL SESSION**
Paradise Ballroom
Moderator: Christine Dietrick, City Attorney, San Luis Obispo

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

(MCLE Specialty Credit for Recognition and Elimination of Bias)
Gender Issues in Policing from the Law and Order Perspectives
Speakers: Susan E. Coleman, Burke, Williams & Sorensen
Sandra Spagnoli, Chief of Police, Beverly Hills Police Department

(MCLE Specialty Credit for Recognition and Elimination of Bias)
The Sovereign Next Door: California Native American Tribal Governments 101
Speakers: Merri Lopez-Keifer, Tribal Counsel, San Luis Rey Band of Mission Indians
Holly A. Roberson, Kronick Moskovitz Tiedemann & Girard

Closing Remarks / Evaluations / Adjourn

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Labor and Employment Litigation Update

Wednesday, May 2, 2018 General Session; 1:00 – 3:00 p.m.

Stacey N. Sheston, Best Best & Krieger

Notes:_____

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Labor and Employment Law Update

League of California Cities

San Diego, CA

May 2, 2018

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Stacey.Sheston@bbklaw.com

WAGE AND HOUR

UNDER FLSA "PRIMARY BENEFICIARY" TEST, STUDENT WORKERS AT COSMETOLOGY SCHOOL NOT "EMPLOYEES"

Benjamin v. B&H Education, 877 F.3d. 1139 (9th Cir. 2017).

Cosmetologists are required under California and Nevada law to be individually licensed. This requires that, before applicants may take the licensing exam, they must take part in hundreds of hours of classroom instruction, including observing demonstrations, and practical training that includes performing services on a person or mannequin. Plaintiffs and other students at Marinello Schools of Beauty attended lectures, reviewed course materials, took tests, and practiced cosmetology on customers in the clinic under some instructor supervision, thereby allowing them to earn academic credit toward qualifying them to take the state licensing exam. In the clinic, students not only practiced cosmetology itself, including hair, skin, and nail treatments, but perform selected duties that include sanitizing their work stations, laundering linens, dispensing products, greeting customers, making appointments, and selling products. Plaintiffs were cosmetology students at Marinello who claimed that, rather than properly educating and training them in cosmetology, the school exploited the Plaintiffs for their unpaid labor. Plaintiffs sought payment for minimum and overtime wages, premium wages for missed meal and rest breaks, civil penalties for violating wage laws, restitution of fines, and reimbursement for supply purchases. The trial court granted summary judgment for the defendant.

The court of appeal affirmed, holding that, under the "economic reality" test, the students were not employees under the FLSA even though they alleged that much of their time was spent in menial and unsupervised work. Agreeing with other circuits, the panel held that a "primary beneficiary" analysis, rather than a test formulated by the Department of Labor, applies in the specific context of student workers. The panel concluded that the students, not defendant's schools, were the primary beneficiaries of their own labors because at the end of their training they qualified to practice cosmetology. The panel held that the students also were not employees entitled to be paid under Nevada or California law.

DELIBERATIVE PROCESS AND ATTORNEY WORK PRODUCT PRIVILEGES PRECLUDED DISCLOSURE OF CERTAIN WAGE RECORD INFORMATION

Labor & Workforce Development Agency v. Superior Court, 19 Cal. App. 5th 12 (2018).

A Public Records Act request in this case was made on behalf of *Fowler Packing* Company, *Inc*. (*Fowler*) and Gerawan *Farming, Inc*. (*Gerawan*) in response to the 2015 enactment of Assembly Bill 1513 (AB 1513) codified in Labor Code section 226.2. AB 1513 addressed the issue of minimum wages for employees paid on a piece-rate basis (i.e., paid per task) and included safe-harbor provisions that provided employers with an affirmative defense against wage and hour claims based on piece-work compensation so

long as back pay is timely made. (Lab. Code, § 226, subds. (b)-(f).) However, the safe-harbor provisions contained carve-outs that place the safe-harbor provisions out of reach for several California companies including *Fowler* and *Gerawan*. (Lab. Code, § 226.2, subds. (g)(2) & (g)(5).) The Public Records Act request sought in pertinent part: "Any and all public records referring or relating to communications between the California Labor & Workforce Development Agency, its officers, and its staff and the United Farm Workers of America regarding AB 1513;" "Any and all public records referring or relating to the statutory carve out for any 'claim asserted in a court pleading filed prior to March 1, 2014,' as codified in AB 1513 section 226.2(g)(2)(A);" and, "Any and all public records referring or relating to AB 1513" and *Fowler* and *Gerawan*. The responsive documents would necessarily include the identities of parties who communicated confidentially with the California Labor and Workforce Development Agency (Agency) that took the lead in formulating the policies enacted in AB 1513.

The trial court ordered the Agency to produce "an index identifying the author, recipient (if any), general subject matter of the document, and the nature of the exemption claimed" to justify withholding information in response to a request for documents under the Public Records Act. The Agency petitioned for writ relief to prevent disclosure of the identities of the parties with whom the Agency communicated confidentially in formulating AB 1513, the substance of these communications, and communications with the Office of Legislative Counsel (Legislative Counsel) during the drafting process. The appellate court granted a stay and issued an alternative writ to consider the matter. Based on the California Supreme Court's guidance in *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325 (*Times Mirror*), the court concluded the trial court's order errs in requiring disclosure of matters protected by the deliberative process and attorney work product privileges. The court of appeals directed the trial court to vacate its order directing the Agency to produce an index disclosing the author, recipient, and general subject matter of documents generated relating to the process of drafting AB 1513. The case was remanded for further proceedings.

DISCRIMINATION/HARASSMENT/RETALIATION

FEHA ALLOWS EMPLOYEES TO SUE EMPLOYERS FOR SEXUAL HARASSMENT BY NONEMPLOYEES

M.F. v. Pacific Peal Hotel Management LLC, 16 Cal. App. 5th 693 (2017).

M.F. was a housekeeper at a hotel owned by Pacific Pearl Hotel Management LLC. The hotel's engineering manager saw a trespasser on the hotel property one morning who was not a guest of the hotel. The trespasser was intoxicated and was carrying a beer, but the engineering manager did not tell him to leave or report his presence to the housekeeping staff. Later, the trespasser approached one of the housekeepers while she was cleaning a room and tried to give her money in exchange for sexual favors. A maintenance worker who was working nearby overheard and helped the housekeeper to make the trespasser leave the room. The trespasser then went to another hotel room where a housekeeper was cleaning and tried to get into the room. He again offered money for sexual favors. The housekeeper was able to close the door on the man and reported the incident to her

manager. The housekeeping manager used a walkie-talkie to notify the other housekeeping managers about the trespasser. The manager checked on the safety of the housekeepers in one building but not in the one in which M.F. was working. M.F.'s supervisor checked the rooms on one floor but not on the floor in which M.F. was working. The trespasser forced his way into the room that M.F. was working and told her to close the blinds. She refused, and he punched her in the face, knocking her unconscious. He then raped and abused her for two hours. During that time, no one came to check on her whereabouts.

M.F. sued Pacific, alleging nonemployee sexual harassment and failure to prevent the harassment from occurring. In response to a motion filed by Pacific, the trial court dismissed the lawsuit. M.F. appealed the dismissal.

The Court of Appeal reversed, finding that her complaint alleged sufficient facts to state a cause of action under FEHA for nonemployee sexual harassment and for Pacific's failure to stop the conduct from occurring, and remanded the case to the trial court to commence proceedings that were consistent with its ruling. Under FEHA, employers may be liable to employees for sexual harassment by nonemployees if the employers knew or should have known about the conduct and failed to take corrective action immediately. The court noted that M.F. established that the trespasser had been seen by the engineering manager and had harassed several housekeepers before she was assaulted. M.F.'s supervisor failed to check on her safety or to try to find out where she was despite knowing that the trespasser had sexually harassed other housekeepers. Pacific argued that she failed to state a claim under the FEHA because it did not have notice of the trespasser's conduct before he or she entered the property and that it took corrective action immediately upon learning of his conduct towards the other housekeepers. The court found, however, that Pacific had sufficient notice of the trespasser's conduct from his earlier actions and the reports that were made by the other housekeepers. The court determined that whether or not the hotel's corrective actions were sufficient would be a question of fact and thus should be considered by a jury.

MARITAL STATUS DISCRIMINATION TURNS ON <u>STATUS,</u> RATHER THAN ON TO WHOM CLAIMANT IS MARRIED

Nakai v. Friendship House Ass'n of Am. Indians, Inc., 15 Cal. App. 5th 32 (2017).

Plaintiff Orlando Nakai, was employed by defendant Friendship House Association of American Indians, Inc. ("Friendship House"), a drug and alcohol rehabilitation program. Nakai's wife informed Friendship House's CEO that Orlando had a gun, was angry at Friendship House employees, relapsed to using drugs and alcohol and that she had a restraining order against him. Based thereon, the CEO terminated Nakai's employment. The CEO also happened to be Nakai's mother-in-law.

Nakai sued, alleging wrongful termination based upon marital status discrimination and failure to conduct a reasonable investigation upon the report of an alleged threat. The trial court granted Friendship House's motion for summary judgment and Nakai appealed.

The appellate court held that Nakai failed to establish a *prima facie* case of marital discrimination. While laws prohibiting marital status discrimination are meant to prevent discrimination against classes of people, they do not extend to the status of being married to a particular person. The court further noted that Nakai claimed he was treated differently not because he was married, but because he happened to be married to the CEO's daughter, which does not constitute marital discrimination. Finally, Nakai was married to the CEO's daughter for 14 years; if marital status were an issue, Nakai would have been terminated earlier. The appellate court also noted that Nakai's own allegations, namely that his wife informed the CEO that Nakai had a gun, was angry at Friendship House employees, relapsed to using drugs and alcohol and that she had a restraining order against him, constituted legitimate, non-discriminatory business reasons to terminate Nakai's employment. Nakai had no evidence of pretext.

The appellate court further held that it did not have any duty to investigate before discharging Nakai because he was an at-will employee with no contractual rights to employment. Friendship House could legally discharge Nakai for any reason, so long as it was not a prohibited discriminatory reason.

RETALIATION CLAIMS UNDER FEHA AND SECTION 1981 DO NOT NECESSARILY RESULT IN IMPROPER 'DOUBLE DAMAGES'

Flores v. City of Westminster, 873 F. 3d 739 (9th Circuit 2017).

Plaintiffs were three police officers of Latino descent who sued their city employer and members of the command staff alleging race and national origin discrimination under FEHA, as well as retaliation under FEHA and 42 U.S.C. § 1981. Specifically, they claimed they were denied special assignments that could increase their chances of promotion. Officers Flores and Reyes also alleged that the defendants retaliated against them for filing administrative complaints, in violation of FEHA and 42 U.S.C. § 1981. The jury largely sided with the officers on several counts, and it awarded the officers a total of $3,341,000.00 in general and punitive damages, and the court awarded over $3 million in attorneys' fees. Defendants unsuccessfully moved for a new trial and judgment as a matter of law, and then defendants appealed.

The City argued that Officer Flores had failed to establish the elements of a retaliation claim, but the appellate court rejected this argument, finding that the City subjected him to one or more adverse employment actions, that his protected conduct was a substantial motivating factor behind the adverse employment actions, and that the City's proffered reasons for its actions were pretextual. The panel also rejected the City's argument that Flores had received "double damages," finding that the FEHA damages award did not necessarily overlap with the damages awarded against the defendant police chiefs for their individual retaliatory actions in violation of § 1981.

Finally, the panel held that the district court did not err in denying the officers' discrimination and retaliation claims against the police chiefs under § 1981, which prohibits discrimination in the making and enforcement of contracts by reason of race. The panel held that California law providing that the employment relationship between

the state and its civil service employees is governed by statute rather than contract should not be read to bar public employees from bringing claims under § 1981. The panel distinguished *Judie v. Hamilton*, 872 F.2d 919 (9th Cir. 1989), which predated the 1991 amendments to § 1981 expanding the reach of the statute's "make and enforce contracts" term.

ONLY FEHA AND WAGE CLAIMS DETERMINED TO BE FRIVOLOUS WILL SUPPORT AWARDS OF FEES OR COSTS TO SUCCESSFUL DEFENDANTS

Arave v. Merrill Lynch et al, 18 Cal. App. 5th 1098 (2018).

Plaintiff Arave brought several claims under FEHA against his former employers, Merrill Lynch and Bank of America, as well as against two individual supervisors (collectively, defendants). He sought to recover damages caused by discrimination, harassment, and retaliation based on his membership in the Church of Jesus Christ of Latter-day Saints. He also sought damages for nonpayment of wages (Lab. Code, § 201) and whistleblower retaliation (Lab. Code, § 1102.5). The jury returned a verdict in favor of defendants on all counts that had survived summary judgment and dismissal. The trial court denied Arave's post-trial motions and awarded defendants, as prevailing parties, $54,545.18 in costs, $29,097.50 in expert witness fees, and $97,500 in attorney fees incurred defending against Arave's wage claim. Arave appealed. Defendants cross-appeal, contending the trial court abused its discretion when it determined Arave's FEHA claims were not frivolous and denied them attorney fees on those claims.

The court of appeals affirmed in all but two respects. First, the court concluded the trial court erred by awarding $83,642.68 in costs and expert witness fees though it found Arave's FEHA claims were not frivolous, and therefore reversed the order making the award. However, because a portion of the award could be attributable to Arave's wage claim, the matter was remanded for the trial court to make that apportionment, as appropriate. The appellate court also concluded the trial court erred by awarding $97,500 in attorney fees on the wage claim without determining whether that claim was frivolous. That issue was also remanded for further determination.

PRIOR SALARY IS NOT A "FACTOR OTHER THAN SEX" JUSTIFYING A PAY DISPARITY UNDER THE EQUAL PAY ACT

Rizo v. Yovino, 854 F.3d 1161 (9th Cir.), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017).

Affirming the district court's denial of summary judgment to the defendant on a claim under the Equal Pay Act, the *en banc* court held that prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees.

Overruling *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982), the *en banc* court held that an employee's prior salary does not constitute a "factor other than sex" upon which a wage differential may be based under the statutory "catchall" exception set forth in 29 U.S.C. § 206(d)(1). "[A]ny other factor other than sex" is limited to legitimate, job-

related factors such as a prospective employee's experience, educational background, ability, or prior job performance. By relying on prior salary, court held that the defendant therefore failed as a matter of law to set forth an affirmative defense. The case was remanded to the district court.

SUMMARY JUDGMENT NOT APPROPRIATE ON FEHA DISABILITY DISCRIMINATION CLAIM WHERE DEFENDANT FAILED TO CARRY BURDEN OF SHOWING OBESITY LACKED PHYSIOLOGICAL CAUSE

Cornell v. Berkeley Tennis Club, 18 Cal. App. 5th 908 (2017).

Plaintiff Cornell was a severely obese woman who was fired from the Berkeley Tennis Club after having worked there for over 15 years in varying capacities. Her performance evaluations and work history had been uniformly positive, and she routinely acted as the "day manager" when the general manager or assistant general manager were out. A new manager (Headley) was hired in 2012 who said he wanted to "change the image of the club" by (among other things) requiring staff to wear uniforms. She informed him of her shirt size on his request, but when uniforms were selected and ordered, the chosen product was not available in her size and the largest size ordered did not fit her. Headley reported to the Personnel Committee that all the staff had begun wearing the uniforms except for Cornell, who "continue[d] to resist this change and ha[d] not been cooperative." Cornell wrote Headley about her desire to comply and asking him to work with her to find an acceptable product, and on a parallel path she obtained a similar shirt from a specialty shop and had the company logo embroidered on it. Headley also hired another employee (a younger, very petite woman) who took over some of Cornell's night duties, and Cornell learned the new employee was being paid more for the same work. Cornell raised her pay concerns with the Personnel Committee, and ultimately the issue of "pay rates for staff" was agendized as part of an upcoming Board of Directors agenda. Headley testified that he found a recording device hidden near the Board table, and some evidence indicated Cornell had been present in the location where it was found (she testified she had been setting up/cleaning up for the meeting.) Cornell was terminated from employment, ostensibly for having attempted to record the Board meeting.

Cornell brought eight claims against the Club: three under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), for disability discrimination and failure to accommodate her disability (the discrimination/failure to accommodate claim), disability harassment, and retaliation; three for wrongful discharge in violation of public policy, based on her three FEHA claims; one for intentional infliction of emotional distress; and one for defamation. The trial court granted the Club's motion for summary adjudication of all eight claims, and Cornell appealed.

The court of appeals affirmed in part and reversed in part. Under the law governing motions for summary adjudication, the Club had the initial burden to produce evidence that Cornell cannot establish at least one element of each claim. The Club failed to sustain this burden on the claims requiring Cornell to show that her obesity has a physiological cause (i.e. obesity is not in itself a "disability" requiring accommodation unless it stems from a physiological cause.) As a result, the trial court improperly

granted summary adjudication of the FEHA claims alleging that the Club discriminated against and harassed Cornell and the claim alleging that the Club terminated her in violation of public policy based on the FEHA discrimination claim. However, the court concluded that summary adjudication was proper on the FEHA claims alleging that the Club failed to accommodate Cornell's disability and retaliated against her and the claims alleging that the Club terminated her in violation of public policy based on the FEHA harassment and retaliation claims. Finally, summary adjudication of the claim alleging that the Club intentionally inflicted emotional distress on Cornell was affirmed, but the court ruled a triable issue of material fact remains on the claim alleging that she was defamed.

NINTH CIRCUIT EXTENDS CONSTITUTIONAL PRIVACY AND ASSOCIATIONAL PROTECTIONS TO AN EMPLOYEE'S OFF-DUTY, EXTRAMARITAL AFFAIR WITH A CO-WORKER UNLESS IT NEGATIVELY AFFECTS JOB PERFORMANCE

Perez v. City of Roseville, 882 F.3d 843 (9th Cir. 2018).

Perez, a probationary police officer, was released from probation approximately nine months into her tenure with the City. During her employment, the City conducted an internal affairs investigation into a citizen complaint that Perez had been involved in a romantic relationship with a fellow officer (some activities were alleged to have occurred on duty). The investigation determined no on-duty misconduct had occurred beyond excessive texting and calling one another. Both Perez and the officer received written reprimands, however Perez was released from probation a few weeks later following the Police Chief's discovery of some other issues of concern. Perez sued the City and three members of the police command staff, claiming gender discrimination and, pursuant to 42 U.S.C. § 1983, that her termination violated her constitutional rights to privacy and intimate association because it was impermissibly based in part on disapproval of her private, off-duty sexual conduct. The trial court granted summary judgment for the City as to all claims.

The appellate court affirmed summary judgment for defendants on plaintiff's gender and due process claims, but reversed as to the Section 1983 privacy claim against the individual defendants. Disagreeing with the Fifth and Tenth Circuits, the panel held that the constitutional guarantees of privacy and free association prohibit the State from taking adverse employment action on the basis of private sexual conduct unless it demonstrates that such conduct negatively affects on-the-job performance or violates a constitutionally permissible, narrowly tailored regulation. Because a genuine factual dispute existed as to whether the defendants terminated the officer at least in part on the basis of her extramarital affair, the panel concluded that she put forth sufficient evidence to survive summary judgment. Moreover, the rights of privacy and intimate association were determined to be clearly established such that any reasonable official would have been on notice that, viewing the facts in the light most favorable to her, the officer's termination was unconstitutional. The panel therefore reversed the district court's grant of qualified immunity on the privacy claim and remanded for further proceedings.

NEW TRIAL LIMITED TO THE ISSUE OF NONECONOMIC DAMAGES WAS APPROPRIATE WHERE JURY'S DETERMINATION OF DISCRIMINATION LIABILITY AND CONSTRUCTIVE DISCHARGE WAS SUPPORTED BY THE EVIDENCE AT TRIAL

Simers v. LA Times Communications, 18 Cal. App. 5th 1248 (2018).

Plaintiff T.J. Simers was a well-known and sometimes controversial sports columnist for Los Angeles Times Communications, LLC. He had held that position since 2000, receiving uniformly favorable and often exceptional performance reviews from defendant. In March 2013, plaintiff, then 62 years old, suffered a neurological event with symptoms similar to a "mini-stroke." He recovered quickly and resumed writing his thrice-weekly column. In June 2013, The Times reduced plaintiff's columns to two per week, to "give [him] more time to write on [his] columns." His editors expressed the dissatisfaction of upper management with several recent columns, and stated "they had been having problems with [his] writing for the past 18 months." Shortly thereafter the Times learned from an article in another publication that a Hollywood producer (who had just filmed a 90-second video that had "gone viral," in connection with one of plaintiff's columns) was apparently developing a television show loosely based on plaintiff's life. Viewing this as a possible ethical breach, the Times suspended the column pending an investigation. The investigation was completed in August, after which the Times issued a "final written warning" that removed plaintiff from his position as a columnist and made him a senior reporter, albeit with no reduction in salary "for now." Plaintiff's lawyer informed defendant plaintiff could not work in that environment and considered himself to have been constructively terminated.

Plaintiff sued the Times, and after a 28-day trial in the fall of 2015, the jury found for plaintiff on his claims of disability and age discrimination, and on his claim of constructive termination. The jury awarded plaintiff $2,137,391 in economic damages for harm caused by his constructive termination and $5 million in noneconomic damages. The parties had agreed to give the jury a special verdict form that instructed them to fill in the blanks for past and future economic damages only if they found plaintiff was constructively terminated. The special verdict form allowed the jury to award past and future noneconomic damages without identifying which noneconomic damages were caused by the constructive termination and which were caused by the discrimination.

The trial court granted defendant's motion for judgment notwithstanding the verdict (JNOV) on plaintiff's constructive termination claim, and otherwise denied JNOV, finding substantial evidence supported the verdict on plaintiff's age and disability discrimination claims. The court also granted defendant's motion for a new trial on all damages, economic and noneconomic, finding it was not possible to determine what amount of noneconomic damages the jury awarded because of the discrimination but not because of the constructive discharge. Both parties appealed.

The court of appeals affirmed, holding that the jury's determination on liability was supported by the evidence. The Times failed to demonstrate how a new trial solely on

the issue of noneconomic damages would cause prejudice to it, and therefore there was no error in the trial court's order limiting the new trial to that issue.

ARGUMENT THAT AN EMPLOYER'S DECISION WAS BASED UPON THE RACE OF A THIRD PARTY WAS IMPROPER AND SHOULD NOT HAVE BEEN CONSIDERED WHEN DETERMINING WHETHER RACE DISCRIMINATION OCCURRED

Diego v. City of Los Angeles, 15 Cal. App. 5th 338 (2017).

Two Hispanic police officers brought action against the City of Los Angeles, alleging they suffered race discrimination within the city police department following their involvement in fatal shooting of young, unarmed African-American civilian who was apparently autistic. They claim they were "benched" after the incident, resulting in lost promotional opportunities and off-work duty, because of their race. They also claimed that the city retaliated against them for filing the lawsuit. The jury found in favor of the officers and awarded nearly $4 million in damages. The City appealed, arguing that the evidence was not sufficient to support the verdict.

The appellate court reversed the jury's verdict because the officers' claims were based on an improper legal theory. The officers claimed that they suffered disparate treatment because they are Hispanic *and* the victim was African-American. Thus, the officers' theory was that the jury could and should consider whether the officers were treated differently, not simply because of their race, but because of the race of their victim. Evidence showed the City assessed the risk management implications of returning officers *of any race* to the streets of Los Angeles who had been involved in a fatal shooting of an innocent, unarmed and autistic African-American man, and doing so did not result in race discrimination in violation of FEHA. The jury should have been instructed that they could not consider the race of the victim in support of their determination of the officers' claims. While the officers claimed that African-American officers would have been treated differently, but they did not introduce any competent evidence to support that claim.

The court held that the officers also did not provide evidence sufficient to support their claim that the City retaliated against them for filing the lawsuit. The City provided evidence—which was supported in important respects by the officers' own evidence and argument—that the officers were "benched" because of the political sensitivity of the shooting in which they were involved and the possible devastating consequences to the City if they were to be involved in a future controversial incident. The fact that the "benching" continued, even for the five-year period that the officers identify as unusual, is fully consistent with that justification and cannot itself support a conclusion that the City's motives changed after the lawsuit was filed.

PUBLIC AGENCY

LABOR CODE SECTION 244 LIMITATION ON REQUIREMENT TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE BRINGING A CIVIL ACTION (I.E. THE *CAMPBELL* RULE) APPLIES ONLY TO CLAIMS BEFORE THE LABOR COMMISSIONER

Terris v. County of Santa Barbara, 20 Cal. App. 5th 551 (2018).

Plaintiff Shawn Terris appealed a summary judgment in favor of her former employer, defendant County of Santa Barbara (County), in her wrongful termination action. Terris was laid off as part of a significant reduction in force by the County, and she attempted to "bump down" to a lower level position. However, the County determined that the new position (First 5 Program/Business Leader) was one requiring special skills Terris did not possess, and thus she was laid off. Terris challenged the decision by filing a complaint with the County's Civil Service Commission (Commission). She alleged her termination procedure violated her seniority rights, and she argued the County and County Executive Officer had engaged in discrimination against her for exercising her rights as a County employee, as an elected Santa Barbara County Employees Retirement Board Trustee, and for filing a Claim Against Public Entity. The Commission ruled that 1) it could decide whether the County followed the proper procedures for terminating Terris's employment, but 2) it could not decide Terris's discrimination claims because she had not exhausted her administrative remedy of filing a discrimination complaint with the Equal Employment Opportunity Office (EEO). Terris did not file an EEO complaint. She urged the Commission to decide only whether the County followed the proper procedures in terminating her employment. One month later, the Commission ruled the special skills designation was appropriate, the layoff was authorized, and the County complied with all required procedures.

Terris then sued alleging she had been fired both in retaliation for asserting protected rights and because of her sexual orientation (in violation of FEHA). Specifically, Terris claimed the County's discriminatory employment action included: 1) terminating her employment to interfere "with her holding an elected office as a Retirement Board Trustee" (§ 1101); 2) attempting to coerce "and influence" her "political activity as a Retirement Board Trustee" (§ 1102); and 3) retaliating against her because of her "complaints about violations of her activity directed to labor organizing County workers" (§ 1102.5). The trial court granted the county's motion for summary judgment, holding Terris did not exhaust her administrative remedies on her whistleblower retaliation claims, and that there were no triable issues of fact on Terris's claim that she was terminated because of her sexual orientation. The trial court went on to award the County costs on the FEHA claim.

On appeal, the court reversed as to the cost award, but affirmed in all other respects. Costs are not typically awarded against merely unsuccessful plaintiffs under FEHA, and the court recognized that the chilling effect of awarding such costs disfavored making such awards. On the issue of administrative remedies, the court noted that *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311 holds that public employees

must pursue appropriate internal administrative remedies before filing a civil action against their employer. While Labor Code section 244 does not require a litigant to exhaust administrative remedies before bringing a civil action, the court held that section applies only to claims before the Labor Commissioner, and that it had no impact on the *Campbell* rule's application to other civil claims.

FBOR SECTION 3254(C) PROCEDURES AND PROTECTIONS APPLY ONLY TO FIRE CHIEF WHO IS HEAD OF THE FIRE AGENCY AND NOT TO SUBORDINATE CHIEF EMPLOYEES.

Corley v. San Bernardino County Fire Prot. Dist., 21 Cal. App. 5th 390 (2018).

Plaintiff Corley was a battalion chief with the San Bernardino County Fire Protection District (the District) who had positive evaluations and no significant disciplinary history. In 2011, a fairly new Fire Chief assigned Corley to several new duties, and was dissatisfied with Corley's performance, which led to his decision to terminate Corley's employment for incompatible management style among other reasons. Following his termination, Plaintiff Corley sued the District on several theories including age discrimination (he was 58 at the time of his termination, and he was replaced by a 48-year-old worker.) Following trial on his age discrimination claim, the jury found Corley's age was a substantial motivating reason for the District's termination of his employment and awarded damages for lost earnings. The trial court subsequently entered a judgment in favor of Corley against the District awarding Corley $597,629 in damages, $853,443 in attorney fees, and $40,733 in costs.

The District appealed, arguing *inter alia* that the trial court erred in denying its request to instruct the jury pursuant to a provision in the Firefighters' Procedural Bill of Rights (§ 3254, subd. (c)). Specifically, the District sought to have the jury instructed that:

> A fire chief shall not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal.
>
> "The removal of a fire chief by a public agency or appointing authority, for the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, or for reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, shall be sufficient to constitute 'reason or reasons.'

The District argued that Corley had been given the rights afforded under this section, which the jury should have been instructed that these procedural protections were sufficient. The court of appeals affirmed holding that section 3254, subdivision (c) applies only to the actual head of the agency Fire Chief, rather than to subordinate battalion chiefs, and concluded that the trial court did not err in refusing to instruct the jury pursuant to this provision.

FIRST DISTRICT COURT OF APPEAL HOLDS THAT DETRIMENTAL CHANGES TO PUBLIC PENSION BENEFITS OF "LEGACY MEMBERS" IS ONLY JUSTIFIED BY COMPELLING EVIDENCE THAT THE REQUIRED CHANGES MANIFEST A MATERIAL RELATION TO THE SUCCESSFUL OPERATION OF THE PENSION SYSTEM

Alameda County Deputy Sheriff's Ass'n v. Alameda County Employees' Retirement Ass'n, 19 Cal. App. 5th 61, *rev. granted,* 230 Cal. Rptr. 3d 681 (March 28, 2018).

Following adoption of the Public Employee Pension Reform Act of 2013 (PEPRA), labor organizations representing county employees in Alameda, Contra Costa and Merced counties sued challenging the constitutionality of excluding pay items previously considered "compensation earnable" under the County Employees Retirement Law of 1937 (CERL). They argued their members hired before PEPRA was adopted had a "vested right" to pension benefits under pre-PEPRA law. Their suits were consolidated into one action, in which the trial court rejected their claims, and appeals followed.

The First District Court first held that individual retirement boards lack discretion to include pay items within the scope of "compensation earnable" that go beyond those provided for in the CERL. Next, the court ruled that various PEPRA sections substantively changed CERL, particularly with respect to the exclusion of on-call and standby pay, as well as exclusion of compensation "paid to enhance a member's retirement benefit." Finally, the court declined to follow the decision in *Marin Ass'n of Public Employees v. Marin County Employees' Retirement Ass'n* (currently on appeal to the California Supreme Court), which had held that public pension system members are not entitled to an immutable pension benefit, but only to a "reasonable" pension. Instead, the *Alameda* court held that applying detrimental changes to pension benefits of "legacy members" is only justified by compelling evidence that the required changes manifest a material relation to the successful operation of the pension system. It remanded for the trial court to address that required vested rights analysis and for further proceedings.

NO VESTED RIGHT TO PARTICULAR MEDICAL BENEFIT CREATED WITHOUT CLEAR CONTRACT LANGUAGE OR EXTRINSIC EVIDENCE OF INTENT TO CREATE SUCH A RIGHT

Vallejo Police Officers Ass'n v. City of Vallejo, 15 Cal. App. 5th 601 (2017).

Following its bankruptcy proceedings in 2008-2009, the City and the Vallejo Police Officers Association (VPOA) agreed on a contract (2009 Agreement) that reduced the City's contribution to health insurance benefits to coverage capped at 100% of the CalPERS Kaiser plan. In 2012, the City began negotiating with the VPOA to further reduce its liability for retiree medical costs to $300 per month. The VPOA rejected this change, arguing that employees and retirees had a vested right to the benefit provided in the 2009 Agreement. The negotiations resulted in impasse, after which the City imposed its $300 per month retiree medical contribution. The VPOA petitioned the superior court for a writ of mandate alleging that the City of Vallejo (City) engaged in bad-faith bargaining in violation of state law and then unilaterally imposed contract terms that

impaired VPOA members' vested rights to retiree medical benefits that covered insurance premiums up to the full cost of a Kaiser health plan. The superior court denied the petition, concluding that VPOA had not shown its members had a vested right to the full Kaiser premium and that the City had not bargained in bad faith; the court therefore declined to order the City to start new contract negotiations or to reinstate retirement medical benefits at the level previously provided to VPOA members. The union appealed.

The appellate court affirmed, noting first the legal assumption that an MOU does not create a vested right absent a "clear showing" of the entity's intent to create such a right, either from clear contract language or convincing extrinsic evidence. The court held the 2009 Agreement had no such language intending to create a vested right. The court went on to reject various declarations by VPOA signatories to the 2009 Agreement attesting to their subjective understandings of the 2009 Agreement's intent. The court ruled that these declarations did not represent the City's intent, which must be demonstrated by admissible evidence to prove intent to create a vested right. Finally, the court held that the mere fact that the City had paid the full cost of retiree medical premiums over a period of years was not proof that the right to such payments would continue.

"STALE COMPLAINT" TIME LIMITATION IN EVIDENCE CODE SECTION 1045(B) DID NOT BAR DISCLOSURE OF PROMOTIONAL PERSONNEL RECORDS RELEVANT TO DISCRIMINATION AND RETALIATION ACTION BY UNSUCCESSFUL APPLICANT

Riske v. Superior Court, __ Cal. App. 5th __, 2018 WL 1789937 (April 16, 2018).

Retired LAPD officer Robert Riske sued the City of Los Angeles alleging the Department had retaliated against him for protected whistleblower activity by failing to assign or promote him to several positions, and selecting instead less qualified candidates. In discovery, Riske sought personnel records relied on by the City in making assignment and promotion decisions. The superior court erroneously ruled those records were not subject to discovery because the officers selected for the positions Riske sought were innocent third parties who had not witnessed or caused Riske's injury, a ruling reversed on appeal. *See Riske v. Superior Court*, 6 Cal. App. 5th 647, 664-665 (2016). The trial court was directed to vacate its order denying Riske's discovery motion and to enter a new order requiring the City to produce those records for an *in camera* inspection in accordance with section 1045.

The superior court reviewed the records and ordered them to be produced in accordance with the parties' protective order. However, citing Evidence Code section 1045(b)(1), the court ordered they be redacted to exclude disclosure of "[i]nformation consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation" in which discovery or disclosure is sought. Thus the court ordered redaction of all items in those reports concerning conduct that had occurred more than five years before Riske filed his complaint.

Riske again petitioned for a writ of mandate directing the superior court to order the City to produce those records without redaction. Riske and the City agreed that, if the five-year disclosure bar applied at all, it is measured from the date each officer was promoted instead of Riske—the alleged adverse employment action at issue in the litigation—and not from the date Riske filed his complaint, as the superior court ruled. Riske argued, and the appellate court agreed, that section 1045(b), which prohibits disclosure of stale complaints against police officers, had no application to the personnel reports sought in this case.

A Practical Guide to Conducting In-House Workplace Investigations

Wednesday, May 2, 2018 General Session; 1:00 – 3:00 p.m.

Margaret E. Long, County Counsel, Modoc and Trinity Counties,
Assistant County Counsel, Alpine and Sierra Counties
David A. Prentice, City Attorney, Ione, County Counsel, Alpine and Sierra Counties

Notes:_____

CAUGHT IN THE ACT: A Practical Guide to Conducting In-House Workplace Investigations

Prepared and Presented by

Margaret Long & David A. Prentice

Introduction[1]

Allegations of employee misconduct can be plentiful within a public agency and present a serious risk of liability if not handled correctly. When an employee makes an oral or written complaint, the employer should take immediate steps to stop the alleged action, protect involved parties and begin investigations. Immediate response to a complaint and the initiation of an investigation will yield the best results. While it is easier to hire an outside investigator to conduct the investigation, this is not always financially or practically feasible, and it's important for agencies to know how to conduct a fair and thorough investigation internally. The purpose of this training is to provide public agency counsel with the tools to conduct and supervise in-house employee investigations that will stand up in a court of law, if necessary.

[1] This training is focused on generalized investigation. Investigations for Police Officers and Firefighters will be different and are covered under the Police Officers Bill of Rights and the Firefighters Bill of Rights.

The following steps should be taken as soon as the employer receives a verbal or written complaint:

Step 1: Taking the Complaint

Once an employer has received a complaint, or knows, or has reason to know, that a violation has occurred in the workplace, an investigation should commence promptly. Counsel should be involved in this process from the very beginning. There is no single definition of "prompt" in the context of initiating an investigation. Variables unique to each situation impact the "promptness" analysis, including the number of witnesses and the complexity of the allegations.

The first step is obtaining a full understanding of the complaint, and to begin the process of documentation. This task is usually accomplished by Human Resources/in-house staff, under the supervision of counsel, and should be commenced within days of receiving the complaint. The results of this first step will define the scope of the investigation going forward.

The process of taking the complaint should include:

- Receive Complaint (written or oral):
    - Ask the Complainant to submit the complaint in writing and provide as much detail as possible. See Sample Complaint Form.
    - Hold an initial meeting where you inquire: "What happened?"
    - Take notes as Complainant describes the issues.
    - Allow Complainant to do the talking, but lead him/her with basic questions: "Who, what, where, and when?"
    - Ask for the identification of possible witnesses.
    - Ask for relevant documents/evidence:
        - Emails, Texts, Notes
    - Make sure they feel safe.

Step 2: Provide Interim Protection

One of the first considerations may be the need to take immediate measures for the protection of the accuser or the alleged victim. Separating the alleged victim from the accused may be necessary to guard against continued harassment or retaliation. Actions such as a schedule change, transfer or leave of absence may be necessary; however, complainants should not be involuntarily transferred or burdened. These types of actions could appear to be retaliatory and result in a retaliation claim. The employer and the accuser must work together to arrive at an amenable solution and serious consideration should be given to whether moving the respondent is preferable to moving or otherwise impacting the complainant. Employers may wish to seek legal advice prior to making any decisions.

Considerations

- Allegations, if proven, would be a terminable offense;
- Probability of interference with investigation;
- Probability of misconduct during investigation;
- Respondent in Complainant's chain of command;
- Impact on Agency operations;
- Can Respondent be transferred, or telecommute?
- Schedule changes to avoid contact with Complainant.

See Sample Notice of Administrative Leave.

Step 3: Determine the Need/ Legal Duty to Investigate

Legal Duty

- Employers have a duty under state and federal law to adequately investigate any employee's charges and claims of discrimination, retaliation, or harassment.
- FEHA provides that employers must "take all reasonable steps necessary to prevent discrimination and harassment from occurring." (Cal. Gov. Code § 12940(k))
- Title VII requires employers to "take all steps necessary to prevent sexual harassment from occurring." (Title VII of the Civil Rights Act of 1964)

Prevent Liability

- Under FEHA, "an employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dept. of Health Svs. v. Sup. Ct. (McGinnis)* (2003) 31 Cal.4th 1026, 1042)
- Under Title VII, "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *(Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 765)
- If an employer has adequate policies and procedures for reporting and responding to employee complaints, it may be able to reduce potential damages and liability.

Potential Consequences of Failure to Investigate

- Violation of Policy and State and Federal Law;
- Policies and Procedures viewed as ineffective, meaningless, or retaliatory by employees;
- Discourages complaints and opportunity to resolve workplace issues prior to litigation;
- Undermines Government Agency's position in disciplinary appeals and litigation.

Reasons to Conduct a GOOD Investigation

***Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal. 4th 93**

In *Cotran*, the plaintiff had been accused of sexual harassment by two female employees. The employer conducted a thorough investigation and concluded that those allegations were true. In fact, those allegations were false. Both women later admitted that there had been no harassment, but that they had been consensually involved with the plaintiff.

The California Supreme Court found that the proper role for the jury is to determine whether, in making its determination, the employer conducted an ***appropriate investigation*** and reached ***reasonable conclusions*** based upon that investigation. In other words, ***whether the employer acted in "good faith."*** The employer does not have to prove that the alleged misconduct actually occurred. Rather, the employer must show that it reasonably believed that the alleged misconduct took place and otherwise acted fairly.

***Silva v. Lucky Stores, Inc.* (1998) 65 Cal. App. 4th 256**

In *Silva*, applying the *Cotran* standard, the court found that a misconduct investigation was adequate because fifteen (15) employees had been interviewed over a full month of investigation and no facts supporting any claim of pretext were advanced. In the context of upholding the investigation in *Silva*, the court emphasized that the investigator must be trained in how to properly conduct workplace investigations. The *Silva* court also held that methods of recording and memorializing witness interviews must be accurate, complete, and trustworthy. From *Silva*, we have learned that:

- Investigation must be timely;
- Investigator must be competent and well trained;
- Investigator should use an established system to investigate claims.

Step 4: Select the investigator

The appropriate investigator should possess all of the following:

- An ability to investigate objectively without bias.
- No stake in the outcome. The investigator should not have a personal relationship with the involved parties. The outcome should not directly affect the investigator's position within the organization.
- Skills that include prior investigative knowledge and working knowledge of employment laws.
- Strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair.
- Attention to detail.
- The right temperament to conduct interviews.

In addition, the investigator should be in a position to maintain confidentiality, be respected within the organization (because his or her conclusions will be used to make a determination), have the ability to act as a credible witness and, if internal, have the likelihood of continued employment with the public entity.

Employers generally use the resources of experienced HR professionals, legal counsel (inside or outside) or a third-party investigator. There are distinct advantages and disadvantages to each type of investigator that can be selected:

Human Resource Staff. HR is the most common choice. Employers often assign the responsibility for investigations to HR professionals because of their specialized job training as well as prior experience in conducting workplace investigations. HR representatives hold a particular advantage because of their superior interpersonal skills; employees typically feel comfortable with them and are willing to confide in them. HR also has the ability to remain impartial, is familiar with the employees, and has knowledge of the organization and of employment laws. The disadvantage is that employees may associate HR representatives too closely with the organizational management and therefore not perceive them as neutral in the investigation. Additionally, management may object if the HR professional has a close personal connection with any of the involved employee(s).

Third-Party Investigators. They are more commonly used when an employer does not have an internal person who possesses the necessary qualifications or the time to conduct the investigation, or if the person accused is among the senior leaders in the organization. They can provide objectivity that an internal investigator may lack. Under the California Private Investigator Act ("CPIA"), an external investigator hired to conduct a workplace investigation must either be a state licensed attorney or a state-licensed private investigator[2]. You cannot use a retired employee or HR consultant to do the investigation.

Legal Counsel Investigations, both In-House and Outside. These investigators have ethical and privilege considerations. They must disclose to the parties involved in the investigation the purpose of the investigation and the attorney-employer relationship. Legal counsel investigators should clearly disclose that the organization, not the accused employee, is the client. Outside counsel brings objectivity to the investigation but lacks knowledge of the employer's culture and the employees. In-house counsel does have knowledge of public entity culture and its employees. However, both in-house and outside counsel can be perceived as intimidating, which could restrict the employees' willingness to be open and provide information.

[2] California Business and Professional Code section 7520-7839

Conflicts of Interest

Potential conflicts of interest should be taken into account when determining who will conduct your investigation. *Nightlife Partners v City of Beverly Hills* (2003) 108 Cal.App. 4th 81, and *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, both tell us that it is inappropriate for one person to simultaneously perform both advisory and prosecutorial functions and that an attorney may occupy only one position at a time and not switch roles from one meeting to the next.

Attorney-Client Privilege

For an investigation report to fall within the protection of the attorney-client privilege, the "dominant purpose" of the workplace investigation must be to obtain legal advice or legal services.[3]

The protection of attorney-client privilege is one of the advantages to having the investigation conducted by an attorney. However, the privilege can still apply to an investigation performed by a non-attorney if an *Upjohn* letter/warning is issued. The *Upjohn* letter formally documents that the non-attorney is working at the direction of legal counsel to gather facts necessary for the attorney to give legal advice.[4] All witnesses should be given an *Upjohn* warning, as well, which states that the investigation is confidential and being done at the direction of legal counsel in order to gather facts necessary for the attorney to provide legal advice.

See *Upjohn Letter and Warning.*

Team approach. An employer might also consider a team approach. Teams provide a multitude of experience, resources and ideas. A team may make up for areas a single investigator may lack, such as experience, expertise in employment law, the ability to obtain witness information or knowledge of internal issues and culture. Generally, a good team, which is often an outside attorney working with HR, covers all internal and external gaps that would be associated with a single investigator. The team approach provides the ability to collaborate in the event that the accuser, the accused or a witness alters his or her earlier statements.

Step 5: Preserve Evidence

The first issue the investigator should consider is whether there is a need to secure evidence, such as a computer hard drive or electronic communications. Investigators should be cautious, however, and consult internal policies regarding access. The public entity may have an approval process that needs to be followed before preserving or accessing electronic information.

[3] *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 746.
[4] *Upjohn v. United States* (1981) 449 U.S. 383.

The following is a list of evidence that the investigator may consider preserving:

- Personnel Files
- Timecards/Other Time Records
- Medical Files
- Expense Files
- Project Files
- Documents in Possession of Others
- Electronic Data
    - Email
    - Voicemail
    - Videotapes
    - Internet Searches
    - Social Media (if available and provided)

It is important to keep track of the source of each document received. Some investigators find it helpful to maintain a spreadsheet of documents that references the source of the document, date received, and a short summary of the document. Documents can then be numbered and referenced by their Exhibit number in the investigative report. Please See Sample Document Log.

Investigators should be cautious in making sure any search of an employee's office or other area in which the employee has a reasonable expectation of privacy is consistent with Federal and State laws. Investigators should seek legal advice before conducting searches.

Step 6: Ensure Confidentiality

Due to the fact that most investigations concern allegations of personal or professional wrongdoing, the public agency has a vested interest in making sure the allegations are not broadcasted. It is critically important to prevent unnecessary harm to a respondent's reputation if the charges are not substantiated. Complainants and witnesses also have privacy rights and may need to be protected from retaliation. It is therefore important not to disclose information regarding respondents, complainants or witnesses to individuals who do not have a "need to know."

Best practices in protecting privacy/confidentiality rights include:

- Avoiding the use of unsecured e-mail during the investigation;
- Ensuring that the confidentiality of documents (hard copy and electronic) is maintained; and

- Avoiding discussion of the allegations except as necessary to solicit information from parties and witnesses.

Despite these cautions about privacy and confidentiality, it is important for investigators not to promise anonymity to any of the involved individuals. **An employer should never promise absolute confidentiality to any party involved in the investigation.** Investigators may assure participants and witnesses that protection of their identity, and the information they provide, will be maintained to the extent possible, within the limits of the law and the legitimate needs of the investigation. It may be necessary to reveal the name of a party or witness in order to investigate the matter effectively.

Employer's Ability to Limit Communications Regarding Ongoing Investigations

The Public Entity may restrict communications only if it can show a legitimate business justification outweighs associational rights, and that the dissemination of information regarding the investigation among employees would interfere with the Public Entity's ability to conduct an effective investigation.

- Blanket Policies Do Not Justify Restrictions on Employees Associational Rights
    - NLRB – *Banner Health*. The Board has ruled that a blanket policy that requires employees not to discuss a complaint with other employees while it is under investigation violates employees' rights under Section 7 of the NLRA to communicate with coworkers about wages, hours, and other working conditions. Employer must demonstrate a legitimate business justification that outweighs the employees' Section 7 rights. A blanket policy does not meet the employer's burden *per se*. (*Banner Health System* (2015) 362 NLRB 271.)
    - PERB – *Perez v. LACC*. The Board, following *Banner Health*, ruled that a "no-contact" instruction issued to a Respondent in an investigation interfered with Respondent's employee rights under EERA (statute governing labor relations in public schools and community colleges). The employer included the "boilerplate" language pursuant to District policy that was aimed at preventing the employee from tainting evidence. No evidence of any specific concerns was presented. (See also *Los Angeles Community College District* (2014) PERB Dec. No. 2404-E.)

Step 7: Create a Plan for the Investigation

An investigation must be planned in advance to be effective and properly executed. A complete plan should include:

1. What are the issues that need to be investigated?
2. Which policies apply and should be reviewed?
3. Who should be interviewed?

4. Is the order of witness interviews important?
5. Does the environment for interviews matter?
6. What documents are relevant?
7. What physical evidence is relevant?
8. What questions should be asked?

Step 8: Develop Interview Questions

Questions should be developed ahead of time in the planning stage, although additional questions will be added throughout the investigation as more evidence and information is shared. Good questions are relevant and designed to draw out facts without leading the interviewee; they should be open-ended to elicit as much information as possible.

For Sample Questions, See Sample Questions for Complainant, Respondent and Witnesses.

Step 9: Conduct Interviews

Once the appropriate investigator has been selected, an investigation plan has been developed and interview questions have been created, interviews can be conducted. The investigator should inform all parties involved of the need for an investigation and explain the investigation process. Caution should be used when stressing confidentiality of the investigation process as this can be seen as interference with employee rights to engage in concerted activity under the National Labor Relations Act (NLRA).

The investigator should focus on being impartial and objective in gathering and considering relevant facts. Preventing pushing the investigation in any particular direction is imperative. The investigator should never offer any opinion or say anything to interviewees that will discredit his or her impartiality. Objectivity must be maintained with every interview.

Taking notes, looking for inconsistencies, and obtaining leads for more evidence and potential witnesses are goals of the interview process. Asking the employee to write down what happened may help uncover inconsistencies. There may be a disparity between what the employee is willing to commit to paper and what he or she verbalized in the interview.

Investigators should be cautious when conducting interviews to avoid any harsh interrogation tactics that could result in charges such as coerced false confessions and false imprisonment.

***Lybarger* Admonishment**

A *Lybarger* admonishment derives its name from *Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 822. In interpreting Government Code Sections 3303(e) and (h), the California Supreme Court determined that whenever a supervisor/manager interrogates an employee and (a) it

appears that the employee may be charged with a criminal offense as a result of his misconduct, or (b) the worker refuses to answer questions on the ground that the answers may be *criminally* self-incriminating, the questioning must be preceded by a *"Lybarger* admonishment."

The employee must also be advised that among other things, the employee has the right to remain silent and not incriminate himself, but:

> (1) His silence could be deemed insubordination, leading to administrative discipline, and
>
> (2) Any statement made under the compulsion of the threat of such discipline (i.e., incriminating statements) could not be used against him in any subsequent criminal proceeding.

See Sample *Lybarger* Admonishment.

Requests for Representation

The complainant may ask to bring someone to the interview. Unless the written procedures speak to this issue (most do not), this is left to the investigator's discretion. It is probably best to make the complainant comfortable by allowing a support person to be present, provided that person is not expected to be a witness and provided the support person agrees to maintain the confidentiality of the information. If the complainant is represented by counsel, it is customary to allow counsel to be present; the complainant will likely refuse to participate if counsel's presence is denied. The investigator should speak to counsel before the proceeding and inform the complainant's counsel that he or she should not interfere with the interview and should allow the complainant to speak for himself or herself.

The respondent also may request to bring a representative to the interview. If the respondent is part of a bargaining unit, *Weingarten*[5] rights apply; thus, since the interview may lead to discipline, the employee must be permitted to bring a representative. Employees need not be informed of the right to union representation, nor is postponement required when a particular union representative is not available as long as another representative is available. The union representative may speak on behalf of the employee but the employee may be required to respond to job-related questions. The union representative does not have the right to cross-examine or interrogate supervisors or third parties who may be present. If the respondent is not part of a bargaining unit, there is no right to representation. However, as with requests from the complainant, the investigator may determine to allow a representative to be present in the interest

[55] NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959 (1975); See also *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617.

of obtaining the best cooperation from the respondent. In such cases, the representative needs to agree in advance to maintain the confidentiality of the information.

Witnesses may request to bring a representative, but do not have a right to representation even if the witness is part of the bargaining unit. The only time a witness has a right to representation is when an interview may lead to discipline. Generally, witnesses should not need a representative present since they can be assured that they are not the subject of the investigation, and that the law protects them from retaliation. When a witness is hesitant to cooperate, investigators should inquire as to why the witness is concerned as there may be a way to address the concern.

Investigators should try gentle reassurance and ask if the witness would at least be willing to answer a few general, background questions. (Often once the witness gets talking, the level of cooperation increases.)

Recording Interview

Some investigators tape record their interviews so they can have a verbatim record of the exchange and free themselves from the task of taking notes during the interview. Investigators who choose to tape record their interviews must have the consent of all parties to the interview. Failure to obtain such consent is a criminal offense.[6] The consent to be taped should be given orally by each individual present once the tape is running.

Interview Approach	
Do	**Don't**
Have a second representative present.	Record the interviews secretly, fail to take notes, or go in without a plan.
Review the purpose of the interview with the witness.	Reveal information that should be kept confidential.
Ask non-leading, non-judgmental and open-ended questions to promote information gathering [who, what, where, when, how?].	Get aggressive or judgmental.
Ask, "Is there anything else?"	Prevent witness from talking freely.

Step 9: Make a Decision

Through the investigation, the investigator must be careful not to jump to any conclusions before all the facts are available. Once the interviews are conducted, other necessary procedures, such as evidence collection, should be completed. Once any credibility issues have been resolved, the

[6] Penal Code section 632.

investigator will evaluate all the information for a formal recommendation. The investigator or member of management, as well as legal counsel, should make the final determination of any employment actions that are warranted based on the investigative report. The employer must consider all the parties involved as well as organizational processes, not just whether the accused is guilty, in the final determination.

Credibility Finding

Investigators must determine employees' credibility. Interviews often provide differing accounts and even conflicting versions of the events. Be aware that the issue is very personal to employees involved. Because of the personal and emotional nature of the issue, their individual perceptions of what happened may be clouded by personal interests, or if their jobs are on the line, they may even lie.

Inexperienced investigators sometimes believe there is no further obligation to make a finding if the two sides provide conflicting information and there are no witnesses to the incident. This is a fundamental misconception of the investigator's role. It is the investigator's obligation to make credibility determinations based on all of the information.

Certain factors should be applied in making such determinations[7]:

- Plausibility - Is the witness's version of the facts believable? Does it make sense?
- Demeanor - Does the witness seem to be telling the truth?
- Motive - Does the person have a reason to lie?
- Corroboration - Are there documents or other witnesses that support the witness's version of events?
- Past record - Does the alleged wrongdoer have a past record of inappropriate conduct?

When an investigator is having a difficult time making a credibility determination, the best approach is usually to re-interview people with relevant knowledge. Sometimes the interviewee will make statements that are inconsistent with the information he or she provided earlier. This inconsistency would weigh against the person's credibility. Conversely, if a person is able to tell of events in a similar fashion on multiple occasions, his or her credibility is strengthened.

Step 10: Develop Written Summary Investigation Results

The employer should consider preparing a final investigative report. The organization should keep a clear paper trail of the evidence, such as examining documentation of previous employee behavior and incidents. The investigator should have a clear record of everything done and any findings, as well as other steps taken during the investigation. Employers should also document

[7] EEOC Recommendations.

interviews with the complainant, the respondent and witnesses. Investigators should ensure their notes from interviews are as factual as possible, contain as much relevant information as possible, are dated, and indicate the duration and time of the interviews.

The most effective investigative reports are those that use short, clear sentences. The report should discuss all material evidence, whether or not it supports the investigator's conclusions. The report should make findings on all material factual disputes. A factual dispute that does not relate closely to the essential aspects of the complaint may be left unresolved at the discretion of the investigator (although such "minor" disputes often relate to credibility and should, therefore, be addressed). The report should include references to exhibit numbers and relevant exhibits should be attached to the report.

The following are the required elements of an investigative report:

- Scope and manner of investigation;
- Summary of the allegations;
- The response to the allegations;
- Summary of the evidence, including witness interviews;
- Credibility determinations;
- Findings of fact; and
- Legal conclusions (but only if called for under the applicable procedures).

The "**scope and manner of the investigation**" is a brief summary of the policies and procedures governing the investigation and the steps the investigator took in gathering information. The investigator may set forth a list of people interviewed and a summary of the documents reviewed. The investigator may discuss any procedural issues that arose, as well as any interviews or evidence the investigator chose not to obtain or was unable to obtain (and why).

The "**summary of the allegations**" is either a verbatim recitation of the complaint, or a summary of the complaint in the investigator's own words. Since most written complaints generally do not contain each and every factual allegation, it is usually helpful for the investigator to summarize the allegations in full and attach the written complaint as an exhibit.

The "**response to the allegations**" is a summary of the respondent's version of the events. If the allegations are numerous, it is helpful to set forth each allegation followed by the respondent's response. Again, the tone of this section should be neutral and objective.

The "**credibility determinations**" is where the investigator carefully describes the factors that weigh in favor of – and against – the witness's credibility and should set forth his or her determinations. As stated above, the question is not whether the person is "lying," but whether the person's statements are credible based on all of the evidence.

In the "**findings of fact**" section of the report, the investigator should apply a four-step process: (1) define the issue; (2) identify the relevant policy or law; (3) set forth the evidence that weighs in favor of the complainant's allegations, as well as that which detracts from it, and; (4) make a finding by explaining why the evidence supporting or refuting the allegation is more persuasive.

Findings Example #1
"We conclude that this allegation occurred. We base this finding on the fact that . . ."

Findings Example #2
"We conclude that this incident likely did not occur. We base this finding on the fact that . . ."

Findings Example #3
"We are unable to determine with reasonable certainty that this event occurred as alleged. We base this finding on the fact that . . ."

Standard of Proof

The "findings" section should state the standard of proof the investigator is applying. Investigators should be mindful of the standard of proof applicable to the investigation. Most investigators will be applying the "preponderance of the evidence" standard of proof as that is the standard used in most civil proceedings. It is a lower standard of proof than that used in the criminal context (proof beyond a "reasonable doubt"). "Preponderance of the evidence" means that one body of evidence has more convincing force than the evidence opposed to it. It is useful to think of a preponderance of the evidence as a 51% (or more) certainty that a fact has been established.

Legal Advice

Investigators will often seek legal advice during the course of an investigation. It is important to keep all written communications containing legal advice (e.g., letters and e-mails from attorneys and notes of conversations with attorneys) in a separate file so the information does not become commingled with the investigative file. The investigative file may at some point need to be turned over to a third party and it is important not to waive the attorney-client privilege by disclosing legal advice.

The report should contain a "legal conclusions" section only if required by law or policy, and after consultation with legal counsel.

The goal of the document is to ensure that if a court, jury or government agency were to review it, the reviewers would conclude that the employer took the situation seriously, responded immediately and appropriately, and had a documented good-faith basis for any actions taken during or as a result of the investigation.

Step 11: Closure of Investigation

Once a decision is made, the employer should notify both the complainant and the respondent of the outcome. It is important to let the complainant know that the organization took the complaint seriously and took appropriate action. The organization must ensure the complainant agrees that he or she has been properly heard and understood, even if he or she is not in agreement with the results. The investigator should set a time frame to follow up with the complainant to ensure there are no other issues and that he or she is settling back into the work environment. The employer should encourage communication and follow-up until the complainant is comfortable again. Finally, the investigator should remind all parties to preserve confidentiality as appropriate.

When necessary, employers must take corrective action that is appropriate to the situation, such as discipline, up to and including termination. The employer should:

- Look at any damages incurred by the victim and discuss with legal counsel how to remedy those damages.
- Determine if education, such as sexual harassment training or anger management training, would be beneficial to the individual(s) involved, or all employees.
- Consider if the need exists to review, modify or redistribute workplace policies.
- Determine whether a review of the investigation and complaint resolution processes is necessary.

Final Matters.

The report should be provided only to counsel, the administrator or department head who assigned the matter to the investigator. The investigator should continue to safeguard the confidentiality of the investigation and all evidence received. Any outside requests for information should be referred to legal counsel.

Some investigators retain only their final report and exhibits; they destroy their notes once the investigative report is finalized. Other investigators retain their interview notes. There really is no right or wrong answer to the question of whether to retain interview notes. However, the investigator should keep in mind the advantages and disadvantages of each approach. The investigator should understand that if he or she retains interview notes, they will be disclosed to both sides should the matter end up in litigation. Thus, the interviewer will have to explain any discrepancies that may exist between the interview notes and the investigative report. On the other hand, some investigators find that certain peripheral information contained in interview

notes does not make it into the final report and yet can be helpful if the investigator is called to testify. The investigator should be consistent in his or her practice.

Conclusion:

In summary, a good investigation should contain the following elements:

- An Impartial Investigator;
- Is Prompt and Thorough;
- Ensures All Witnesses Interviewed, Documents Gathered and Reviewed and Relevant Facts Uncovered;
- Is Well Documented;
- Its Findings are Well-Reasoned and Supported by Evidence and Appropriate Credibility Determinations;
- Confidentiality and Privacy Rights are protected;
- Results are Communicated in Appropriate Manner to Complainant and Respondent;
- Appropriate Action is Taken to End the Inappropriate Conduct, if applicable; and
- Policy/Procedure Improvements and Training Opportunities are Identified and Shared with Appropriate Officials, and Action is Taken to Rectify Processes or Other Shortcomings

Margaret E. Long 2240 Court Street Redding, CA 96003 (530) 691-0800 margaret@plelawfirm.com	**David A. Prentice** 5242 N. Palm Ave., Suite 108 Fresno, CA 93704 (559) 500-1600 david@plelawfirm.com

SAMPLE COMPLAINT FORM

NAME: _____	DEPARTMENT: _____
WORK TELEPHONE: _____ HOME TELEPHONE: _____	HOME ADDRESS: _____ _____
IMMEDIATE SUPERVISOR: _____	DEPARTMENT HEAD: _____

Basis of Complaint: _____

Date of alleged act: _____

Describe the alleged act and any harm it has caused you:

_____

_____

_____

_____

Attach additional sheets and documents as needed. Number of pages attached: _____

Name, position and telephone number of employee(s) familiar with your complaint:

_____

_____

How is each person named above knowledgeable regarding this matter?

_____

_____

_____

What documents/evidence support your allegation of the alleged act?

_____

_____

CERTIFICATION: I certify that the information supplied is true and correct to the best of my knowledge.

_____ _____

Complainant Name: Date:

SAMPLE LETTER PLACING ON ADMINISTRATIVE LEAVE

Date

Name
Address

Dear Employee:

This letter is to notify you that effective _____, you are being placed on paid administrative leave pending the resolution of an administrative investigation related to your employment.

This action is being taken as a consequence of allegations which have resulted in an active investigation regarding (e.g., your use of county information technology assets). You will remain on administrative leave until further notice.

During the period of your administrative leave, the following applies:

1. You are prohibited from entering any property owned or operated by your employer, which is not open to the public.

2. You shall immediately surrender all employer-provided property in your possession, including but not limited to office and building keys, computers and other communication devices.

3. You may be called back to work or for an investigatory interview at any time during business hours. Failure to be readily available during business hours my subject you to disciplinary action.

4. You will not discuss the investigation with any county employee or potential witness to the events being investigated. (USE ONLY IF LEGITIMATE REASON)

5. While on paid administrative leave, you are to remain available for your employer to reach you between the hours of 8:00 a.m. to 5:00 p.m. If you plan on being unavailable, please contact me and provide notice of your unavailability.

If you have any questions, please contact me.

Sincerely,

cc: Human Resources

Sample *Upjohn* Letter and Warning

Date

Name
Address

Re: Non-Attorney Assisting Legal Counsel in an Internal Investigation

Dear _____:

I am legal counsel for _____ and have been retained/assigned to provide legal advice regarding the following investigation: _____. I have asked that you assist me in gathering relevant facts in order for me to provide such legal advice. In gathering such relevant facts, you will at all times be working at my direction, and your communications with me are protected by the attorney-client privilege. The attorney-client privilege belongs solely to _____ (insert name of public entity) and not you. That means that only _____ (insert name of public entity) may elect to waive the attorney-client privilege and reveal our discussion to third parties.

In order for this discussion to be subject to the privilege, it must be kept in confidence. All of your communications with me regarding this investigation should be labelled as "Prepared at Request of Counsel. Attorney-Client Privilege/Work Product." All documents related to this investigation should be retained in a separate location and treated confidentially. You should not discuss this investigation with anyone other than me without my pre-approval.

You should advise all individuals you interview of the above attorney-client privilege. Specifically, you should advise all individuals interviewed as follows:

"I am working at the direction of legal counsel and conducting this interview to gather facts to give to the assigned lawyer. The lawyer will rely on these facts to provide advice to _____ (insert name of public entity). The interview is part of an investigation to determine the facts and circumstances of _____ (brief description of allegations), in order for the attorney to provide legal advice on how best to proceed. My notes and reports of your communications with me are protected by attorney-client privilege and are attorney work product. The attorney-client privilege belongs solely to the public entity and not you; in other words, the attorney I am working with represents the City and not you and there is no attorney-client privilege between you and the City's legal counsel or me. While all of the information you provide to me will be shared with the City, it will only be shared with individuals necessary to investigate and resolve

any of the issues raised in the investigation. To be clear, only the public entity can waive the privilege and reveal our discussion to third parties. You are required to keep our conversation in confidence, except you may discuss this notification with your attorney. Do you have any questions? Are you willing to proceed?"

Please let me know if you have any questions.

Sincerely,

Sample Evidence Log

In re Investigation of: _____

Investigator: _____

Evidence #	Date Collected	Source of Evidence	Description of Evidence
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			

SAMPLE QUESTIONS FOR COMPLAINANT

Meeting with: _____ Date: _____
Investigator(s): _____
Introduction:

- Thank the employee for his/her time and cooperation.
- Address the nature of what is being investigated.
- Explain that the matter under investigation is serious and the employer has a commitment/obligation to investigate the claim.
- Explain that no conclusion will be made until all of the facts have been gathered and analyzed.
- Keep the matter confidential to protect the integrity of the investigation.
- State that any attempt to influence the outcome of the investigation by retaliating against anyone who participates, providing false information, or failing to be forthcoming can be the basis for corrective action, up to and including termination.

Questions:

1. Who committed the alleged inappropriate behavior?
2. What exactly happened?
3. When did the incident occur or is it ongoing?
4. Where did the incident occur?
5. How did you react?
6. Did you ever indicate that you were offended or somehow displeased by the act or offensive treatment?
7. Who else may have seen or heard the incident?
8. Have you discussed the incident with anyone?
9. Do you know whether anyone complained about inappropriate behavior by that person? If yes, who?
10. How has the behavior affected you and your job?
11. Did you seek any medical treatment or counseling as a result of the incident?
12. Are there any notes, physical evidence, or other documentation regarding the incident(s)?
13. Is there anyone else who may have relevant information?
14. Do you have any other relevant information?
15. What action do you want the employer to take?
16. Do you feel safe to return to work?

SAMPLE QUESTIONS FOR WITNESSES

Meeting with: _____ Date: _____
Investigator: _____

Introduction

- Express appreciation for the employee's time and cooperation.
- Explain the nature of what is being investigated.
- Note that the matter under investigation is serious and that the employer has a commitment/obligation to investigate this claim.
- Emphasize that no conclusion will be made until all of the facts have been gathered and analyzed.
- Keep the matter confidential to protect the integrity of the investigation.
- Stress that any attempt to influence the outcome of the investigation by discussing it with others, retaliating against anyone who participates, providing false information, or failing to be forthcoming can be the basis for corrective action, up to and including termination.

Foundation Questions

1. Please describe any inappropriate or offensive behavior that you have experienced or witnessed. What did you see or hear? When did this occur? How often did it occur?
2. Are you aware of behavior by the accused toward the complainant or toward others in the workplace?
3. What did the complainant tell you? When did he or she tell you this?
4. Do you know if the complainant reported the concern to his or her supervisor?
5. Upon learning of the incident(s), did you report it to your supervisor?
6. Do you have any notes, physical evidence or other documentation regarding the incident(s)?
7. Do you know of any other relevant information?
8. Are there other persons who have relevant information?

SAMPLE QUESTIONS FOR RESPONDENT

Meeting with: _____ Date: _____
Investigator(s): _____

Introduction:

- Thank the employee for his/her time and cooperation.
- Address the nature of what is being investigated and provide a copy of the notice of the Complaint.
- Provide *Lybarger* Admonition, if necessary.
- Explain that the matter under investigation is serious, and the employer has a commitment/obligation to investigate the claim.
- Explain that no conclusion will be made until all of the facts have been gathered and analyzed.
- State that any attempt to influence the outcome of the investigation by retaliating against anyone who participates, providing false information, or failing to be forthcoming, can be the basis for corrective action, up to and including termination.
- The purpose of the interview is to obtain a thorough and accurate understanding of what has occurred, and to identify all evidence and witnesses who may have knowledge of the incident.
- Keep the matter confidential to protect the integrity of the investigation.

Questions:

1. What occurred?
2. If denied, what motive would anyone have to make these allegations up? Where were you at the time alleged incidents occurred? Who witnessed your presence?
3. When did it happen?
4. Where did it happen?
5. How did it happen?
6. Who did or said what? In what order?
7. How did the complainant(s) respond?
8. Are you aware of any other incidents involving the complainant(s)? If so, who? What? Where? When?
9. Are you aware of any other complaints by the complainant(s)?
10. Do you know why it happened?
11. Are there any notes, documents, or other evidence to support your version of the facts?
12. Who else may know relevant information?
13. Did you discuss the incident(s) with anyone prior to this interview? If so, who?

SAMPLE *LYBARGER* ADMONISHMENT

You are about to be interviewed as part of an administrative investigation. As a result, neither your statements, nor any information or evidence which is gained by such statement, can be used against you in any subsequent criminal action.

You are being ordered to answer questions specifically related to your employment. Your failure to answer questions directly related to this administrative investigation may result in disciplinary action, up to and including your discharge. You are further ordered to be truthful in all your statements. Failure to be truthful will be considered insubordination and will subject you to further disciplinary action, up to and including termination.

I hereby acknowledge receipt of the foregoing admonishment.

_____ _____

Signature Date

SAMPLE INVESTIGATIVE REPORT
Complaint of Sexual Harassment
Made by Claimant X
November 1, 2017

Investigation conducted by Investigator Y

Table of Contents Page

I. Scope and Manner of Investigation

On October 20, 2017, Claimant X reported sexual harassment by Respondent Z. This was reported to Supervisor M. On October 25, 2017, the City asked me to conduct an investigation into Claimant X's claims.

In investigating the allegations, I interviewed the following individuals on the dates noted.

Name	**Date**
Claimant X	October 26th
Supervisor M	October 26th
Witness Wendy	October 26th
Witness Frank	October 27th (by phone)
Witness Suzie	October 27th
Respondent Z	October 28th

II. Claimant X's Claims

A. Inappropriate Workplace Remarks
B. Inappropriate Workplace Conduct
C. Invitations to Socialize Outside the Workplace
D. Miscellaneous

III. Respondent Z's Responses to the Allegations

A. Inappropriate Workplace Remarks
B. Inappropriate Workplace Conduct
C. Invitations to Socialize Outside the Workplace
D. Miscellaneous

IV. Summary of Witness Interviews

A. Witness Wendy
B. Witness Frank
C. Witness Suzie
D. Supervisor M

V. Credibility Determinations

The account provided by Claimant X diverges from the account provided by Respondent Z. Thus, it is necessary to make credibility determinations. In making such determinations, certain factors are relevant to the fact-finder: (1) the inherent plausibility of each person's story; (2) corroborating evidence that would tend to support or contradict each person's story; (3) each person's motive to lie; and (4) each person's demeanor; that is, whether the person appears to be telling the truth when interviewed about the incident.

A. Claimant X's Credibility

I did not find Claimant X to be credible in many respects.

The reasons for this finding are as follows . . .

B. Respondent Z's Credibility

I found Respondent Z to be credible.

The reasons for this finding are as follows . . .

C. Credibility of Other Witnesses

VI. Findings

1. Summary of the Issue(s)

The issues to be determined through this investigation are:

A. Did Respondent Z sexually harassed Claimant X?

2. Relevant Policy or Law

The City has a Sexual Harassment Policy, which is attached hereto.

3. Finding of Facts

Based on the facts presented and my credibility assessments, I make the following findings of fact:

A. In making findings of fact, I have applied a preponderance of the evidence standard.
B. Respondent Z tried to kiss Claimant X on one or two occasions. Respondent Z hugs and kisses other employees and co-workers. Claimant X found this conduct to be unwelcomed and asked him to stop. Respondent Z did not try to kiss or hug Claimant X after she told him she did not want him to do so.
C. Claimant X did not report the incident to Supervisor M until . . .

4. Final Determination

Findings Example #1
"We conclude that this allegation occurred. We base this finding on the fact that . . ."

Findings Example #2
"We conclude that this incident likely did not occur. We base this finding on the fact that . . ."

Findings Example #3
"We are unable to determine with reasonable certainty that this event occurred as alleged. We base this finding on the fact that . . ."

INVESTIGATION CHECKLIST

- ☐ **Step 1: Taking the Complaint**
- ☐ **Step 2: Provide Interim Protection**
- ☐ **Step 3: Determine if Need/ Legal Duty to Investigate**
- ☐ **Step 4: Select the Investigator**
- ☐ **Step 5: Preserve Evidence**
- ☐ **Step 6: Ensure Confidentiality**
- ☐ **Step 7: Create a Plan for the Investigation**
- ☐ **Step 8: Develop Interview Questions**
- ☐ **Step 9: Conduct Interviews**
- ☐ **Step 10: Develop Written Summary of Investigation Results**
- ☐ **Step 11: Closure of Investigation**

PERS' Path Forward: Risks, Opportunities and Options

Wednesday, May 2, 2018 General Session; 1:00 – 3:00 p.m.

Jonathan V. Holtzman, Renne Public Law Group
Mary Beth Redding, Bartel Associates

Notes:_____

Presentation: "The PERS Path Forward: Risks, Opportunities, and Options"

WHY THE CONVENTIONAL UNDERSTANDING OF THE "CALIFORNIA RULE" ON PENSION VESTING IS ALL WRONG

By: Jonathan Holtzman and Linda Ross, Renne Public Law Group®

I. AUTHORS' NOTE

The central issue Mary Beth and I will address in our talk is the problem on which most California cities are spending a lot of their time these days: how to deal with huge increases in CalPERS pension costs. In our presentation, we will discuss the very limited options available to cities to address both the known, and as yet unknown increases in PERS contribution rates.

A key part of that discussion is whether there will be any relief from the California Supreme Court in the area of vested rights – perhaps creating opportunities to reduce pension costs for current employees, not just new employees. The California Supreme Court is now considering three cases that touch on this issue – *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2016) 7 Cal.App.5th 115 (*Cal Fire*), *Alameda County Deputy Sheriff's Association et al. v. Alameda County Employees' Retirement Association, et al.* (2018) 19 Cal.App.5th 61 (*Alameda*), and *Marin Association of Public Employees' Retirement Association* (2016) 2 Cal.App.5th 674 (*Marin*) .

All three cases stem from changes to pension plans affecting current employees; all three cases involve changes that occurred as a result of PEPRA. The cases involve "ancillary" benefits such as the elimination of "air time," pensionability of cash outs, and other issues related to pension spiking. All of these changes can be loosely described as elimination of practices that are antithetical to good pension administration. None of the cases directly address whether the legislature, for example, could require current employees to go into the new, leaner, pension tiers that were created by PEPRA. Hence, the decisions in these cases are unlikely to tell us whether such wholesale changes would pass constitutional muster, even if the legislature were willing to enact such legislation.

However, there is a reasonably good chance the Court may take a new look at the so called "California Rule," and provide some guidance on when changes to benefits for current employees are permissible – a standard that will at least tell us what kinds of legislative changes may be acceptable.

The authors of this paper prepared the League's Amicus Brief in the lead case before the Supreme Court – Cal Fire – and represent a party in the Alameda case. This

article is based generally on the brief we submitted in Cal Fire. Although we have worked on vesting-related issues for decades, writing the brief over a number of months gave us an opportunity to do a deeper dive into the so called California rule. In the process, we gained a fuller appreciation of why the purported rule *cannot* be a correct statement of law. In this paper, we hope to take you on part of our journey.

II. INTRODUCTION

Much has changed since the California Supreme Court last visited the question of when a "vested" retirement benefit may be altered. The unfunded liabilities of pension plans have soared, and are now at levels that barely cover the liabilities for those who have already retired. Employer pension costs have increased rapidly, and are anticipated to grow by another fifty percent, in some cases doubling, in the next few years. Employee contributions to pensions, intended to pay half of pension costs, now cover less than one fifth of the cost in many cases. Public sector collective bargaining has blossomed, but is handicapped by the assumption that pension modification, even for prospective service, cannot be on the table.

Contrary to conventional wisdom, if pension modification is not adequately addressed, the risk is not to the pension systems. Rather, it is to retirees and to the public. If cities cannot make their pension contributions, it is the retirees who will face harsh consequences as CalPERS will cut their pensions. Additionally, federal courts have found that pension vesting rules provide no immunity from reducing pensions in bankruptcy. As for the tax-paying public, the pension crisis has resulted in the "hollowing out" of city services, with parks, libraries, after-school programs and social services often being the first to go, and police and fire services following. Even cities that are technically solvent have become "service insolvent," unable to afford the basic services they were created to provide.

In the cases before it, we hope the Court will address a number of pivotal issues:

The "unmistakability" doctrine. In *Retired Employees Association Of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186-1197 (*REAOC*), the Calfornia Supreme Court confirmed that there must be "clear and convincing" evidence of legislative intent to create a vested right. *REAOC* is in accord with many other federal and state courts that have required "unmistakable" evidence before finding that a legislative body has relinquished its constitutional power to modify legislation. In our brief, we have asked the Court to confirm that the unmistakability doctrine must be rigorously applied, and reject the unions' contentions that it does not apply to pension benefits or applies only to "implied" benefits.

Prospective versus retrospective vesting. It is possible that the court may decide the cases before it by concluding, based on the unmistakability doctrine, that the benefits at issue were not vested, and decline to reach the more important issue of the "California rule." The State, the League and other amici, have urged the Court to follow the lead of the appellate courts that have addressed the broader issue, attempting to make sense of the concept of "vesting" as applied to benefits for future service not yet rendered. In *Cal Fire* and in in *Marin Association of Public Employees v. Marin County Employees' Retirement* the Courts of Appeal based their conclusions that the pension benefit modifications at issue did not violate the Contracts Clause in part on the fact that the changes to current employees' benefits operated only prospectively.

Pension benefits have long been characterized as a form of "deferred compensation." As with other forms of compensation, there is a high bar to changing pension benefits attached to time already worked. However, for benefits attached to time not yet worked, there must be a different standard, because the benefits have not yet been earned.

Courts nationwide recognize this distinction. The California Supreme Court too has repeatedly stated that, for active employees, "reasonable" modifications may be made "before the pension becomes payable" and until then "the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension." (E.g., *Miller v. State of California* (1977) 18 Cal.3d 808, 816.) However, some parties have argued, based upon dicta in a number of decisions before and after *Miller*, that this flexibility is for all practical purposes illusory.

"Comparative advantage" for every disadvantage. In their briefing in Cal Fire, the unions predictably contend that for every disadvantageous change to a pension benefit, an equivalent advantageous change "must" be granted. In practice this argument would prevent any correction of past abuses or unforeseen burdens. To the extent that a change is based upon an abuse or unanticipated burden, it simply makes no sense to require the benefit be replaced by an equivalent benefit. The standard is self-cancelling: changes to benefits for prospective service can be made, but only if each and every person affected is made whole, meaning the change is illusory.

Three appellate courts, including the Courts of Appeal in *Cal Fire*, *Alameda* and *Marin*, have now recognized this "strait jacket" and held that under this Court's jurisprudence, an equivalent "should" be granted, but is not always required. The State, the League and other amici agree that whether an "equivalent benefit" is granted is only one of a number of factors that should be considered in determining whether a change to a benefit for prospective service is reasonable.

Unforeseen advantages and burdens. A benefit that is offered when an employee first comes to work, and potentially lasts until they die, will be subject to changing conditions. There is a significant benefit to both employee and employer to modifying these benefits for future service yet to be rendered. Modification protects critical public services, allowing a city to continue employing workers; it protects the ability to pay benefits that employees have already earned; and it protects retirees whose pensions could be threatened by city insolvency. The contrary rigid position leaves no room for these countervailing advantages rooted in sound public policy.

The California Supreme Court has long held that vested benefits, particularly for service not yet rendered, "may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." (*Betts v. Board of Admin.* (1978) 21 Cal.3d 859, 863.) "Constitutional decisions 'have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.'" (*Allen v. Board of Admin. Of the Public Employees' Retirement System* (1983) 34 Cal.3d 114, 120, [citations omitted].)

Based on the above and existing case law, our brief suggested a number of criteria that courts should consider, on a case-by-case basis, when considering whether a "vested" benefit may be diminished:

- Whether the modification affects only service yet to be rendered, or service already rendered. Modification of benefits tied to future service is subject to a lesser standard because they have not yet been earned.

- The extent of the modification. This factor includes whether the benefit change is to an ancillary benefit, such as air-time, or a more central component of the pension scheme. The lesser the modification, the more latitude the legislature and local legislative bodies have in making changes. Modifications are permitted so long as a "substantial and reasonable" pension remains.

- The public policies to be served. Whether the modification bears "a material relation to the theory of a pension system and its successful operation…." This includes the need to adapt to changing conditions, in order to protect against abuses that have arisen or burdens that were unforeseen. Tying the hands of government for nearly a century based on outdated assumptions proven incorrect over time endangers both the public and the rights of employees who have completed the pension bargain through their service.

III. BACKGROUND

A. California's Cities Are Facing An Unprecedented Financial Crisis Due To The Unsustainable Rise In Pension And Retiree Health Costs

Seven years ago, the Little Hoover Commission sounded the alarm. In an oft-quoted sentence, the Commission reported: "California's pension plans are dangerously underfunded, the result of overly generous benefit promises, wishful thinking and an unwillingness to plan prudently." (Little Hoover Commission, Public Pensions For Retirement Security, February 2011 ("Little Hoover Report").)

The Report demonstrated that, "[t]he 10 largest pension systems in California – encompassing 90 percent of all assets and members in the state's defined benefit systems – faced a combined shortfall of more than $240 billion in 2010." (Little Hoover Report at ii.)[1] These systems were only 58% to 74% funded, when an 80% funded status "is considered the low threshold for a stable system." (*Ibid*.)

The Report found that "pension costs will crush government. "Government budgets are being cut while pension costs continue to rise and squeeze other government priorities." (*Id*. at iii.)

B. Public Employers, Such As Cities, Bear The Cost Of Pension Unfunded Liabilities.

The state has 85 "defined-benefit" plans, including six state plans, 21 county plans, 32 city plans and 26 specific district and other plans. (Little Hoover Report at 4.)[2]

The largest plan, indeed the largest pension plan in the nation, is the California Public Employees' Retirement System ("CalPERS"). Although most California cities are members of CalPERS, some cities, including Los Angeles, San Francisco and San Jose, manage their own pension funds. (*Ibid*.)

[1] See also, "The Pension Gap," Los Angeles Times, September 18, 2016.

[2] CalPERS includes all state workers, some university employees, judges, some legislators, and public agencies and school districts who contract with CalPERS. (Little Hoover Report at 4.) The California State Teachers' Retirement System ("CalSTRS") is the nation's second largest pension system. (*Ibid*.) Under the County Employees' Retirement Law ("CERL"), 20 counties operate retirement plans independent of CalPERS. (*Id*. at 5.) The University of California operates its own pension system. (*Ibid*.)

Typically pension systems are governed by a board of officials, some elected by employees and retirees and others appointed by government bodies. The retirement boards manage the fund investments and, with the assistance of actuaries, set the amounts that employers must contribute to the system. (*Ibid.*)

Pension contributions are charged as a percentage of payroll. Typically, public *employee* contributions are limited by statute or cover only the employee's share of "normal cost" which is the cost for the current year. Public *employer* contributions, on the other hand, are potentially unlimited, because employers are responsible for not only the employer share of "normal cost" but also the total cost of any "unfunded liabilities."

As a result, public employers, and thus taxpayers, are the guarantors of pensions. In a typical example, employees pay only 11% of their salaries towards their pensions (the normal cost), whereas the city, because it pays for both normal cost and unfunded liabilities, pays 61% of payroll -- in other words an additional $61 for every $100 in salary.

C. Since The Little Hoover Commission 2011 Report, City Pension Costs Have Skyrocketed

In 2011, the Little Hoover Commission stated that: "In another five years, when pension contributions from government are expected to jump 40 to 80 percent and remain at those levels for decades … there will be no debate about the magnitude of the problem." (Little Hoover Report at 22.) It stated:

> Across the state, governments will be forced to sacrifice schools, public safety, libraries, parks, roads and social services – core functions of government – and the public jobs that go with them, to pay the benefits that have been overpromised to current workers and retirees.

(*Id*. at 43.) That prediction has come true.

CalPERS is only 68% funded.[3] Based on recent rate hikes, local government employers owe CalPERS $5.3 billion this year, and that amount will almost double to $10.1 billion in 2024." ("California Pension Contributions to Double by 2024 – Best Case," California Policy Center, Jan. 31, 2018.) Statewide, the public employer contribution "will double, from $31 billion in 2018 to $59 billion by 2024." (*Ibid.*)

For example, in late 2016, the Los Angeles Times reported that Los Angeles's "general fund payments for pensions and retiree healthcare reached $1.04 billion last

[3] See CalPERS 2016-2017 Comprehensive Annual Financial Report For Fiscal Year Ending June 30, 2017, p. 4.

year, eating up more than 20% of operating revenue – compared with less than 5% in 2002." ("Paying for public retirees has never cost L.A. taxpayers more. And that's after pension reform," Los Angeles Times, November 18, 2016.)

Los Angeles is not alone. "L.A.'s pension burden, while severe by national standards, is not unusual for California. Six of the state's 10 largest cities – Los Angeles, San Diego, San Jose, Sacramento, Oakland and Bakersfield – devoted more than 15% of their general fund budgets to pensions and retiree healthcare during the 2015 fiscal year, The Times found. San Jose contributed the greatest share – almost 28%." (*Ibid*.)[4]

The Times also looked at the City of Richmond, where payments for employee pensions and retiree healthcare "have climbed from $25 million to $44 million in the last five years, outpacing all other expenses." ("Cutting jobs, street repairs, library books to keep up with pension costs," Los Angeles Times, February 6, 2017.)

The Times concluded: "Richmond is a stark example of how pension costs are causing fiscal stress in cities across California." The Times noted that municipalities, including Vallejo, Stockton, and San Bernardino had filed for bankruptcy. (*Ibid*.)

D. California Cities Are Facing Increases In Pension Costs That They Cannot Meet Without Cutting Vital City Services, Or Even Becoming Insolvent

In 2017, the League of California Cities commissioned an actuarial study to address the impact of increased CalPERS contributions on the League's members ("Retirement System Sustainability, A Secure Future For California Cities," League of California Cities Retirement System Sustainability Study and Initial Findings, January 2018) (http://www.cacities.org/pensions ("League Study").)[5] My co-presenter, Mary Beth Redding from Bartel and Associates was the lead researcher. The Study reported as follows:

[4] According to the Times, the percentages of the general fund during 2014-2015 (spent on pensions and retiree health benefits) are as follows: San Jose (27.86%), Oakland (20.78%), Los Angeles (20.70%), Bakersfield (10.46%), San Diego (19.30%), Sacramento (17.38%), Anaheim (13.11%), Fresno (12.15%), Long Beach (11.62%), San Francisco (8.13%).

[5] The League study analyzes cities who are members of CalPERS, and does not include those with their own pension systems, such as Los Angeles, San Jose or San Francisco. However, like members of CalPERS, those cities, as demonstrated by the Los Angeles Times articles cited above, are being required to devote an unsustainable percentage of their general fund resources to retirement costs.

1. City pension costs are dramatically increasing to unsustainable levels

According to the League Study, between fiscal years 2018-19 and 2024-25, cities' dollar contributions for annual pension costs will increase more than 50%. For example, if a city will pay $5 million in 2018-19 then the city is expected to pay more than $7.5 million in 2024-25. (League Study at 2; and Slides 18 & 19.)

By fiscal year 2024-25, the average projected city contribution rate is 34.6% of salary for miscellaneous employees and 60.2% for safety (police officers and fire fighters) employees. This means for every $100 in pensionable wages for miscellaneous employees, cities would pay on average *an additional* $34.60 to CalPERS for pensions alone. For every $100 in pensionable wages for safety employees, cities would pay on average *an additional* $60.20 to CalPERS for pensions alone. These amounts do not include the costs of retiree health care. (League Study at 2, 3, Slide 20.)

2. Rising pension costs will require Cities to nearly double the percentage of their general fund dollars they pay to CalPERS

As part of its study, the League surveyed its members, asking what portion of City general fund budgets were devoted to paying pension costs to CalPERS. These percentages are for CalPERS costs only, over and above the cost of salaries – and do not include the cost of retiree healthcare.

The League Study concluded that in fiscal year 2006-07, the average city spent 8.3% of its general fund budget on CalPERS pension costs, but that average increased to 11.2% in fiscal year 2017-18, and is anticipated to increase to 15.8% in fiscal year 2024/2025. (League Study at 4, and Slide 33.)

In fiscal year 2024-25, 25% of cities are anticipated to spend more than 18% of their general fund budget on CalPERS pension costs with 10% of those cities anticipated to spend 21.5% or more. (League Study at 4 and Slide 33.) These cities are located all over the state. (League Study at 4, and Slides 34, 35, 36.)

Cities are limited in their ability to raise revenue and by law must balance their annual budgets. (Cal. Const., art. XVI, sec. 18.) Accordingly, as pension contributions rise, local agencies are forced to reduce or eliminate critical programs such as fire protection, law enforcement, parks services, and other municipal services.

3. Snapshots Of Individual Cities Tell The Story

The overall statistics are dire, but the plight of individual cities brings them to life.

The City of Corona recently wrote CalPERS to seek help in meeting its pension obligations. Since 2003, the City's annual employer contribution to CalPERS increased from $5.5 million to $23.8 million, more than 300%, with an expected increase to $40.3 million in the next seven years. The City reported it was "on a path to insolvency" with its reserves depleted by fiscal year 2020-21. Already Corona has cut 28% of its workforce, including police and fire personnel, and must make additional cuts "across the City including Fire, Police and Parks and Recreation." (Letter to Rob Feckner, President, CalPERS Board of Administration, from City of Corona, November 10, 2017.)

The California Policy Center recently published a list of the cities that would be hit hardest by CalPERS rate hikes. ("How Much More Will Cities and Counties Pay CalPERS?" California Policy Center, January 10, 2018.) For the city that topped the list, the Policy Center concluded that by 2024, for every dollar the city paid active employees in wages, the city "will have to contribute 89 cents to CalPERS" and in just six years, the city's "payment on its unfunded liability will increase by 99%, from $2.9 million today to $5.8 million in 2024." (*Ibid.*)

In a case study that included six cities, the Stanford Institute For Economic Policy Research (SIEPR) demonstrated that spending on pension obligations is "crowding out" spending on vital city services. ("Pension Math: Public Pension Spending and Service Crowd Out in California, 2003-2030," Stanford Institute for Economic Policy Research, October 2, 2017, at 75, 84-85.) For example, the study concluded that in the City of Vallejo, the number of police officers had fallen from 221 in 2005 to 143 in 2014, the number of fire personnel had fallen 30% in the same time period, and projected pension increases would require an additional 24% reduction in police and fire expenditures. (*Id*. at 59.)

4. The Factors Driving Current Costs Were Not Anticipated When Increased Benefits Were Granted

The escalating costs of pensions are due to many changes in assumptions that were not known when the pensions were originally offered. For example, the 3% @ 50

benefit formula for public safety employees was first made available in 2000.[6] At the time, CalPERS asserted that the benefit would have no cost to employers because the plans were super-funded. (Little Hoover Report at 13.) That assumption turned out to be wrong for a number of reasons.

First, people are living longer, so actuarial mortality tables needed to be adjusted to reflect a longer pay-out period for pensions. Second, markets lost an enormous amount of their value due to recessions in 2001 and 2008 that were far more severe and prolonged than all but a few expected. Third, it appears that investment returns, even after the recession, will not live up to the assumptions accepted at the time (8% annual growth). And fourth, retirees now outnumber active employees, in part because the number of public employees has not grown at nearly the rate it had previously, and because the baby-boomers are aging but living longer. As a result, pension systems have developed large unfunded liabilities, which in turn have resulted in higher costs for public employers. (Little Hoover Report at 25-28).

These kinds of changes have occurred over only the last twenty years. One can only imagine how many more changes will occur over the next fifty years that will affect the viability of pensions being offered today.

IV. HOW TO RECTIFY THE POPULAR MISCONCEPTION OF THE "CALIFORNIA RULE" ON PENSION MODIFICATION.

A. In California, The Law Of Vested Rights Is Judge Made Law That Must Be Clarified As Circumstances Change and Evolve

The California constitution's contracts clause prohibits the legislature from enacting any "law impairing the obligation of contracts." (Cal. Const., art. I, § 9.) The constitution says nothing about public employee pensions. Rather, the application of the contracts clause to pensions has evolved through constitutional interpretation – as developed by the Supreme Court and the lower appellate courts.

[6] In 1999, AB 400 authorized state and local agencies to offer the 3% @ 50 pension formula for safety personnel. Under this formula, safety personnel such as police officers and fire fighters received a pension benefit calculated by multiplying 3% x number of years worked x final salary, up to 90% of their final salary. The Little Hoover Commission reported "The changes were allowed to be applied retroactively, putting in motion a bidding war among government agencies, particularly at the local level, to retain and attract talent by boosting retirement benefits." (Report at 13.) "In 2001, the Legislature passed AB 616, allowing local agencies to increase pension formulas for miscellaneous employees to as high as 3 percent at 60, sparking another bidding war." (*Id*. at 14.)

Decades ago, a pension was characterized as a mere "gratuity" that could be withdrawn at will.[7] Over time, courts across the country rejected that concept, and looked for an alternative that more accurately reflected the reality that employees worked not only for current wages, but for "deferred compensation" in the form of a pension.

But courts also acknowledged that public employers must have flexibility in dealing with these long-term obligations. As stated in *Kern*: "The rule permitting modification of pensions is a necessary one since pension systems must be kept flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy." (29 Cal.2d at 855.)

This flexibility, however, has been undermined, and potentially nullified, by arguments: (1) that pension benefits are automatically vested without a review of actual legislative intent to form a contract, (2) that employees must be given a "comparable new advantage" for any disadvantage, and (3) that modifications are lawful only in the case of retirement system insolvency or a fiscal emergency. .

B. Absent "Unmistakable" Evidence That A Legislative Body Intended To Be Bound Indefinitely, There Is No Vested Right To Any Pension Or Other Retirement Benefit.

Retirement benefits involve potential long-term financial commitments for the life of an employee and the employees' survivors, thus spanning 60 to 90 years. Accordingly, the California Supreme Court has held that the "legislative intent to create private rights of a contractual nature against the governmental body must be 'clearly and unequivocally expressed.'" (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186-1197 ("*REAOC*") [quoting *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co*. (1985) 470 U.S. 451, 466].) This is the "unmistakability" doctrine. (*United States v. Winstar* (1996) 518 U.S. 839, 860.) "[N]either the right of taxation, nor any other power of sovereignty, will be held . . . to have been

7 As explained by the New Jersey Supreme Court in *Spina v. Consolidated Police and Firemen's Pension Fund Commission* (1964) 41 N.J. 391, "[i]t appears in some cases, notably in California, Georgia, and Washington, that the contract thesis was thought to be required lest the pension benefits fall within the constitutional ban against gifts of public moneys." (*Id.* at 403 [citing *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 851 ("*Kern*").) *Kern* had similarly acknowledged: "In some states pensions for government employees are treated as gratuities or bounties which can be withdrawn at any time. . . . In California, however, section 31 of article IV of the Constitution forbids gifts of public money to an individual, and this prohibition may have influenced our courts to hold that a pension right constitutes something more than a mere gratuity." (29 Cal.2d at 851 [citations omitted].)

surrendered, unless such surrender has been expressed in terms too plain to be mistaken." (*Ibid*.)

Any vested rights claim "confronts a tropical-force headwind in the form of the 'unmistakability doctrine.'" (*Cranston Firefighters, IAFF Local 1363, AFL-CIO v. Raimondo* (1st Cir. 2018) 880 F.3d 44, 48.)

1. The "unmistakability" doctrine is necessary to preserve the state's sovereign authority

As recognized by the California Supreme Court in *REAOC*, whether a legislative enactment "was intended to create private contractual or vested rights or merely to declare a policy to be pursued until the legislative body shall ordain otherwise requires sensitivity to 'the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the [governmental body].'" (*REAOC*, 52 Cal.4th at 1186 [quoting *National R.R*., 470 U.S. at 466].) "'Thus, it is presumed that a statutory scheme is not intended to create private contractual or vested rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption.'" (*Id.* at 1186 [quoting *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, 697].) The requirement that "the government's obligation unmistakably appear thus served the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." (*Winstar*, 518 U.S. at 875.)

The "unmistakability" doctrine has been applied rigorously by state and federal courts – including the courts of this state – to contract clause claims, involving both express and implied provisions.

2. The unmistakability doctrine applies to pension statutes, whether express or implied

The doctrine applies to express pension statutes. "The party asserting a contract clause claim has the burden of making out a clear case, free from all reasonable ambiguity, [that] a constitutional violation occurred." (*Deputy Sheriffs' Association of San Diego County v. County of San Diego* (2015) 233 Cal.App.4th 573, 578[finding no vested right to statutorily-created pension benefit].)

If there is any ambiguity, courts will not find a vested benefit. "Although both plaintiff retirees and the State advance plausible arguments on that question, the lack of such unmistakable legislative intent dooms plaintiffs' position." (*Berg v. Christie* (2016) 225 N.J. 245, 253 [COLA benefit].) Courts have held that the term "shall" is not dispositive.

(*Moro v. State of Oregon* (2015) 357 Or. 167, 225 [“The legislature’s use of ‘shall,’ without more, is plainly insufficient to establish the irrevocability of an offer.”].)

In contrast, courts have looked for explicit statements that the state is contractually bound or that changes are precluded. “The First Circuit has been quite hesitant to infer a contract where the state pension statute neither speaks in the language of contract nor explicitly precludes amendment of the plan.” (*American Federation of Teachers v. State of New Hampshire* (2015) 167 N.H. 294, 302.) “[I]t is easy enough for a statute explicitly to authorize a contract or to say explicitly that the benefits are contractual promises, or that any changes will not apply to a specific class of beneficiaries.” (*Id.* at 303 [concerning adjustments to the “earnable compensation” and COLAs].) “A legislature may demonstrate its intent to be contractually bound by using terms such as ‘contract,’ ‘covenant’ or ‘vested rights.’” (*AFT Michigan v. Michigan* (Mich. Ct. App. 2014) 303 Mich.App. 651, 664, *aff’d sub nom*. *AFT Michigan v. State of Michigan* (2015) 497 Mich. 197 [citing S*tudier v. Michigan Public School Employees’ Retirement Bd.* (2005) 472 Mich. 642, 663-64].)

Since the Supreme Court confirmed the unmistakability standard in *REAOC*, state and federal courts, citing *REAOC*, have applied its standard to preserve legislative authority. See *Vallejo Police Officers Assn. v. City of Vallejo* (2017) 15 Cal.App.5th 601, 620 (“In sum, the trial court did not err in ruling that VPOA did not meet its burden to show ‘a clear basis’ in the 2009 Agreement or ‘convincing extrinsic evidence’. . . of a vested right to retiree medical benefits in the full amount of the Kaiser rate”) [citation omitted]; *Fry v. City of Los Angeles* (2016) 245 Cal.App.4th 539, 552 (Charter amendments and later ordinances “do not evince a ‘legislative intent’ to create a vested right to a Board-determined subsidy amount. Rather, they evince an intent to reserve to the City Council the final decision authority over the subsidy”); *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (9th Cir. 2014) 742 F.3d 1137, 1144 (“Missing here is ‘statutory language or circumstances accompanying its passage clearly... evinc[ing] a legislative intent to create [implied] private rights of a contractual nature enforceable against [the County]’ regarding the pooled health insurance premium.)

In summary, the “unmistakability doctrine” requires a strict threshold determination concerning whether the legislature in fact intended to be bound, without possibility of change, when granting a benefit.

C. Under the Theory of Deferred Compensation, Properly Applied, Benefits Promised In Connection With Completed Service Are Distinct From Benefits Attached To Future Service

Although the California Supreme Court recently affirmed the centrality of the “unmistakability doctrine,” California case law remains muddled regarding the distinction

between benefits that have been earned due to completed service, and prospective benefits based on service not yet rendered. The relatively few cases that have addressed the issue head-on do not suggest a principled basis for diverging from federal contracts clause jurisprudence, or from the law applied in most states outside of California.

1. The Concept of "Deferred Compensation" Applies Only To Completed Service

The doctrine of vested rights rests upon a theory of "deferred compensation" – that as employees work, they earn pension benefits to be paid at some future date. (*Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.* (2016) 2 Cal.App.5th 674, 695 ("*Marin*") ["[A] pension is treated as a form of deferred salary that the employee earns prior to it being paid following retirement."].) Under this theory, a number of judicial decisions, described below, recognize contract clause protection for benefits attached to time already worked, but not for periods not yet worked. "A rule that only protected accrued benefits would be consistent with the theory of pensions as deferred compensation; whereas a rule that protected future accruals . . . would be a significant, unprecedented change that goes beyond any known theory of deferred compensation." (Amy B. Monahan, *Statutes As Contracts? The "California Rule" and Its Impact on Public Pension Reform* (2012) 97 Iowa L. Rev. 1029, 1061.)

Both the *Cal Fire* and *Marin* decisions rested, in part, on the prospective nature of the changes at issue in those cases. (*Marin*, 2 Cal.App.5th at 708 ["The Legislature's change to the definition of compensation earnable was expressly made purely prospective by the Pension Reform Act. MCERA's responsive implementation was also explicitly made prospective only."]; *Cal Fire Local 2881 v. Cal. Public Employees Retirement Sys.* (2016) 7 Cal.App.5th 115, 131 ("*Cal Fire*") ["Nothing in the revised statutory scheme immediately destroyed plaintiffs' right to purchase the airtime service credit; rather the revised scheme set forth a deadline by which plaintiffs had to exercise this right in order to avoid losing it."].)

2. Case Law Recognizes The Distinction Between Past And Future Services

A number of other jurisdictions recognize the distinction between services performed and services yet to be performed, and find vesting only as to benefits attached to services already performed.

Florida's "preservation of rights" statute states: "rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as

valid contract rights and shall not be abridged in any way." (See *Scott v. Williams* (Fla. 2013) 107 So.3d 379, 389.)

Yet the Florida Supreme Court held that that the legislature has authority "to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired." (*Id.* at 388-389.) The Florida Court explained:

> We stress that the rights provision was not intended to bind future legislatures from prospectively altering benefits which accrue for future state service. To hold otherwise would mean that no future legislature could in any way alter future benefits of active employees for future services, except in a manner favorable to the employee. This view would, in effect, impose on the state the permanent responsibility of maintaining a retirement plan which could never be amended or repealed irrespective of the fiscal condition of this state. Such a decision could lead to fiscal irresponsibility …… [We] conclude that the legislature has the authority to modify or alter prospectively the mandatory, noncontributory retirement plan for active state employees.

(*Id.* at 388.)

In *AFT Michigan v. Michigan* (Mich. Ct. App. 2014) 303 Mich.App. 651, the Court stated that, under the Michigan constitution, "'the Legislature cannot diminish or impair accrued financial benefits, *but we think it may properly attach new conditions for earning financial benefits which have not yet accrued*.'" (*Id.* at 681; see also *Advisory Opinion re Constitutionality of 1972 PA 258* (1973) 389 Mich. 659, 663 [finding constitutional a statute requiring members to pay an increased contribution to pensions with no corresponding increase in benefits].)

In *Everson v. State* (Haw. 2010) 122 Hawai'i 402, the Hawaii Supreme Court interpreted a state constitutional provision stating that membership in any employees' retirement system "shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired." (Id. at 408.) The court explained: "By adding the word 'accrued' before 'benefits,' . . . 'the delegates only sought to indicate that there 'can be no impairment of past benefits, but that [the] future benefits can be changed by the legislature[.].'" (*Id.* at 410.)

In *Professional Fire Fighters of New Hampshire v. State* (2014) 167 N.H. 188, the New Hampshire Supreme Court stated, in applying the "unmistakability doctrine: "We hold that there is no indication that in enacting . . . [the statute] the legislature unmistakably intended to bind itself from prospectively changing the rate of NHRS

member contributions to the retirement system." (*Id.* at 196.) The Court relied on the decisions of the Florida and Michigan courts, cited above, recognizing that the legislature has authority "to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired."' (*Id*. at 195 [quoting *Scott*, 107 So.3d at 389].)

Similarly, in *Moro v. State of Oregon, supra,* 357 Or. 167, the Oregon Supreme Court stated: "Although we conclude that the legislature cannot change the COLA retrospectively, for PERS benefits already earned, it can change the COLA prospectively, for benefits earned by PERS members on or after the effective date of the amendments." (*Id*. at 231.)

In summary, a standard that distinguishes benefits tied to completed work is consistent with the theory of deferred compensation. And it is good policy: the Little Hoover Commission Report concluded that "[t]he only way to manage the growing size of California government's growing liabilities is to address the cost of future, unearned benefits to current employees, which at current levels is unsustainable." (Little Hoover Report at 42-43.)

3. The Failure To Distinguish Between Completed And Future Service Interferes With Collective Bargaining

The distinction between benefits already earned and benefits based on future service has become critical in collective bargaining. The courts began shaping the "California Rule" before the state legislature enacted the Meyers Milias Brown Act, which created significant additional protections for employees as to their pay and benefits through collective bargaining. (See Gov. Code § 3500(a) ["It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations."].) But over the decades, the inflexible "California Rule" on modification of pension benefits has proven incompatible with the collective bargaining process.

An inflexible rule interferes with the ability to "trade off" future benefits for current wages. As things currently stand, employees may be frustrated in obtaining higher wages because of the cost to fund not only already earned, but also future unearned benefits. As observed by The Little Hoover Commission: "Workers might prefer to trade current job security and a livable wage for theoretical, yet-to-be-earned pension benefits . . . ." (Little Hoover Report at 19.) Moreover, "[i]n a time of fiscal contraction, failing to allow negotiation on prospective pension changes might very well lead to salary cuts, layoffs, hiring freezes, and reductions in other forms of fringe benefits." (Monahan, 97 Iowa L. Rev. at 1079.) On the employer end, there are employers that would like to create

incentives for employees who have special skills or contribute to productivity, but cannot because doing so would increase pension liabilities.

The application of the vested rights doctrine in the collective bargaining setting is particularly problematic because some courts have generally viewed "vested rights" as individual rights that cannot be bargained. While this may make some sense with respect to benefits that have already been earned, it makes no sense at all for benefits for work not yet performed. This is particularly true because the line between pension matters and negotiated compensation is often blurry. For example, it does not make sense to say that employees cannot be asked to pay more for their pension benefits, as some courts have concluded, but the employer can reduce pay to accomplish virtually the identical result.

D. Even If A Right Is Vested, The Legislature Has The Power To Modify That Right Without Providing A "Comparable Advantage" In Circumstances Far Short Of Economic Emergency

1. There Need Not Be A "Comparable New Advantage" For Every Disadvantage

Three appellate courts of this state agree that there need not be a "comparable new advantage" for every disadvantage involved in a pension modification: *Alameda,* 19 Cal.App.5th, *Marin*, 2 Cal.App.5th 674, and *Cal Fire,* 7 Cal.App.5th 115.

In *Alameda*, the Court of Appeal agreed with the *Marin* Court that a modification "should" but not "must" include a comparable new advantage. According to the *Alameda* Court:

> After tracing the origin of the 'must' language to a 1969 appellate court decision and establishing that it has never again been reiterated by the Supreme Court, *Marin* makes, we feel, a convincing argument that the use of 'must' in *Allen II* was not 'intended to herald a fundamental doctrinal shift. Thus, according to *Marin*, the high court's vested rights jurisprudence generally requires only that detrimental pension modifications should (i.e., ought) to be accompanied by comparative new advantages – in effect, 'a recommendation, not . . . a mandate.

The *Marin* court conducted a scholarly review of the Supreme Court's prior rulings on the standard that governs modification of pension benefits for public employees, concluding that "since 1983, "the 'must" formulation has never been reiterated by the Supreme Court, which has instead uniformly employed the 'should' language from the 1955 *Allen* decision." (2 Cal.App.5th at 697-699.) And the Court noted that this Court's 1983 decision in *Allen* actually found "the reduction was not constitutionally improper,"

without evaluating any comparable advantage (*id.* at 699), making the term "must" dicta. The Court stated, "we cannot conclude that *Allen v. Board of Administration* in 1983 was meant to introduce an inflexible hardening of the traditional formula for public employee pension modification." (*Id.* at 699.)

a. The California Supreme Court Has Continuously Stated That Employees Have Only The Right To A Substantial and Reasonable Pension

The California Supreme Court has repeatedly stated that public pensions may be modified so long as a "substantial and reasonable pension" remains. Where the Court has found modifications to be unwarranted, the modification has either drastically reduced or destroyed the pension or no sufficient rationale was offered for the modification. For example:

- As originally stated in *Kern*: "the employee does not have any right to any fixed or definite benefits, but only to a *substantial or reasonable pension*. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered." (29 Cal.2d at 854-855 [emphasis added].) In *Kern*, the modification did not meet this standard because it essentially abolished the pension system on the eve of the plaintiff's retirement. (*Id.* at 855-856.)

- *Packer v. Board of Retirement* (1950) 35 Cal.2d 211 ("*Packer*"): "any one or more of the various benefits offered … may be wholly eliminated prior to the time they become payable, provided … the employee retains the right to a *substantial pension*." (Id. at 218 [emphasis added].) The Court held: "It is reasonably clear from the foregoing, however, that the employees, including Packer, retained rights to substantial pension benefits and, accordingly, that the 1941 revision did not exceed the scope of permissible modification." (*Id.* at 219.)

- *Allen v. City of Long Beach* (1955) 45 Cal.2d 128 ("*Allen*"): "[M]odifications *must be reasonable*, and it is for the courts to determine upon the facts of each case what constitutes a permissible change." (*Id.* at 131.) The Court disapproved the modification from a fluctuating to a fixed pension because the amendment not only "substantially decreases plaintiffs' pension rights without offering any commensurate advantages" but also "there is no evidence or claim that the changes enacted bear any material relation to the integrity or successful operation of the pension system established by section 187 of the charter.

- *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438. Relying on *Allen*, the Court stated that modifications must be "reasonable" and disapproved the modification from a fluctuating to a fixed pension for the same reasons in *Allen*. (*Id.* at 449.)

- *Miller v. State of California* (1977) 18 Cal.3d 808: "a public pension system is subject to the implied qualification that the governing body may make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a *substantial and reasonable pension*." (*Id.* at 816 [emphasis added].) In *Miller*, this Court held that it was not a violation of the contracts clause to lower the age of retirement. (*Id.* at 817-818.)

- *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863 ("*Betts*"): "the employee does not obtain, prior to retirement, an absolute right to a fixed or specific benefits, but only to a '*substantial or reasonable' pension*." (emphasis added.) *Betts* stated only that "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Id.* at 864.) Although *Betts* disapproved of a change from a "fluctuating" to a "fixed" method of computing benefits, defendant in that case offered no justification for the change. (*Id.* at 867-968.)

- *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 120 ("*Allen II*"). "With respect to active employees, we have held that any modification of vested pension rights must be reasonable, must bear a material relation to the theory and successful operation of a pension system, and, when resulting in disadvantage to employees, must be accompanied by comparable new advantages." Although *Allen II* used the term "must," the holding of the case actually turns on the threshold determination of whether the plaintiffs had a contractual right to the benefits they sought, which the court held they did not. (*Id*. at 124-125.)

- *Legislature v. Eu* (1991) 54 Cal.3d 492 ("*Eu*"): "[M]odifications must be reasonable and any `changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.'" (*Id.* at 529 [citations omitted].) In *Eu*, this Court did not use the term "must" but rather used the term "should" and based its decision on the fact that the future benefit had been destroyed. The changes did not

"merely modify the LRS pension system; rather they terminate that system entirely as to additional benefits accruing for future services." (*Id*. at 530.)

In sum, this Court has repeatedly stated that public pensions may be modified so long as a "substantial and reasonable pension" remains.

b. The Comparative New Advantage Requirement Would Nullify The General Rule That Reasonable Modifications May Be Made So Long As There Remains A Substantial And Reasonable Pension

The "comparative new advantage" requirement eliminates the general rule – that pensions may be modified so long as a "substantial and reasonable" pension remains – with a proviso – that there "must" be a "comparable" advantage for every disadvantage.

This position essentially nullifies the state's sovereign powers and is thus contrary to contracts clause jurisprudence. A limitation on the government's reserved power cannot be "construed to destroy the reserved power in its essential aspects." (*City of El Paso v. Simmons* (1965) 379 U.S. 497, 509; see also *U.S. Trust Co. of N.Y. v. New Jersey* (1977) 431 U.S. 1, 23, n. 20 ["[A] state is without power to enter into binding contracts not to exercise its police power in the future."].) The California Supreme Court has long held that a statute may not be interpreted in this manner; a general rule may not be eliminated by a proviso to that rule. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735-736 [rejecting petitioner's interpretation because it "ascribes an unreasonably expansive meaning to the second sentence—the proviso" which "virtually read the first sentence out of the section"].) For the same reason, many argue that the Court should not permit the elimination of the touchstone of its jurisprudence regarding benefits for service not yet rendered – the "substantial and reasonable pension" standard -- to be obliterated by a proviso.

In fact, applying the equivalent benefit test to prospective benefits often makes no sense – and the *Cal Fire* case is a paradigm example. The change at issue there – eliminating "air-time" – is rooted in a recognition that granting the benefit in the first place was a perversion of good pension practice, and that the benefit led to unearned windfalls. It simply would not make sense to grant an "equivalent" benefit once it became clear that the premises relied upon in granting the benefit were flawed. It also makes no sense when the need to change a benefit arises out of economic concerns. Granting an equivalent benefit in either case would merely perpetuate the problem the public agency is seeking to address.

2. Modifications Must Be Upheld To Keep A Pension System Flexible, In Accord With Changing Conditions, And To Maintain The Integrity of The System

Based on long-standing instructions from the California Supreme Court, the law must permit pension modifications that protect against "advantages and burdens" that were "unforeseen" at the time a benefit was granted. For employees not yet retired, "prospective" modifications must be permitted so long as they leave a "substantial and reasonable" pension, are "reasonable" and "bear a material relation to the theory and successful operation of a pension system." A court need not find a fiscal emergency or permit only a temporary solution.

a. Modifications Must Be Permitted To Address Unforeseen Advantages And Burdens

The Supreme Court has stated: "An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." (*Betts*, 21 Cal.3d at 863.)

This flexibility is needed to preserve sovereign power to consider future events and to protect already accrued benefits. As stated in *Allen II*, "The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains `reasonably to be expected from the contract.'" (34 Cal.3d at 120 [citations omitted].) "Constitutional decisions `have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.'" (*Ibid.* [quotations and citations omitted].)

Based on this doctrine, *Lyon v. Fluornoy* (1969) 271 Cal.App.2d 774, found no constitutional impairment in a law that severed the tie between retired legislator's pensions and current legislators' salaries (which had increased three-fold), and instead gave retirees an annual cost of living increase. The court explained that: "To pay them allowances based upon the new . . . salary would hand them a bonanza far outstripping their expectations for cost-of-living increases, dwarfing their relatively modest contributions and demanding enlarged appropriations of general tax funds to maintain the retirement system's solvency." (*Id*. at 786.)

Similarly, recent calls for pension reform have resulted from these "unforeseen advantages and burdens." State and local governments have granted benefits based on financial projections, accepted at the time, but proven wrong by subsequent events. For

example, as discussed above, in 1999, when SB 400 permitted increased pension formulas, "CalPERS claimed in its promotional literature the plan could be implemented 'without it costing a dime of additional taxpayer money.'" (Little Hoover Report at 13.) As it turned out, these projections were wrong, because the 2008 recession, coupled with the higher than expected cost of the pension increases, plunged CalPERS deep into red ink. (*Id*. at 14.)

That red ink caused CalPERS to increase employer contributions to cover the resulting unfunded liabilities. Employees, in contrast, continued to contribute at reduced levels that did not support the actual cost of the benefit and thus reaped a windfall.[8] This is but one example of the effect of an "unforeseen burden" on employers, coupled with an "unforeseen advantage" for employees. Another is provided by the Cal Fire case itself. The purchase of air-time, although designed to be paid for by employees, actually resulted in large unexpected windfalls while saddling public employers with tens of millions of dollars of unforeseen liabilities.

b. Modifications That Are Limited To Prospective Service Are Subject to A Lesser Standard Than Already Earned Benefits

"Public employment gives rise to certain obligations which are protected by the contracts clause of the Constitution, including the right to the payment of salary which has been earned." (*Miller*, 18 Cal.3d at 815.) But, as stated by the *Marin* court: "Earned in this context obviously means in exchange for services already performed." (2 Cal.App.5ht at at 694 [quoting *White v. Davis* (2003) 30 Cal.4th 528, 566].)

Accordingly, courts place great weight on whether a modification is prospective and require a lesser burden to support modification. Both the *Marin* and the *Cal Fire* cases rested, in part, on the prospective nature of the changes at issue in those cases. (*Marin*, 2 Cal.App.5th at 708; *Cal Fire*, 7 Cal.App.5th at 131.) Moreover, as discussed above, numerous other courts in other jurisdictions have approved modifications because they were prospective, applicable only to future work. (See, e.g., *Scott v. Williams*, 107 So.3d at 389 [the legislature has the authority to modify or alter prospectively the mandatory, noncontributory retirement plan for active state employees]; *AFT Michigan v. Michigan*, 303 Mich.App. at 669 [legislature may attached new condition for earning financial benefits which have not yet accrued]; *Advisory Opinion re Constitutionality of*

[8] As reported by the Los Angeles Times, "CHP officers who retired in 1999 or earlier after at least 30 years on the job collected pensions averaging $62,218" whereas for "those who retired after 1999, the average pension was $96,270." ("The Pension Gap, Los Angeles Times, September 18, 2016.)

1972 PA 258. 389 Mich. at 663-664 [finding constitutional a statute requiring members to pay an increased contribution to pensions with no corresponding increase in benefits]; *Everson v*. *State,* 122 Hawai'i at 410 [under state constitution, there "can be no impairment of past benefits, but that [the] future benefits can be changed by the legislature"]; *Professional Fire Fighters of New Hampshire v. State*. 167 N.H. at 196 [the legislature has authority "to amend a retirement plan prospectively, so long as any benefits tied to service performed prior to the amendment date are not lost or impaired."]; *Moro v. State of Oregon*, 357 Or. at 231 [legislature could "change the COLA prospectively, for benefits earned by PERS members on or after the effective date of the amendments."].)[9]

c. Pensions May Not Be Destroyed, But Modifications Must Be Permitted If They Leave A Reasonable and Substantial Pension

As an initial matter, "alteration of contractual obligations" that is "minimal" does not constitute an unconstitutional impairment of contract, "end[ing] the inquiry at its first stage." (*Allen II*, 34 Cal.3d at 119.)

Moreover, in assessing the extent of the modification, courts look to whether the benefit was central to a party's agreement to enter into a contract. (See *City of El Paso,* 379 U.S. at 514 ["We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement...."]; *Allied Structural Steel v. Spannaus* (1978) 438 U.S. 234, 243 n. 14 [noting that *El Pas*o Court concluded that the "`measure taken ... was a mild one indeed'" because it did not affect term that induced contract].)

But even if a modification is not "minimal," the California Supreme Court has stated that "the governing body may make reasonable modifications and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits but only to a substantial and reasonable pension." (*Miller*,

[9] *Legislature v. Eu*, 54 Cal.3d 492, 530-531, included statements concerning the vested nature of benefits tied to future work. But *Eu* in fact involved *the destruction of already earned benefits*, because "the statutory change threatened to divest the legislators of what they had already earned." (Monahan, 97 Iowa L. Rev. at 1068.) The modifications at issue in *Eu* sought to terminate the system entirely, "*which in turn threatened to entirely divest legislators of the benefits they had already accrued, though were not yet eligible to receive.*" (State Answer Brief at 42 [emphasis added].) Accordingly, *Eu* does not create a barrier to the conclusion that already earned benefits and prospective benefits are to be treated in a distinct manner.

18 Cal.3d at 816). "An employee may acquire a vested contractual right to a pension but… this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period [the employee] serves," and "the amount, terms and conditions of the benefits may be altered*." (Kern*, 29 Cal.2d at 855.) "[A]ny one or more of the various benefits offered … may be wholly eliminated prior to the time they become payable, provided the employee retains the right to a substantial pension." (*Packer*, 35 Cal.2d at 218.) Under this standard, a court must review the extent of the modification to determine whether a "substantial and reasonable" benefit remains.[10]

Courts must make this determination on a case by case basis. "Such modifications must be reasonable and it is for the courts to determine on the facts of each case what constitutes a permissible change." (*Betts*, 21 Cal.3d at 863.) In *Marin*, the Court found that a "substantial and reasonable" pension remained, even after the elimination, from the pension calculation, of standby pay, administrative response pay, call back pay and other "premium" pays. (*Marin*, 2 Cal.App.5th at 704.) In *Cal Fire*, a "substantial and reasonable" pension remained after the withdrawal of the option to purchase "airtime." Withdrawing the airtime offer did not change what public employees could reasonably expect to receive in exchange for their labor. Indeed those who never purchased airtime saw no changes whatsoever to their expected pension once the offer was withdrawn.

In summary, for prospective benefits, yet to be earned, modifications must be permitted so long as a reasonable and substantial pension remains.

3. Changes Must Be Permitted When They Bear A Material Relation To The Theory Of A Pension System And Its Successful Operation

Some contend that only imminent fiscal collapse would justify modification to a pension benefit. This contention would nullify the Supreme Court's admonition regarding the need for flexibility in light of changing circumstances, and permit modification only when it is too late.

10 As explained in *Marin*, "[w]hen the Supreme Court says that pension rights may not be 'destroyed,' it means a pension system cannot be abolished on the eve of retirement," (2 Cal.App.5th at 701 [citing *Kern* at 29 Cal.2d 848].), "or not after substantial service has been provided," (*id.* [citing *Eu*, 54 Cal.3d at 492].), "or not by effectively abolishing a pension plan the legislative authority refuses to fund" (*id*. at 701-702 [citing, *inter alia*, *Bellus v. City of Eureka* (1968) 69 Cal.2d 336 and *Klench v. Board of Pension Bd. Commrs*. (1926) 79 Cal.App. 171]).

A contract modification will pass constitutional muster if it is "reasonable and necessary to serve an important public purpose." (*U.S. Trust Co. of N.Y.,* 431 U.S. at 25.) In making this determination, courts look to see whether there is a "significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." (*Energy Reserves Grp., Inc. v. Kan. Power & Light Co* (1983) 459 U.S. 400, 411-412 [citations omitted].) "[T]he public purpose need not be addressed to an emergency or temporary situation." (*Id*. at 412; see also *Campanella v. Allstate Life Ins. Co*. (9th Cir. 2003) 322 F.3d 1086, 1088 [no need for emergency or temporary situation.]; Baltimore *Teachers Union, Local 340, AFL-CIO v. Mayor and City Council of Baltimore* (4th Cir. 1993) 6 F.3d 1012, 1020 fn. 11 ["The public purpose justifying an impairment of contract need not be "an emergency or temporary situation," although the existence of an emergency is of course relevant].)

Once a legitimate public purpose has been identified, the court determines "whether the adjustment of `the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" (*Energy Reserves*, 459 U.S. at 412 [quoting *U.S. Trust Co. of N.Y.*, 431 U.S. at 22].)

The Supreme Court has repeatedly stated the standard for pension modification: whether the change bears "a material relation to the theory of a pension system and its successful operation …." (*Allen*, 45 Cal.2d at 131; *Allen II*, 34 Cal.3d at 120.) In *Marin*, the Court stated that: "Plaintiffs make no real effort to demonstrate why the Pension Reform Act's modification of the definition of compensation earnable does not 'bear some material relation to the theory of a pension system and its successful operation'." (2 Cal.App.5th at 707.)

In the *Cal Fire* case, the State's brief identified compelling policy justifications that satisfy the standard articulated by this Court. The State's policy justifications include (1) "restoring the link between pension benefits and public service" -- the purchase of airtime had artificially inflated the years used to calculate pensions, undermining trust in the system, (2) employees were using airtime to retire earlier than expected, depriving the state of veteran employees, and (3) employees were not in fact paying the entire cost of the airtime purchase, and it was falling on employers.

Given the minimal nature of the modification, the State's rationales are more than adequate.

E. It Is Not Necessary To Find Pension System Insolvency To Justify Changes In Benefits; Long Before A Pension System Is Insolvent, Cities And Their Retirees Will Be Harmed

In the recent *Alameda* case, the Court of Appeal suggested that only "total pension system collapse may be a sufficiently weighty concern" to justify changes in benefits for legacy members of the CERL system.

This statement displays a fundamental misunderstanding of how a pension system unravels. Long before a pension system goes broke – and that may never happen –cities and retirees will be irrevocably harmed. If a member employer, due to rising pension costs and lack of funds, ceases paying its annual contributions to CalPERS, CalPERS will cut retiree pensions. Similarly, if the member employee files for bankruptcy, the federal bankruptcy court has the authority to cut retiree pensions.

1. If A Member Employer Is Unable To Pay, CalPERS Cuts Retirees' Pensions

In *In re City of Stockton, California* (Bankr. E.D. Cal. 2015) 526 B.R. 35, ***aff'd in part, dismissed in part*** (B.A.P. 9th Cir. 2015) 542 B.R. 261, the City of Stockton filed for Chapter 9 bankruptcy in part due to its inability to make its payments to CalPERS. The federal bankruptcy court found that retiree pensions could be reduced in bankruptcy. In so deciding, the court made two key observations: (1) when an employer can no longer afford to pay CalPERS, it is not CalPERS that bears the financial risk, (2) rather, the retirees bear the risk in the form of reduced pensions. *(Id.* at 40.)

As the *Stockton* court explained: "CalPERS does not bear financial risk from reductions by the City in its funding payments because state law requires CalPERS to pass along the reductions to pensioners in the form of reduced pensions. Rather, it is the pensioners, present and future, themselves who are at risk of loss." (526 B.R. at 41-42.) The Court further explained:

> The automatic reduction of benefits dictated by PERL § 20577 when a municipality does not pay its pension bill casts a different light on the CalPERS termination lien because it means that CalPERS bears no financial risk of underfunding of the termination pool. Rather, the individual members and their beneficiaries are the ones who bear the risk of inadequate funding. In effect, CalPERS is merely a servicing agent that does not guarantee payment.

(*Id*. at 49.)

The court concluded: "As has been explained, CalPERS must pass on to retirees the City's shortfalls in funding its City-sponsored pension, which makes CalPERS merely a pass-through conduit to the actual creditors." (*Id*. at 60.)

In the past few years, CalPERS has cut retiree pensions when member employers were unable to pay the cost of their employer contributions. (See "Public Workers From Two More Towns Expected To Lose CalPERS Pensions." Sacramento Bee, September 13, 2017.) As reported in the *Bee*: "In Trinity, five current and former employees will see their promised pensions slashed by 70 percent. Niland's five beneficiaries will see a 92 percent to 100 percent cut in pension benefits, according to CalPERS' staff reports." (*Ibid*.).

2. If An Employer Files For Bankruptcy, The Bankruptcy Court Has The Authority To Cut Retiree Pensions

In concluding that employee pension payments could be reduced as part of a bankruptcy plan, the *Stockton* court rejected CalPERS' argument "that California law insulates its contract from rejection and that the pensions themselves may not be adjusted." (526 B.R. at 39.) The court explained that the law of vested rights did not insulate pensions from reduction: "The rigidity of the California vested rights doctrine is a factor behind the current pressure on public pensions in California. It encourages dysfunctional strategies to circumvent limitations and peculiarities in California public finance." (*Id.* at 55.) The court held that:

> The fatal flaw in the "vested rights" analysis of California public pensions is that neither the Contracts Clause of the California Constitution nor the Contracts Clause of the Federal Constitution prevents Congress from enacting a law impairing the obligation of contract. The Supremacy Clause of the Federal Constitution resolves conflicts between a clear power of Congress and a contrary state law in favor of Congress.

(*Id*. at 56.)

Other bankruptcy courts also have held that pensions may be modified in bankruptcy. (See *In re City of Detroit, Mich*., (Bankr. E.D. Mich. 2013) 504 B.R. 97, 154 ["Because under the Michigan Constitution, pension rights are contractual rights, they are subject to impairment in a federal bankruptcy proceeding. Moreover, when, as here, the state consents, that impairment does not violate the Tenth Amendment. Therefore, as applied in this case, chapter 9 is not unconstitutional."]; see also *In re City of Detroit* (Bankr. E.D. Mich. 2014) 524 B.R. 147, 180–181.)

In summary, imminent insolvency of the pension system, or even its members, cannot be the standard under which courts determine whether pension benefits may be modified. Long before any pension system or member is insolvent, its member agencies, unable to pay their annual contributions, will cut vital services, or default, and retirees will be penalized in the form of reduced benefits. The legislature must be permitted to identify and resolve problems before pension systems enter into this "death spiral."

V. CONCLUSION

Hopefully, the cases before the California Supreme Court will clarify the standards for judicial review of pension modifications. Among other things, the Court has an opportunity to confirm that (1) the "unmistakability doctrine" applies to all claims of vested rights, (2) benefits attached to time already worked are distinct, and subject to a different and lesser standard, than for time not yet worked, (3) there need not be a "comparable new advantage" for any disadvantage, (4) the touchstone of reasonable modification of prospective benefits is whether the change is based on unforeseen advantages and burdens, (5) an economic emergency is not required in order to modify prospective benefits.

The Court may tackle only the first of these issues in *Cal Fire*. Or, it may address the fundamental infirmity of the so-called California rule – perhaps repudiating the idea that it was ever a complete statement of the rule. The likelihood that it will address these issues has increased greatly because the Governor has strongly urged that reconsideration, and all three cases before the court address it. The court seems least likely to address the fiscal solvency issue. From a factual perspective, none of the cases before it are really based on solvency concerns. However, because the *Alameda* case directly addresses the issue in *dicta*, and does so in a manner that would be highly detrimental to cities, it is critical that the court at least leave the issue open for future consideration. Otherwise, even a favorable decision for cities may have a very dark underbelly – the prospect that cities will be unable to take actions necessary to address the affordability of future CalPERS rates.

FPPC Update

Wednesday, May 2, 2018 General Session; 3:15 – 4:45 p.m.

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

Notes:_____

LEAGUE OF CALIFORNIA CITIES
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FPPC UPDATE SPRING 2018

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POLITICAL REFORM ACT REVISION PROJECT

The past two years, the FPPC has focused on its overhaul of the Political Reform Act. The overarching goal of the Project as stated by FPPC Chair Remke was to streamline and simplify the language of the Act without weakening disclosure or sacrificing accountability. In early 2017, after much work and outreach, the draft of the revised Act was submitted to the Legislative Counsel for review. In September comments were provided to the FPPC by the Counsel which, according to FPPC staff were substantial. At that time FPPC staff was to review the comments and decide whether to take those comments under submission and re-work the draft and re-start the comment process or determine not to take the Project further. After reaching out to FPPC legal staff in March, they stated that while elements of the Project may be pursued in the future to further the goal of streamlining the Act without weakening disclosure or sacrificing accountability, a comprehensive statutory restructuring is not imminent.

It is the feeling of the League's FPPC Committee that this was a preferable course given that the proposed draft changed and reordered every existing section of the Act and did not appear to create significant clarity to warrant the revisions.

RECENT CHANGES TO FPPC REGULATIONS

Over the past several months, the League's FPPC Committee has monitored any proposed regulatory changes which would have a substantive impact on the conflict of interest rules, and to date, there have not been any proposed regulation changes of significance that the Committee has seen a need to comment on.

A regulation worth mentioning though is one that was repealed, Regulation 18901, Mass Mailings Sent at Public Expense. The reason for this repeal is that the mass mailing provisions are now incorporated fully into Government Code Section 89002 as a result of the recent

enactment of Senate Bill 45 ("SB 45"). SB 45 codified the FPPC's mass mailing restrictions into Government Code Sections 89002 and 89003 and added a prohibition on certain mass mailings by or on behalf of a candidate whose name is on the ballot within 60 days of the election. SB 45 further restricts prior permissible mass mailings for officials who will appear on a ballot as it relates to letterhead, certain public meetings related to the candidate, and business cards as more specifically described in Subsection 89002(b)(1), (9) and (11). Government Sections 89002 and 89003 are provided below.

89002.

(a) Except as provided in subdivision (b), a mailing is prohibited by Section 89001 if all of the following criteria are met:

(1) An item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box. The item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document.

(2) The item sent either:

(A) Features an elected officer affiliated with the agency that produces or sends the mailing.

(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency that produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

(3) Any of the costs of distribution are paid for with public money or the costs of design, production, and printing exceeding fifty dollars ($50) are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this section.

(4) More than 200 substantially similar items are sent in a single calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).

(b) Notwithstanding subdivision (a), a mass mailing of the following items is not prohibited by Section 89001:

(1) An item in which the elected officer's name appears only in the letterhead or logotype of the stationery, forms, including "For Your Information" or "Compliments of" cards or stamps, and envelopes of the agency sending the mailing, or of a committee of the agency, or of the elected officer, or in a roster listing containing the names of all elected officers of the agency. For purposes of this section, the return address portion of a self-mailer is considered the envelope. In any such item, the names of all elected officers must appear in the same type size, typeface, type color, and location. The item shall not include the elected officer's photograph, signature, or any other reference to the elected officer, except as specifically permitted by this section. The item may, however, include the elected officer's office or district number and the elected officer's name or district number in his or her Internet Web site address or electronic mail address.

(2) A press release sent to members of the media.

(3) An item sent in the normal course of business from one governmental entity or officer to another governmental entity or officer, including all local, state, and federal officers or entities.

(4) An intra-agency communication sent in the normal course of business to employees, officers, deputies, and other staff.

(5) An item sent in connection with the payment or collection of funds by the agency sending the mailing, including tax bills, checks, and similar documents, in any instance in which use of the elected officer's name, office, title, or signature is necessary to the payment or collection of the funds. The item shall not include the elected officer's photograph, signature, or any other reference to the elected officer, except as specifically permitted by this section.

(6) Any item sent by an agency responsible for administering a government program, to persons subject to that program, in any instance in which the mailing of the item is essential to the functioning of the program, the item does not include the elected officer's photograph, and use of the elected officer's name, office, title, or signature is necessary to the functioning of the program.

(7) Any legal notice or other item sent as required by law, court order, or order adopted by an administrative agency pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2), and in which use of the elected officer's name, office, title, or signature is necessary in the notice or other mailing. For purposes of this paragraph, inclusion of an elected officer's name on a ballot as a candidate for elective office, and inclusion of an elected officer's name and signature on a ballot argument, shall be considered necessary to that notice or other item.

(8) A telephone directory, organization chart, or similar listing or roster which includes the names of elected officers as well as other individuals in the agency sending the mailing, in which the name of each elected officer and individual listed appears in the same type size, typeface, and type color. The item shall not include an elected officer's photograph, name, signature, or any other reference to an elected officer, except as specifically permitted by this section.

(9)

(A) An announcement of any meeting or event of either of the following:

(i) An announcement sent to an elected officer's constituents concerning a public meeting that is directly related to the elected officer's incumbent governmental duties, is to be held by the elected officer, and that the elected officer intends to attend.

(ii) An announcement of any official agency event or events for which the agency is providing the use of its facilities or staff or other financial support.

(B) Any announcement provided for in this paragraph shall not include the elected officer's photograph or signature and may include only a single mention of the elected officer's name except as permitted elsewhere in this section.

(10) An agenda or other writing that is required to be made available pursuant to Sections 11125.1 and 54957.5, or a bill, file, history, journal, committee analysis, floor analysis, agenda of an interim or special hearing of a committee of the Legislature, or index of legislation, published by the Legislature.

(11) A business card that does not contain the elected officer's photograph or more than one mention of the elected officer's name.

(c) For purposes of this section, the following terms have the following meanings:

(1) "Elected officer affiliated with the agency" means an elected officer who is a member, officer, or employee of the agency, or of a subunit thereof such as a committee, or who has supervisory control over the agency or appoints one or more members of the agency.

(2) "Features an elected officer" means that the item mailed includes the elected officer's photograph or signature or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color.

(3) "Substantially similar" is defined as follows:

(A) Two items are "substantially similar" if any of the following applies:

(i) The items are identical, except for changes necessary to identify the recipient and his or her address.

(ii) The items are intended to honor, commend, congratulate, or recognize an individual or group, or individuals or groups, for the same event or occasion, are intended to celebrate or recognize the same holiday, or are intended to congratulate an individual or group, or individuals or groups, on the same type of event, such as birthdays or anniversaries.

(iii) Both of the following apply to the items mailed:

(I) Most of the bills, legislation, governmental action, activities, events, or issues of public concern mentioned in one item are mentioned in the other.

(II) Most of the information contained in one item is contained in the other.

(B) Enclosure of the same informational materials in two items mailed, such as copies of the same bill, public document, or report, shall not, by itself, mean that the two items are "substantially similar." The informational materials shall not include the elected officer's name, photograph, signature, or any other reference to the elected officer except as permitted elsewhere in this section.

(C) An item is only considered substantially similar to other items sent by the same official, not to items sent by other officials in the same agency.

(4) "Unsolicited request" is defined as follows:

(A) A written or oral communication, including a petition, that specifically requests a response and is not requested or induced by the recipient elected officer or by any third person acting at his or her behest. However, an unsolicited oral or written communication, including a petition, that does not contain a specific request for a response shall be deemed to constitute an unsolicited request for a single written response.

(B) An unsolicited request for continuing information on a subject shall be deemed an unsolicited request for multiple responses directly related to that subject for a period of time not to exceed 24 months. An unsolicited request to receive a regularly published agency newsletter shall be deemed an unsolicited request for each issue of that newsletter.

(C) A previously unsolicited request to receive an agency newsletter or mass mailing on an ongoing basis shall not be deemed to have become solicited by the sole fact that the requestor responds to an agency notice indicating that, in the absence of a response, his or her name will be purged from the mailing list for that newsletter or mass mailing. A notice in the following language shall be deemed to meet this standard:

"The law does not permit this office to use public funds to keep you updated on items of interest unless you specifically request that it do so."

Inclusion of a similar notice in other items does not constitute a solicitation under this section.

(D) A communication sent in response to an elected officer's participation at a public forum or press conference, or to his or her issuance of a press release, shall be deemed an unsolicited request.

(E) A person who subscribes to newspapers or other periodicals published by persons other than elected officers shall be deemed to have made unsolicited requests for materials published in those subscription publications.

(Added by Stats. 2017, Ch. 827, Sec. 1. (SB 45) Effective January 1, 2018.)

89003.

Notwithstanding subdivision (b) of Section 89002, a mass mailing, as defined in Section 82041.5, that meets the criteria of subdivision (a) of Section 89002 shall not be sent within the 60 days preceding an election by or on behalf of a candidate whose name will appear on the ballot at that election, except as provided in paragraphs (2) to (8), inclusive, and paragraph (10) of subdivision (b) of Section 89002.
(Added by Stats. 2017, Ch. 827, Sec. 2. (SB 45) Effective January 1, 2018.)

In March, the FPPC Executive Staff Report to the Commission stated that there may be possible amendments to conflict of interest rules including (1) rules for small shareholders and related business entities and (2) bright line materiality standards, including clarification of the 500-foot property rule. No date was given as to when those potential changes would be forthcoming.

PRIORITIES OF THE FPPC FOR 2018

FPPC Chair Remke's 2018 priorities state that the Commission's focus will be on assisting candidates, committees and filing officers in their duties for the 2018 election year. It has been mentioned in many Commission meetings that election years are very busy years, and staff will mainly be focused on compliance and responding to complaints as it relates to election matters. They will also continue to work to improve transparency in government ethics by launching an enforcement database public portal.

The Commission is looking to review its enforcement priorities and procedures. Based on watching the Commission meetings on this topic, some Commissioners want to examine the process followed by staff undertaking its enforcement activities. There appears to be a split on the Commission on how involved the Commission should be when it comes to enforcement activities and what information they are entitled to know in approving enforcement actions.

The Commission is also reviewing its governing practices. Again it appears there is a split on the Commission as it relates to the Commission's role and whether there should be committees established to be more involved in staff activities and oversight and developing procedures to provide more information to the Commission as well as streamlining processes of the FPPC.

If you would like to get a feel for the current dynamic on the Commission, it is worth watching one of their meetings. It is clear there is a split on many matters that staff brings forward for Commission action.

SELECT RECENT FPPC ADVICE LETTERS

Lucan Advice Letter No. A-18-002

This opinion applied FPPC regulation 18702.1(b), Materiality Standard for Financial Interests in Business Entities that are not otherwise listed in subsection (a) which is not a commonly seen analysis.

In *Lucan*, the FPPC looked at whether the construction of an extended hotel stay in an official's jurisdiction, where there currently was no similar rental option, will have a reasonably foreseeable material financial effect on the official's interest in multiple residential rental properties. One of the elements in Regulation 18702.1(b) which can create a disqualifying financial impact is if the decision would "increase or decrease the amount of competition in the field in which the business entity is engaged." The FPPC found that because the proposed hotel would have the option of extended stays that the development would serve as competition for potential future tenants for the Councilmember's rental properties. It was also noted that one of the rental properties was within 1,800 feet from the Project. As a result, it was found to be reasonably foreseeable that the Project would contribute to a change in the value of the official's rental business. The Advice Letter noted that when examining whether a decision would increase competition for purposes of materiality, the FPPC has previously considered (1) the current level of competition in the field, (2) the proximity of the competitors to the official's business entity, and (3) whether the entity and its competitor share a similar target market.

The FPPC concluded that because extended stays were not available in the City and that at least one of the rental properties was near the Project that, even though their target market is not identical, the new hotel units would serve as competition.

The FPPC then went on to look at the public generally exemption and found the official may take part in the decisions under the public generally exception because residential rental units make up more than 25 percent of the residential real property in the jurisdiction rendering that a significant segment of the public and there was no indication that the Project would affect the official's rental properties differently than other rental properties.

Relevant portions of the regulations referenced:

§ 18702.1. Materiality Standard: Financial Interests in Business Entities.

(b) For a governmental decision not identified in subdivision (a), the financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity. Examples of decisions that may be applicable include those that:

(1) Authorize, prohibit, regulate or otherwise establish conditions for an activity in which the business entity is engaged;

(2) Increase or decrease the amount of competition in the field in which the business entity is engaged;

(3) Increase or decrease the need for the products or services that the business entity supplies;

(4) Make improvements in the surrounding neighborhood such as redevelopment projects, traffic/road improvements, or parking changes that may affect, either temporarily or permanently, the amount of business the business entity receives;

(5) Decide the location of a major development, entertainment facility, or other project that would increase or decrease the amount of business the entity draws from the location of the project; or

(6) Increase or decrease the tax burden, debt, or financial or legal liability of the business entity.

§ 18703. Public Generally.

(a) General Rule. A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.

(b) *A significant segment of the public is at least 25 percent of:*

(1) All businesses or non-profit entities within the official's jurisdiction;

(2*) All real property, commercial real property, or residential real property within the official's jurisdiction; or*

(3) All individuals within the official's jurisdiction.

(c) A unique effect on a public official's financial interest includes a disproportionate effect on:

(1) The development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.

(2) An official's business entity or real property resulting from the proximity of a project that is the subject of a decision.

(3) An official's interests in business entities or real properties resulting from the cumulative effect of the official's multiple interests in similar entities or properties that is substantially greater than the effect on a single interest.

(4) An official's interest in a business entity or real property resulting from the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage.

(5) A person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official.

(6) An official's personal finances or those of his or her immediate family

Gee Advice Letter No. A-17-249

This Advice Letter is interesting in that it analyzed interests in private membership organizations, and although the decision at issue did not find there was a conflict, the country club membership was found to be both a real property and a business investment interest. This Advice Letter is of note as certain club memberships should be listed on SEI Forms and such memberships could also create a conflict of interest, a fact that many electeds may not realize.

The FPPC analyzed the membership structure of the Country Club and determined the value of the membership exceeded $2,000. In addition, if the Club dissolves the value of the Club assets and real estate, after debts and liabilities were paid, would be divided among the members. The FPPC stated that consistent with prior advice: "when the resale value of a club membership is determined at least in part by the value of the club's real estate, the members have a least a beneficial interest in that real estate." It further concluded that since the members would be entitled to a proportionate share of the value of the assets if the Club were dissolved, their memberships constitute interests in real property.

Next, the FPPC stated that consistent with prior Commission determinations, club memberships can be an investment in a business entity where the membership was at least $2,000 in value and can be resold for profit or loss.

However, the FPPC determined that the councilmembers could take part in the decision regarding the creation of the downtown parking program because the decision will not have a reasonably foreseeable material effect on their interests.

Schneider Advice Letter A-17-280

In this Advice Letter, the FPPC applies Regulation 18234, Interests in Trusts a regulation not commonly looked at.

The FPPC advised that a councilperson, who resides in a home held in a family trust, does not have an economic interest in the property because her parents, the trustees of the trust, may revoke the trust at their discretion, and she is not receiving any income from the trust. As a result, the councilperson does not have a disqualifying conflict of interest in decisions involving actions related to improvements to be made at park property located within 500 feet of her home.

The FPPC noted that the councilperson does not own the property or pay rent. She does currently stand to inherent the property valued at $1.5 million under the parents' revocable trust. Nonetheless, the parents could modify the trust, she cannot, nor was she a trustee or co-trustee nor did she receive any income from the trust. The only interest she had in the trust was as a beneficiary who will inherent the property when her parents are deceased.

The FPPC looked to Regulation 18234 which defines when an official has an interest in a trust, it requires that the person be a beneficiary and either receive income or have an irrevocable future right to receive income. As a result, the councilperson could participate in decisions related to improvements at the park.

§ 18234. Interests in Trusts.

(a) An official has an economic interest in the pro rata share of the interests in real property, sources of income, and investments of a trust in which the official has a direct, indirect, or beneficial interest of 10 percent or greater.

(b) For purposes of this section, the interests of the official include those of the official, spouse, and dependent children regarding interests in real property and investments and those of the official and spouse regarding sources of income.

(c) For purposes of determining whether an official has an economic interest in interests in real property, sources of income, and investments of a trust, the official has a direct, indirect, or beneficial interest in a trust if the official is:

(1) A trustor and:

(A) Can revoke or terminate the trust;

(B) Has retained or reserved any rights to the income or principal of the trust, or retained any reversionary or remainder interest; or

(C) Has retained or reserved any power of appointment, including but not limited to the power to change the trustee, or the power to amend, alter or designate, either alone or in conjunction with anyone else, the person or persons who shall possess or enjoy the trust property or income.

(2) A beneficiary and:

(A) Presently receives income; or

(B) Has an irrevocable future right to receive income or principal. For purposes of this subsection, an individual has an irrevocable future right to receive income or principal if the trust is irrevocable, unless one of the following applies:

(i) Powers exist to consume, invade, or appoint the principal for the benefit of beneficiaries other than the official and such powers are not limited by an ascertainable standard relating to the health, education, support, or maintenance of the beneficiaries; or

(ii) Under the terms of the trust, someone other than the official can designate the persons who shall possess or enjoy the trust property or income.

(d) For the purposes of this section, an official does not have a direct, indirect, or beneficial interest in a trust solely because the official is a trustee or co-trustee. However, income received for the performance of trustee services is income as defined in Government Code Section 82030.

Navigating Pitfalls Under Government Code Section 1090 When Contracting Consultants

Wednesday, May 2, 2018 General Session; 3:15 – 4:45 p.m.

James C. Harrison, Remcho, Johansen & Purcell
Margaret R. Prinzing, Remcho, Johansen & Purcell

Notes:_____

NAVIGATING PITFALLS UNDER GOVERNMENT CODE SECTION 1090

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May 2018

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INTRODUCTION

Government Code section 1090, which prohibits public officials and certain government consultants from being interested in a contract in both their official and private capacities, is one of the harshest conflict of interest laws in the United States. A contract made in violation of section 1090 is void ab initio, and courts have required the contracting party to disgorge any benefit obtained through the contract, even when the official abstained from the decision to approve the contract. Section 1090 may be enforced through civil actions brought by government agencies, and in some cases, by taxpayers. The Fair Political Practices Commission has authority to bring a civil action or impose administrative fines for violations of the law, and the Attorney General and district attorneys may also file criminal charges for violations of section 1090. Section 1090 does not discern between a good contract and a bad contract: even if a contract benefits the government agency, if it is made in violation of section 1090, it is void.

Although the Legislature has attempted to ameliorate some of the harshness of the law by adopting exceptions over the years, the courts, the Attorney General, and the Fair Political Practices Commission have continued to give it a broad reading. Most recently, the California Supreme Court held that section 1090 applies to consultants who act as "trusted advisors" to government agencies. And several appellate courts have applied section 1090 to design-build contracts let by school districts because the consultants had been involved in the design phase of the project. In 2016, the Attorney General issued an opinion up-ending years of practice by advising that a contract city attorney could not advise the city regarding a bond issuance because the attorney had a financial interest (in the form of additional fees) in the bond issuance itself, which the Attorney General deemed to be a contract. And the Fair Political Practices Commission has issued numerous advice letters concluding that a consultant who advised a government agency about a project could not be retained by the agency to participate in subsequent phases of the same project, depriving public agencies of the ability to contract with consultants who may have the best experience or offer the best price.

These recent decisions have created a host of challenges for public agencies seeking to obtain the best value for their taxpayer dollars while avoiding challenges that can delay or even derail a project. In this paper, we provide an overview of section 1090 and discuss recent court decisions, Attorney General opinions, and FPPC advice letters, particularly as they apply to consultants and contract city attorneys. Finally, we offer some practice tips for navigating the challenges presented by this unique and unforgiving law.

I. GOVERNMENT CODE SECTION 1090

A. Overview Of The Statute

Government Code section 1090 provides that public "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." Cal. Gov't Code § 1090. Any participation, even in

an advisory capacity, by the public official, at any point in time, in the process by which a contract is developed, negotiated, approved, executed, or modified can be a violation of section 1090. *People v. Gnass*, 101 Cal. App. 4th 1271, 1287, n.3, 1292 (2002). Nor does it matter whether the contract involves actual fraud, dishonesty, unfairness, or loss to the government entity, or whether the contract is fair or oppressive. *People v. Honig (Honig)*, 48 Cal. App. 4th 289, 314 (1996). Further, if one member of a board has a financial interest in a contract, the entire board is disqualified from making the decision, even if the interested member does not vote on the contract or participate in discussions before the vote. *Thomson v. Call*, 38 Cal.3d 633, 645, 649-50 (1985).[1]

The following elements are required to prove a violation of section 1090: (1) the official participated in the making of a contract in his or her official capacity; (2) the official had a cognizable financial interest in that contract; and (3) the financial interest does not fall within any of the statutory exceptions for remote or noninterests. *Lexin v. Superior Court*, 47 Cal. 4th 1050, 1074 (2010).

The penalties for violating Government Code section 1090 are severe. A contract made in violation of section 1090 is void and unenforceable. Cal. Gov't Code § 1092(a). As a practical matter, courts have construed this to mean the contracts are *voidable*; a public entity retains the discretion to decline to bring an action to declare the contract void, and instead allow the contract to stand, provided that decision is made by officials who have no financial interest in the contract. *San Bernardino County v. Superior Ct.*, 239 Cal. App. 4th 679, 688 (2015); *compare People ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 921, 951 (2013) (Attorney General has standing to bring suit on behalf of the City of Bell to void illegal contracts benefitting city officials who remained in office when the action was commenced).

If a contract is deemed to be void, a contractor may be required to disgorge any profits flowing from the contract, regardless of whether the violation was intentional. *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 551-52 (2007); *Carson Redevelopment Agency v. Padilla*, 140 Cal. App. 4th 1323, 1336 (2006). The classic case illustrating this harsh application of the law is *Thomson*, 38 Cal. 3d at 652, where a city councilmember sold his property to a private developer, who in turn conveyed the property to the city as part of a development agreement. The councilmember had refrained from any participation in the

[1] The Legislature has created two general categories of exceptions to section 1090. First, the Legislature has created exceptions for "remote interests." Cal. Gov't Code § 1091. These exceptions are applicable only to members of boards or commissions and only if the conflicted member discloses his or her financial interest in the contract to the public agency on the record and abstains from any participation in the making of the contract. Cal. Gov't Code § 1091(a). The Legislature has also created exceptions for "non-interests." Cal. Gov't Code § 1091.5. Individuals may fully participate in contracting decisions in which they have one of the listed "non-interest" exceptions if they comply with the requirements of that section.

council's consideration of the development agreement, on advice of the city attorney. The California Supreme Court nonetheless ordered the councilmember to disgorge the proceeds from the sale ($258,000), while allowing the city to keep the property, in order to provide "a strong disincentive for those officers who might be tempted to take personal advantage of their public offices. . . ." *Id*.; *see also Finnegan v. Schrader*, 91 Cal. App. 4th 572, 583-84 (2001) (ordering general manager of a sanitary district to refund the compensation he had received from the agency because he was a member of the agency's board at the time of his appointment, even though he had recused himself from the decision). Even profits that do not come directly from the public entity's funds are subject to disgorgement if they are the result of an illegal contract under section 1090. *Los Angeles Memorial Coliseum Commission v. Insomniac, Inc.*, 233 Cal. App. 4th 803, 826-27 (2015) (concert promoters subject to disgorgement of profits from ticket sales, but not funds paid for time and effort, where general manager and employee of commission had profited personally by diverting concert revenues to themselves and entities owned by them); *see also County of San Bernadino v. Walsh*, 158 Cal. App. 4th 533, 549 (2007) ("In order to fulfill the fundamental public policy underlying section 1090, the County may obtain a forfeiture of the proceeds of a tainted contract, even when the proceeds were received from a third party rather than the public entity itself.") *Id*.

Violations of section 1090 can be enforced in a civil action brought by the public entity or by a party to the contract. The statute of limitations for bringing such a challenge is *four years* after the contract was executed or the conflict was discovered, whichever comes later. Cal. Gov't Code § 1092(b). A new cause of action accrues with each amendment to the contract. *City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, 196-97 (1980). And a public agency may bring suit even after the four year limitations period if its claim is raised in a cross-complaint that relates back to the filing of a complaint on a related subject matter. *California-American Water Co. v. Marina Coast Water District*, 2 Cal. App. 5th at 748, 763-64 (2016).

Two courts have ruled that only the parties to the contract can bring a section 1090 claim, and that taxpayers do not have independent standing to bring such claims. *California-American Water Co.*, 2 Cal. App. 5th at 760; *San Bernadino County v. Superior Ct.*, 239 Cal. App. 4th 679, 684 (2015). The First and Second District Courts of Appeal, however, held more recently that taxpayers do have standing to sue under section 1090. *California Taxpayers Action Network v. Taber Construction, Inc.*, 12 Cal. App. 5th 115, 144-45 (2017); *McGee v. Balfour Beatty Construction, LLC*, 247 Cal. App. 4th 235, 248 (2016).

In addition, a public official found to have committed a knowing and willful violation of section 1090 may be punished by a fine of not more than $1,000 or imprisonment. Cal. Gov't Code § 1097. A convicted public official is forever disqualified from holding any office in the state. *Id*. In *Honig*, 48 Cal. App. 4th 289, 329-30 (1996), for example, the court upheld the criminal conviction of the former state superintendent of public instruction for causing Department of Education funds to be used to pay salaries of a nonprofit organization that employed his wife, even though the funds were not used to pay his wife's salary directly. Statutory amendments added in 2014 also provide for criminal liability for any "individual who willfully aids or abets an officer or person in violating" section 1090. Cal. Gov't Code § 1097(b).

The statute of limitations for criminal prosecutions is three years from the date the offense was committed or discovered. Cal. Penal Code §§ 801, 803(c). The Attorney General or the district attorney in the county in which the violation occurred may prosecute officials for violating section 1090.

It is important to note that reliance upon advice of counsel, actions taken in good faith, and the belief that the contract was in the public's best interest are not defenses to a prosecution under section 1090. *D'Amato v. Superior Ct*., 167 Cal. App. 4th 861, 869 (2008); *see also People* , 48 Cal. App. 4th at 347-48; *Thomson*, 38 Cal. 3d at 646. Equitable defenses such as laches are also generally unavailable to defeat a section 1090 claim. In *Thomson v. Call*, 38 Cal. 3d 633, 647-49 (1985), the California Supreme Court held: "In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity." *Id*. at 649; *see also id*. at 652 (emphasis in original) ("*[C]ivil liability* under section 1090 is not affected by the presence or absence of fraud, by the official's good faith or disclosure of interest, or by his nonparticipation in voting. . . .").

Since 2014, the Fair Political Practices Commission has been authorized to bring administrative or civil actions against anyone "who violates any provision of [section 1090] or who causes any other person to violate any provision of those laws," but only upon written authorization from the district attorney in the county in which the violation occurred. Cal. Gov't Code §§ 1097.1(a), 1097.1 (b). If the FPPC proceeds in a civil action, then the maximum penalty is "the greater of ten thousand dollars ($10,000) or three times the value of the financial benefit received by the defendant for each violation." The statute of limitations for such civil actions is four years from the date the violation occurred. *Id*. § 1097.3(c).

B. What It Means To "Make" A Contract

In determining what constitutes a contract under section 1090, courts and the Attorney General have defined the term broadly to include transactions that may not traditionally be thought of as contracts. *See*, *e.g.*, *Honig*, 48 Cal. App. 4th 289 (1996) (applying section 1090 to grants); 89 Op. Cal. Atty. Gen. 258 (2006) (applying section 1090 to a city council's contribution to a nonprofit); 85 Op. Cal. Atty. Gen. 176 (2002) (applying section 1090 to city council's grant of public funds to a nonprofit); 78 Op. Cal. Atty. Gen. 230 (1995) (applying section 1090 to a city's development agreement); 75 Op. Cal. Atty. Gen. 20 (1992) (applying section 1090 to prohibit a hospital district from paying the travel expenses of a board member's spouse).

Although section 1090 does not define what it means to "make" a contract, the courts and the Attorney General have likewise broadly construed the term to apply to participation at any stage of the contracting process. Participation in making a contract includes "any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids." *Healy* Adv. Ltr., FPPC No. A-17-159 (Aug. 16, 2017).

The California Supreme Court established this point in the seminal case of *Stigall v. City of Taft*, 58 Cal. 2d 565, 569 (1962), where a city council member participated in developing a request for proposals and, after resigning from the council, assisted his plumbing company in submitting the low bid for its completion. Although the council member was no longer a public official and had no role in approving the final contract, the Court nonetheless found that he had "made" the contract by virtue of his earlier participation in the development of the RFP. *Id.* at 568-69. The Court declined to adhere to a technical reading of what it means to "make" a contract, and instead construed the term broadly in light of the statutory objective to "limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision." *Id.* at 569. It was in this context that the Court concluded the term "made" encompassed the planning, preliminary discussions, and drawing of plans and specifications. *Id*. at 571. Because the council member had a financial interest in the contract he "made," he was found to have violated section 1090.

The courts have also found violations of section 1090 where the official attempted to influence a contracting decision, even if he did not have a formal role in the making of the 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*, 40 Cal. App. 3d 1046, 1052 (1974) (citation omitted); *see also People v. Wong*, 186 Cal. App. 4th 1433, 1450-51 (2010) (municipal airport commissioner who received payment to influence harbor commission's decision to negotiate with a third party violated section 1090).

Thus, in order to avoid "making" a contract within the meaning of section 1090, public officials cannot participate in the awarding of the contract in any way, including an attempt to influence the award.

C. What Constitutes A Financial Interest?

The concept of financial interest is defined broadly. "Although Section 1090 does not specifically define 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." *Hensely* Advice Letter, FPPC No. A-16-254 (2017). "However 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*, 2 Cal. 2d 141, 146 (1934) (citation omitted).

In *Honig*, 48 Cal. App. 4th at 320, the Court stated, "we cannot focus upon an isolated 'contract' and ignore the transaction as a whole," and so "[t]he use of a third party as a contractual conduit does not avoid the inherent conflict of interest in such a transaction." *Id.* "[F]orbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances." *Id.* at 315. That the interest "'might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public

good.'" *Lexin v. Superior Ct*., 47 Cal. 4th 1050, 1075 (2010) (quoting *Terry v. Bender*, 143 Cal. App. 2d 198, 208 (1956)). Thus, "[t]he law does not require that a public officer acquire a transferable interest in the forbidden contract before he may be amenable to the inhibition of the statute, nor does it require that the officer share directly in the profits to be realized from a contract in order to have a prohibited interest in it." *Honig*, 48 Cal. App. 4th at 315 (citations omitted). "Put in ordinary . . . terms, an official has a financial interest in a contract *if he might profit from it*." *Id*. at 333 (emphasis added).

Although the vast majority of cases and Attorney General opinions involve the prospect of financial gain, the courts and the Attorney General have also referred to the potential for a loss as a "financial interest" for purposes of section 1090. Even in those cases in which there is a potential loss, however, the analysis turns, at least in part, on the prospect of financial gain. Thus, in *People v. Watson*, 15 Cal. App. 3d 28, 45 (1971), a commissioner on the Los Angeles Board of Harbor Commissioners was convicted at trial of violating section 1090, and appealed to challenge the sufficiency of the evidence and jury instructions. The court affirmed, finding that the evidence supported the verdict, because it demonstrated that the Commissioner had loaned money to a man for a business venture that eventually involved a lease agreement that was approved by the Harbor Commission with the Commissioner's vote. The court found that Commissioner had a financial interest in the lease because it *enhanced* the security of the loan. *Id.* at 37. The court also affirmed jury instructions that referred only to the "contingent possibility of monetary or proprietary benefits." *Id.* at 37-38.

The same is true of an opinion in which the Attorney General advised a city council that it was prohibited from approving a pro bono legal contract with a law firm that employed a council member, because the contract could have a financial effect on the firm even though the firm agreed to provide the services for free. 86 Op. Cal. Atty. Gen. 138 (2003). Although the Attorney General cited the firm's interest in avoiding expenses as an example of a financial interest, the Attorney General also cited the potential for the firm to obtain additional business as a result of the prestige it would enjoy due to its work for the city.

In a more recent decision, however, the Court of Appeal concluded that the CEO of a hospital district, George Bischalaney, who also served as the President and CEO of a nonprofit established by the district and Sutter Health to manage the hospital, did not have a financial interest under section 1090 in a contract made between the district and the nonprofit because there was no nexus, direct or indirect, between the contract and the compensation Bischalaney received from his nonprofit employer. *Eden Township Healthcare District v. Sutter Health*, 202 Cal. App. 4th 208, 222 (2011). Although Bischalaney was the CEO of both the hospital district and the nonprofit, he participated in the negotiation of the contract *only* on behalf of the nonprofit. He did not attempt to influence the hospital district's board of directors to enter into the agreement with the nonprofit. *Id.* at 215. The court acknowledged that Bischalaney had a financial interest in the salary he received from his employer, but it concluded that the District had not shown that the contract had a nexus to his salary. *Id*. at 222. The court distinguished such decisions as *Thomson* and *Honig* and the Attorney General opinion involving a contract for *pro bono* legal services, discussed above, on the ground that in

each of those instances, "the party who was found to have had a prohibited financial interest received a *tangible benefit* that arose out of the contract at issue." *Id*. at 226 (emphasis added). By contrast, in the case before it, the court concluded that "[t]here is simply no evidence of any change in [the chief executive officer's] salary, benefits, or status in this record" and therefore "there is no disqualifying conflict of interest." *Id*. at 227.[2]

However, the *Eden Township* court made clear that when there is *any* nexus between the contract and a prohibited financial interest, even an indirect one, the connection is sufficient to trigger the application of the statute. The court distinguished *Honig* on the basis that "a pathway exist[ed] that would trace . . . financial benefit" from the contracts between the Department of Education and the school districts to the state superintendent himself. *Eden Township,* 202 Cal. App. 4th at 224. Specifically, the money flowing to the school districts was used to pay educators working for the superintendent's wife's nonprofit, which then freed up resources that the nonprofit used to pay the wife's salary. *Id.*

II. CONSULTANTS ARE SUBJECT TO 1090

A. Consultants May Face Civil And Criminal Liability For Violating 1090

Many courts, the Attorney General, and the FPPC have said that section 1090 is applicable *in the civil context* to consultants and independent contractors "whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency"; such consultants "may not have personal interests in that agency's contracts." *Hub City Solid Waste Services, Inc. v. City of Compton*, 186 Cal. App. 4th 1114, 1124-25 (2010). Three appellate courts have gone so far as to hold that a corporate entity could be considered a consultant for section 1090 purposes. *California Taxpayers Action Network v. Taber Construction, Inc.,* 12 Cal. App. 5th 115, 146-47 (2017); *Davis v. Fresno Unified Sch. Dist.*, 237 Cal. App. 4th 261 (2015); *McGee v. Balfour Beatty Construction, LLC*, 247 Cal. App. 4th 235, 247-48 (2016). The FPPC similarly advises that corporate entities that contract with a public agency can be subject to section 1090. *Chadwick* Adv. Ltr., FPPC No. A-15-147 (Sep. 29, 2015).

[2] Note that the peculiar facts of the case may have influenced the outcome. The hospital district initiated the action after a change in the composition of the board in an effort to undo the prior board's decision to sell the hospital to Sutter. The new board decided that it was not in the district's best interests to sell the hospital and sought an order declaring the contract void even though the former board's negotiating team testified that they understood that Bischalaney participated in the negotiations exclusively on behalf of the non-profit. The court noted: "The District does not claim it will be adversely affected, from a *financial* standpoint, if the [hospital] sale is completed. Indeed, as best we can discern, the District's main issue with the transaction is based on public policy concerns regarding the loss of emergency room access, and not public finances. This policy concern, standing alone, is not a proper basis for section 1090 liability." *Id*. at 224-25.

The California Supreme Court recently confirmed that consultants can be found *criminally* liable under section 1090. *People v. Superior Court (Sahlolbei)*, 3 Cal. 5th 230, 233 (2017). The Court overruled an earlier court of appeal decision that held independent contractors could never be held criminally liable under section 1090. *Id.* at 247. *People v. Christiansen*, 216 Cal. App. 4th 1181 (2013) (overruled by *Sahlolbei*, 3 Cal. 5th at 247).

The Court offered guidance with respect to which consultants are subject to section 1090. The Court held that section 1090 applies to consultants and independent contractors who "have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." *Sahlolbei, 3 Cal. 5th at* 245. In that instance, the defendant's duties as a member of the hospital's medical executive committee brought him within the scope of the statute, including section 1090's criminal liability provisions, even though he was an independent contractor, because he influenced the hospital to hire another doctor and profited from that doctor's contract. Under this decision, Government Code section 1090 applies to independent contractors who serve as trusted advisors to government agencies. *Id.* at 240. Thus, section 1090 applies to consultants that advise government agencies with respect to third party contracts. However, the Court in dicta indicated that the ordinary rules of section 1090 "might give way in circumstances where a contractor reasonably believed he or she was not expected to subordinate his or her financial interests to the public's." For example, the Court wrote, "a stationery supplier that sells paper to a public entity would ordinarily not be liable under section 1090 if it advised the entity to buy pens from its subsidiary because there is no sense in which the supplier, in advising on the purchase of pens, was transacting on behalf of the government." *Id.*

B. Consultants May Negotiate The Terms Of Their Own Contract

The courts, the FPPC, and the Attorney General have recognized that consultants must be able to negotiate their own contracts with the public entity, including a provision to be paid additional compensation for services beyond their regular duties, so long as they are operating solely in their private capacity when doing so. *Campagna v. City of Sanger*, 42 Cal. App. 4th 533, 539-40 (1996); *McEwen* Adv. Ltr., FPPC No. I-92-481 (1993); *see also Pansky* Adv. Ltr., FPPC No. I-14-096 (2014) (advising that there is no 1090 violation where contract with lawyer includes a provision under which the agency will pay the counsel or his or her law firm additional compensation to litigate matters on which he or she advises the agency). However, as the Attorney General recently opined (*see* discussion in section IIC, below), that additional compensation cannot be contingent on the execution of contracts with third parties. Furthermore, this exception does not create an opening for a consultant to use his official position to influence a decision that leads to a *new* contract with his employer or that otherwise results in a financial benefit to the contractor outside the scope of the existing contract.

In *Campagna*, for example, a contract city attorney entered into an agreement with the city to provide ongoing advice and representation for a set monthly retainer and litigation services "on a reasonable legal fee basis." 42 Cal. App. 4th at 535. Acting on the

attorney's advice, the city agreed to institute litigation against a chemical company and to retain his firm for that litigation on a contingency fee basis. The city subsequently approved a contract with the contract city attorney's firm and a second firm to handle the litigation. *Id.* at 536. The Court of Appeal found that the contract city attorney could negotiate the terms of his firm's compensation for the litigation services because his existing contract contemplated that he would provide such services for a reasonable fee. *Id.* at 540. However, the Court also concluded that he violated section 1090 by negotiating in his capacity as city attorney a referral fee that he received in his personal capacity from the second law firm. *Id*. at 541-42. In other words, because he used his official position to influence a contract in which he had a financial interest, the court found he had violated section 1090.

Similarly, in *HUB City Solid Waste Servs., Inc. v. City of Compton*, 186 Cal. App. 4th 1114 (2010), the Court of Appeal concluded that a contractor who managed the city's in-house waste management division had violated section 1090 by participating in the city's decision to outsource the city's waste disposal operations to a newly created company in which the contractor was the sole shareholder. Pursuant to his original contract with the city, the contractor acted as the director of the in-house waste division, "working alongside city employees, overseeing day-to-day operations of Compton's waste management division, and taking responsibility for public education and compliance with state mandated recycling and waste reduction efforts." *Id.* at 1120. While serving in that capacity, he proposed to take over responsibility for waste disposal by licensing the city's trucks and facilities and hiring its employees. The city then entered into a no-bid contract with the newly created company to take over the city's waste disposal operations. The Court summarized its conclusion as follows:

> Pursuant to the management agreement . . ., [the contractor] supervised city staff, negotiated contracts, and purchased equipment and real estate on behalf of the city. His activities served a public function, and he was intricately involved in the city's waste management decisions. As [the sole shareholder of the new entity], [the contractor] had a personal financial stake in the franchise agreement. That interest was neither remote nor speculative, and resulted in an immediate and obvious conflict of interest. It cast doubt on whether [the contractor] was acting in Compton's best interest when he proposed franchising the city's waste management services and licensing city-owned equipment and facilities.
>
> *Id*. at 1125.

The Court rejected the contractor's argument that he was acting in his personal capacity when he proposed the arrangement to the city, noting that the "'negotiations, discussions, reasoning, planning and give and take' leading to the execution of a contract are deemed to be part of the making of an agreement under section 1090." *Id.* at 1126 (internal quotations omitted).

Recent appellate decisions involving school construction contracts have also found that a consultant who helps a government agency design a project may not enter into a subsequent contract to carry out the same project. Last year, the First District Court of Appeal held that taxpayers stated a cause of action under section 1090 by alleging that a corporate consultant to a school district, who had provided "preconstruction services" related to a building project, could not then contract with the district to complete the construction project under a lease-leaseback arrangement. *California Taxpayers Action Network v. Taber Constr., Inc.*, 12 Cal. App. 5th 115, 147 (2017). The Second District Court of Appeal reached the same conclusion in *McGee v. Balfour Beatty Constr., LLC*, 247 Cal. App. 4th 235, 249 (2016). In that case, the plaintiff alleged that the construction firm provided preconstruction services to a school district, including budgeting and development of plans and specifications, which rendered invalid a subsequent lease-lease-back construction contract.

C. A Consultant May Not Advise An Agency Regarding A Third Party Contract In Which The Consultant Has An Interest

These cases illustrate that a consultant may negotiate, in the consultant's individual capacity, to provide additional services contemplated by the original contract, but may not advise the government agency with respect to a contract with a third party in which the consultant has an interest.

A 2016 opinion of the Attorney General and a 2014 opinion of the FPPC interpreting section 1090 illustrate the distinction between the two scenarios. In 2016, the Attorney General considered an arrangement under which a contract city attorney's agreement for services provided that the contract attorney would also act as the city's bond counsel and would be paid a percentage of the bond issuance as compensation, if the city were to issue bonds during the contract period. 99 Op. Cal. Atty. Gen. 35 (2016). The Attorney General concluded that each such bond issuance is a public contract, and that the contract city attorney is precluded from being financially interested in those contracts, even if such an arrangement is specified in advance of any bond issuance in her agreement with the city. The contract city attorney would be involved in "making" the contract by advising the city on decisions regarding the size and scope of the bond issuance. She would be financially interested in the contract because she would only get paid if the bonds were issued and her compensation would vary depending on the size of the issuance. Although the Attorney General found the contingent nature of the payment troubling because it created the potential for a conflict between the contract attorney's personal and public interests, the opinion stressed that "it is the fact that the city attorney has a financial interest in the bond *contract*, rather than the contingent nature of the compensation, that presents a problem under section 1090."[3] *Id.*, n.28 (emphasis in original).

[3] Before issuing the opinion, the Attorney General sought and received comments from many law firms providing contract city attorney services, all of which, not surprisingly, argued against

The opinion in that sense draws on *Campagna*, 42 Cal. App. 4th 533, in which the court found that the city attorney did not violate section 1090 when he negotiated a contract between his own firm and the city to provide additional litigation services on a contingent basis, but did violate the statute when, acting in his capacity as city attorney, he negotiated a second contract for litigation services to be provided by his own firm and a different firm on a contingency basis, for which the other firm agreed to pay him a referral fee. The court distinguished the two situations on the basis that the second contract was not between the city and Campagna directly, but rather with a third party. The Attorney General concluded that in both *Campagna* and the facts before it, "the section 1090 violation stems not from the contingent nature of the fee, but from the financial interest in a contract made on behalf of the city." 99 Ops. Cal. Atty. Gen. 35, n.28. *See also People v. Gnass*, 101 Cal. App. 4th 1271 (2002) (city attorney violated section 1090 by serving as disclosure counsel for 10 bond contracts issued by various joint powers authorities that he had participated in making in his capacity as city attorney).

Other parts of the Attorney General opinion, however, suggest that the percentage compensation was indeed a big factor in finding a conflict. The opinion states:

> The incentive created by this compensation structure – in which the contract city attorney would be paid for his or her bond work only if the city issues bonds and would be paid more the larger the bond issuance – puts the attorney in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good. The city attorney, who must provide the city with unbiased advice, instead has a personal interest which might interfere with the unbiased discharge of his duty to the public or prevent the exercise of absolute loyalty and undivided allegiance to the best interests of the governmental unit which he represents. Section 1090 forbids the creation of a

finding a section 1090 violation so long as the initial contract expressly contemplated the additional services and compensation. The FPPC's comment letter, while lacking any lengthy analysis, agreed with the city attorneys. To date, the Attorney General's opinion has not been cited yet by any court opinion. The FPPC has cited it once, but only for the proposition that section 1090 does not apply to the making of the original contract and that a consultant may negotiate in his private capacity to amend the contract to perform additional services. *Calabrese* Advice Letter, FPPC No. A-17-087.

> situation whereby [the official] becomes interested in a public contract.
>
> 99 Ops. Cal. Atty. Gen. 35 (footnotes and internal quotation marks omitted).

By contrast, in the *Pansky* Advice Letter, No. I-14-096 (2014), the question before the FPPC was whether there was a violation of section 1090 when an outside construction counsel's contract with a government agency included a provision under which the agency would pay the counsel or the counsel's law firm additional compensation to litigate matters on which the outside counsel advises the agency. The FPPC concluded that the initial contract did not pose a problem under section 1090 because the attorney was acting in his private capacity, but proceeded to analyze whether the attorney's participation in subsequent decisions on whether he should receive additional compensation pursuant to the original contract constituted a section 1090 violation.

The FPPC found that the attorney's participation in these matters did not violate the statute. It contrasted the construction counsel's scenario with that in 66 Op. Cal. Atty. Gen. 376 (1983), which involved a redevelopment agency counsel whose compensation was based on a percentage of the increase in the assessed value of parcels of property in the redevelopment area. The redevelopment agency counsel would be involved in an advisory capacity to the city in the discussion, negotiation, and drafting of a wide variety of public contracts that could increase the value of parcels in the redevelopment area. *Id.*

Noting that there was significant difference between the facts of the two situations, the FPPC wrote:

> In the Attorney General's opinion, the contracting decisions in which the attorneys participated involved redevelopment contracts with outside entities made after the attorneys' compensation arrangement was established by the city. The construction counsel contract we address here only involves the original compensation arrangement made by the construction counsel with the city and any additional compensation does not involve a future separate contract with an outside party in which the construction counsel has a financial interest. Thus, there appears to be a significant difference between these matters in that the construction counsel's additional compensation is not the subject of a later contract.
>
> *Id.*

Thus, authorities that have considered this question have found that it is not a violation of section 1090 for a public official to receive additional compensation for services

contemplated by the original contract, but that advising an agency with respect to a third party contract in which the consultant has an interest violates section 1090.

D. Consultants Who Advise Agency About A Project Cannot Obtain Subsequent Contract To Carry Out New Phase Of Project

Recent advice letters issued by the FPPC illustrate that a consultant who advises an agency regarding a project may not subsequently contract with the agency to carry out an additional phase of the project, with three narrow exceptions: (1) where the consultant provides only technical advice; (2) where the new contract results from a de novo review; and (3) where the consultant has neither the possibility of gain nor loss as a result of the subsequent contract decision.

Under section 1090, an independent contractor or consultant is generally prohibited from entering into a subsequent contract to complete a project if the consultant had extensive involvement in the initial design and development of the project. *Simon* Adv. Ltr., FPPC No. A-17-148 (citing *Hub City*, 186 Cal. App. 4th at 1125). In those situations, the FPPC has advised that the consultant has exerted considerable influence on the contracting decision of the public agency because of its initial involvement in setting the parameters for the subsequent work and therefore is prohibited under section 1090 from participating in the subsequent phase. *Ciccozzi* Adv. Ltr., FPPC No. A-17-049 (2017); *see also Fowler* Adv. Ltr., FPPC No. A-15-228 (corporate consulting firm that, under initial contract with the City of Santa Rosa, assisted City Council in understanding current development impact fees and evaluated those fees in preparation for City's upcoming update of those fees, could not enter into subsequent contract with City to update those fees because it had been "intricately involved in developing and forming" the RFP that would lead to that subsequent contract).

There are, however, three exceptions to that general rule. First, the FPPC has opined that if the consultant played a limited technical role in the initial design phase and was "removed from directly advising City staff" with respect to the scope of work for the subsequent phase, then section 1090 would not apply because the consultant could not be considered an "employee" of the agency. *Chadwick* Adv. Ltr., FPPC No. A-15-147 (2015). In *Chadwick*, the City of San Diego contracted with Schmidt Design Group (SDG) to provide the general development plan for the redesign, and SDG in turn hired several subcontractors to provide technical advice on matters such as irrigation, civil engineering, and geotechnical matters. After the general development plan was approved, the City issued an RFP to implement the plan, based on SDG's plans and research. While the FPPC determined that SDG was prohibited under section 1090 from responding to the RFP, it concluded that several subcontractors that worked on the initial design phase were not. The FPPC reasoned that the subcontractors that merely provided technical input, submitted reports directly to SDG, and did not directly advise City staff and did not exert sufficient influence over the design phase to foreclose their ability to work on the subsequent implementation phase.

Second, a consultant that works on an initial phase of a project may be able to work on a subsequent phase if the subsequent work requires *de novo* and more detailed analysis than what the consultant provided initially, and the consultant did not advise the public agency on the scope of work to be performed on the second contract. In the *Grossman* Advice Letter, FPPC No. A-17-167(a) (2018), the FPPC advised that HSE, an engineering firm, could provide the City of Belmont design plans, construction and engineering support for the rehabilitation of a sewer pump station, notwithstanding the fact that HSE had previously undertaken an assessment of the pump station, which included recommendations and a cost analysis for improvements. The FPPC advised that despite its earlier work, HSE did not exert considerable influence over the City's decision to enter into the second contract for engineering design and implementation work for improving the pump station, because HSE (1) did not engage in or advise the City with respect to the scope of the second contract, and (2) HSE's initial work was an assessment and inventory report, and did not set design criteria or recommendations for the second contract that "could give HSE an advantage in providing engineering services" under the second contract. The FPPC went on to state that that the work HSE performed under the first contract was distinctly different "in scope, detail, and purpose" from work required under the second contract, and the scope of work for the second contract "requires the successful respondent to make a *de novo* evaluation of the Pump Station rehabilitation." Given these specific facts, the FPPC concluded that HSE was not prohibited under section 1090 from bidding on the work.

Third, in 2015, the FPPC advised the City of Hawthorne that its contract with Good Energy, an energy consulting company, to assist the city in establishing and managing a community choice aggregation program did not violate section 1090 because Good Energy did not have a financial interest in the city's contracts with energy suppliers, even though the city paid Good Energy a per-kilowatt-hour fee for electricity purchased for the program. *Ennis* Adv. Ltr., FPPC No. A-15-006 (2015). The contract required Good Energy to provide "Program Design Services," which involved preparing a feasibility study and implementation plan, and "Program Management Services," which included preparing bid packages for, and negotiating contracts with, energy suppliers. The contract provided that the city would pay a flat fee of $100,000 for Program Design Services, and that for its Program Management Services, Good Energy would be entitled to a fixed rate fee of "$.001/kilowatt-hour to be paid for by the elected electricity supplier per kWh (volumetrically) for electricity purchased for the duration of the municipal contract."

The FPPC concluded that Good Energy was subject to section 1090 because its employees acted as the city's experts and influenced the city's contract decisions, and because its employees participated in decisions involving contracts. However, section 1090 did not prevent the city from executing the contract with Good Energy because Good Energy did not have a financial interest in the city's contracts with energy suppliers. The FPPC reasoned that the contract fixed Good Energy's compensation at the outset and that "[n]o matter the contract for energy supplier obtained, Good Energy's compensation will remain at that rate." Thus, "Good Energy has neither the possibility of financial loss or gain."

III. POTENTIAL CONFLICTS ARISING FROM HOLDING TWO POSITIONS

While most case law and advice regarding section 1090 involves a contract between a government agency and a private entity, it is important to recall that section 1090 applies to contracts between government agencies as well.

Indeed, Monterey County succeeded in having a contract with a water district declared void because a member of the board of the County's regional water agency was also being paid as a sub-consultant to the water district. In *California-American Water Co.*, 2 Cal. App. 5th 748, 765-66 (2015), the Court invalidated three contracts made by the county water agency while one of its board members was under contract with a private firm as a subcontractor to a water district with which the county water agency was negotiating to build a desalination project. *Id.* at 752. To address Monterey County's water needs, the county water agency, a water district, and a water company entered into five interrelated agreements to collaborate on a water desalination project. After it was revealed that a member of the board of the county's water agency had received income as a subcontractor to the water district, the county took the position that the agreements were void under section 1090. The Court agreed, and held that the contracts were void under section 1090, derailing a project that was years in the making. The water agency board member was ultimately convicted of a felony for violating section 1090. *Id*. at 753.

While this may be an extreme example, it is relatively common for an employee of one public agency (e.g., a city attorney) to serve on the board of another agency (e.g., a school district). In recognition of this fact, the Legislature has adopted exceptions to govern such circumstances. Ordinarily, when an official has a financial interest for purposes of section 1090, neither the official nor any body or board of which he or she is a member may participate in "making" the contract. However, Government Code section 1091 sets out certain "remote interests" that allow the board to act as long as the conflicted member discloses his or her interest to the board, the interest is noted in the board's official records, and the board approves the contract without counting the vote of the member with the remote interest. Cal. Gov't Code § 1091(a).

One such remote interest is "[t]hat of a person receiving salary, per diem, or reimbursement for expenses from a government entity." Cal. Gov't Code § 1091(b)(13). Whenever a member of a government body or board receives salary from a department of another public agency that would be affected by a decision of the board on which the member sits, the board may enter into the contract with the member's agency/employer, provided that the interested member complies with the requirements of section 1091(a).

Government Code section 1091.5 sets forth additional exceptions for non-interests. When an officer's financial interest is deemed a non-interest, the officer may participate in the decision without violating the statute. One such non-interest is:

> that of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.
>
> Cal. Gov't Code § 1091.5(a)(9).

Taken together, the remote interest exception in section 1091(b)(13) and the non-interest exception in section 1091.5(a)(9) mean that whenever a contract would affect the *department* of a government entity that employs a board member, the board may only approve the contract if the interested member recuses himself or herself and the board approves the decision without counting that member's vote. However, if the contract would affect a department other than the department that employs the board member, the board member may participate in the vote, provided that he or she discloses the interest and the interest is noted in the agency's official records.

When an official holds a leadership position with an agency that contracts with the Board on which he or she sits, a contract with any department of the agency would likely "directly involve[ ] the department of the governmental entity that employs the officer or employee . . . ." *See Jackson* Adv. Ltr., FPPC No. A-15-223 (Dec. 23, 2015).

In *Lexin*, the California Supreme Court concluded that this exception "was intended to apply to situations where the body or board of which an official is a member is contemplating a contract with-or on behalf of-a government entity for which the official also works." 47 Cal. 4th at 1079. The Court explained:

> The exception to the exception, for contracts that "directly involve[ ]" the official's or employee's own department, limits this provision slightly. We infer that while the subdivision was intended to excuse an existing government employment relationship as itself insufficient to give rise to a conflict, where a particular contract involved the official's own department, the risk that it might have personal impacts, generating additional income or other benefits for the employed official, was in the Legislature's eyes too great a risk to permit. Thus, while section 1091.5(a)(9) excludes from section 1090 an existing interest in government salary, it does not permit contracts – those with or directly involving one's own department – that pose a risk of potentially changing the official's salary or other employment

financial interests. Prophylactically, contracts directly affecting the official's department are excluded.

Id. at 1079-80.

The Attorney General's conflict of interest guide also addresses this point. "When the official in question is a member of the governing board, and not a member of a 'department' of the agency, the official would have a non-interest in the contract between the two agencies. For example, a member of a county board of supervisors who also serves as a member of a children and families commission has a non-interest in contracts between the two agencies because the 'department' limitation does not apply." California Attorney General's Office, Conflicts of Interest (September 30, 2010) Contracts between Government Agencies, p. 75.

IV. PRACTICE TIPS

A. Enter Into A Single Contract That Covers The Entire Project

As described in section II(D), the FPPC takes the position that a consultant who advises an agency regarding a project may not subsequently contract with the agency to carry out an additional phase of the project, with three narrow exceptions. Because the 1090 problem arises from entering into the subsequent contract, public agencies may be able to avoid the conflict by entering into a single contract at the outset of a project, which embraces not only any planning, consulting or other initial steps, but also the project that would be the subject of the subsequent contract. For example, if a city intends to build a bridge, rather than entering into a contract with an engineering firm for the sole purpose of providing consulting services concerning the design and placement of the bridge, the city could enter into the contract with the engineering firm to provide both consulting services for the planning phase of the project, as well as consulting services for the construction phase of the project.

B. Do Not Tie Compensation To Third Party Contracts

As described in section II(C), a conflict arises when a consultant advises a government agency with respect to a contract with a third party in which the consultant has an interest.

To minimize risks related to this problem, consider when entering into a contract with a consultant whether you may want the consultant to provide advice or in any way be involved with making third party contracts. If so, ensure that the consultant's compensation is in no way tied to any such potential third party contract.

C. Vet Contracts Between Government Agencies

Because conflicts can arise under contracts between government agencies, as discussed in section III above, it is important at the contract formation stage to analyze such contracts for potential conflicts and to take such preventative steps as are possible. Scrutinize the agencies involved to determine whether any employee of one agency also serves on the board of another agency. If the contract involves a governmental body or board with a member who draws a salary, a per diem, or receives reimbursement from another agency that would be party to the contract, consider the fact that that member would have to disclose her interest to the board, the interest would have to be noted in the official record, and a vote to approve the contract would have to proceed without the conflicted member. However, if the contract would involve a department of that member's agency other than the department that employs the member, the member would still have to provide disclosure and the agency would still have to note the interest in the official record, but could participate in the vote.

D. Hire An Independent Consultant To Negotiate Consultants' Contracts

As discussed in section II(B), the law recognizes that consultants must be able to negotiate their own contracts with the public entity so long as they are acting solely in their personal capacity when doing so. Given that it can sometimes be difficult to determine when an individual is acting in his personal capacity, rather than his official capacity, the Attorney General advises that contractors retain an individual who does not provide services to the agency to negotiate the terms of a contract with the consultant or any amendment to that contract. *See* Cal. Office of the Atty. Gen, at 66.

E. Considerations After Identifying A 1090 Problem In An Executed Contract

If you identify a potential 1090 problem in a contract that has already been executed, there are several issues to consider.

First, determine whether it is in the public entity's best interests to continue with the contract. If not, the public entity has the option under the law to void the contract, which may require the contractor with the conflict to disgorge any financial gain obtained under the contract.

If, however, it is in the public entity's best interest to continue with the contract, consider whether it is possible to ratify the contract. In an unpublished decision, *City of San Diego v. Furgatch*, the Fourth District Court of Appeal held that post-contract ratification was sufficient to cure a violation of 1090. 2002 Cal. App. Unpub. Lexis 6573, *4 (July 17, 2002). In *Furgatch*, a city council member's receipt of gifts from a contracting party on a major development project and an individual associated the project infected public contracts with a 1090 violation. After the conflicted city council member resigned, the city council reconsidered the original project, ratified the development agreement, and filed a validation action seeking a judicial declaration that the underlying contracts were valid and not subject to further

challenge under 1090 and 1092. The court of appeal held that the removal of the conflicted member and subsequent ratification by the council had the effect of curing the 1090 violation. *Id*. at *42-43.

Whether ratification will be a viable option will turn on the facts, including whether the official with the conflict has been or can be removed, and whether as a practical matter it will be possible to recreate contract deliberations in the absence of the official with the conflict.

Second, consider the consequences that could flow if the public entity does not take steps to address the problem. This could include an enforcement action from a public entity like the FPPC or district attorney, a party to the contract, or a taxpayer, with the potential for significant civil or criminal liability, the voiding of the contract, significant attorneys' fees, and negative publicity.

(00339058-5)

Developments in Campaign Finance: How to Update Your City's CFRO

Wednesday, May 2, 2018 General Session; 3:15 – 4:45 p.m.

Karen A. Getman, Remcho, Johansen & Purcell
Lisa A. Vidra, Senior Deputy Attorney, Culver City

Notes:

CAMPAIGN FINANCE LAW DEVELOPMENTS THAT MAY AFFECT YOUR LOCAL CAMPAIGN FINANCE REFORM ORDINANCE – AND PRACTICE TIPS FOR YOUR REVIEW

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May 2018

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I. INTRODUCTION

Almost everyone knows that the U.S. Supreme Court issued an important campaign finance case called *Citizens United* – but few know what that case actually means, or that it was only one of many opinions issued by that Court in the last fifteen years that have radically upended this area of law. In that time period, the Court has shifted from appearing friendly toward contribution and expenditure limits (*e.g.*, *McConnell v. Fed, Election Comm'n*, 540 U.S. 93, 188-89 (2003)), to being increasingly willing to strike down restrictions on campaign activity or at the very least subject them to vigorous judicial scrutiny (*e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010)).

Given these important changes, cities that have enacted campaign finance reform ordinances should consider whether they need an update to comply with current law and minimize the risk of future litigation. This paper summarizes important legal developments in the law of campaign finance and suggests areas where local ordinances may need to be revisited and updated.

II. DEVELOPMENTS IN CAMPAIGN FINANCE LAW

A. Expenditure Limits

1. Limits on expenditures by candidates

Limits on campaign expenditures are almost always unconstitutional, as they are direct limits on speech and subject to strict scrutiny. *Randall v. Sorrell*, 548 U.S. 230, 246 (2006); *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). The Supreme Court "'has rejected expenditure limits on individuals, groups, candidates, and parties.'" *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 692 (9th Cir. 2010) (citation and emphasis omitted). The one possible exception is when a candidate's acceptance of public funds is conditioned on her acceptance of expenditure limits. *Buckley*, 424 U.S. at 57, n.65.

The courts have also struck down provisions that have the effect of limiting campaign expenditures, even if not couched in such terms. Thus in *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1114, 1129 (9th Cir 2011), the Ninth Circuit struck down a city's temporal limit on campaign fundraising insofar as it precluded candidates from spending their own funds on their election campaign more than 12 months prior to the election.[1] And on a number of occasions, California courts

[1] The Ninth Circuit's decision in *Thalheimer* concerned a motion for preliminary injunction that had been granted in part and denied in part by the district court. Based on the Ninth Circuit's ruling, on remand, the district court entered summary judgment

have struck down restrictions on candidates transferring funds between their campaign committees, on the theory that this operates as a restriction on the candidate's campaign expenditures. *See*, *e.g.*, *Migden v. Fair Political Practices Comm'n*, No. 2:08-CV-00486-EFB (E.D. Cal. 2008) (injunction prohibiting the FPPC from enforcing a Political Reform Act provision that unconstitutionally restricted individuals from spending campaign funds left over from prior elections); *Franklin v. Correa*, Orange County Sup. Ct. No. 03CC11220 (2004) (successful anti-SLAAP motion brought against candidate's opponent's attempt to stop him from transferring campaign funds from a prior campaign committee); *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 721 F. Supp. 1172, 1175 (E.D. Cal. 1989) (declaring unconstitutional provision of Political Reform Act precluding expenditure of "carryover" campaign funds).

2. Limits on independent expenditures by corporations and unions

State law defines an independent expenditure as one made "in connection with a communication which *expressly advocates* the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, *unambiguously urges* a particular result in an election but which is not made to or at the behest of the affected candidate or committee." Cal. Gov't Code § 82031, emphasis added. By definition, independent expenditures are not coordinated with the candidate. That definition is commonly incorporated in local ordinances, and is substantially the same as federal law.

In *Citizens United*, 558 U.S. at 365, the Court held unconstitutional the long-standing federal ban on corporations and labor unions using their general treasury funds to make independent expenditures on behalf of federal candidates. The Court expressly overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and in particular disapproved *Austin's* rationale that there is a government interest in preventing the distorting effects of corporate speech on the political marketplace. *Citizens United*, 558 U.S. at 348-52. The Court held that the only rationale constitutionally acceptable as a basis for upholding expenditure limits is to *prevent corruption or the appearance of corruption*. *Id.* at 908-11. Because independent expenditures are not coordinated with the candidate, the risk of corruption is alleviated.

While state law does not prohibit corporations and unions from making independent expenditures in support of or in opposition to candidates, several cities

striking down much of San Diego's campaign finance reform ordinance, including the ban on individual and corporate/union contributions to independent expenditure committees. *Thalheimer v. City of San Diego*, 2012 U.S. Dist. LEXIS 6563 (S.D. Cal. Jan. 20, 2012).

and other local public entities have tried to enact such bans. In *Thalheimer*, 645 F.3d at 1117-21, the Ninth Circuit enjoined San Diego's ban on corporate contributions to independent expenditure committees. Other federal courts of appeal that have reviewed a ban or limit on corporate contributions to independent expenditure committees have similarly concluded such a limitation is unconstitutional. *E.g.*, *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm'n v. Barland*, 664 F.3d 139, 153-54 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 693-95 (D.C. Cir. 2010) (en banc).

3. Limits on expenditures for issue advocacy

While advertisements that expressly advocate for the election of a candidate or ballot measure are subject to regulation, there are limits on the government's ability to regulate "issue ads," which discuss an issue of importance in an upcoming election but do not clearly advocate for or against a particular candidate or measure. In *McConnell*, 540 U.S. at 204-06, the Supreme Court rejected a facial challenge to a federal law prohibiting corporations and unions from using their general treasury funds to broadcast communications that name a federal candidate shortly before an election. Four years later, however, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 481 (2007), the Court held unconstitutional the application of that provision to a nonprofit corporation's television advertisements urging viewers to contact their Senators regarding the filibuster of judicial candidates. The Court held that the government could not regulate issue advocacy, but instead could regulate only express advocacy or its "functional equivalent." *Id*. It found that an ad is the functional equivalent of express advocacy only when "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 469-70.

State law, as interpreted by the Fair Political Practices Commission ("FPPC"), also only regulates express advocacy or its functional equivalent. Cal. Gov't Code § 82031. Taking a cue from the Federal Election Commission's detailed work in this area, state law defines in great specificity what it means to "expressly advocate" for or against a candidate, when a communication "unambiguously urges a particular result" in the election, and when a communication falls within a "safe harbor" and thus cannot be regulated. Cal. Gov't Code § 82015. Local jurisdictions should apply a similar analysis as does the FPPC to distinguish between express advocacy and issue advocacy in order to stay within constitutional bounds.

4. Voluntary expenditure limits

While government-imposed mandatory expenditure limits are almost always unconstitutional, sometimes the government will try to encourage a candidate to voluntarily limit her expenditures by offering some type of perk or advantage for

doing so. In *Buckley*, the Supreme Court upheld the use of voluntary expenditure limits as a condition of receiving public financing. 424 U.S. at 57, n.65. If a city wishes to continue its voluntary expenditure limits, it should ensure that any "sweetener" used to encourage acceptance of the limit is truly voluntary and not coercive. As the Supreme Court recently reiterated, "[t]he resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (striking down the "Millionaire's Amendment," discussed further *infra*).

At the state level, and in some local jurisdictions, acceptance of voluntary expenditure limits allows candidates to publish a candidate statement in the voter information pamphlet. Cal. Gov't Code § 85601. State law also addresses what happens when candidates change their mind about the spending limits at later stages in the process, and local jurisdictions would be wise to do so as well. *Id*. §§ 85401-85402.

Several cities have allowed candidates who accept voluntary expenditure limits to receive contributions that are larger than those allowed for candidates who decline to limit their spending. This poses a risk; in *Davis*, 554 U.S. at 743, the Court stated that it has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *See also id.* at 744 ("the unprecedented step of imposing different contribution and . . . expenditure limits on candidates vying for the same seat is antithetical to the First Amendment.").

Even before *Davis*, however, a federal district court in Sacramento struck down as unconstitutional a state law – Proposition 208 – that provided differing contribution limits depending solely on whether the candidate had accepted voluntary expenditure limits. The district court reasoned that if the higher limits for candidates who accepted the spending limits were sufficient to combat corruption, then the lower limits must be "constitutionally infirm." *Cal. Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1296 (E.D. Cal. 1998).

5. Expenditures by public agencies

Sometimes it is the government itself whose expenditures are scrutinized in the midst of an election campaign. In *Vargas v. City of Salinas*, 46 Cal.4th 1, 8 (2009), the California Supreme Court reaffirmed the long-standing principle that, under the California Constitution, the government is precluded from using public funds "for materials or activities that reasonably are characterized as campaign materials or activities." Note that this is a different standard than the "express advocacy" standard that is used to determine whether the activities of private persons and entities can be regulated.

The *Vargas* Court confirmed that public agencies are allowed to "publish a 'fair presentation of facts' relevant to an election matter." *Id*. at 25 (quoting *Stanson v. Mott*, 17 Cal. 3d 206, 222 (1976)). The Court treated certain expenditures as

presumptively campaign-related (*e.g.*, "bumper stickers, posters, television and radio advertisements," *id.* at 32) and others as presumptively informational (*e.g.*, taking a position on a measure at an open and public meeting, and preparing staff reports analyzing the measure's impacts, *id*. at 36). For activities that fell in-between, the Court reviewed the "style, tenor and timing" of the activity to determine whether it was a valid expenditure of public funds. *Id.* at 27. The *Vargas* opinion includes as an appendix the materials prepared by the City of Salinas that the Court found to be informational and therefore permissible. *Id*. at 47. These can be a helpful guidepost against which to measure publicly funded materials.

The FPPC has imposed fines on local agencies that spend public funds on materials deemed to fall within the *Vargas* presumption of campaign materials. For example, in January 2015 it fined the City of Rialto $6,000 for, among other things, sending 200 or more pieces of mail that unambiguously urged a yes vote on a local ballot measure. *City of Rialto*, Stipulation, Decision, and Order, FPPC No. 12-869 (2015).

B. Contribution Limits

1. Contribution limits must be closely drawn to combat corruption, and adjusted for inflation

Unlike expenditure limits, contribution limits are far more likely to be upheld as constitutional. This is because the courts do not treat contribution limits as limits on direct speech, and thus subject them to a less rigorous, though still exacting, standard of review. Moreover, the courts generally defer to the legislative body's determination of where to draw the line on an appropriate contribution limit.

However, contribution limits are not immune from constitutional challenge. In *Randall*, 548 U.S. at 261-62, the U.S. Supreme Court struck down Vermont's contribution limits of $400 per 2-year election cycle for gubernatorial candidates, and lower limits for other state offices, because they were so restrictive as to impede the ability of challengers to raise sufficient funds to mount a meaningful campaign.

The *Randall* Court also criticized Vermont's failure to index the contribution limits to inflation, with cost of living adjustments. 548 U.S. at 261. Such adjustments can have a significant impact over time. For example, the contribution limits for California state candidates are adjusted every odd-numbered year to reflect any increase or decrease in the Consumer Price Index, then rounded to the nearest hundred. Cal. Gov't Code § 83124. The state limit of $3,000 for most state candidates, first set in the year 2000, now stands at $4,400 with inflation adjustments. *Id.* § 85301(a); *see California State Contribution Limits*, http://www.fppc.ca.gov/learn/campaign-rules/state-contribution-limits.html (last visited Mar. 14, 2018).

Before the *Randall* Court's decision, a federal district court in Sacramento similarly found limits of $100 to $500 for state candidates too low to allow those candidates to mount an effective campaign. *Cal. Prolife Council PAC*, 989 F. Supp. at 1298-99.[2] More recently, after protracted litigation, the Ninth Circuit upheld a Montana law limiting contributions to state senate candidates to $340, and limiting contributions to gubernatorial candidates to $1,320. *Lair v. Motl*, 873 F.3d 1170, 1174 (9th Cir. 2017). The court concluded that Montana had demonstrated the risk of quid pro quo corruption in the state was more than "mere conjecture," and that the limits were not so low as to prevent candidates from amassing sufficient funds. *Id*. at 1178, 1187. Central to the court's analysis was an examination of the contribution limits "as a percentage of the cost of campaigning" for elected office in Montana. *Id*. at 1187. The court upheld Montana's relatively low contribution limits in part because the cost of campaigning in Montana was relatively modest compared to other states. *Id.*

If a city's contribution limit is challenged, the city council would be well served by having legislative findings and a factual record – *e.g.*, evidence of past improper *quid pro quo* arrangements, voter approval of contribution limits, etc. – to demonstrate that the city has a sufficient interest in preventing corruption or the appearance of corruption to justify the particular limit. *Lair*, 873 F.3d at 1178-79; *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 652-54 (9th Cir. 2007); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393-95 (2000). City councils also would be wise to demonstrate that in setting the limit, they took into account the size of the city, historical records of how much it typically costs to run for election there, the costs of media and staffing in the area, and other facts particular to the jurisdiction.

2. Aggregate limits on contributions are suspect

Some local ordinances impose an aggregate contribution limit, under which a person who makes direct contributions to local candidates cannot also make contributions to other local candidates or to committees that will make contributions to the local candidates. These aggregate limits are constitutionally suspect.

In *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434, 1462 (2014), the U.S. Supreme Court struck down as unconstitutional a federal law that capped the total amount of contributions that one person could make to all federal

[2] On appeal, the district court's preliminary injunction was affirmed and the case was remanded for the court to conduct a full trial on the merits. *Cal. Prolife Council PAC v. Scully*, 164 F.3d 1189, 1190-91 (9th Cir. 1999). While the case was on remand, the voters passed Proposition 34, which repealed Proposition 208's contribution limits and enacted new, larger limits adjusted for inflation. The plaintiffs subsequently dismissed their challenge to the Proposition 208 limits as moot.

candidates and committees in a single calendar year. The Court rejected the Government's argument that aggregate limits serve to combat corruption, holding that only activity that constitutes the appearance of or actual *quid pro quo* corruption suffices as a governmental interest sufficient to warrant a restriction on the First Amendment rights of donors. *Id*. at 1451. The Court also rejected the notion that the aggregate limits were necessary to prevent circumvention of the base contribution limit by persons channeling funds through various committees. *Id*. at 1453.

Note that under federal law, donors who contribute the maximum amount to a candidate cannot contribute to a committee primarily formed to support that candidate, or to a committee that they know will make a substantial contribution to the candidate; they can, however, contribute to a committee that "likely" will support that candidate as well as others. *Id.*

3. Contributions by political parties to candidates

The U.S. Supreme Court's decision in *Randall*, 548 U.S. at 256-59, found unconstitutional state contribution limits that severely restricted a political party's ability to help its candidates win elections. The limits treated national parties and all of their affiliates as a single entity to which the contribution limit for individuals applied. *Randall* distinguished an earlier Supreme Court decision that had upheld federal limits on political party expenditures that were coordinated with candidates (*Fed. Election Comm'n v. Colorado Republican Federal Campaign Comm'n*, 533 U.S. 431, 456, 487 (2001)), because the party limits under federal law were much higher than limits on individual contributions. *Randall*, 548 U.S. at 258.

Relying on *Randall*, the Ninth Circuit enjoined a city limit of $1,000 on contributions by political parties to candidates for nonpartisan city offices. *Thalheimer,* 645 F.3d at 1126-28. On remand, the district court struck down the city's limit on contributions to political parties as so low that it was tantamount to an outright ban. *Thalheimer*, 2012 U.S. Dist. LEXIS 6563, at *58.

4. Restrictions on contributions by corporations, contractors, lobbyists and other special groups

Local ordinances sometimes prohibit contributions from corporations, or persons who have contracted with the city, or who lobby city officials, or who are engaged in particular business activities. State law does not restrict contributions from those who contract with the state, but it has had a variety of lobbyist contribution restrictions over the years, some of which have been declared unconstitutional. If a city has or contemplates these types of restrictions, it should articulate a valid justification and should narrowly tailor the restriction to meet that justification.

Federal law continues to limit direct contributions to candidates by corporations and labor unions; this was not addressed in *Citizens United*, and thus an

earlier case upholding the federal ban remains controlling, though its reasoning has been undermined by more recent developments. *Federal Election Commission v. Beaumont*, 539 U.S. 146, 159-60, 163 (2003); *see also United States v. Danielczyk*, 683 F.3d 611, 618-19 (4th Cir. 2012). In 2011, the Ninth Circuit upheld a San Diego city ban on direct candidate contributions from entities other than natural persons, i.e. corporations and unions. *Thalheimer*, 645 F.3d at 1124.

A recent decision struck down an Illinois law that banned medical cannabis cultivation centers and dispensaries from making contributions to state candidates. *Ball v. Madigan*, 245 F. Supp. 3d 1004, 1016-17 (N.D. Ill. 2017). The court found that while the state had a sufficiently important governmental interest in preventing actual corruption or the appearance of corruption from licensed industries, this ban, with its focus on a single industry, was so narrow as to call into doubt whether it advanced that interest. *Id.* The court distinguished two cases that had upheld state bans on contributions from the casino industry, where those bans were supported by legislative findings and evidence of actual corruption. *Id.* at 1015 (citing *Casino Ass'n of La. v. Foster*, 820 So. 2d 494 (La. 2002); *Soto v. New Jersey*, 565 A.2d 1088 (N.J. Super. Ct. 1989)).

Most courts that have considered a ban or limit on contributions from government contractors have upheld it if closely drawn to prevent *quid pro quo* corruption. *Green Party of Conn. v. Garfield*, 616 F.3d 189, 205 (2d Cir. 2010) (upholding contractor ban); *Ognibene v. Parkes*, 671 F.3d 174, 196-97 (2d Cir. 2011) (upholding lower limit on contractor contributions); *Yamada v. Snipes*, 786 F.3d 1182, 1185 (9th Cir. 2015) (upholding contractor ban). *But see Dallman v. Ritter*, 225 P.3d 610, 640 (Colo. 2010) (striking down as vague and overbroad a constitutional amendment enacted by the voters that banned contributions to candidates by state contractors and their immediate family, for the duration of the contract and for two years thereafter).

Most recently, the D.C. Circuit Court of Appeals, sitting *en banc*, upheld a federal law prohibiting contributions to federal candidates by federal government contractors, finding that it was justified to protect against *quid pro quo* corruption and was closely drawn because of its temporal limits. *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 22-23 (D.C. Cir. 2015), *cert denied*, 136 S. Ct. 895 (2016). The ban applied only during the time period between commencement of contract negotiations and completion of the contract's performance, and the law allowed for other forms of unrestricted political participation by federal contractors.

With respect to limits on lobbyist contributions, the Second Circuit held that Connecticut's ban violated the First Amendment, because there was limited evidence of corruption involving lobbyists and their family members, and thus the ban was not closely drawn to meet a sufficiently important government interest. *Green Party of Conn.*, 616 F.3d at 206-07. It did, however, leave open the possibility that a contribution limit for lobbyists might pass constitutional muster. *Id*. at 207. This

contrasts with a ruling from the Eastern District of California upholding California's ban on personal contributions to candidates by individuals who are registered to lobby the candidate's agency, finding the law narrowly tailored to serve the State's important interest in avoiding the potential for corruption. *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1193-94 (E.D. Cal. 2001). The California Supreme Court had earlier struck down as overbroad a statute that sought to ban contributions arranged or recommended by lobbyists. *Fair Political Practices Comm'n v. Superior Court*, 25 Cal.3d 33, 43-45 (1979).

5. Contribution limits for ballot measures

Contribution limits for ballot measure committees have long been held unconstitutional. The reason is that there is no governmental interest in preventing corruption in the support for or opposition to a ballot measure comparable to support for an individual candidate. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297-99 (1981).

6. Public financing

Until recently, only charter cities could enact public financing of election campaigns in California. Recent state legislation changed that, and now public financing of candidate campaigns is allowed for all counties, districts, general law cities, and the State. Cal. Gov't Code § 85300 (as amended by Stats. 2016, ch. 837, sec. 2).

Public financing schemes have often included provisions that increase public funding for candidates who face unlimited spending by a self-funded candidate or by independent expenditure groups. The Supreme Court recently has declared two such provisions unconstitutional. In *Davis*, 554 U.S. 724 736, 742-44, the Supreme Court struck down the so-called "Millionaire's Amendment" which permitted the opponent of a federal candidate who spent over $350,000 of his personal funds to collect triple the normal contribution amount, while the candidate who spent the personal funds remained subject to the original contribution cap. The Court held that the law unduly burdened the First Amendment right to spend personal funds on campaign speech and was not justified by a compelling governmental interest. *Id.* at 742-44.

In *Arizona Free Enterprise v. Bennett*, 564 U.S. 721, 728 (2011), the Court applied that same reasoning to strike down a state "matching funds" provision. The Arizona law granted additional public funds to a candidate who had accepted public financing and whose privately financed opponent's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to the publicly financed candidate, exceeded the publicly financed candidate's initial state allotment. *Id.* at 728-30. Once matching funds were triggered, the publicly financed candidate would receive roughly one dollar for every dollar raised or spent by the privately financed candidate, including that candidate's expenditure of his own funds, and one dollar for every dollar spent by the independent

groups. *Id.* at 728. Once again, the Court found that the law unduly burdened the First Amendment rights of the privately funded candidate, and was not justified by a compelling governmental interest. *Id.* at 749-50.

In 2013, the District Court for the Southern District of New York upheld New York City's more narrowly tailored public financing scheme. *Ognibene v. Parkes*, 2013 U.S. Dist. LEXIS 49083, *1 (S.D.N.Y. April 4, 2013). Under the New York City law, a participating candidate who agrees to abide by voluntary expenditure limits "receives public matching funds for all eligible individual private contributions by New York City residents of up to $175, at a rate of six dollars in public funds for every dollar in private contributions." *Id.* at *7. If and when the local campaign finance board determines that a candidate who is not participating in the voluntary expenditure limit program has more than half of the applicable expenditure limit for that office, then the expenditure limit of any candidate participating in the voluntary expenditure limit program goes up by 150 percent. *Id.* If a non-participating candidate "raises or spends more than three times the applicable expenditure limit for the relevant office," the expenditure cap for participating candidates is lifted. *Id.* at *8-9.

The *Oginbene* court distinguished *Arizona Free Enterprise* by emphasizing the limited relief available under the New York ordinance. *Id.* at *20. Unlike in Arizona, participating candidates in New York City who faced well-financed opponents did not receive additional public funds; instead, a participating candidate's voluntary expenditure cap was raised or lifted to match the amount of money spent by their opponent, but it remained up to the participating candidate to raise the funds necessary to compete. *Id.* The *Oginbene* court also noted that there was no evidence that the non-participating candidate's speech would be chilled by increasing the voluntary expenditure limit of the participating candidates. *Id.* at *23-24.

7. Temporal limits on contributions

In *Thalheimer*, 645 F.3d at 1122-24, the Ninth Circuit mostly upheld[3] a city's temporal limit that prohibited the making of campaign contributions to a candidate more than 12 months prior to the candidate's election (except to the extent it precluded expenditures from a candidate's own funds). The court's decision was based in part on the fact that city officials had in the past been corrupted by contributions timed to coincide with the donor's business before the city. *Id.* at 1123, n.3.

[3] As previously discussed, the Ninth Circuit's decision in *Thalheimer* concerned a motion for preliminary injunction that had been granted in part and denied in part by the district court. On remand, the district court entered summary judgment based on the Ninth Circuit's ruling. *Thalheimer*, 2012 U.S. Dist. LEXIS 6563.

However, an earlier decision in the Ninth Circuit struck down temporal limits as creating an undue burden on challengers. In *Service Employees Int'l Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1321-22 (9th Cir. 1992), the Ninth Circuit held that Proposition 73, which would have set contribution limits on a fiscal year basis (instead of election cycle), unconstitutionally discriminated in favor of incumbents (and against challengers). The court reasoned that under the fiscal year contribution scheme, challengers would be "unable to engage in fundraising during each fiscal year between elections [. . . .]" *Id*. at 1315. The district court in *California Prolife Council Political Action Committee v. Scully*, 989 F. Supp. 1282, 1291-92 (E.D. Cal. 1998), aff'd, 164 F.3d 1189 (9th Cir. 1999), considered a similar argument, but determined that the very low limits at issue there created problems for both incumbents and challengers alike, and therefore did not unconstitutionally discriminate against challengers.

C. Disclosure Requirements

Campaign disclosure laws are not subject to strict scrutiny, but instead are reviewed under an "exacting scrutiny" standard, requiring "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366. To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis*, 554 U.S. 744 (quoting *Buckley*, 424 U.S. at 64) ("'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment'" and thus disclosure requirements are "closely scrutinized."); *California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (California has compelling interest in requiring disclosure of contributions and expenditures made to support or oppose ballot measures).

Many disclosure requirements have been upheld against constitutional challenges. For example, federal disclaimer and disclosure requirements for televised advertisements were upheld in *Citizens United*, 558 U.S. at 366-68. The Court also held that the disclosure of the names and addresses of signers of controversial referendum petitions is constitutional, although it left open the possibility of an as-applied challenge if plaintiffs could prove they faced a realistic threat of harassment by disclosure. *Doe v. Reed*, 561 U.S. 186, 201 (2010). When ruling on a preliminary injunction, the District Court for the Northern District of California came to a similar conclusion regarding the disclosure of names and other personal information of individuals who contributed $100 or more to support Proposition 8 in the November 2008 election. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

State law imposes a complicated series of disclosure requirements for campaign advertisements that are tailored to the type of advertisement and the type of sender. *E.g.*, Cal. Gov't Code §§ 84501-84511 (the Disclose Act). The recently enacted Disclose Act imposes particularly stringent disclaimer requirements on independent expenditures. *E.g.*, *id*. §§ 84502, 84506.5. Under the PRA, local jurisdictions are

permitted to enact *more* stringent disclaimer requirements for committees that are active exclusively in their jurisdiction (*e.g.*, City Council, Mayor). For example, under the Disclose Act some committees are now required to include their top three donors over $50,000 on their disclaimer; a city could pass an ordinance requiring committees to disclose their top three donors over $10,000. *Id*. § 84503.

Recently, the FPPC and the Attorney General have succeeded in gaining non-public access to information about the donors to nonprofit organizations that were engaged in election-related activities. *Americans for Prosperity Foundation v. Harris*, 809 F.3d 536 (2015); *Fair Political Practices Comm'n v. Ams. for Responsible Leadership*, No. S206407, 2012 Cal. LEXIS 10964 (Nov. 4, 2012). The courts found that disclosure of the information to the enforcement agencies in these circumstances did not unduly chill the First Amendment rights of the donors to remain confidential.

D. Relying on FPPC Definitions, Rules and Forms

The provisions of the Political Reform Act, and FPPC regulations and forms, have undergone many changes in recent years. Local ordinances that rely on or incorporate FPPC definitions, rules and forms may unknowingly also have changed as a result. As just one example, legislation passed in 2015 changed the definition of "recipient committee" (a person or group of persons who receive campaign contributions) by increasing the qualifying monetary threshold from $1,000 in contributions to $2,000 in contributions. Cal. Gov't Code § 82013(a) (as amended by Stats. 2015, ch. 364, sec. 1). Cities that incorporate the Political Reform Act definition of "committee" may want to revise their ordinances if they wish to maintain the lower threshold and continue imposing disclosure obligations on committees that raise $1,000 or more.

E. Audits and Enforcement

Many jurisdictions have no provision for periodic or random audits of local campaign committees. Such audits can be time-consuming but are an important tool to proactively identify potential violations and to ensure that the local ordinance is continuing to work as intended.

Local ordinances often have harsh enforcement provisions – *e.g.*, misdemeanor charges and forfeiture of office. The City Attorney is most likely to function as the investigator and prosecutor of any violations, but provision has to be made for investigations of the City Attorney in instances where she also is an elected official, and for instances where the City Attorney believes outside assistance is warranted.

Many local ordinances provide for citizen enforcement actions if the City Attorney chooses not to proceed. Some, but far from all, allow for disgorgement of improperly received contributions, and give authority to seek injunctive relief. Some

jurisdictions have sought and received statutory authorization from the State to refer violations of local campaign finance reform ordinances to the FPPC for investigation and prosecution. *See* Cal. Gov't Code §§ 83123-83123.7.

III. PRACTICE TIPS FOR REVIEWING A CITY'S CAMPAIGN FINANCE ORDINANCE

Campaign Expenditures

- ☑ Limits on independent expenditures are never okay
- ☑ Limits on a candidate's expenditure of his or her own funds are never okay unless acceptance of the limit is voluntary
- ☑ Voluntary expenditure limits cannot be coercive and acceptance should not result in a higher contribution limit for some candidates compared with others
- ☑ Cannot provide extra public funds to match personal expenditures by an opposing candidate
- ☑ Be wary of other restrictions (*e.g.*, temporal limits, transfer limits) that could be construed as an expenditure limit
- ☑ Distinguish between "express advocacy" or its equivalent and "issue advocacy"; only the former can be regulated
- ☑ Governments cannot spend public funds on campaign materials or activities, but they can be used for informational materials on a ballot measure

Contribution Limits

- ☑ Contribution limits cannot be too low for the candidates to mount an effective campaign
- ☑ Contribution limits should have a cost of living adjustment
- ☑ Contribution limits should be supported by a factual record demonstrating the need to prevent corruption or the appearance of corruption and the cost of local campaigns
- ☑ Differing contribution limits are highly suspect
- ☑ Aggregate contribution limits are highly suspect

- ☑ Must have a justification for, and narrowly tailor, special limits for corporations, contractors, lobbyists and the like

- ☑ Cannot limit contributions to independent expenditure committees or ballot measure committees

Disclosure Requirements

- ☑ Must be substantially related to a sufficiently important governmental interest, but likely to be upheld if not unduly burdensome.

- ☑ May need to be updated based on changes to the Political Reform Act

- ☑ Local requirements can be stricter than state law, if justified and not unduly burdensome

Other Considerations

- ☑ Allow plenty of time for the process of City Council discussions and community input, well before your next election

- ☑ Consider having a City Council subcommittee to engage with the City Attorney's office early in the process

- ☑ Involve your City's Elections Official, who can review spending and contribution disclosures from prior elections to determine the cost of running for office in your City

- ☑ Use the FPPC and the manual for local candidates as a resource ("Information for Local Candidates, Superior Court Judges, Their Controlled Committees and Primarily Formed Committees for Local Candidates")

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The California Voting Rights Act: Recent Legislation & Litigation Outcomes

Thursday, May 3, 2018 General Session; 9:00 – 10:30 a.m.

Youstina N. Aziz, Richards, Watson & Gershon
Douglas Johnson, President, National Demographics Corporation
James L. Markman, City Attorney, Brea, La Mirada, Rancho Cucamonga and Upland

Notes:

The California Voting Rights Act: Recent Legislation & Litigation Outcomes

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The California Voting Rights Act:
Recent Legislation & Litigation Outcomes

You are sitting at your office on a Thursday afternoon, and the city manager sends you an email letting you know that the city received a demand letter about a voting rights issue. You review the demand letter and realize that it is a letter from a prospective plaintiff's attorney alleging that the city's election system is in violation of the California Voting Rights Act ("CVRA") and threatening litigation if the city does not voluntarily change its elections system. What do you do?

At least 88 cities have made the change to by-district elections and two more, the City of Goleta and the City of Carpinteria, agreed to make the change for 2022. Other cities, such as the City of San Clemente have decided to put the matter on the 2018 ballot for voters' approval. Approximately eighteen other cities are in some form of legal dispute but have not yet decided to make the change to by-district elections. For context, only 28 cities employed by-district elections prior to passage of the CVRA. Cities are not the only public entities susceptible to a CVRA challenge. Thirty two community college districts, over 165 school districts, and at least 12 other special districts have made the change to by-district elections.

This paper provides an overview of the CVRA and recent developments in both legislation and litigation surrounding the CVRA. It summarizes the options cities have in responding to CVRA demand letters, the process cities are required to go through in order to change their election system, and issues that have arisen in the process of jurisdictions transitioning from at-large to district-based elections. This paper focuses on the process for changing to district-based elections for general law at-large cities; the process may be slightly different for charter cities depending on whether they have to amend their charter to change their election system.

I. Introduction

The CVRA, Elections Code Sections 14025-14032, was enacted to implement the California constitutional guarantees of equal protection and the right to vote.[1] The CVRA provides a private right of action to members of a protected class where, because of "dilution or the abridgment of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election."[2] The CVRA defines a "protected class" broadly as a class of voters who are members of a race, color, or language minority group.[3]

To establish a violation under the CVRA, a plaintiff must show that "racially polarized voting" occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters.[4] Racially polarized voting means voting in which there is a difference in the choices of candidates or other electoral choices that

[1] Elec. Code § 14031.
[2] Elec. Code §§ 14027, 14032.
[3] Elec. Code § 14026(d).
[4] Elec. Code § 14028(a).

are preferred by voters in a protected class and the choices of the voters in the rest of the electorate.[5] The occurrence of racially polarized voting is determined by examining (1) results of elections, with more weight given to elections in which at least one candidate is a member of a protected class, or (2) elections involving ballot measures or other electoral choices that affect the rights of the members of the protected class.[6]

While modeled after the federal Voting Rights Act of 1965 ("FVRA"), the CVRA lowers the threshold required to establish a voting rights violation. For example, unlike the FVRA, a protected class does not have to be geographically compact or concentrated to allege a violation of CVRA.[7] Moreover, proof of intent on the part of the voters or elected officials to discriminate against a protected class is not required.[8] The CVRA also eliminates the "totality of circumstances" test set forth in the FVRA, precluding introduction of other evidence as to why preferred candidates of the protected class lost elections. The deletion of the totality of circumstances factors makes CVRA litigation purely a statistical exercise.

Because of that lower threshold of proof, no jurisdiction has prevailed in a CVRA action as of the time this paper was written. Lacking an example of a successful defense, and because of the enormous financial cost involved in defending against – much less losing – such claims, and the majority of jurisdictions that receive a demand letter change to by-district elections without analyzing their election system to determine whether there is, in fact, racially polarized voting. The short time frame jurisdictions have in order to implement district-based elections under Elections Code Section 10010 also pushes jurisdictions toward by-district elections.

II. Recent Legislation

a. Ability to Transition to District-Based Elections by Ordinance

Before January 1, 2017, Government Code Section 34886 allowed cities with populations less than 100,000 to transition to district-based elections by ordinance. Cities with populations greater than 100,000 were required to place the issue on the ballot for voters to approve the transition. The population cutoff created an issue for larger cities that received demand letters to change their election system. For example, the City of Rancho Cucamonga received a letter on December 23, 2015 alleging that the city's election system was in violation of the CVRA and urging the city to voluntarily change its at-large system of electing council members or face litigation. Because Rancho Cucamonga's population was greater than 100,000, the city had to place the measure on the ballot for voters' approval. After the city began analyzing its election system, but before it was able to place the issue on the November 2016 ballot, a CVRA action was filed against the city on March 10, 2016. After the voters approved the transition to district-based elections, the plaintiffs refused to dismiss the action alleging that the election system adopted by the city was flawed.

Recent legislative amendments to Government Code Section 34886 allow a city, regardless of population, to adopt an ordinance establishing district-based elections without

[5] Elec. Code § 14026(e).
[6] Elec. Code § 14028(b).
[7] Elec. Code § 14028(c).
[8] Elec. Code § 14028(d).

being required to submit the ordinance to the voters for approval. The elimination of the population cutoff in Section 34886 helps large cities avoid the scenario that occurred in Rancho Cucamonga by giving them the ability to adopt district-based elections by ordinance. Still some jurisdictions contemplate placing the issue on the ballot for voters' approval after they receive a letter alleging that the city's at-large election system violates the CVRA. If that is the case, the city should work with the potential plaintiff to reach a settlement to that effect. If a city decides to place the measure on the ballot, there is a risk that the voters will turn it down, leaving the city to choose between facing litigation or acting contrary to the voters' decision.

b. Amendments to Elections Code 10010 -"Safe-Harbor Provision"

Following efforts to provide some protection to jurisdictions from the costs involved in CVRA-related litigation, the California Legislature amended Section 10010 of the Elections Code to include a "Safe-Harbor" provision that would give jurisdictions the opportunity to change their election system once they receive a demand letter, while capping the amount of attorney's fees and costs that are recoverable by a prospective plaintiff(s).

Effective January 1, 2017, Elections Code Section 10010 requires a prospective plaintiff to send a written notice to the clerk of the city asserting that the city's method of conducting elections may violate the CVRA.[9] Section 10010 puts a 45-day stay on a prospective plaintiff's ability to bring an action allowing the city to adopt a resolution outlining its intention to transition from at-large to district-based elections.[10] If the city begins the process of switching to districts before receiving a notice letter or within 45 days of receipt of a notice and adopts a resolution to that effect, under Section 10010, a potential plaintiff cannot commence an action within 90 days of the resolution's passage.[11]

After adopting the resolution of intention, the city is required to hold two public hearings over a period of no more than 30 days before drawing draft maps.[12] During those hearings, the public is invited to provide input regarding the composition of the districts.[13] After the city's demographer draws the draft maps, the city must publish at least one draft map and, if members of the governing body of the city will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections.[14] The city then holds at least two additional hearings over a period of no more than 45 days, at which the public is invited to provide input regarding the content of the draft maps and the proposed sequence of elections.[15] The city has to publish the draft maps and sequencing at least seven days before those hearings.[16]

In short, a jurisdiction receiving a CVRA demand letter has 45 days to declare their intent to change their election system and then 90 days after that declaration to adopt the change.[17] If

[9] Elec. Code § 10010(e)(1).
[10] Elec. Code § 10010(e)(2)-(3).
[11] Elec. Code § 10010(e)(3)(B).
[12] Elec. Code § 10010(a)(1).
[13] *Id.*
[14] Elec. Code § 10010(a)(2).
[15] *Id.*
[16] *Id.*
[17] Elec. Code § 10010(e)(3)(A)-(B).

the city misses either of those deadlines, it could find itself in court and facing attorney fee demands well into the six or even seven figures.

Elections Code 10010 also offers some protection to jurisdictions in terms of exposure to a prospective plaintiff's attorneys' fees. If the jurisdiction meets the deadlines outlined above, the prospective plaintiff who sent the demand letter may only recover up to $30,000 in attorneys' fees and costs from the city.[18] The prospective plaintiff has to make the demand for reimbursement of costs with 30 days of the ordinance's adoption.[19] If more than one prospective plaintiff requests a reimbursement of attorneys' fees and costs, the city shall reimburse the prospective plaintiffs in the order in which they sent the demand letter, but the cumulative amount of reimbursement to all prospective plaintiffs is capped at $30,000.

c. Application of the Safe Harbor Provision

Back to your city: the first step after receiving the demand letter is to calculate 45 days from the date of the city's receipt. The date the letter is received is crucial because the city has 45 days of receipt of the letter to determine whether to change its elections system. If the city adopts a resolution by that date outlining its intention to transition from at-large to district-based elections, the prospective plaintiff is precluded from commencing an action under the CVRA for 90 days during which time the city goes through the process set forth above for transitioning to districts.

Second, you should place the matter on the next closed session agenda to inform the council of receipt of the demand letter and get direction regarding how they would like to proceed. Because of the 45-day deadline, you have limited opportunity to place the matter on closed session. Due to the complexity of the CVRA and related legislation, the city council may need more than one closed session to discuss the matter. You may also hold special closed sessions to discuss the matter, if necessary.

Third, because the council will most likely want to assess the accuracy of the allegations in the demand letter and the potential exposure, the jurisdiction's legal counsel should engage a demographer once you have received the demand letter. The demographer is instrumental in two aspects. First, if the city council decides to conduct a racially polarized voting analysis prior to determining whether to transition to district-based elections, the demographer conducts the analysis and presents it to the city council. Second, if the city council decides to initiate the process of transitioning to district-based elections, the demographer creates the district maps for the city council's consideration. In engaging the demographer, the city should consider retaining him or her through its city attorney in order to protect their work product to the extent possible.

Fourth, you should retrieve the election results for the city's most recent elections. Often times the demand letter contains allegations that are not entirely accurate because a prospective plaintiff's attorney is not familiar with the city's election history. For example, with some cities, prospective plaintiffs cited the absence of minorities on the city council as evidence of racially polarized voting. Because a prospective plaintiff relied on surnames to determine whether

[18] Elec. Code § 10010(f)(3).
[19] Elec. Code § 10010(f)(1).

minority candidates were elected to city council, plaintiff's allegations failed to account for minority candidates who do not necessarily have minority surnames, such as a minority candidate who changed his or her last name after marriage. Reviewing the city's election history to fact-check the allegations in the demand letter helps the city council make an informed decision.

d. District-Drawing Process

If the city council decides to proceed with the transition to district-based elections after analyzing the issue, the city council should adopt a resolution setting forth its intention to change its election system. Subsequently, the city must hold at least four public hearings before holding a hearing at which to vote on the ordinance establishing district-based elections. Two of the public hearings must be held before drawing the draft map(s). During those two public hearings, the city council would receive public input regarding the composition of the districts. Usually, these public hearings are held during regularly scheduled city council meetings; however, the city can also schedule them during special meetings. While Elections Code Section 10010 does not set forth the notice requirement for the first two public hearings, it is prudent for the city to apply the same notice requirement in Section 10010 for the second two public hearings which requires that any draft maps be published at least seven days before the hearing at which they would be considered. The city council cannot start the map drafting process without first holding those two public hearings. The first two hearings can be noticed in a single published hearing notice.

The focus of the first two hearings is on answering resident questions about the process and identifying the neighborhoods and communities of interest that should be used as the 'building blocks' to develop the draft district maps. Issues such as whether a community wants to be united in one district or included in multiple districts are often debated at this time. Most residential neighborhoods tend to lean toward being united in one district, while downtown business districts, port or industrial areas, and large active living senior communities typically lean toward having multiple representatives.

After the first two public hearings are held, the demographer drafts at least one draft map, but often times multiple maps are drawn. Interested residents may also submit maps, either using their own means or using tools provided by the demographer. Section 10010 requires that the first version of a draft map be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it must be published and made available to the public for at least seven days before being adopted. After holding the four public hearings, the city council can then vote to approve or defeat the ordinance establishing district-based elections.

There are various ways residents can be encouraged and empowered to propose draft maps (in addition to the map(s) drafted by the City's official demographer). Depending on the level of public interest, the Council may have only the demographer's maps to consider, or as many as 20 or 40 resident-drawn proposals. Experienced demographers can provide tools to empower residents to draw maps as well as assistance guiding the city council through reviewing the pool of maps and arriving at a final selection.

The seven-day draft map publication provisions of Section 10010(a)(2) complicate the consideration of draft maps. The public is not barred from proposing new maps at each hearing, but the city council is barred from "considering" any new map that was not published at least seven days in advance. Section III. *a.*, *infra*, discusses the publication requirement set forth in Section 10010.

The timeline set forth in Elections Code 10010 does not leave much room for cities to conduct very robust community outreach programs regarding the city's transition to district-based elections. While not required under Elections Code Section 10010, cities should still make the effort to hold community meetings and forums to get feedback from the public and answer questions regarding the process. Extensive outreach and notification about the transition to district-based elections will reduce the voters' surprise and posible objections when the first by-district election is held.

e. Application of Process to Charter Cities

A charter city would need to review its charter to determine whether a charter amendment is necessary to change the city's election system and whether the proposed charter amendment would be placed on the ballot. If the jurisdiction is a charter city, there is a preliminary question of whether the public hearing requirements of Elections Code 10010 would apply. On the one hand, Section 10010 specifically states that "[a] political subdivision that changes from an at-large method of election to a district-based election . . . shall do all of the following before a public hearing at which the governing body of the political subdivision votes to approve or defeat ***an ordinance*** establishing district based elections . . . ." (Emphasis added). On its face, Section 10010 applies only when a city changes its election system by ordinance. At the same time, the CVRA explicitly provides that it applies to charter cities,[20] and Section 10010 specifically references the CVRA and incorporates some of the CVRA's provisions.[21]

In placing a charter amendment on the ballot, a charter city needs to determine whether to apply the requirements set forth in Elections Code Section 10010. While there are no binding court decisions on the issue, it is prudent for a charter city to follow the process set forth in Elections Code Section 10010 to avoid potential challenges to its process. The city also needs to determine whether to hold the public hearings before or after it places the charter amendment on the ballot. On the one hand, there is an argument that the public hearings must be held before a charter amendment is placed on the ballot, because if the proposed amendment passes, that establishes district-based elections for the city council. On the other hand, because Section 10010 states specifically that it applies to an ordinance establishing district-based elections, there is an argument that a charter amendment is not an ordinances that is subject to the requirements set forth in that section.

A charter city should review its municipal laws to determine the process set forth therein for changing its election system and potential issues that may arise in attempting to comply with the requirements of Elections Code Section 10010.

[20] Elec. Code § 14026(c).
[21] *See* Elec. Code § 10010(b), (d).

III. Notable Issues

There are a number of unresolved issues surrounding both the CVRA and the process of transitioning to district-based elections. While this paper does not attempt to discuss all the issues, it highlights a few topics that are important to keep in mind.

a. Notice and Publication

Section 10010(a)(2) requires that maps be "published at least seven days before consideration at a hearing," but it does not define "publish" or specify how the maps are to be "published." The Black's Law Dictionary definition for "publish" is "to distribute copies (of a work) to the public." Other provisions of the Elections Code requiring publication of materials specify that they be published in newspapers of general circulation with the alternative being posting the material conspicuously in three public places in the city.[22]

While some cities have been able to publish their maps in newspapers of general circulation, smaller cities that have a local newspaper are often restricted by the newspaper's timelines since they are published once a week. And cities that successfully encouraged public participation in the drafting of maps have ended up with more than twenty draft maps, making publishing all of them in a newspaper prohibitively expensive. Many cities have resorted to publishing notices of the public hearings in newspapers and listing a number of locations throughout the city where the maps will be available. If the City has a website that it maintains, it can also post the maps on its website and include that link in the notice.

Another issue to keep in mind is the federal Voting Rights Act requirement that election material be translated in various languages depending on the county where the election is held. For example, in Orange County, election material must be translated into at least four languages: Spanish, Chinese, Korean, and Vietnamese.[23] While the notices and other materials concerning a city's transition to district-based elections does not relate to a specific election, the city should consider translating the materials concerning the public hearings in languages that are prevalent in that city.

b. At-Large Mayor Position Under California Law

There is a question of whether a by-district election system with an at-large mayor qualifies as an at-large election system that is vulnerable to a CVRA challenge. Only at-large election systems are susceptible to a CVRA challenge.[24] However, the CVRA's definition of an at-large method of election is somewhat broad and misleading. Under the CVRA, an "at-large method of election" encompasses not only a system in which the voters of the entire jurisdiction elect the members of city council, but it also encompasses from-district election systems (election systems in which the candidates are required to reside in districts but are elected by the

[22] *See, e.g.*, Elec. Code §§ 9205, 12110-12111.
[23] https://www.ocvote.com/voting/translatedelectionmaterials/, last visited: April 11, 2018.
[24] Elec. Code § 14027.

voters of the entire city) and combination systems.[25] A combination system is an elections system that "combines at-large elections with district-based elections."[26]

The combination system can include a system in which a primary election may be conducted "by-district", but the general election is conducted "from" those same districts, e.g., the top two vote winners in the primary in each district run for election "at-large" in the general election. A combination system may also be an election system in which some seats are elected at large and some are elected by-district. For example, a jurisdiction that has a seven-member city council with three members elected at-large and four members elected by-district is a combination system. Based on the plain language of the CVRA, however, a plaintiff can claim that a by-district election system with an at-large mayor qualifies as a "combination system."

While the issue of whether a by-district election system with an at-large mayor qualifies as an at-large system has arisen in previous CVRA cases, there are no binding, appellate decisions on the issue. In previous CVRA cases, plaintiffs have made the argument that the election of even one member of a city council at-large, regardless of his or her title, makes the election system at-large and subject to challenge under the CVRA. For example, in the action involving the City of Rancho Cucamonga, the city placed the question of whether it should change its election system from at-large to a district-based system with an at-large mayor. Even after the ballot measure passed, plaintiffs refused to dismiss the case, arguing in part, that the city's new election system remains an at-large system that violates the CVRA.[27] The parties in that case reached a settlement; therefore, the question was not decided by a court. Notably, the settlement agreement in the Rancho Cucamonga case kept the at-large mayor position intact.

In the case of ***Jauregui v. City of Palmdale***, the trial court found that the mayor of Palmdale is a separately elected office and noted that Government Code Section 34900 expressly authorizes that form of government.[28] The court noted that while the mayor is a voting member of the council, he or she has additional duties, powers, and obligations. Therefore, the court found that the mayor in that case was a separately elected office, and the elimination of this office was not an appropriate remedy to address the CVRA violation.

Other provisions of California law provide support for the view that a by-district election system with an at-large mayor is a district-based election system, not an at-large system that is vulnerable to a CVRA challenge. The Government Code specifically allows for an at-large mayor position on the city council. Effective January 1, 2017, Government Code Section 34886 provides that the council "of a city may adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor, as described in subdivisions (a) and (c) of Section 34871, without being required to submit the ordinance to the voters for approval."

[25] Elec. Code § 14026(a).
[26] Elec. Code § 14026(a)(3).
[27] ***Southwest Voter Registration Education Project v. City of Rancho Cucamonga***, San Bernardino Superior Court Case No. CIVDS 1603632.
[28] ***Jauregui v. City of Palmdale***, Los Angeles Superior Court Case No. BC483039, Final Statement of Decision dated December 23, 2013.

Subdivisions (a) and (c) of Government Code Section 34871 in turn provide:

> [T]he legislative body may submit to the registered voters an ordinance providing for the election of members of the legislative body in any of the following ways:
>
> (a) By districts in five, seven, or nine districts . . . [¶]
>
> (c) By districts in four, six, or eight districts, with an elective mayor . . . .

Section 34886 states that "[a]n ordinance adopted pursuant to this section shall include a *declaration that the change in the method of electing members of the legislative body is being made in furtherance of the purposes of the California Voting Rights Act of 2001*." (Emphasis Added). Section 34886 provides support for the position that a by-district system with an at-large mayor is not susceptible to CVRA violation because that Section specifically allows the adoption of that election system "in furtherance of the purposes" of the CVRA. Nonetheless, the broad definition of at-large election systems in the CVRA can provide the basis for a prospective plaintiff to challenge a jurisdiction's adoption of an at-large mayor position.

The risk of such a challenge is higher if creating an at-large mayor seat would potentially dilute the voting power of a protected class.[29] A jurisdiction's decision to establish an at-large mayor seat would involve it adding a district it otherwise wouldn't have or eliminating a district that it would otherwise have. Depending on the jurisdiction's demographics and concentration of members of protected classes, dividing the city into more or less districts can affect the voting power of the city's protected class(es). If changing the number of districts decreases the voting power of a protected class in the city, that would bolster a prospective plaintiff's argument that the city's decision to create an at-large mayor position violates the CVRA.

c. District Elections Ordinance and the Power to Petition for Referendum

Article 2, Section 9(a) of the California Constitution provides that "[t]he referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state." Based on the plain language of that provision, districting or reapportionment ordinances do not fall under any of these exceptions because they are not a statute calling elections; rather, the ordinances set forth the system of election and the conduct of the elections in the future. In dicta, the court in ***Assembly of State of Cal. v. Deukmejian***, 30 Cal.3d 638, 654 (1982) noted that "[w]hile it is obvious that a reapportionment statute relates to elections, it is equally clear that such statutes do not call elections." That case concerned a writ of mandate challenging the placement on the ballot of referenda challenging the state's reapportionment statutes, and the Assembly, State Senate, and Congressional redistricting maps were successfully referended in 1982. In ***Vandermost v. Bowen***, 53 Cal.4th 421, 437 (2012), the court noted that "if a referendum that is directed at a newly adopted redistricting map qualifies

[29] The CVRA defines a "protected class" as "a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.)." Elec. Code § 14026(d).

for the ballot, triggering a stay of the new redistricting map pending the electorate's vote on the referendum, this court has the responsibility of determining which voting district map should be used for the upcoming interim electoral cycle." (Internal citations omitted). In ***Ortiz v. Board of Supervisors***, 107 Cal.App.3d 866, 872 (1980), the court stated that "[c]hanges in supervisorial district boundaries is a legislative function and thus subject to the referendum." (Internal citations omitted).

Even though these cases discuss reapportionment or redistricting plans, the same general principles would apply to ordinances establishing district elections because they do not fall under any of the exceptions set forth in Article 2, Section 9(a) of the Constitution, and districting ordinances are similar to reapportionment statutes in that while they relate to elections, they do not "call elections." Therefore, an ordinance establishing district-based elections would ordinarily be effective 30 days after adoption.[30]

In the past, perspective plaintiffs have made the argument that a local ballot measure cannot contravene state law (such as the CVRA) or policy, nor can a local ballot measure contravene the state's delegation of power to a local governing body. That argument also relies on the fact that California law was amended effective Jan. 1, 2017 to delegate the power to adopt district elections to city councils. However, there is nothing in the Elections Code that prevents a city from deciding to place the issue on the ballot for its voters, despite having the authority to change its election system by ordinance. Charter cities whose charters specify at-large elections must decide whether CVRA overrides the Charter or if a public vote on a charter amendment is necessary.

Making the ordinance effective thirty days after adoption creates an opportunity for referendum. If a petition for referendum is filed, however, and the matter has to be placed on the ballot, the city may face legal action by a prospective plaintiff claiming that the city's election system violates the CVRA. There seems to be a gray area in the law and a need to balance between the power to petition for referendum and the need to apply state law.

IV. Litigation Update

a. Southwest Voter Registration Education Project v. City of Rancho Cucamonga

On December 23, 2015, the City of Rancho Cucamonga received a demand letter alleging violation of the CVRA. After receiving the letter, the city began analyzing the issue. On March 10, 2016, plaintiff Southwest Voter Registration Education Project[31] filed an action against the city alleging that the city's at-large election system violated the CVRA.[32] On May 4, 2016, the City Council adopted a resolution submitting the question of district elections to the voters at the regular municipal election on November 8, 2016. The city's electorate approved the measure at the November 2016 election.

[30] Gov. Code § 36937.

[31] The plaintiff subsequently amended its complaint to add an individual plaintiff to the action.

[32] ***Southwest Voter Registration Education Project, et al. v. City of Rancho Cucamonga***, San Bernardino Superior Court Case No. CIVDS1603632.

Nonetheless, the plaintiffs pressed forward with the action on the ground that the adopted by-district election system with an at-large mayor was an at-large election system that was subject to the CVRA. The plaintiffs also challenged the map that the city's voters approved as part of the measure.

In November of 2017, the parties settled the action, and the only remaining issue to be decided in arbitration is plaintiffs' recovery of attorneys' fees from the city. The settlement agreement kept in place the election system approved by the voters during the November 2016 election. Pursuant to the settlement agreement, the parties shall work on adjusting the district map following the 2020 federal census.

b. Pico Neighborhood Association, et al. v. City of Santa Monica

On April 12, 2016, plaintiffs Pico Neighborhood Association, Maria Loya, and Advocates for Malibu Public Schools filed an action against the City of Santa Monica alleging, among other things that the city's election system violates the CVRA.[33] As of the date of drafting this paper, the case is set for trial on July 30, 2018.

On March 29, 2018, the City of Santa Monica filed a motion for summary judgment, or in the alternative, summary adjudication, on the ground that expert demographic analysis proves that no constitutionally or statutorily permissible remedy could enhance the Latino voting strength in the city. The city argues, therefore, that plaintiffs cannot meet their burden of demonstrating that an electoral scheme other than the city's current system would enhance Latino voting power. Based on the city's pleadings, the city's Latino population constitutes roughly 13 % of the city's citizen voting age population, and not a single voting precinct is majority-Latino. Therefore, the city argues, a district-based election system would dilute, not enhance, Latino voting strength. The city contends that a proof of racially polarized voting alone is not sufficient to establish a violation of the CVRA; rather, the plaintiff must show that the at-large election system has diluted the minority group's vote.

Alternatively, the city argues that the remedy plaintiff seeks—establishment of district-based elections—is not a constitutional remedy because any court order implementing district-based elections would separate voters on the basis of race. Such a remedy, the city argues, has to be narrowly tailored to accomplish a compelling state interest. The city argues that any district that attempts to group the city's Latino population in one district would be highly irregular in share that it would constitute racial gerrymandering.

The city is also seeking summary judgment on plaintiffs' claim for violation of the Equal Protection Clause on the ground that plaintiffs cannot draw a connection between the city's at-large system of election and any impact on Latino voting power in the city.

The city's motion is currently set for hearing on June 14, 2018.

[33] ***Pico Neighborhood Association, et al. v. City of Santa Monica***, Los Angeles Superior Court Case No. BC616804.

c. Higginson v. Xavier Becerra, et al.

On October 4, 2017, plaintiff Don Higginson, a former mayor of the City of Poway, filed a federal action challenging the constitutionality of the CVRA.[34] The action was filed against Attorney General Xavier Becerra and the City of Poway after the City adopted district-based elections in response to a demand letter. The plaintiff alleged a cause of action under 42 U.S.C. §§ 1983 and 1988 for violation of his rights under the Fourteenth Amendment and alleged that the CVRA and the city's adopted map violated the equal protection clause. The plaintiff sought an order declaring that the CVRA and the district map adopted by the city were unconstitutional and enjoining their enforcement and use.

Subsequently, on October 19, 2017, the plaintiff filed a motion for a preliminary injunction to temporarily enjoin the Attorney General from enforcing the CVRA and the city from using the district-map for elections during pendency of the action. The city took a neutral position in the litigation. On November 22, 2017, the Attorney General filed a motion to dismiss the claim asserting that the plaintiff lacked standing to bring the action and that he failed to state a claim upon which relief can be granted.

The court granted the Attorney General's motion to dismiss on the ground that the plaintiff lacked standing to bring the action, and there was no subject matter jurisdiction. The court found that: (1) plaintiff has failed to plead facts to demonstrate that his injury is "fairly traceable" to requirements imposed on the City by the CVRA; (2) the complaint did not allege any existing or threatened enforcement action under the CVRA by the Attorney General or other state agency which motivated the city's switch to by-district elections; and (3) plaintiff did not allege facts supporting an inference that the decision to adopt by-district elections was motivated by an effort to address racially-polarized voting in the City's at-large elections or an effort to address a CVRA violation because the City stated during the process that this was a business decision to avoid litigation. The court also dismissed the case as to the City for the same reasons.

Based on the court's decision with respect to the motion to dismiss, the court denied the preliminary injunction motion, noting that it cannot conclude that plaintiff has demonstrated a likelihood of success on the merits in light of the determination that the complaint failed to allege sufficient facts to establish subject matter jurisdiction.

On April 6, 2018, the plaintiff filed a notice of appeal in the Ninth Circuit.[35]

V. Conclusion

While the constitutionality of the CVRA is currently being challenged in both federal and state courts, cities and other jurisdictions with an at-large election system remain susceptible to

[34] ***Higginson v. Xavier Becerra, et al.***, United States District Court for the Southern District of California, Case No. 3:17-CV-02032-WQH-JLB.
[35] ***Higginson v. Becerra, et al.***, 9th Cir. Case No. 18-55455.

receiving a CVRA demand letter. Elections Code Section 10010 provides a safe harbor for cities and other jurisdictions that decide to abide by its timeline and transition to district-based elections once they receive a demand letter. The process for charter cities may vary depending on the charter provisions that govern elections and charter amendments as well as the application of Section 10010 in light of the cities' municipal laws.

Ballot Box Planning and Finance

Thursday, May 3, 2018 General Session; 9:00 – 10:30 a.m.

Michael G. Colantuono, City Attorney, Auburn and Grass Valley
Kevin D. Siegel, Burke, Williams & Sorensen
Marc L. Zafferano, City Attorney, San Bruno

Notes:

Municipal Finance at the Ballot Box

by

Michael G. Colantuono

May 3, 2018

League of California Cities, City Attorneys' Conference

San Diego, CA

I. Introduction

This paper presents updates on a range of legal issues that arise when cities and counties confront ballot measures affecting local government finance. Some are established principles of elections law, some reflect new developments and some are pending cases. In general, this area of law is developing quickly — via initiatives, legislation and court cases — and practitioners should be alert for new developments.

II. *California Cannabis Coalition v. City of Upland*: Tax Initiatives Not Subject to Same Rules as Taxes Proposed by Government

The recent California Supreme Court decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 ("*Upland*") has generated much commentary and some — including the San Francisco City Attorney's Office — predict local special taxes might be allowed on a simple majority vote, rather than the two-thirds required by Propositions 13, 62, and 218.[1] However, I conclude the two-thirds-voter-approval requirement survives.

Here are *Upland*'s facts: Proponents circulated an initiative to allow three marijuana dispensaries in Upland.[2] They collected signatures of more than 15% of City voters on a petition calling for a special election, as the Elections Code then allowed.[3]

[1] Cal. Const., art. XIII A, § 4 [Prop. 13]; Gov. Code, § 52723 [Prop. 62]; Cal. Const., art. XIII C, § 2, subd. (d) [Prop. 218].) The San Francisco City Attorney's opinion appears at <htpps://www.sfcityattorney.org/wp-content/uploads/2015/07/CA-Cannabis-Coalition-Memo-1.pdf> (last viewed Mar. 17, 2018).

[2] *Upland, supra*, 3 Cal.5th at p. 931.

[3] *Id*. at pp. 931–932. Effective January 1, 2018, Elections Code section 9214 has been repealed and initiative proponents may no longer compel a special election. This is part of a legislative trend to consolidate elections on the state election dates to encourage voter participation. (Senate Rules Committee Analysis of AB 765, June 22, 2017 at pp. 4–5.)

A City report prepared pursuant to Elections Code section 9212 estimated the City's annual cost to regulate a dispensary at $15,000 per year, concluding the $75,000 fee therefore included a $60,000 general tax — i.e., a tax to fund any City purpose.[4] Under Proposition 218, general taxes may only appear on general election ballots when city council seats are scheduled to be contested.[5] The City Council therefore set the measure for a general election two years later.[6] The Coalition sued to compel an earlier, special election.[7] The trial court agreed with the City that the measure imposed a general tax and could not be set for a special election.[8]

The Court of Appeal reversed, concluding Proposition 218's general-election rule does not apply to initiatives.[9] The Supreme Court agreed.[10] The Court reasoned that limits on initiatives are disfavored and must be plainly stated and the general-election rule is a procedural requirement that applies to government, but not to initiative proponents.[11]

The Court makes clear, however, that the two-thirds-voter-approval requirement for special taxes — taxes which may be spent only for stated purposes — does apply to initiatives:

> [F]or example, the enactors [of Prop. 218] adopted a requirement providing that, before a local government can impose, extend, or increase any special tax, voters must approve the tax by a two-thirds vote. That constitutes a higher vote requirement than would otherwise apply. … [V]oters explicitly imposed a procedural two-thirds vote requirement on themselves in article XIII C, section 2, subdivision (d) … ."[12]

However, other language leads some to argue the decision imperils the two-thirds rule. First, Justices Kruger and Liu, dissenting in part, characterize the language just quoted as less than definitive: "the majority opinion contains language that could be read to suggest that article XIII C, section 2(d) [the two-thirds rule] should be

[4] *Upland, supra*, 3 Cal.5th at p. 932.
[5] Cal. Const., art. XIII C, § 2, subd. (b).
[6] *Upland, supra*, 3 Cal.5th at p. 932.
[7] *Ibid*.
[8] *Ibid*.
[9] *Id*. at pp. 932–933.
[10] *Id*. at p. 931.
[11] *Ibid*.
[12] *Id*. at p. 943.

interpreted differently from section 2(b) [the general election rule]."[13] However, this was a rebuttal to the majority, not a holding that could undermine its conclusion.

Other parts of the opinion refer to the general-election rule by citing the entire section which includes it— article XIII C, section 2.[14] That is unhelpfully ambiguous, as section 2 includes the general election rule, the two-thirds vote requirement, and three other rules. Moreover, the Court expressly leaves open the impact of its conclusion on article XIII D — governing assessments on property and property related fees, including many retail water, sewer and trash fees. As Propositions 13 and 62 use language very similar to that of Proposition 218,[15] these questions arise under all three measures.

Still more alarming for Proposition 218's advocates is the Court's expressly refraining from deciding whether a city council could adopt an initiative tax proposal without submitting it to voters at all — as is increasingly common in the land use context.[16] I expect courts to conclude a City Council cannot adopt an initiative tax without voter approval because the Court's language preserving the two-thirds rule describes it as a procedural restriction voters imposed on themselves. If voters cannot tax themselves without two-thirds voter approval, governments cannot either.

While the *Upland* opinion is not as clear as one would hope, I conclude the two-thirds voter approval requirement for special taxes — and the election requirement for taxes generally — survive. This may change in future cases, of course, so time will tell.

III. *City of San Buenaventura v. United Water Conservation District*: A Temporary Suggestion that Special Taxes Differ under Propositions 13 and 218

City of San Buenaventura v. United Water Conservation District (2017) 3 Cal.5th 1191 (*Ventura*) involved Ventura's challenge to a groundwater augmentation charge to fund the services of a water conservation district imposed on the City's use of its groundwater rights. Under Water Code section 75594, the respondent agency was obligated to set rates for municipal and industrial uses of groundwater at between three and five times the rate set for agricultural groundwater use.[17] The case's conclusion that

[13] *Id*. at p. 956, fn. 7 (Kruger, J., concurring and dissenting).
[14] *Id*. at pp. 932, 936, 938, 939, 941, 947, 948.
[15] Cal. Const., art. XIII A, § 4 [Prop. 13]; Gov. Code, § § 53722–53723 [Prop. 62].
[16] *Upland, supra*, 3 Cal.5th at p. 947.
[17] *Ventura, supra*, 3 Cal.5th at p. 1197.

this challenge arises under Proposition 26 (Cal. Const., art. XIII C, § 1, subd. (e)) rather than Proposition 218 (Cal. Const., art. XIII D, § 6, subd. (b)) is not our present concern. What is of interest is that the opinion originally included a footnote 3 stating that the special taxes which require two-thirds voter approval under Proposition 13 (Cal. Const., art. XIII A, § 4) are not the special taxes which require such approval under Proposition 218 (Cal. Const., art. XIII C, § 2, subd. (d)) because the former include only taxes on real property. That statement, taken together with *Upland*'s suggestion that an initiative tax proposal might be adopted without voter approval under Elections Code section 9215 [council option to adopt initiative rather than order an election] seemed to portend the demise of the two-thirds voter approval requirement for special taxes. The Howard Jarvis Taxpayers Association, *amicus* in the case, petitioned the Court for rehearing seeking deletion of this statement from footnote 3. The Court made that correction (and others sought by Ventura and the respondent district) on denial of rehearing.

Plainly this is a fertile time in the law of municipal revenues and new case law warrants close attention.

IV. Preemption of Initiatives Limiting Municipal Financial Authority

Our courts have confronted local initiative proposals to impose voter approval requirements on local government taxes more stringent than those established by our often-amended state Constitution. *City of Atascadero v. Daly* (1982) 135 Cal.App.3d 466 ("*Atascadero*") was a post-Proposition 13 dispute involving an initiative requiring voter approval of any City revenue measure. The Court of Appeal concluded it was both preempted by, and exceeded the scope of, the initiative power "as an unlawful attempt to impair essential governmental functions through interference with the administration of the City's fiscal powers."[18]

Proposition 218 brought a similar challenge. *Howard Jarvis Taxpayers Association v. City of San Diego* (2004) 120 Cal.App.4th 374 invalidated an initiative amendment to the City charter purporting to require two-thirds voter approval of general taxes. The Court of Appeal had little difficulty concluding the measure was preempted by Proposition 218. The California Supreme Court reached the same conclusion as to a water district initiative to require voter approval of water rates in *Bighorn-Desert View Water Agency* v. *Verjil* (2006) 39 Cal.4th 205, 218–221. As Proposition 218 allows water rates to be

[18] *Atascadero, supra*, 135 Cal.App.3d at p. 471.

imposed by a legislative body after a majority protest proceeding, without an election (Cal. Const., art. XIII D, § 6, subd. (c)), local voters cannot initiate legislation to the contrary.

Thus, local governments confronted with an unwelcome initiative commonly find that preemption is their most serviceable defense.

V. Mandatory Content of Special Tax Measures

When tasked to draft a special tax measure for the ballot, public lawyers should attend to the requirements of Government Code sections 50075.1 and 50075.3. The first requires a special tax proposal to include:

> (a) A statement indicating the specific purposes of the special tax.
>
> (b) A requirement that the proceeds be applied only to the specific purposes identified pursuant to subdivision (a).
>
> (c) The creation of an account into which the proceeds shall be deposited.
>
> (d) An annual report pursuant to Section 50075.3.

Government Code section 50075.3 requires a special tax proposal to require an annual report prepared by the "chief fiscal officer of the levying local agency" stating:

> (a) The amount of funds collected and expended.
>
> (b) The status of any project required or authorized to be funded as identified in subdivision (a) of Section 50075.1.

These provisions purport to apply to charter cities.[19] Compliance seems advisable. These provisions are not onerous, provide public confidence in tax proposals, and omitting them will invite unwelcome controversy. Nevertheless a persuasive argument can be made that these are matters of local concern and a charter city which has contrary local policy may enforce them.[20]

[19] Gov. Code, § 50075.5, subd. (a).
[20] (E.g., *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 20–26 [requiring substantial justification of statewide concern to preempt local tax ordinance].)

VI. AB 195's Requirements for Ballot Labels for Finance Measures

Effective January 1, 2018, tax measures local legislative bodies place on the ballot are subject to a new ballot-label requirement. AB 195 (Obernolte, R-Big Bear Lake) amended Elections Code section 13119 to require all local measures imposing or increasing a tax — including those proposed by a local agency rather than by initiative — to be accompanied by a ballot statement specifying the annual revenue to be raised and the rate and duration of the tax.[21] A similar, earlier requirement applied only to initiatives.[22] The requirement seems targeted at ballot labels — the questions actually printed on ballots — because it refers to "the statement of the measure" "included" in "the ballot" and only the ballot label would seem to fit this description. Thus, it can be argued that inclusion in an impartial analysis or other provision of the ballot pamphlet is insufficient. The conservative course will be to include it in a ballot label, although the language will support other interpretations.

The amendment was spurred by suit on a tax the Los Angeles Metropolitan Transportation Authority ("MTA") placed on the November 2016 ballot.[23] Measure M proposed a half-cent sales tax to support MTA services.[24] Seven cities filed a pre-election challenge citing Elections Code section 13119, alleging ballot materials did not state the amount to be raised annually nor accurately state its rate and duration.[25] The MTA argued section 13119 applied only to initiatives — not measures a legislative body places on the ballot.[26] The trial court agreed and the Court of Appeal denied writ review. [27]

The Howard Jarvis Taxpayers Association sponsored AB 195 to extend section 13119 to tax measures placed on the ballot by local governments.[28] Its requirements also

[21] Elec. Code, § 13119, subd. (b).
[22] Stats. 2015, c. 337, § 1 (adopting earlier version of Elections Code, § 13119).
[23] Senate Floor Analysis, A.B. 195, June 27, 2017 at p. 2 (citing *City of Carson, et al. v. Dean Logan, Registrar-Recorder/County Clerk of the County of Los Angeles* (2016) Los Angeles County Superior Court Case No. BS164554.
[24] <www.theplan.metro.net/#measurem> (last viewed Mar. 17, 2018).
[25] Senate Floor Analysis, A.B. 195, June 27, 2017 at p. 2.
[26] *Id*. at pp. 2–3.
[27] *Id*. at p. 3. The Second District denied an appellate writ on September 9, 2016. (*City of Carson v. Superior Court*, 2nd DCA Case No. B277440.)
[28] Senate Floor Analysis, A.B. 195, June 27, 2017 at p. 1.

apply to measures to approve bonds or other debt.[29] AB 195 also mandates a ballot statement be an "impartial synopsis of the purpose of the proposed measure, and shall be in language that is neither argumentative nor likely to create prejudice for or against the measure."[30]

The new requirements apply to measures proposed by general law and charter cities, general law and charter counties, and special districts — including school districts. While there might be an argument charter cities are beyond the Legislature's reach, many charter cities adopt the Elections Code by reference and others must confront the Legislature's declaration that section 13119 serves a statewide purpose and the likely political consequences of ignoring the statute.

Local governments placing revenue measures on the ballot should be careful to include in ballot labels the annual revenue expected from proposals — which can be difficult to estimate — and to state the rate and duration of taxes. For taxes which have no sunset, a common formula states "the tax will remain in effect until voters amend or repeal it." The more essential task may be to ensure the ballot statement is impartial, arguing neither for nor against the measure.

No doubt, those opposed to local tax measures will continue to look to the courts to edit ballot language to which they object and such suits may become more common. Careful drafting and legal review are therefore essential.

VII. Impartial Analysis under Elections Code Section 9280

City attorneys are familiar with their responsibility to prepare impartial analyses of ballot measures, whether proposed by initiative or the city council. Still, it is useful to closely scrutinize the language of Elections Code section 9280.

Technically, such analyses are optional.[31] Section 9280 states "the governing body **may** direct the city elections official to transmit a copy of the measure to the City Attorney." But, of course, such analyses are expected and provide useful information to voters and useful legislative history, and are therefore typically provided. If "the

[29] Elec. Code, § 13119, subd. (a).
[30] *Id*., subd. (c).)
[31] Elec. Code, § 9280 (emphasis added); Elec. Code § 354 ("'Shall' is mandatory and 'may' is permissive.")

organization or salaries of the office of the city attorney are affected," the impartial analysis is to be prepared by the city clerk.[32]

Section 9280 mandates an impartial analysis state "whether the measure was placed on the ballot by a petition signed by the requisite number of voters or by the governing body of the city." The analysis is limited to 500 words, counted as provided in Elections Code section 9.

Most substantively, section 9280 provides: "The city attorney shall prepare an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure." This is in contrast with the title and summary of an initiative, which Elections Code section 9203 requires to "express … the purpose of the proposed measure." The latter speaks to the intent of initiative proponents and the measure they propose. Section 9280 speaks to the "effect of the measure on the existing law and the operation of the measure." This invites a broader discussion of background law and the effect of the measure and would seem to encompass any legal flaws in a measure that might cause all or part of it to have no "effect … on existing law" or no "operation."

Of course, impartial analyses, like other ballot materials, can be challenged by a timely writ under Elections Code section 9295 and a recent decision suggests an impartial analysis must be just that — impartial, even though the duty to write such that the text neither argues for or against the measure appears in section 9203 as to titles and summaries and not in section 9280 as to impartial analyses. Still, the use of the word "impartial," in the latter is likely sufficient. Moreover, there is little doubt that courts will find that requirement in the statute as they did for ballot labels (the question printed on the ballot as to a measure) in *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169 (granting writ to excise "reform" from title of pension reform measure).)

Accordingly, many city attorneys are reluctant to express views in impartial analyses regarding the lawfulness of a ballot measure. Further, such views can cause difficulties in defense of a measure should it pass. When confronted with a plainly illegal measure, the better approach may be to consult the city council about the desirability of pre- or post-election judicial review under cases such as *Widders v.*

[32] Elec. Code, § 9280.

Furchtenicht (2008) 167 Cal.App.4th 769 [granting city attorney's declaratory relief from duty to prepare title and summary for initiative that directed city council to act rather than proposed legislation as required by *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504].)

Another common question for city attorneys is whether to allow their clients to review and comment on a draft title and summary or a draft impartial analysis. As city officials can be particularly hostile to initiative measures that, by definition, are measures a city council has refused to adopt, some city attorneys view this as something like an ex parte contact in the due process context. Others are comfortable allowing such review and comment provided it is clear that the end product is the city attorney's own work and reflects his or her own judgment as to a fair and impartial analysis of the measure. I place myself in the latter camp, but am aware that it is necessary to avoid the appearance of impropriety in this context, as judicial review is always possible.

VIII. Marijuana Taxes

Given the adoption of Proposition 62 in 2016 and the development of a legal market in cannabis in California, marijuana tax proposals are appearing on many ballots. A few observations about such taxes are timely.

First, although it is common to impose local taxes as a percentage of the retail sales price and to require them to be collected upon sales, they cannot be —formally — sales and use taxes. Uncodified language in the Bradley-Burns Uniform Local Sales and Use Tax Law (Rev. & Tax. Code, § 7200 et seq.) preempts any other local sales and use tax. (Stats. 1968, ch. 1265, § 2, p. 2388 ["Therefore, the Legislature declares that the state, by the enactment of the Sales and Use Tax Law and the Bradley-Burns Local Sales and Use Tax Law, has preempted this area of taxation."]; *Century Plaza Hotel Co. v. City of Los Angeles* (1970) 7 Cal.App.3d 616, 626 [invalidating LA's sales tax on alcoholic beverages, citing this language].)

Local cannabis taxes should therefore be structured as business license taxes, which can be in lieu of or in addition to general business license taxes. They should be legally incident on the seller, even if they permit a seller to pass the charge through to buyers and to reflect it on receipts in doing so. (Cf. *Jacks v. City of Santa Barbara* (2017) 3

Cal.5th 248, 271 ["the economic incidence of a charge does not determine whether it is a tax"].) Ordinance language to make these points clear might be as follows:

> The taxes imposed under this chapter are excises on the privilege of engaging in commercial cannabis activity in the city. It is not a sales or use tax and shall not be calculated or assessed as such. Nevertheless, at the option of a commercial cannabis business, the tax may be separately identified on invoices, receipts and other evidences of transactions.

It can be helpful to include language in a cannabis business tax to allow it to be enforced in conjunction with the city's general business license tax. This can ease the administrative burden and ensure a complete body of local law to govern the full range of tax administration issues. Such a provision might read like this:

> The city council of the City of _____ intends this chapter to be enforced consistently with [article/chapter] of this code and any rule or regulation promulgated under that [article/chapter], except as expressly provided to the contrary in this [article/chapter].

Another topic of concern when drafting a tax ordinance is the duty arising from the Dormant Commerce Clause of the federal Constitution and comparable principles of state law to avoid discrimination in favor of intra-city economic activity or against inter-city economic activity. (E.g., *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444 [invalidating payroll and gross receipts tax provisions preferring intra-city activity].) This can arise, for example, from proposals to reserve cannabis opportunities to city residents or residents of disadvantaged neighborhoods in the city. It can also arise from proposals to allow retail delivery services only if operated from a fixed location in the city. The fixed location requirement is lawful, but the requirement that it be located in the city is not. Such provisions invoke the right to travel, as well. (E.g., *Cooperrider v. San Francisco Civil Service Com*. (1979) 97 Cal.App.3d 495 [invalidating one-year residency requirement for applicants for City employment].)

A model cannabis business tax I prepared for the Public Health Institute, that imposes higher taxes on sweetened beverages infused with cannabis ("canna-pops") and on high potency cannabis products like wax and shatter, appears at <https://www.gettingitrightfromthestart.org/california-local-regulation> (as of Mar. 17, 2018).

IX. Referenda and Initiatives to Repeal or Reduce Taxes

a. *Mission Springs Water District v. Verjil*: Initiatives to Reduce or Repeal Revenue Measures

Proposition 218 expressly establishes the right to use the initiative "in matters of reducing or repealing any local tax, assessment, fee or charge." (Cal. Const., art. XIII C, § 3.) The power is not unlimited. Rates proposed by initiative cannot contradict Proposition 218. (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 218–221 [initiative requiring voter approval of water rates preempted by Prop. 218].) Nor may they violate statutes governing the rates. (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892 [invalidating initiative to set rates which violated Water Code § 31007, which obliges county water districts to set rates sufficient to cover costs] ("*Mission Springs*").) Nor could Proposition 218 or a local initiative violate the Contracts Clause of the federal Constitution, as by setting rates in violation of covenants to a utility's bondholders. (*Consolidated Fire Protection Dist. of Los Angeles County v. Howard Jarvis Taxpayers' Ass'n* (1998) 63 Cal.App.4th 211, 219–225 [rejecting contracts clause claim to defend fire assessment but discussing law which would support such a claim as to a bond covenant].)

Litigation along the lines of *Mission Springs*, which involved a water district's suit to keep a water-rate-reduction measure off the ballot, has proliferated since the adoption of Proposition 218. Courts can be reluctant to interfere with the initiative power, but should follow the law described here.

b. *Howard Jarvis Taxpayers Association v. Amador County Water Agency*: Referenda to Prevent Adoption of Revenue Measures

Proposition 218's extension of the initiative power to reducing and repealing revenue measures is specific to the initiative power. Article II, section 9, subdivision (a)'s exclusion from the referendum power of "statutes providing for tax levies or appropriations for usual current expenses of the State" remains in force. This provision applies to local government and the State alike. (*Geiger v. Board of Sup'rs of Butte County* (1957) 48 Cal.2d 832.) A critical difference between referenda and initiatives is that the former immediately suspend what would otherwise be new legislation while the latter take effect only prospectively — after the election. (*Rossi v. Brown* (1995) 9 Cal.4th 688,

710 [upholding initiative to repeal utility tax, noting distinction between prospective initiatives and immediately effective referenda].)

Notwithstanding this established law, three recent cases litigated the availability of a referendum to prevent adoption of water charges. A case in Yorba Linda was resolved by changes in the water district's board. One against the Amador County Water Agency is fully briefed and awaiting argument in the Third District Court of Appeal. [33] I won an unpublished decision for the Monterey Peninsula Water Management District in the Sixth District on April 11, 2018, but the Court did not reach this issue.[34] Thus, new law on this issue may be expected in the *Amador* case.

X. Tax Fairness, Transparency and Accountability Act of 2018

The California Business Roundtable is now circulating an initiative constitutional amendment for the fall ballot that would amend articles XIII A, XIII C, and XIII D of the California Constitution to further restrict state and local government revenue authority.[35] It seeks to overturn the results of nearly every published appellate decision under Propositions 218 and 26 favorable to government. As of February 26, 2018, its proponents certified to the Secretary of State that they had collected a quarter of the signatures necessary to place the matter before voters. It is not yet clear they will succeed in doing so. Space does not allow an exhaustive analysis of the measure, but the highlights follow. References are proposed provisions of the Constitution except as otherwise noted.

1. **Taxes**: The proposal eliminates the distinction between general and special taxes, requires two-thirds voter approval of all local taxes, and requires a separate statement in a tax ordinance of the purposes to which funds may be devoted. If for general government purposes, the tax must use these words: "unrestricted general revenue purposes." (Art. XIII C, § 1, subds. (a) & (d) repealed; new art. XIII C, § 2, subd. (f) and art. XIII D, § 3, subd. (a)(2).)

[33] *Howard Jarvis Taxpayers Association v. Amador Water Agency*, 3d DCA Case No. C082079 (fully briefed as of 11/3/16 and awaiting argument).
[34] *Monterey Peninsula Taxpayers Association v. Board of Directors of the Monterey Peninsula Water Management District*, 6th DCA Case No. H042484 (opinion filed Apr. 11, 2018).
[35] Initiative number 17-0050, which can be viewed at <https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0050%20%28Two-Thirds%20Vote%20Requirement%20V1%29.pdf> (as of Mar. 17, 2018).

2. **Fees**: It requires a two-thirds vote of the city council to adopt or increase any of the few revenues not defined as taxes (art. XIII C, § 2, subd. (d)); limits all taxes to general election ballots absent a fiscal emergency declared by a unanimous vote of councilmembers present (art. XIII C, § 2, subd. (b)); and allows a referendum on such fees (which suspends the increase as soon as the signatures are certified) using the very low standard under Proposition 218 for a tax initiative (5% of the number of voters who cast votes in the last gubernatorial election). (Art. XIII C, § 2, subd. (d).)
3. **Initiatives**: *Upland* is expressly overruled and voters acting by initiative are subject to the same two-thirds requirement as taxes proposed by local legislative bodies. (Art. XIII C, § 1, subd. (b), § 2, subd. (e), § 5.)
4. **Standard of proof**: It requires "clear and convincing evidence" to justify a fee as other than a tax. (Art. XIII C, § 1, subd. (i).)
5. **Window period**: It invalidates all local taxes (as this measure defines them — to include some fees) adopted or increased in 2018 unless they meet the standards of this proposal, including its requirements for a separate statement of the purposes for which revenue can be spent and its particular label for general fund revenues. (Art. XIII C, § 2, subd. (i).)
6. **Invalidating precedent**: It expressly invalidates *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310 (fees for paper bags in plastic bag ban ordinance not taxes under Prop. 218 because they do not fund government), *California Chamber of Commerce v. State Air Resources Board* (2017) 10 Cal.App.5th 604 (AB 32 auction fees not taxes under Prop. 13 because voluntarily paid for the right to pollute) ("*Cal. Chamber*"), and *Upland*, *supra*, 3 Cal.5th 924 (different standards for initiatives than legislative tax proposals [statement of intent].)
7. **Franchises**: It eliminates the Proposition 26 exception for fees for a benefit or privilege (art. XIII C, §, 1, subd. (e)(1) deleted), but retains the exemption for uses of property, in an effort to undo *Cal. Chamber*. Query whether franchises can be uniformly defined as for use of government property.
8. **Development impact fees**: It retains existing exemptions for these fees and the Legislative Analyst predicts such fees will become more vital than ever in funding local government infrastructure and services. (Art. XIII C, § 1, subd. (e)(5).) These now specifically include tourism marketing district assessments. Non-property-based business assessments (such as those under *Evans v. San Jose* (2005) 128 Cal.App.4th 1123 and the 1989 Business Improvement District Law) now require two-thirds voter approval as taxes by the silent implication of this exception.

9. **Service charges and regulatory fees**: These are limited to the "reasonable and actual cost" of service, not just the "reasonable cost." (Art. XIII C, § 1, subds. (e)(2) & (3); art. XIII C, § 1, subd. (i).)
10. **Imposed**: It eliminates the requirement that revenue measures be "imposed" to constitute taxes. This is intended to invalidate *Cal. Chamber,* but it may have unpredictable impacts on voluntary relationships between businesses and government. It also states that a voluntary relationship between a payor and government does not defeat characterization as a tax. (Art. XIII C, § 1, subd. (h)(2).) This may have unpredictable consequences, too. It would seem to prevent in lieu fees outside the development context except with two-thirds voter approval.
11. **Fines & penalties**: These are not taxes only if imposed to punish law violations and "pursuant to adjudicatory due process." (Art. XIII C, § 1, subd. (e)(4).) Will administrative citations suffice?
12. **Revenues to non-government actors**: These are made taxes if government imposes any restriction on use of the funds. This invalidates *Schmeer* without preventing minimum wage laws. (Art. XIII C, § 1, subd. (h)(1).)
13. **Proportionality requirement**: All non-taxes are subject to an oddly stated proportionality requirement: "proportional based on the service or product provided" or "proportional to the cost to government created by the payor in performing regulatory tasks." (Art. XIII C, § 1, subd. (i).)
14. **Broader definition of "extend":** Voter approval is required to "extend" a revenue measure by extending its duration, applying it to new territory (this invalidates *Citizens Ass'n of Sunset Beach v. Orange County Local Agency Formation Com'n* (2012) 209 Cal.App.4th 1182 and effectively requires two-thirds voter approval for inhabited annexations), to a new class of customers or to a wider tax base. (Art. XIII C, § 1, subd. (g).)
15. **Bonds**: It disclaims any impact on voter-approval of bonds backed by property taxes (art. XIII C, § 5) likely to avoid the political problem of undermining school funding.

If this measure is approved, public lawyers will have much to analyze and their clients will face few options to fund public services. I, for one, hope it is not.

XI. Conclusion

After 40 years of initiative measures intended to reduce the cost of government, California has crafted an extraordinarily complex set of rules governing municipal revenues. Significant new revenues to fund local government services generally require voter or property owner approval. Accordingly, knowledge of the rules for ballot measures noted here would seem to be an essential part of any city attorney's skill set. And, no doubt, these rules will continue to change. Staying current will be essential to staying afloat!

Ballot Box Planning and Finance — Evolving Case Law Regarding the Electorate's Right to Referendum

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9:00 - 10:30 a.m.

LOCC City Attorneys' Dept. – Spring Conference
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Paradise Point, San Diego, California

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I. Recent Cases Addressing the Electorate's Right to Referendum

This paper discusses background law and recent cases regarding referenda, particularly with respect to (a) the electorate's right to referendum on a zoning ordinance adopted by a City Council to bring zoning into compliance with the General Plan and (b) determining whether a resolution adopted by the City Council, e.g., to approve the purchase or sale of real property, is a legislative action subject to referendum.

In addition, we provide pointers for evaluating and processing petitions that seek to place a non-legislative matter to a vote of the electorate, including from our recent experience handling a San Bruno matter that ultimately resulted in a favorable Court of Appeal decision, *San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524.

Finally, we provide a "cheat sheet" of Elections Code provisions applicable to the circulation, processing and voting on referenda petitions.

A. Right to Referenda on Zoning Ordinance Amendment that Brings Zoning into Compliance with General Plan: The Law in Flux.

1. Under Longstanding Precedent, the Electorate Has Lacked a Right to Referendum on an Ordinance that Brings Zoning into Compliance with the General Plan, but Two Courts of Appeal Recently Ruled Otherwise.

We are all well aware of the electorate's fundamental right to initiative and referendum, reserved for (rather than granted to) the people by Article 2, sections 8 and 11 of the California Constitution. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 934.)[1] It is "'one of the most precious rights of our democratic process.'" (*Id.* at 930 (quoting *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591).) The "courts have consistently declared it their duty to jealously guard and liberally construe the right so that it be not improperly annulled." (*Id.* at 934.)

We are also well-aware of the general law rule that zoning ordinances (and other land use decisions) must be consistent with general plans. (*Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 544; Gov. Code § 65860.)[2] Indeed, "[a] zoning ordinance that conflicts with a general plan is invalid at the time it is passed." (*Lesher,* 52 Cal.3d at 544.)

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[1] This fundamental right "is generally coextensive with the legislative power of the local governing body." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775.)

[2] The consistency rule does not apply to charter cities, unless (1) required by their charter, or (2) the city has a population of 2,000,000 or more. (*Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201, 1213-14; Gov. Code § 65860(d).)

Pursuant to the latter rule, initiatives and referenda must be consistent with a city's general plan. (*Lesher*, 52 Cal.3d at 541; California Municipal Law Handbook (Cal CEB), § 3.113, p. 273.)

Which brings us to the question: does the electorate have the right to vote on a referendum for a zoning ordinance that, if repealed, will revert to zoning that conflicts with the general plan?

For 32 years, the answer was no, pursuant to Fourth District case law. (*deBottari v. City Council of the City of Norco* (1985) 171 Cal.App.3d 1204, 1212; see also *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, 879.)

But in 2017 and 2018, the Sixth District and First District Courts of Appeal, respectively, rejected the Fourth District's conclusion. (*City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34, *review granted* Aug. 23, 2017; *Save Lafayette v. City of Lafayette* (2018) 20 Cal.App.5th 667.) While the Sixth District's 2017 decision is not citeable pursuant to the grant of review, the First District's decision is final, resulting in an active split among the Courts of Appeal, which split will be decided by the Supreme Court.

Below, we address the underpinnings of the Court of Appeal decisions and offer some educated predictions for the anticipated Supreme Court ruling.

2. The Fourth District's Conclusion Is Founded on the Rule that the Restoration of Prior Zoning Is the Equivalent of the Adoption of Zoning that Conflicts with the General Plan.

In *deBottari* and *City of Irvine*, the Norco and Irvine City Councils had recently amended their zoning ordinances, each time in response to development applications. The amendments brought their zoning ordinances into compliance with previously-adopted general plan amendments. Opponents of the projects submitted referendum petitions to challenge the amended zoning, but did not challenge the underling general plan amendments. The Fourth District ruled in each case that the electorate had no right to vote on the amended zoning ordinances because their repeal would restore zoning that was inconsistent with the cities' general plans, an illegal act. (*deBottari*, 171 Cal.App.3d at 1212; *City of Irvine,* 25 Cal.App.4th at 879.)[3]

The referendum proponents argued in each case that the city could cure the inconsistency that would be caused by rescission, and that the Court should thus not invalidate the referendum. The Fourth District rejected the argument. No law authorized the electorate to take action that would cause the zoning to be inconsistent with the general plan (*City of Irvine,* 25 Cal.App.4th at 879), and the attempt to restore the prior zoning was void "*ab initio*." (*deBottari*, 171 Cal.App.3d at 1212.)

[3] Irvine, a charter city, had an ordinance mandating that zoning be consistent with its General Plan. (*City of Irvine,* 25 Cal.App.4th at 874, 875.)

3. The Sixth and First District Decisions (1) Differentiate between the Prohibition Against *Enacting* a Zoning Ordinance by Initiative from the Preservation of the Status Quo by Referendum, and (2) Observe that Cities Retain Discretion to Adopt Alternative Zoning Ordinances that Are Consistent with General Plans, and thus Reject the Fourth District's Conclusion.

In *City of Morgan Hill* and *Save Lafayette*, the Sixth and First Districts expressly disagreed with the Fourth District. Underlying each decision are two related concepts.

The first is that the prohibition against enacting a zoning ordinance that conflicts with the general plan is different than the preservation of the status quo by referendum. As to the former, the voters could not adopt an initiative that created inconsistent zoning. As to the latter, by contrast, a referendum only preserves the status quo, and the law does not preclude a temporary inconsistency between a general plan and a zoning ordinance. (*City of Morgan Hill,* 12 Cal.App.5th at 41; *Save Lafayette, 2*0 Cal.App.5th 657, 669.) As the Sixth District explained:

> [U]nlike an initiative, a referendum cannot "enact" an ordinance. A referendum that rejects an ordinance simply maintains the status quo. Hence, it cannot violate [Gov. Code] section 65860, which prohibits the *enactment* of an inconsistent zoning ordinance.

(*City of Morgan Hill,* 12 Cal.App.5th at 42 (italics in original).)

The second concept is that, in the event that the electorate rejected the zoning amendments, the city councils retained discretion to adopt an alternative zoning ordinance amendment that would bring the zoning back into compliance with the cities' general plans. As the Sixth District stated:

> We disagree with *deBottari* and hold that a referendum petition challenging an ordinance that attempts to make the zoning for a parcel consistent with the parcel's general plan land use designation is not invalid if the legislative body remains free to select another consistent zoning for the parcel should the referendum result in the rejection of the legislative body's first choice of consistent zoning.

(*City of Morgan Hill*, 12 Cal.App.5th at 37-38.)[4]

[4] The Sixth District further explained that the prohibition against the enactment of zoning that conflicts with a general plan did not dictate the adoption of the ordinance amendment at issue, and that the city retained "discretion to select one of a variety of zoning districts for the parcel that would be consistent with the general plan." (*Id.* at 40-41.)

While *City of Morgan Hill* is on review and thus not citeable, the First District stepped into the fray, siding with the Sixth District, and going a step further by asserting that cities should contemporaneously amend general plans and zoning ordinances to keep them in compliance:

> The referendum does not seek to enact a new or different zoning ordinance; it simply seeks to put the existing ordinance before the Lafayette voters. If the voters reject it, then the zoning ordinance returns to the status quo, which was inconsistent at the time the city council amended the general plan. The referendum does not create the inconsistency. This result simply stresses the need for a city to amend its general plan and any conflicting zoning ordinance at the same time, in order to avoid the result of creating an inconsistent zoning ordinance. Were it otherwise, the holding in *deBottari* effectively precludes citizens from challenging tardy zoning ordinances by referendum following amendments to general plans.

(*Save Lafayette, 2*0 Cal.App.5th 657, 669.)

4. The Supreme Court Granted Review in *City of Morgan Hill*.

In its grant of review in *City of Morgan Hill*, the Supreme Court posed the question as follows:

> Can the electorate use the referendum process to challenge a municipality's zoning designation for an area, which was changed to conform to the municipality's amended general plan, when the result of the referendum—if successful—would leave intact the existing zoning designation that does not conform to the amended general plan?

(*Morgan Hill, City of v. Bushey River Park Hospitality* (Cal. 2017) 221 Cal.Rptr.3d 846, [case no. S243042].)

The competing Court of Appeal decisions rest on important principles of law—the electorate's reserved right of initiative and referendum on one hand, zoning and general plan consistency on the other. Accordingly, the LOCC submitted a neutral amicus brief in the Supreme Court—authored by Thomas Brown, Burke, Williams & Sorensen, LLP—which articulated issues presented by the conflict between the Courts of Appeal and requested that the Supreme Court provide clear guidance, so that cities are not faced with choosing between competing appellate decisions. The Morgan Hill case is fully briefed, and hopefully will be decided within a year.

Our prediction: given the tendency for the Supreme Court to hold that the

electorate has a right to vote[5] coupled with the logic of the First and Sixth District cases, we anticipate that the Court will likely affirm the First and Sixth District decisions and disapprove the Fourth District decisions.

B. Responding to Petitions that Seek to a Place a Non-Legislative Matter on the Ballot for a Vote of the Electorate.

In contrast to the foregoing debate about which bright line rule will prevail in the Supreme Court, there is a relatively murky area of law regarding whether an action is legislative, and thus subject to a vote or the electorate, or administrative (i.e., non-legislative), and thus not subject to a vote of the electorate.[6]

First, we address background law, including the general, vague test for differentiating between legislative and administrative decisions, cases in which the courts have held that the approval of a contract is not legislative and those in which the approval has been held to be legislative. Second, we address a recent First District Court of Appeal decision that sheds further light on the issue.

1. Background Law.[7]

a. The Electorate Has the Right to Vote on Legislative, But Not Administrative (i.e., Non-Legislative) Acts.

"The electorate has the power to initiate legislative acts, but not administrative ones." (*City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384, 399.) As explained in a 43-year old, but oft-cited case:

> While it has been generally said that the reserved power of initiative and referendum accorded by article IV, section 1, of the Constitution is to be liberally construed to uphold it whenever reasonable [citations], it is established beyond dispute that the **power of referendum may be invoked only with respect to matters which are *strictly* legislative** in character [citations].

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[5] See, e.g., *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924 (electorate has right to special election to vote on taxes, even though Proposition 218 requires that a city must submit tax proposals on a general election ballot); *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205 (electorate has right to initiative to replace fees for services adopted pursuant to Proposition 218).)

[6] The courts commonly, but not always, refer to non-legislative acts, such as the approval of a use permit, variance, or subdivision map, as administrative acts. (See, e.g., *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 518, 522-23; *Essick v. City of Los Angeles* (1950) 34 Cal.2d 614, 623.)

[7] Much of the following discussion applies to both initiatives and referenda. But the principal focus is on responding to referendum petitions, particularly with respect to resolutions.

> Under an unbroken line of authorities, administrative or executive acts are not within the reach of the referendum process [citations]. The plausible rationale for this rule espoused in numerous cases is that **to allow the referendum or initiative to be invoked to annul or delay the executive or administrative conduct would destroy the efficient administration of the business affairs of a city or municipality** [citations]. [Emphasis added.]

(*Lincoln Property Co. No. 41 Inc. v. Law* (1975) 45 Cal.App.3d 230, 233-34.)

b. Differentiating Between Legislative Action and Administrative Acts: The Answer Is Often, But Not Always Clear.

You might expect that there are bright line tests for differentiating between legislative and administrative (i.e., non-legislative) acts, and hence whether the electorate has the right to referendum.

Below are three examples that illustrate that lack of a bright-line rule:

1. Is the adoption of an ordinance always legislative?

    a. No doubt it is 99% of the time.

    b. But there is a least one exception: where the council has adopted a minor amendment that merely implements a previously adopted legislative policy. (*Southwest Diversified, Inc. v. City of Brisbane* (1991) 229 Cal.App.3d 1548.) For example, in *Southwest Diversified,* a citizens group presented a referendum petition regarding the council's adoption of an ordinance that adjusted the boundaries of a previously-adopted zoning district. The Court explained that zoning ordinances are typically, but not always, legislative acts. (*Id.* at 1556-58.) Brisbane's new zoning ordinance was such an exception. "[A]t the time the parcel was originally zoned, the legislative body treated the boundaries as provisional and subject to future adjustment according to prescribed standards and procedures." (*Id.* at 1558.) Thus, the new ordinance implementing the prior ordinance was non-legislative, and this Court properly prohibited the City from conducting an election on the referendum. (*Id.* at 1559.)

2. Is the adoption of a resolution always administrative?

    a. Of course not. Consider, for example, that the adoption of general or specific plan by resolution is, indisputably, a legislative act. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 386.) But this rule is a matter of common law; there is no statute on point. (*Midway*

Orchards v. County of Butte (1990) 220 Cal.App.3d 765, 779-81.) Moreover, because the resolution is not effective for 30 days after adoption, it is deemed legislative (so as to provide the electorate a right to submit a referendum petition to preserve the status quo, not because any statute delays the effectiveness for 30 days). (*Id.* at 779, 781.)

b. Note also that, while the Legislature has not prescribed when resolutions, such as approval of general plan amendment, are legislative, the Legislature has in other circumstances provided that certain resolutions are not effective for 30 days so they could be subject to referendum. (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 780-81.) Examples include a resolution forming an improvement district under Water Code section 31608 and a resolution authorizing issuance of bonds under Public Utility Code sections 13105 or 13378. But, as the *Midway Orchard* Court observed, "[w]hile it is true that resolutions ordinarily take effect immediately, the reason is nearly always traceable to court-made law." (*Id.* at 780.)

c. In sum, absent common law or statutory law that provides that a resolution is not effective for 30 days and/or is subject to referendum, the resolution is presumably an administrative act that is immediately effective and not subject to referendum.

3. Is the approval of a contract, e.g., by resolution, administrative?

a. Generally, but not always, the approval of a contract is an administrative act. (See, e.g., *Worthington v. City Council of City of Rohnert Park* (2005) 130 Cal.App.4th 1132, 1143 (even though approval of a MOU with Indian Tribe regarding measures to mitigate impacts of casino reflected policy decisions, the council adopted "a contract, not a law," and resolution was not subject to referendum).)

b. But other decisions have held that the approval of certain contracts by resolution constituted a legislative act subject to referendum. (See, e.g., *Hopping v. City of Richmond* (1915) 170 Cal. 605, 613-15 (resolution to accept donation of real property for city hall site was legislative act subject to referendum). These cases have tended to be ad hoc and fact-specific, and they do not provide clear, bright-line rules for differentiating between legislative and administrative resolutions.

c. Below, we discuss analytical frameworks for differentiating between approvals of contracts that are subject to referendum and those that are not, with the assistance provided by a recent First District

Court of Appeal decision.

c. The General (and Vague) Test for Determining if an Action Is Legislative.

The Courts of Appeal have set forth extraordinarily general guidance regarding the distinction between legislative and non-legislative action. As summarized by the First District: "The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." (*Worthington,* 130 Cal.App.4th at 1140-41, quoting *Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954, 957-58, internal quotation marks omitted.) In *Valentine*, the Court had explained, somewhat more helpfully*:*

> Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as … legislative …. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence.

(*Valentine v. Town of Ross* (1974) 39 Cal.App.3d 954, 957-58, citations and internal quotation marks omitted.)[8]

In addition, the *Valentine* Court elaborated, an act is administrative if it merely pursues a plan prescribed by "some power superior to it," e.g., the state or federal government. (*Valentine*, 39 Cal.App.3d at 957, citations and internal quotation marks omitted); see also *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596 & fn. 14 (electorate lacks the right to initiative and referendum where the state's system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state").)

Applying this general test is, of course, a matter of interpretation. And when proponents of an initiative or referendum are intent on bringing the matter to a vote of the electorate, they may very well disagree with the City's interpretation.

Accordingly, below we set forth some generally applicable rules from the case law to assist in the analysis.

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[8] Many courts have cited the Valentine Court's articulation of this general test. (*See,* e.g., *City of San Diego v. Dunkl*, 86 Cal.App.4th at 399-400.)

d. Substantive Rules to Apply (and Two to Ignore) When Determining if the Adoption of a Resolution Was a Legislative Act Subject to Referendum.

The foregoing legislative v. administrative test is, of course, applicable to both initiatives and referenda. Below, we take a deeper look into one aspect of this issue, to wit, determining if a resolution adopted by the City Council is a legislative act subject to referendum, particularly when it involves the approval of a contract, e.g., to sell or acquire property, or for the provision of public services.

Below, we set forth some generally-applicable rules to follow (and two to ignore).

1. The adoption of a resolution approving a contract to provide public services will typically constitute a legislative act subject to referendum. (See, e.g., *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1113 (resolution granting franchise for waste-hauling services is legislative); *Empire Waste Management v. Town of Windsor* (1998) 67 Cal.App.4th 714 (same).)

2. Similarly, the adoption of a resolution approving a contract to acquire real property for public use will usually constitute a legislative act subject to referendum. (See, e.g., *Hopping,* 170 Cal. at 613-15 (resolution to accept donation of real property for city hall site was legislative act subject to referendum); *Reagan v. City of Sausalito* (1962) 210 Cal.App.2d 618, 621-22, 624 (resolution authorizing expenditure of public funds to acquire waterfront property for park purposes was legislative act subject to referendum); *Citizens Against a New Jail v. Board of Supervisors* (1976) 63 Cal.App.3d 559, 562 (decision whether to renovate or build a new jail was legislative act); *Teachers Management & Inv. Corp. v. City of Santa Cruz* (1976) 64 Cal.App.3d 438, 447 (the decision of a city to build and operate a public structure is unquestionably legislative in nature," and thus a proper subject to a vote of the electorate).)

3. But if the City Council had previously made the policy decision regarding the acquisition of the property or the provision of the services, and the resolution is a final act that merely implements that policy decision, the adoption of the resolution to approve the contract may be administrative. For example, in *McKevitt v. City of Sacramento*, at issue was whether a resolution which approved the acquisition of property for a park, using funds from a trust bequeathed to the city for park acquisition purposes, was legislative or administrative. (*McKevitt v. City of Sacramento* (1921) 55 Cal.App. 117, 121-23.) The city had previously accepted the trust fund and was bound to comply with its conditions. Thus, the implementation of that previously approved policy was administrative and not subject to

referendum. (*Id.* at 125.)[9]

4. Similarly, if a higher governing body, e.g., the federal or state government, has prescribed or proscribed the City's options, the adoption of the resolution approving the contract will likely be legislative. (*Worthington*, 130 Cal.App.4th at 1140-41; *Associated Home Builders,* 18 Cal.3d at 596 & fn. 14; *City of San Diego v. Dunkl*, 86 Cal.App.4th at 399.) For example, in *Worthington*, the First District explained that federal law and Indian Tribe sovereignty "displace[d] any local regulation" regarding siting of casinos, thereby rending the City's negotiation of an MOU for mitigation measures administrative (in addition to the ruling that the MOU was a contract, not a law). (*Worthington*, 130 Cal.App.4th at 1145; see also *W. W. Dean & Associates v. City of South San Francisco* (1987) 190 Cal.App.3d 1368, 1376-78 (although the original adoption of a Habitat Conservation Plan was a legislative act, the amendment thereof pursuant to the HCP and the Endangered Species Act was an administrative act not subject to referendum).)

5. In addition, if a vote of the people would interfere with essential governmental functions, including by seeking to impose procedural restrictions that would impair the legislative body's ability to carry it its duties, then the matter should not be considered legislative action (*Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1331.) For example, in *Citizens for Jobs and the Economy*, the Fourth District invalided an initiative to require, inter alia, voter approval of county decisions to convert military base, because the ordinance would unduly constrain the board of supervisors from carrying out its duties.

6. Don't be fooled by the oft-stated rule that "[a] public entity's award of a contract, and all of the acts leading up to the award, are legislative in character." (*San Diegans for Open Government v. City of San Diego* (2016) 245 Cal.App.4th 736, 739 (citations and internal quotation marks omitted).) This rule is commonly invoked for the purpose of determining whether a challenge to the contract is subject to review by petition for traditional or administrative mandate (under CCP sections 1085 or 1094.5). As the First District recently made clear, the case law invoking this rule does "not involve the legislative/administrative distinction as it pertains to election jurisprudence." *San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 532 & fn. 4.)[10]

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[9] While the McKevitt case is nearly 100 years old, this holding has neither been abrogated nor distinguished.

[10] In addition, if a vote of the people would interfere with essential governmental functions, then the electorate lacks the right to vote (irrespective of whether the action is legislative or administrative). (*Citizens for Jobs and the Economy v. County of Orange*

7. Similarly, don't conflate the legislative v. administrative test with the discretionary v. ministerial test.[11] Many non-legislative/administrative actions require the exercise of discretion. For example, the decisions on applications for a subdivision map, conditional use permit, or variance are non-legislative/administrative, and thus not subject to referendum. (*Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 518, 522-23; see also *Essick v. City of Los Angeles* (1950) 34 Cal.2d 614, 623.) But these decisions involve exercises of discretion and application of policy.[12] By contrast, differentiating between a discretionary and a ministerial act is not relevant to the determination of whether the electorate has a right to vote on a matter.

e. Processing Issues to Consider When Presented to with a Referendum (or Initiative).

At pages 19-23 below, we set forth a summary of Elections Code requirements applicable to petitioners' circulation of a referendum for presentation to the City, the City's acceptance, processing and consideration of the referendum petition, and the elections process.

First, the City Attorney and City Clerk should conduct an initial evaluation to determine if the petition meets the mandatory Elections Code requirements, e.g., as to timeliness, correct identifying information on each "section" of the petition, declaration of circulator, and that the petition includes the "full text" of the legislation (or purported legislation). If the petition fails to satisfy each of these mandatory requirements, the City Clerk has a ministerial duty to reject it. For example, if the petition failed to including exhibits incorporated by reference into the legislation (or purported legislation), the City Clerk has a ministerial duty to reject the petition. (*Defend Bayview Hunters Point Committee v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 858 (City Clerk properly exercised her ministerial duty to reject referendum petition that did not attach the 57-page redevelopment plan incorporated by reference into the adopting

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(2002) 94 Cal.App.4th 1311.) For example, in *Citizens for Jobs and the Economy*, the Fourth District invalided an initiative to require voter approval of county decisions to convert military base.

[11] "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment." (*Transdyn/Cresci v. City and County of San Francisco* (1999) 72 Cal.App.4th 746, 752.)

[12] Note also that "'[p]olicy' … is not synonymous with legislation." (*Worthington,* 130 Cal.App.4th at 1142.)

ordinance).)[13]

Second, if there is a potential question as to whether the subject of the petition concerns non-legislative action, the City Attorney should evaluate that issue. If you conclude the subject matter concerns administrative action, consider advising the City Clerk to reject the petition (rather than advising the City Council to do so). Two principal reasons:

1. The City Clerk's decision may be subject to an administrative appeal (depending upon your local ordinance). As such, the petitioners would be obligated to exhaust their administrative remedies by appealing to the City Council. If they do, then the City will have the opportunity to consider petitioners' contentions regarding whether the electorate has the right to vote on the matter and, if those contentions have merit, can take corrective action before litigation is filed. If petitioners do not appeal, then the superior court should rule that they failed to exhaust their administrative remedies (as the San Mateo Superior Court ruled in the San Bruno matter, discussed below).[14]

2. Whereas a city bears a heavy burden, in a pre-election challenge, to prove that the initiative or referendum is substantively invalid—it must make a "compelling showing" of illegality (see *Gayle v. Hamm* (1972) 25 Cal.App.3d 250, 255-56)—this rule does not apply to a petition regarding non-legislative acts. Since there is no constitutional right to initiative or referendum on a non-legislative act, there is no presumption in favor of deferring a challenge until after an election. (See, e.g., *City of San Diego v. Dunkl*, 86 Cal.App.4th at 399; *Lincoln Property Co. No. 41 Inc. v. Law* (1975) 45 Cal.App.3d 230, 233.) Accordingly, if the City determines that the petition concerns administrative action, its rejection of the petition—in lieu of either initiating a declaratory relief action or deferring a challenge until after an election—is proper.

2. San *Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524.

Our success in the trial and appellate courts with respect to a referendum petition that challenged a resolution approving the sale of real property illustrates much of the

[13] The "full text" requirement is pursuant to Elections Code section 9238, which provides in subsection (b) that "each section of the referendum petition shall contain (1) the identifying number or title, and (2) the text of the ordinance or the portion of the ordinance that is the subject of the referendum."

[14] Of course, this same analysis would apply to the City Clerk's rejection of a referendum petition for other reasons, e.g., the failure to timely submit or to attach the "full text."

foregoing analysis.

a. Statement of Facts.

(1) The City's Proceedings.

Over a 15-year period, the San Bruno City Council made several legislative decisions regarding the development of a hotel at a property fronting El Camino Real near the I-380 interchange. The legislative actions included the adoption of a Specific Plan for a 500-room, full service hotel followed by an amendment to the Specific Plan to reduce the size of the hotel to a 152-room, select service hotel.

In 2012, the City acquired the property for $1.4 million. Thereafter, the City pursued the sale of the site to a hotel developer, OTO Development, LLC (the "Developers").

Some members of the community (e.g., a union and its supporters, the "Petitioners")) thought the City should require that the hotel operate with union labor, despite the Specific Plan amendment paring down the project to a smaller, select service hotel. The Petitioners pursued their agenda by opposing the sale of the property. The City did not acquiesce to their demands.

On March 29, 2016, at a duly-noticed meeting, the City Council adopted a Resolution to sell the Property to the Developers for $3.97 million, and executed a Purchase and Sale Agreement ("PSA") the form of which was referenced in the Resolution and included with the Staff Report. The Petitioners circulated a referendum petition ("Referendum" or "Referendum Petition") seeking either the City Council's rescission of the Resolution or its placement of the Referendum on the ballot. On April 18, 2016, while the Petition was circulating, the City and the Developers executed the PSA.

On April 27, 2016, Petitioners timely submitted their Referendum Petition to the City. It appeared from the face of the Petition that it was in proper form and included a sufficient number of signatures to warrant examination and verification within the next 30 days. However, we (City Attorney Marc Zafferano and Special Counsel Kevin Siegel) identified two potential reasons for rejecting the Petition.

First, we evaluated whether the Resolution at issue was a legislative act subject to referendum. Our take was that it was not, which preliminary conclusion was supported by our initial research.

Second, we evaluated whether the Referendum failed to provide the full text of the Resolution. The Petitioners had attached the form of the PSA, which was included in the Staff Report and referenced in the Resolution, but which important two important exhibits, the Site Plan and legal description, and had a couple of blanks in the text. While the Resolution did not expressly state that the form of the PSA was incorporated therein, we expected that the Petitioners were nonetheless obligated to include the final and complete form of the PSA to fully inform those they requested to sign the Petition

as to the Council action that they sought to reverse.

For these two reasons, we determined that the City Clerk should reject the Petition. The City Attorney sent the City Clerk a brief letter so advising, citing each ground.

By letter dated May 17, 2016, the City Clerk informed Petitioners that "the City will not be taking further action on the referendum petition," because, as the City Attorney advised her, the Resolution was not a legislative act subject to referendum, and the Referendum Petition did not include the final version of the PSA.

Chapter 1.32 of the San Bruno Municipal Code ("SBMC") provides that, within 30 days, "[a] person aggrieved by an administrative action taken by an officer, board, commission, or other body of the city may appeal from the action to the city council by filing a written notice of appeal with the city clerk." (SBMC § 1.32.020.)

Petitioners did not file an administrative appeal of the City Clerk's rejection of their Referendum Petition.[15] Instead, on Monday, May 23, 2016, Petitioners wrote to the City Clerk and City Attorney seeking further explanation. Later that week, before Respondents replied to the letter, Petitioners filed this suit

(2) The Superior Court Proceedings.

On May 27, 2016, the Petitioners filed a Petition for Writ of Mandate ("Petition") seeking to reverse the City's rejection of the Referendum Petition. We answered on June 17, 2016, denying their claims and alleging, *inter alia*, that claims failed because Petitioners had not (1) exhausted their administrative remedies by appealing the City Clerk's decision to the City Council and (2) named the Developers as Real Parties-in-Interest. The Petitioners filed a First Amended Petition for Writ of Mandate that merely added the developers as Real Parties-in-Interest.

Petitioners asserted that (1) the City had a mandatory duty to process the Petition and, if the Council did not rescind the Resolution, to put it on the ballot, and (2) the approval of the PSA was a legislative act because included policy decisions, including to whom the property would be sold, for how much, and for what purposes.[16]

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[15] The City Clerk serves as the City's elections officer. (*Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 127.

[16] Petitioners argued in the Superior Court that the PSA constituted a development agreement, and therefore was subject to referendum. This argument failed in the Superior Court, and the Petitioners abandoned it on appeal.

We also argued, however, briefly, that Petitioners' attachment of the draft PSA to the Referendum Petition did not comply with the "full text" requirement. Judge Miram did not reach this issue. We abandoned it on appeal, given the strength of our primary arguments, that the Referendum had attached the form of the PSA included in the Staff

The San Mateo Superior Court (Judge Miram) held a court trial/writ hearing on July 28, 2016. On August 26, 2016, the Court ruled for the City, holding that Petitioners' action was barred by their failure to exhaust administrative remedies, and (2) even if not barred, the City properly rejected the Referendum Petition because it concerned non-legislative action.[17]

The Petitioners appealed to the First District Court of Appeal.

b. In a Published Decision, the First District Held that the Resolution Approving the PSA Was an Administrative Act Not Subject to Referendum

On appeal, we argued the following primary points (each of which is discussed above, at pages 9-11):

1. Petitioners' action was barred by their failure to administratively appeal the City Clerk's rejection of their Referendum Petition to the City Council. (We were hoping to prevail on the merits, and not solely on this ground. But we believed in the correctness of this argument, which logically is the first argument to make, and a win is a win.)

2. The City properly rejected the Petition because the adoption of the Resolution approving the PSA was an administrative act not subject to referendum.

    a. Because the electorate does not have the right to vote on non-legislative acts, there is no presumption in favor of deferring a decision until after an election (unlike when the question is whether the initiative is substantively valid, in which case the public agency must make a "compelling showing" that the measure should be kept of the ballot).

    b. Whereas the approval of a Development Agreement, which freezes zoning, is legislative, the approval of a contract to sell real property for private development is administrative.

    c. The cases in which the courts have held that the approval of a contract is legislative is limited to two strands:

        i. Contracts for public services, e.g., waste hauling franchise agreements (*Lindelli v. Town of San Anselmo*; *Empire Waste Management v. Town of Windsor*); and

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Report, and that the Resolution had not expressly stated that the PSA was *incorporated* into the Resolution by the reference to it.

[17] In the Superior Court, Judge Miram did not rule on the "full text" argument.

ii. Contracts to acquire property for public uses, e.g., for a city hall (*Hopping v. City of Richmond*), public park (*Reagan v. City of Sausalito*), or jail (*Citizens Against a New Jail*).

d. To rule that the PSA were legislative could lead to absurd results.

i. For example, the approval of a contract to purchase paper from Dunder Mifflin, or any other contract, could be deemed a legislative act subject to referendum, which would be an absurd legal conclusion and could lead to unreasonable interference in basic governmental operations.

ii. Consider also that, in order to provide the electorate time to submit a referendum petition, a resolution approving most contracts, perhaps all contracts, would arguably not be effective for 30 days. In and of itself, the delay would interfere with basic governmental functions.

e. The adoption of the Resolution approving the PSA was a non-legislative act.

i. The City Council had previously made its legislative decisions, when it adopted and amended the Specific Plan (which is a legislative act as confirmed by case law) which in which made land use decisions regarding the site, e.g., the size of the hotel.

ii. The decision to sell the property to the Developers implements that prior legislative action, and it does not contain new land use or other legislative decisions regarding the development of the site.[18]

The First District Court of Appeal ruled for the City.

The Court of Appeal grounded its decision in the generally-applicable analytical framework provided in numerous precedents, e.g. that "[t]he power to be exercised is legislative in its nature *if it prescribes a new policy or plan*; whereas, it is administrative in its nature *if it merely pursues a plan already adopted* by the legislative body itself, or some power superior to it." (*San Bruno Committee for Economic Justice v. City of San Bruno* (2017) 15 Cal.App.5th 524, 530 (citations and internal quotation marks omitted; italics in original).)

The Court rejected Petitioners' argument that the Resolution is necessarily

[18] The Developers' Brief, which the City joined, argued that to allow the Referendum to proceed to the ballot would interfere with essential governmental functions.

legislative because important decisions were made, such as the sales price and to whom to sell the site for hotel development. (*Id.* at 535-36.) The Court also distinguished the cases relied upon by Petitioners in which the public agency acquired property for public uses (e.g., *Hopping v. City of Richmond, Reagan v. City of Sausalito)* or entered into contracts for public services (e.g., *Lindelli v. Town of San Anslemo*). (*Id.* at 531-33.)

The Court held that the decision to sell the property to OTO was the final act in a long chain of decisions by the City, and thus not a legislative act. As the Court stated:

> We agree with the trial court that "[t]he power to sell property which implements prior legislative decisions regarding the development of property is an administrative, not legislative act." Resolution No. 2016-26 pursues an existing legislative plan. Long before the measure's adoption, the City Council took several legislative actions setting forth the manner in which The Crossing hotel site would be developed, including with respect to type of hotel, size, and room count, as well as selecting OTO as the developer after circulating an RFP. The City purchased the site in 2012, after already having decided to reduce the size of the potential hotel to 152 rooms. The City Council certified the SEIR and approved the Specific Plan amendment to conform to the potential hotel project. [Footnote.] These actions were legislative actions that set the stage for the PSA. That plaintiffs elected not to challenge these actions does not confer upon them the right to referendum now.

(*Id.* at 534.)

Finally, the Court concluded by commenting on the absence of authority favoring Petitioners' position, and declining to reach the remaining arguments (e.g., about exhaustion of administrative remedies and interference with essential governmental functions):

> Plaintiffs have not referred us to any authority for the proposition that a municipal contract to sell public land for private development constitutes a legislative act when the primary substantive decisions pertaining to the proposed development have already been made. We note Resolution No. 2016-26 itself does not include any new action to further amend the Specific Plan, adopt new legislation, or otherwise take legislative action. [Footnote.] Its essential purpose is to transfer the property to OTO in order to further already existing legislative policies put in place for the development of The Crossing hotel site. Accordingly, we conclude that the trial court properly declined to invalidate Bonner's refusal to process plaintiffs' referendum

petition. In light of our conclusions, we need not address the parties' remaining arguments.

(*Id.* at 536.)[19]

c. Conclusion.

This San Bruno decision is an important development in the law regarding when the electorate has the right to vote on resolutions approving contracts, particularly with respect to contracts to sell property. While we pushed for a decision that would provide a more defined set of rules to for cities to follow when presented with petitions seeking the electorate's approval regarding contracts and other presumably administrative matters, the decision does advance the law in this direction.

II. Referendum Processing Procedures – a Cheat Sheet

Set forth below are key rules governing referenda, including those set forth at Elections Code sections 9235-9247, which govern city referenda, and other Elections Code sections incorporated therein.

A. Process to Qualify Referendum Petition

1. Deadline for Submission. The petition must be submitted to the City's elections official, the City Clerk,[20] "during normal office hours, as posted, within 30 days of the date the adopted ordinance is attested by the city clerk or secretary to the legislative body."[21]

2. Form of the Petition.

   a. Identifying Information

      i. Title: Each page of the referendum petition shall state: "Referendum Against an Ordinance Passed by the City Council."[22]

[19] The Court also rejected Plaintiffs' reliance on cases describing the approval of a contract as legislative, in which the issue was whether the matter was reviewed as a traditional writ of mandate under Code of Civil Procedure section 1085, not whether the electorate had a right to vote on the issue. (*Id.* at 532 fn. 4.)

[20] The City Clerk is the City's elections official. See Elec. Code § 320.

[21] Elec. Code § 9237.

[22] Elec. Code § 9238(a).

ii. Each "section"[23] of the referendum petition shall contain (1) "the identifying number ***or*** title" of the ordinance **and** (2) "the text of the ordinance ***or*** the portion of the ordinance that is the subject of the referendum."[24] As to the latter requirement, this includes any and all attachments to the ordinance.[25] The ordinance attached to the petition should mirror the ordinance (including attachments) that was attested to by the City Clerk.

b. Declaration of Circulator

i. "[E]ach section of the petition" shall have a declaration attached "signed by the circulator of the petition … setting forth, in the circulator's own hand" (1) his or her name, (2) residential street address, and (3) the dates between which the signatures were obtained.

ii. Each declaration (again, each section must be accompanied by a declaration) must also state (1) the circulator witnessed the appended signatures, (2) "according to [his or her] best information and belief," each signature is genuine, and (3) the circulator is at least 18 years old.

iii. The declaration must be signed under penalty of perjury under California law, with the date and place of execution.

iv. The declaration constitutes "prima facie evidence that the signatures are genuine and that the persons signing are qualified voters." The presumption may be rebutted by an official investigation after the petition is accepted for filing.[26]

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[23] The term "section" refers to an identical part of the petition (identifying information, signatures, etc.) and is sometimes called a copy of the petition. (See *Hebard v. Bybee* (1998) 65 Cal.App.4th 1331, 1335-36; see also http://www.sos.ca.gov/elections/ballot-measures/how-qualify-initiative/initiative-guide/, accessed 3/20/18.)

[24] Elec. Code § 9238(b), emphasis added. Note the disjunctive "or." If the petition includes both descriptors, an error regarding either one may render the petition invalid. (*Hebard,* 65 Cal.App.4th at 1238-39.)

[25] *Defend Bayview Hunters Point*, 167 Cal.App.4th at 848-49 (petition for referendum defective because it did not attach the 57-page redevelopment plan incorporated by reference into the ordinance).

[26] Elec. Code §§ 104, 9022, 9238.

3. Acceptance of Petition Based on Prima Facie Showing of Requisite Number of Signatures.

   a. At least 10% of the City's voters must have signed the petition.[27] At the time the proponents seek to file the petition, the City Clerk makes a preliminary determination about whether this threshold is satisfied (and shall return the petition to the circulator if not accepted), as follows:

      i. To determine the number of eligible voters, the City Clerk must refer to the County elections official's last report of registration to the Secretary of State.

      ii. When determining whether the 10% threshold is met, only a "prima facie" showing is required. In other words, the City Clerk does not at this time determine whether the signatures are valid (including whether the signers printed their names, are qualified voters, and submitted other requisite information, such as their residence).[28] Instead, all the City Clerk needs to do is make a quick count (for example, if there are 15 signatures per page, multiply the number of pages by 15 to come up with the initial total for this step).

   b. In addition, the entire petition (i.e., all sections) must be submitted at once. (Once filed, the proponents cannot add anything.)[29]

4. Signature Examination/Verification.

   a. After the petition is filed, the City Clerk must examine the petition and certify the results within 30 days, excluding Saturdays, Sundays and holidays.[30] The City Clerk determines whether the petition is signed by the requisite number of voters either by reviewing duplicate files of signatures or facsimiles of voter signatures. The City Clerk also determines whether the signers provided their printed name and residential address .[31]

   b. After examination, the City Clerk must:

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[27] Elec. Code § 9237.

[28] Elec. Code §§ 9022, 9210, 9238, 9239.

[29] Elec. Code §§ 9210, 9239.

[30] Elec. Code §§ 9114, 9240. There is an optional "sampling" methodology for signature verification set forth in section 9115. Please contact the City Attorney's office if you need clarification as to how that process works.

[31] Elec. Code §§ 100, 9114, 9240.

i. Attach a certificate of the results of the examination to the petition.

ii. Notify the proponents of the results.

iii. If the petition is sufficient, certify the results to the City Council at the next regular meeting. If the petition is insufficient, no action must be taken.[32]

5. Effect on Ordinance. If a petition for a referendum is timely filed, it suspends the operation of the ordinance, and the Council must reconsider the ordinance.[33]

6. Action by Council.

a. The City Council may either repeal the ordinance or submit it to the voters at the next regular municipal election occurring not less than 88 days later, or at a special election called not less than 88 days later.[34]

b. The Elections Code does not dictate when the City Council must act to repeal the ordinance or place it on the ballot, i.e., whether it must be at the same meeting at which the City Clerk certifies the results.[35] However, it is clear that the Council has a mandatory duty to act in a timely fashion.[36]

c. If submitted to a vote, the ordinance does not become effective unless it obtains majority voter approval.[37]

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[32] Elec. Code §§ 100, 9114, 9115, 9240. Note that technical, nonsubstantive deficiencies do not render the referendum deficient. (*Hebard*, 65 Cal.App.4th at 1339.) The courts narrowly apply this rule, reasoning that most of the rules are substantive and important to the election process. (See *id.*)

[33] Elec. Code § 9237.

[34] Elec. Code §§ 9114, 9115, 9241.

[35] See Elec. Code §§ 9240, 9241. By contrast, when the City Clerk certifies that an initiative has qualified, the City Council must adopt the ordinance at that meeting or within 10 days, submit the ordinance to the electorate, or order a report pursuant to section 9212 and then take action within 10 days. (Elec. Code § 9215.) The referendum provisions neither include a similar requirement nor incorporate the foregoing requirements. (See Elec. Code § 9243 (incorporating the election procedures of sections 9217-9225, re: initiatives, but not section 9215, re: timing for Council action.)

[36] See *deBottari,* 171 Cal.App.3d 1204.

[37] Elec. Code §§ 9114, 9115, 9241.

d. If the ordinance is repealed by the Council or by the electorate, it shall not be reenacted for one year from the date of its repeal or voter disapproval.[38]

7. Election Schedule.

a. If a referendum qualifies for the ballot, the generally applicable rules for holding the election (e.g., re: impartial analysis and ballot arguments, and re: the election itself) apply.[39]

b. The ordinance cannot go into effect unless "a majority of the voters voting on the ordinance vote in favor of it."[40]

B. Election Process

As mentioned above, the rules regarding the ballot materials and the election apply. Thus, if the referendum qualifies for the ballot, the City Attorney will prepare an impartial analysis, and proponents and opponents may submit ballot arguments.[41] If any false or misleading information is submitted, the City or an interested voter may seek a writ of mandate or injunction to correct the material, based on clear and convincing evidence.[42]

The Elections Code describes the form of the ballot for referenda: "Shall the statute (or ordinance) (stating the nature thereof, including any identifying number or title) be adopted?" Opposite the statement of the statute or ordinance to be voted on and to its right, the words "Yes" and "no" must be printed on separate lines, with voting squares.[43]

C. Timeline Summary

- Petition shall be accepted for filing if based on a prima facie showing 10% of the City's voters have signed and the petitions include the proper declaration(s) of circulator(s).

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[38] Elec. Code §§ 9114, 9115, 9241.

[39] Elec. Code § 9237.5 ("The provisions of this code relating to the form of petitions, the duties of the county elections official, and the manner of holding elections shall govern the petition procedure and submission of the ordinance to the voters"); Elec. Code § 9243 ("Elections pursuant to this article shall be held in accordance with Sections 9217 to 9225, inclusive").

[40] Elec. Code § 9241.

[41] Elec. Code §§ 9280, 9282.

[42] Elec. Code § 9295. Note that tight timeliness apply.

[43] Elec. Code § 13120.

- Clerk determines validity of petition – 30 days after petition filed – *not counting Saturdays, Sundays, and holidays*.
- If the petition is sufficient, Clerk certifies the petition to the City Council – at the next Council meeting after validity determination made.
- City Council *either* repeals the ordinance *or* sets the matter for a public vote.
- Public votes on the ordinance – at *either* the next regular election not less than 88 days after the Council's order for a public vote *or* at a special election called for a date no sooner than 88 days after the Council's order.

General Municipal Litigation Update

Thursday, May 3, 2018 General Session; 10:45 a.m. – Noon

Javan N. Rad, Chief Assistant City Attorney, Pasadena

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

Notes:

General Municipal Litigation Update

Cases Reported from September 15, 2017
Through April 12, 2018

Prepared by
Javan N. Rad
Chief Assistant City Attorney
City of Pasadena

League of California Cities
2018 City Attorney's Spring Conference

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I. Land Use

***Weiss v. People ex rel. Dept. of Transportation*, 20 Cal.App.5th 1156 (2018)**

Holding: CCP Section 1260.040, which allows for motions on compensation issues in eminent domain cases, cannot be used to bring a motion to decide a liability issue in an inverse condemnation case.

Facts: Four separate property owners, alleging noise, viewshed, and other concerns relating to a freeway wall in San Clemente, filed an inverse condemnation action against CalTrans and the Orange County Transportation Authority. As the litigation proceeded, CalTrans and OCTA filed motions seeking to dismiss the inverse condemnation claim, on the ground that the Plaintiffs could not establish liability. Rather than seek dismissal through, for example, a Motion for Summary Judgment, CalTrans and OCTA filed the motion under CCP Section 1260.040, which allows for pretrial resolution of "issue[s] affecting the determination of compensation" in eminent domain cases. Although the Plaintiffs challenged the motions as being improper, the trial court considered the motion on the merits, and found Plaintiffs had not established liability in CalTrans and OCTA, dismissing the case. Plaintiffs appealed.

Analysis: The Court of Appeal reversed, finding CCP Section 1260.040 inapplicable to what is (a) a liability issue; (b) in an inverse condemnation case. The court disagreed with *Dina v. People ex rel. Dept. of Transportation*, 151 Cal.App.4th 1029 (2007) (viewing the statute as applicable to inverse condemnation actions). The court found that an approach like that approved in *Dina* would improperly "engraft, *ipse dixit*, a new pretrial procedure in the nature of a nonsuit motion to decide the issue of liability in inverse condemnation cases." The court further explained that it would not "import" Section 1260.040 into inverse condemnation cases, as such an approach is not supported by the text of the statute, the broader statutory framework, or legislative history.

***City of Vallejo v. NCORP4, Inc.*, 15 Cal.App.5th 1078 (2017)**

Holding: City entitled to injunction shutting down marijuana business for failure to pay marijuana tax.

Facts: In 2011, voters approved a city-sponsored ballot measure imposing a tax on marijuana businesses. Marijuana businesses were not permitted under zoning rules, but over 20 illegal marijuana businesses were still operating at the time. In 2015, when over 40 marijuana businesses were operating, the City Council established a procedure to allow existing marijuana businesses with "limited civil immunity," if they obtained tax certificates and paid taxes required under the 2011 ballot measure. The Defendant had paid a single quarterly payment of marijuana tax in 2012. The city then sued the Defendant for continued operation of an illegal marijuana business. The trial court ultimately denied the city's motion for a preliminary injunction. The city appealed.

Analysis: The Court of Appeal reversed, directing the trial court to enter a preliminary injunction. The court found that the city may lawfully preclude operation of a marijuana business that has a history of unpaid taxes, such as Defendant's business. The court noted that "past compliance shows a willingness to follow the law, which suggests future lawful behavior." The court also held that the *ex post facto* clauses of the California and U.S. Constitutions did not apply, as they only apply to criminal statutes punishing conduct prior to a law's enactment – and not to a local ordinance regulating marijuana businesses.

***Urgent Care Medical Services v. City of Pasadena*, ___ Cal.App.5th ___, 2018 WL 1149371 (2018)**

Holding: City entitled to injunction shutting down medical marijuana dispensaries, where city's permissive zoning scheme established dispensaries as a nuisance *per se*.

Facts: The city employs a permissive zoning system, where zoning prohibits any land use not specifically set forth in the zoning code. Medical marijuana

dispensaries are not permitted uses in the zoning code. The zoning code further provides that non-permitted uses are nuisances. Plaintiffs, the operators of several medical marijuana dispensaries, agreed that, in general, cities may prohibit dispensaries. However, Plaintiffs took the position that the zoning code did not sufficiently state that a dispensary is a nuisance, precluding a finding of nuisance *per se*. The city sought injunctions shutting down the Plaintiffs' dispensaries, which the trial court granted. Plaintiffs appealed.

Analysis: The Court of Appeal affirmed. The court noted that the city's permissive zoning structure is sufficient to establish a nuisance *per se*. This *UCMS* decision follows existing case law allowing cities to ban dispensaries, such as *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 56 Cal.4th 729 (2013). The *UCMS* case is still helpful, however, as it is one of the few post-Proposition 64 cases to consider a local ban on dispensaries. The decision therefore clarifies that, while most marijuana activities may now be decriminalized through Proposition 64, local land use control over cannabis businesses remains intact.

***Teixeira v. County of Alameda,* 873 F.3d 670 (9th Cir. 2017) (*en banc*)**

Holding: County's denial of conditional use permit did not violate potential gun store customers' Second Amendment rights. Additionally, the Second Amendment does not confer a freestanding right of a business to sell firearms.

Facts: Plaintiffs applied for a conditional use permit to operate a gun store, which the Zoning Board granted. A local homeowners association challenged the decision to the County Board of Supervisors, which overturned the Zoning Board and revoked the CUP. Plaintiffs filed suit, alleging a series of constitutional violations. Of note, the Plaintiffs alleged the county prevented potential customers from buying a gun, and by prohibiting the Plaintiffs from selling firearms. The District Court granted the county's Motion to Dismiss, without leave to amend. Plaintiffs appealed. A three-judge panel of the Ninth Circuit, in relevant part, reversed the dismissal of the Second Amendment claims, remanding for further

proceedings. The Ninth Circuit granted *en banc* review to address the Second Amendment claims alone.

Analysis: The *en banc* panel, by a 9-2 vote, affirmed the District Court's dismissal. As to the Plaintiffs' potential customers, the panel found that gun buyers have no right to have a gun store in a particular location, so long as access to firearms is not meaningfully constrained. As to the Plaintiffs themselves (proposing to operate the gun store), after reviewing a detailed history of English and American law on the right to bear arms, the panel concluded that the acting of selling firearms is not part of the Second Amendment's right to bear arms. In other words, the panel held that the Second Amendment does not confer a "freestanding right" to sell firearms.

***Epona, LLC v. County of Ventura*, 876 F.3d 1214 (9th Cir. 2017)**

Holding: Requirement of conditional use permit for outdoor weddings, without sufficient guidance to permitting officials, and without a time limit to issue a permit, violates the First Amendment.

Facts: A county ordinance provided that, to hold a temporary outdoor event in agriculturally-zoned property, a conditional use permit is required. The CUP scheme provides that a permit "shall" issue if relevant standards are satisfied. Here, the Plaintiff, who owned a 40-acre property, created a garden area and wished to rent out for wedding ceremonies. Plaintiff applied for a CUP to conduct up to 60 temporary outdoor events per year, including weddings. The Planning Commission denied the application. The County Board of Supervisors split its vote, which had the effect of affirming the denial. Plaintiff then filed suit, alleging, among other things, a violation of the First Amendment. The District Court granted the county's Motion to Dismiss, and the Plaintiff appealed.

Analysis: The Ninth Circuit reversed, in relevant part, finding that the ordinance violates the First Amendment. First, the ordinance gives permitting officials insufficient guidance in the area of five separate conditions, such as consistency with the general plan and various compatibility requirements. The court held that

these conditions were not "definite and specific." Second, the ordinance does not identify a time period within which a CUP application must be decided. The court found that the two aspects of the ordinance, taken together, confer unbridled discretion on permitting officials in violation of the First Amendment.

II. Civil Rights and Torts

***District of Columbia v. Wesby*, ___ U.S. ___ 138 S.Ct. 577 (2018)**

Holding: Officers had probable cause to arrest individuals for unlawful entry at a raucous party at what appeared to be a vacant house, and officers would be entitled to qualified immunity even if probable cause were lacking, under the facts.

Facts: Officers responded to a complaint of loud music and illegal activities at a vacant house. When the officers arrived, the house looked like a vacant property, and did not have furniture downstairs, other than a few chairs. The officers observed a makeshift strip club operating in the living room, and in a bedroom, the officers observed a naked woman and several men, in the room with a bare mattress on the floor. 21 people inside the house did not offer a clear or consistent story of why they were at the house. Two women said a woman named "Peaches" or "Tasty" was renting the house, and gave them permission to be there. The officers were not able to get Peaches' real name, but two officers separately called Peaches on her phone, and Peaches refused to come to the house. Peaches finally admitted to officers that she did not have permission to use the house. The 21 partygoers were arrested for unlawful entry, but the charges were ultimately dropped. 16 of the 21 partygoers filed suit, alleging false arrest under the Fourth Amendment. The District Court granted the partygoers' Motion for Summary Judgment, and, at trial, a jury awarded the partygoers $680,000 in damages and over $1 million in fees. The District of Columbia Circuit affirmed, and the U.S. Supreme Court granted certiorari.

Analysis: The Supreme Court reversed, finding the officers had probable cause to arrest the partygoers. The officers made an "entirely reasonable inference" that the

partygoers were making use of the vacant house for a party, noting that "[m]ost homeowners do not live in near-barren houses." The court also emphasized that a probable cause analysis requires courts to look at "the whole picture," which suggested criminal activity – not individual facts, standing alone. Additionally, the court found that, even if the officers lacked probable cause, they would be entitled to qualified immunity. The court noted there was no controlling case establishing a lack of probable cause here – and, in fact, "several precedents suggest[] the opposite."

***Kisela v. Hughes*, ___ U.S. ___, 138 S.Ct. 1148 (2018) (*per curiam*)**

Holding: Police officer entitled to qualified immunity where suspect was armed with a large knife, was within striking distance of her roommate, ignored officers' orders to drop the knife, and the incident unfolded in less than one minute.

Facts: Police officers responded to a 911 call that a woman was hacking a tree with a kitchen knife. Plaintiff emerged from the house with a large kitchen knife, and she matched the description of the woman who was seen hacking the tree. Plaintiff walked toward her roommate and stopped, no more than six feet away from her. The officers told Plaintiff to drop the knife at least twice. Plaintiff's roommate then said "take it easy" to Plaintiff and the officers, and Plaintiff appeared calm, albeit not responsive. One officer then shot Plaintiff four times, and officers then handcuffed Plaintiff, who suffered non-life-threatening injuries. The entire incident lasted less than one minute. After the fact, it was learned that Plaintiff, in an effort to seek attention, has "episodes" where she acts inappropriately, such as threatening to kill her roommate's dog, Bunny. Plaintiff filed suit, alleging that the officer used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment in favor of the officer. The Ninth Circuit reversed the grant of summary judgment. Plaintiff then petitioned the U.S. Supreme Court for certiorari.

Analysis: The Supreme Court granted certiorari, and issued a 7-2 *per curiam* opinion. The court found the officer was entitled to qualified immunity. The officer had "mere seconds" to assess the Plaintiff's potential danger to the

roommate. Plaintiff was just seen hacking a tree with a kitchen knife, and was erratic enough to cause a bystander to call 911. Plaintiff also failed to acknowledge at least two commands to drop the knife. Officers are not required to anticipate court decisions that do not yet exist, "where the requirements of the Fourth Amendment are far from obvious." Here, the court found that a reasonable officer could have believed that Plaintiff posed an immediate threat to her roommate.

***Thompson v. Rahr*, 885 F.3d 582 (9th Cir. 2018)**

Holding: Deputy sheriff entitled to qualified immunity where he pointed his gun and threatened to kill Plaintiff, who was not handcuffed but was complying, during a felony arrest arising from a nighttime traffic stop.

Facts: A deputy sheriff pulled over Plaintiff for traffic violations. When the deputy ran Plaintiff's information, he discovered Plaintiff had a suspended driver's license, that he was a convicted felon, and his most recent felony was for possessing a firearm. The deputy then decided to arrest the Plaintiff, and asked Plaintiff to exit his vehicle. Plaintiff then sat on the bumper of the patrol car, while the deputy waited for backup. After backup arrived, the deputy then saw a loaded gun in an open garbage bag in the rear floorboard of the Plaintiff's vehicle. Plaintiff, who was not yet handcuffed, alleged that the deputy pointed his gun at Plaintiff's head, demanded Plaintiff surrender, and threatened to kill him if he did not. Plaintiff complied and was arrested for being a felon in possession of a firearm. A state court later dismissed the criminal charges against Plaintiff. Plaintiff filed suit, alleging that the deputy used excessive force in violation of the Fourth Amendment, in pointing his gun at Plaintiff, and threatening to kill him. The District Court dismissed the Plaintiff's claims through a Motion for Summary Judgment, finding the deputy was entitled to qualified immunity. Plaintiff appealed.

Analysis: The Ninth Circuit affirmed. At the outset, the court noted that, accepting Plaintiff's allegations at the summary judgment stage, it was objectively unreasonable for the deputy to point his gun and threatened to kill Plaintiff. The

Plaintiff was under control, and he was not in close proximity to an accessible weapon. However, the law was not clearly established that every reasonable officer would have known they were violating the Constitution. The deputy was conducting a nighttime felony arrest arising from a traffic stop, a gun was found at the scene, Plaintiff did have a prior felony firearm conviction, and Plaintiff was taller and heavier than the deputy.

***Rodriguez v. Dept. of Transportation*, ___ Cal.App.5th ___, 2018 WL 1514987 (2018)**

Holding: "Discretionary approval" element of design immunity is satisfied even where engineers did not consider the safety feature the Plaintiff asserts would have prevented injury.

Facts: Plaintiff was a passenger in a pickup truck on a state highway. The truck veered onto the shoulder and off the road to the right, then struck the end of a guardrail, went over an irrigation ditch, and came to rest, catching fire with the occupants inside. Another passenger died, and Plaintiff and the driver were injured. Plaintiff filed suit against Caltrans, alleging a dangerous condition of public property cause of action. Plaintiff asserted that the guardrail was inadequate, and the roadway did not have warning features, such as a "rumble strip," for drivers who veer onto the shoulder. Caltrans moved for summary judgment, asserting design immunity, supported by design plans from 1992, 2002, and 2011. Plaintiff did not dispute that Caltrans engineers had discretionary authority to approve the plans. However, more specifically, Plaintiff pointed out that Caltrans engineers did not even consider rumble strips – and that they therefore did not exercise their discretion, in that regard, to be entitled to design immunity. The trial court rejected Plaintiff's argument, and granted summary judgment for Caltrans, finding design immunity applied. Plaintiff appealed.

Analysis: The Court of Appeal affirmed. The court noted that Caltrans failure to consider rumble strips is irrelevant to discretionary approval element of design immunity. The court found that Plaintiff's argument over Caltrans' failure to consider rumble strips was "too narrow," and the wisdom of Caltrans design

decision is not reviewed through the discretionary approval element of design immunity. Here, the plans were approved by an engineer with discretionary authority. And the plans included the alleged dangerous feature – a paved highway without rumble strips. Therefore, Caltrans proved it made a decision – to build the road with a bare shoulder – which satisfies the discretionary approval element.

III. Pensions

***Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.*, 19 Cal.App.5th 61 (2018) (rev. granted, 3/28/18)**

Holding: Impairment of vested rights of public employees may only be accomplished through "compelling evidence" that the impairment bears a material relation to the successful operation of a pension system. Rising pension costs alone are generally insufficient.

Facts: In 2012, Governor Brown signed into law the Public Employee Pension Reform Act of 2013 and related legislation to address a variety of pension issues. In particular, PEPRA modified the calculation of "compensation earnable" under Government Code Section 31461. Various employees and unions in three counties challenged the constitutionality of PEPRA, as applied to employees hired prior to PEPRA's 2013 effective date (legacy members). In a consolidated action, the trial court ruled on a series of legal issues, and a number of parties appealed.

Analysis: In relevant part, the Court of Appeal concluded that PEPRA only modified the County Employees Retirement Law of 1937 (and did not change it) relating to two of the four challenged types of compensation (on-call and standby pay). The court then sought to ascertain whether the changes to these two types of compensation were a reasonable modification of existing law, or whether they impaired the vested rights of legacy members. However, since the trial court did look at this issue, the Court of Appeal remanded for consideration of whether there is "compelling evidence" that the impairments bear a material relation to the successful operation of a pension system. The court also noted that, generally

speaking, rising pension costs alone are not sufficient to impair vested rights. In requiring a more individualized analysis of an impairment, the court declined to follow the more generalized approach suggested in *Marin Assn. of Public Employees v. Marin County Employees' Retirement Assn.*, 2 Cal.App.5th 674 (2016) (rev. granted 11/22/16).

IV. Propositions 218/26

City of San Buenaventura v. United Water Conservation District, 3 Cal.5th 1191 (2017)

Holding: Groundwater pumping charges are not property-related charges, and are therefore not subject to Proposition 218.

Facts: The city filed suit to challenge a series of groundwater pumping charges imposed by United Water for their conservation and management services to augment groundwater supplies. The charges are assessed by virtue of Water Code Section 75594, which requires such fees for non-agricultural use of groundwater to be at least three times the fee imposed on agricultural users. However, the city argued the charges violate, among other things, Proposition 218. The trial court ruled in the city's favor, ordering refunds of over $1.3 million for a two-year period, plus interest. The Court of Appeal reversed, ruling in favor of United Water, and the California Supreme Court granted review.

Analysis: The Supreme Court affirmed, in part, and reversed, in part. The court held that groundwater pumping charges are not property-related charges, and fall outside of article XIII D of the California Constitution, added by Proposition 218. Rather, the charges are only imposed on the city because the city extracts groundwater that it manages for the benefit of the public. The court then found that Proposition 26 imposes two separate requirements for (non-tax) fees; namely, that (a) the fee is justified by the cost of service; and (b) the payor of the fee is charged a reasonable relationship to the burdens on or the benefits received from

the service. The court held the Court of Appeal failed to consider the latter Proposition 26 requirement, and remanded for further proceedings on that issue.

V. Contracts

***San Diegans for Open Government v. Public Facilities Financing Authority of the City of San Diego*, 16 Cal.App.5th 1273 (2017) (rev. granted, 1/24/18)**

Holding: Allegation of interest on behalf of taxpayer who is a city resident is sufficient to confer organizational interest standing to challenge city contract under Government Code Section 1090.

Facts: The city and its public financing authority adopted a resolution authorizing the issuance of bonds to refund and refinance the remaining amount owed by the city on bonds used to construct the Petco Park baseball stadium. Thereafter, Plaintiff, a non-profit allegedly comprised of taxpayers in the city filed suit, challenging the validity of the bonds. Plaintiff alleged that one or more members of the financing team that participated in the bond transaction had a financial interest in the sale of bonds, in violation of Government Code Section 1090. Prior to trial starting, trial court determined, as a matter of law, that Plaintiff lacked standing to bring a Section 1090 claim. The court concluded Plaintiff was not a "party" to the bond transaction, as that term is defined in Government Code Section 1092. Plaintiff appealed.

Analysis: The Court of Appeal reversed. The court concluded that Section 1092's reference to "any party" means any litigant with an interest in the contract sufficient to support standing. To that end, the court held that Plaintiff had standing, through its interest on behalf of a taxpayer who was a resident of the city. However, the court noted that recent cases have reached "somewhat conflicting conclusions" in this area of standing to bring a Section 1090 action.

***West Coast Air Conditioning Co., Inc. v. California Department of Corrections and Rehabilitation*, 21 Cal.App.5th 453 (2018)**

Holding: Unsuccessful bidder for public works contract was entitled to award of bid preparation costs under promissory estoppel theory, where contract award was set aside by trial court.

Facts: CDCR sought bids for a public works contract, and obtained bids from Hensel Phelps for $88 million, from Plaintiff for $98 million, and from four other bidders. Both HP's and Plaintiff's bids were less than CDCR's engineer's estimate of $103 million. CDCR awarded the contract to HP, and Plaintiff filed suit. Plaintiff alleged that HP's bid had myriad defects, including mathematical errors, that materially affected HP's bid price, and that CDCR, as a matter of law, was prevented from waiving the defects. The trial court granted Plaintiff's motion to set aside CDCR's award to HP. After trial, the court awarded Plaintiff $250,000 for its bid preparation costs against CDCR, under the equitable theory of promissory estoppel. CDCR appealed.

Analysis: The Court of Appeal affirmed the award of bid preparation costs to Plaintiff under promissory estoppel. A bidder deprived of a public contract because of a "misaward" has neither a tort nor a contract action, but rather, must rely on promissory estoppel. Here, the court concluded that it would be inadequate to just set aside CDCR's award of the HP contract, without awarding either (a) the contract to Plaintiff, who was the lowest responsive bidder; or (b) damages equal to Plaintiff's bid preparation costs. Here, the court noted it was "quite clear" that neither party is interested in a contractual relationship with the other, so it concluded the trial court properly awarded the Plaintiff its bid preparation costs.

VI. Elections

***San Bruno Committee for Economic Justice v. City of San Bruno*, 15 Cal.App.5th 524 (2017)**

Holding: Resolution authorizing sale of property, which implemented prior legislative decisions, is an administrative act, not subject to referendum.

Facts: In 2001, the city certified an environmental impact report approving a specific plan for a former U.S. Naval facility site, calling for a hotel and retail space. In 2012, the city purchased the site for $1.4 million. The city then selected a hotel developer through a request-for-proposal process. In 2016, the City Council adopted a resolution authorizing the execution of a $3.9 million purchase and sale agreement where a hotel developer would purchase the property. The city paid no subsidy or public funds to the developer. Plaintiffs filed signatures supporting a referendum petition challenging the 2016 resolution. The city declined to process the referendum petition. The city took the position that the 2016 resolution was not a legislative act, and therefore not subject to a referendum. Plaintiffs filed a petition for writ of mandate, which the trial court denied. Plaintiffs appealed.

Analysis: The Court of Appeal affirmed. The power of referendum applies only to legislative acts – not to executive or administrative acts. Here, the court noted that the resolutions were not done in the exercise of legislative power. Rather, the selling of the property implemented prior legislative decisions – making the resolutions administrative, not legislative, acts. The agreement authorized by the 2016 resolution merely pursues an existing legislative plan. It mirrors the development criteria discussed in the specific plan. The city had already purchased the property back in 2012. The site would be developed by a hotel developer already selected through an RFP process. The city was selling land to a private developer, and no subsidy was provided. The hotel developer would be engaging in a purely private business.

***Save Lafayette v. City of Lafayette*, 20 Cal.App.5th 657 (2018)**

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

Facts: The City Council amended its general plan to allow for a residential development in an area formerly designated as administrative and office space. One month later, the City Council approved an ordinance changing the

zoning designation of the area to residential, consistent with the (previously-approved) general plan amendment. Plaintiffs filed a referendum challenging the approval of the zoning ordinance. The City Council refused to repeal the ordinance or to place it on the ballot. The city argued that a repeal of the ordinance would create an inconsistency between the zoning designation and the general plan. Plaintiffs filed a petition for writ of mandate, which the trial court denied. Plaintiffs appealed.

Analysis: The Court of Appeal reversed, finding the referendum should have been submitted to the voters. The court noted that the referendum does not seek to enact a new or different zoning ordinance. The act of putting a referendum on the ballot merely maintains the status quo – which, here, is a zoning ordinance that was inconsistent at the time the City Council amended the general plan. In this regard, the court followed *City of Morgan Hill v. Bushey*, 12 Cal.App.5th 34 (2017) (rev. granted 8/23/17). The court further stressed the need for cities to amend its general plan and any conflicting zoning ordinances concurrently, to avoid the result of creating an inconsistent zoning ordinance.

VII. Public Records

Labor & Workforce Development Agency v. Superior Court, 19 Cal.App.5th 12 (2018)

Holding: Index of responsive documents is exempt from disclosure under Public Records Act through deliberative process privilege. Additionally, certain materials confidentially provided by Legislative Counsel to client state agency are also exempt from disclosure, under the work product privilege.

Facts: The Legislature passed AB 1513 in 2015, which revised rules governing the payment of piece-rate compensation, building on two 2013 appellate court decisions. In response to the 2013 court decisions, the Governor directed the Labor & Workforce Development Agency to take the lead in drafting legislation to address the court decisions. The Agency also sought confidential input from key

business and labor stakeholders. Two agricultural businesses made public records requests to the Agency, essentially seeking documents that would include who communicated confidentially with the Agency, which took the lead in formulating the policies enacted in AB 1513. After a series of hearings and orders, the trial court ordered the Agency to produce (a) an index of responsive documents that identifies the author, recipient, and general subject matter; and (b) material that the Agency contended was subject to the attorney work product privilege. The Agency petitioned the Court of Appeal for review.

Analysis: The Court of Appeal issued a writ of mandate, ordering the trial court to vacate its prior orders. The court found that revealing even the identities of the persons whom the Agency confidentially communicated with in gathering information to draft AB 1513, would run afoul of the deliberative process privilege. Such disclosure would "tend to dissuade stakeholders on issues subject to future legislative efforts from commenting frankly, or at all, on matter which only varying viewpoints can provide a more complete picture." Additionally, the court found the Legislative Counsel's attorney-client relationship with the Governor extends to the Agency, which acted at the Governor's direction in formulating AB 1513. Here, the Legislative Counsel confidentially sent drafts of AB 1513, legal opinions, and recommendations to the Agency. The court found the work product privilege to have not been waived – as the Agency was the client for receiving drafting assistance and advice on AB 1513.

City Trees and Urban Forests: Understanding Inverse Condemnation Liability

Thursday, May 3, 2018 General Session; 10:45 a.m. – Noon

Robert C. Ceccon, Richards, Watson & Gershon
Ann Sherwood Rider, Assistant City Attorney, Pasadena

Notes:_____

CITY TREES AND URBAN FORESTS: UNDERSTANDING INVERSE CONDEMNATION LIABILITY

Prepared by:

Robert C. Ceccon, Richards, Watson & Gershon

Ann Rider, Assistant City Attorney, City of Pasadena

I. INTRODUCTION

Last year, in *Mercury Casualty Company v. City of Pasadena*, 14 Cal.App.5th 917 (2017), *reh'g denied* (Sept. 15, 2017), *review denied* (Nov. 15, 2017) ("*Mercury Casualty*") the California Court of Appeal decided whether a tree was a "work of public improvement" for purposes of inverse condemnation liability. Although two prior California appellate decisions touched on that issue, *Mercury Casualty* was the first California appellate decision to examine that question in detail.

In *Mercury Casualty*, the Court considered a trial court ruling which held that the City of Pasadena ("Pasadena" or "City") was liable for damage that a City-owned tree caused when it fell in a windstorm in which winds reached 101 mph. The trial court held that Pasadena was liable for damage simply because its tree was close enough to strike the adjacent house, and that the City was liable regardless of the reason it fell.

The trial court further found that Pasadena's Ordinance creating an urban forest was a "design" that satisfied the inverse condemnation requirement that damage be caused by a work of public improvement "as deliberately designed and constructed." In essence, the trial court found that Pasadena's urban forest was one large work of public improvement, and that (presumably) every tree in that forest could give rise to an inverse condemnation claim. Thus, according to the trial court, if a branch fell from one of the approximately 60,000 trees in its urban forest, the City would be liable *regardless of the cause*. Based on the trial court's ruling, if a drunk driver ran into a tree and caused a branch to fall on a parked car, Pasadena would be liable in inverse condemnation. Similarly, if the largest recorded earthquake in the history of the world struck California, with Pasadena at its epicenter, the City would be strictly liable for damage from every falling tree.

The City appealed. In *Mercury Casualty*, the Court was presented with novel questions regarding the scope of inverse condemnation liability under Article 1, Section 19 of the California Constitution. These questions included:

1. Whether a city tree in a public right of way is a work of public improvement even though there was no record of who planted it;
2. Whether, in analyzing causation, a regulatory ordinance creating an urban forest is a "design of a public project";
3. Whether negligent maintenance can give rise to a claim for inverse condemnation; and
4. Whether inverse condemnation liability can be imposed where there is no evidence that damage was substantially caused by a tree "as deliberately designed or constructed".

The Court in *Mercury Casualty*, answered three of these questions in a manner favorable to public entities, and deferred ruling on the fourth. It found:

1. In order for a tree to be a work of public improvement, it must be "deliberately planted by or at the direction of the government entity as part of a planned project or design serving a public purpose, such as to enhance the appearance of a public road." *Mercury Casualty*, *supra*, 15 Cal.App.5th at p. 928.
2. Pasadena's ordinance creating an urban forest "does not constitute a design for a public project or improvement, nor does it covert [the tree that fell] into a work of public improvement, that subjects the City to inverse condemnation liability." (*Id*. at p. 930.)

3. "To establish an inverse condemnation claim based on a government entity's maintenance of one of its improvements, the property owner must show that the plan of maintenance was deficient in light of a known risk inherent in the improvement." (*Id*. at pp. 930-931.)

Because the *Mercury Casualty* Court found no work of public improvement, no design, and no negligent plan of maintenance, it did not decide the fourth question concerning whether the damage caused by the falling tree was a result of its "deliberate design and construction." It is possible that this issue may be decided in the future, and this paper will discuss how best to address it if it arises.

II. RELEVANT FACTS OF *MERCURY CASUALTY*

The Court in *Mercury Casualty* devoted several pages of its decision to discussing the evidence from trial. In order to understand the scope of the decision, and its impact on public entities, a brief discussion of the facts is in order.

Mercury Casualty involved an extreme and unprecedented weather event that occurred on November 30, 2011 and December 1, 2011, with winds greatly exceeding hurricane force (the "2011 Windstorm"). Between midnight and 1:00 a.m. on December 1, wind gusts in Pasadena peaked at 101 mph – which is double hurricane force. The 2011 Windstorm destroyed more than 2,200 of the 57,000 trees in Pasadena's urban forest and caused extensive damage to both private and public property in Pasadena, including damage to 5,000 other City trees.

The 2011 Windstorm damaged a residence (the "Property") owned by Sarah and Christopher Dusseault (the "Dusseaults"). Between midnight and

1:00 a.m. on December 1, at the peak of the 2011 Windstorm, a City tree fell onto the Property.

The tree that fell was "planted in the late 1940s or early 1950s by an unknown party." (*Mercury Casualty, supra*, at p. 923.) The tree was in a 20-foot-wide dirt parkway owned by the City. (*Id*. at p. 922.) However, the Dusseaults landscaped Pasadena's parkway and installed a sprinkler system which "may have caused [the trees in the parkway] to grow 40 to 50 feet taller than they would have grown with only natural irrigation." (*Id*. at p. 923.) When they landscaped in 2011 (a few months before the 2011 windstorm), a neighbor testified that they removed a root from the tree that fell that "was about two feet long and the width of a human fist." (*Ibid*.)

Mercury Casualty Company ("Mercury") insured the Property and paid the Dusseaults for their property damage. Mercury then sued the City seeking to recoup that money. On July 23, 2012, Mercury filed a complaint against the City that alleged three causes of action: inverse condemnation, dangerous condition of public property, and nuisance. On February 26, 2015, Mercury dismissed all causes of action except inverse condemnation. The City viewed the dismissal of the dangerous condition cause of action as an admission that Mercury had no evidence to support it dangerous condition claim; Pasadena had an exemplary tree maintenance program. It pruned the tree that fell in April 2007 and inspected the trees in front of the residence at the Dusseaults' request in 2006 and 2008.[1] So there was no evidence that the City acted or omitted to act in a manner that caused damage to Mercury's insured.

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[1] The Court of Appeal stated that "the City's five-year cycle for inspecting and caring for City trees was not only adequate, the undisputed evidence established that it exceeded the standards used in most other cities." *Mercury Casualty, supra*, 14 Cal.App.5th at p. 931.

Inverse condemnation liability was bifurcated and tried to the court. The trial court found in favor of Mercury. The Court found that the "'tree that fell was a work of public improvement'" and that "'[t]he City's maintenance of a 110-foot-tall Canary Island pine tree only 60 feet away from the insured's residence exposed the property owner to a peril from the falling tree, **caused by whatever event**, to which she would not otherwise have been exposed.'" (*Id*. at p. 924.) (Emphasis added.) The Court entered judgment in favor of Mercury for $800,000 plus $329,170 in costs (including attorneys' fees. (*Id*. at p. 925.)

Pasadena appealed.

III. OVERVIEW OF INVERSE CONDEMNATION LAW

Article 1, section 19 of the California Constitution allows a property owner to recover "just compensation" from a public entity for private property that is "taken or damaged for a public use." *Locklin v. City of Lafayette*, 7 Cal.4th 327, 362 (1994). "When there is incidental damage to private property caused by governmental action, but the governmental entity has not reimbursed the owner, a suit in 'inverse condemnation' may be brought to recover monetary damages for any 'special injury,' i.e., one not shared in common by the general public." (Ibid.)

In inverse condemnation, a property owner may recover from a public entity for "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed ... whether foreseeable or not." *Albers v. County of Los Angeles*, 62 Cal.2d 250, 263–264 (1965) ("*Albers"*). Thus, a public entity generally is strictly liable for any damage to private property caused by a public improvement as that improvement was deliberately designed, constructed, or maintained. *Pacific*

Bell v. City of San Diego, 81 Cal.App.4th 596, 610 (2000) ("*Pacific Bell*"). Typically, these involve storm drains, sewers, water mains, powerlines, and other quintessential infrastructure. If shown to be *publicly* owned and constructed, these are unquestionably works of public improvement so the threshold element is assumed without discussion in most physical damage inverse decisions.

The fundamental policy "underlying the concept of inverse condemnation is that the costs of a public improvement benefiting the community should be spread among those benefited rather than allocated to a single member of the community." *Pacific Bell*, *supra*, 81 Cal.App.4th at p. 602. Thus, as the California Supreme Court explained in *Albers*, the primary consideration in an inverse condemnation action is "'whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking.'" *Albers*, supra, 62 Cal.2d at p. 262. In other words, "[i]nverse condemnation liability ultimately rests on the notion that the private individual should not be required to bear a disproportionate share of the costs of a public improvement." *Belair v. Riverside County Flood Control Dist*., 47 Cal.3d 550, 566 (1988).

Notably, trees differ from classic public works in a few significant respects, and lawyers representing public entities should keep these differences in mind in cases in which a tree is claimed to be a work of public improvement. First, unlike classic works of public improvement, the property owner adjacent to a City tree derives the most benefit from it, including shade and increased property values; this is contrary to the stated basis for inverse condemnation liability, where a property owner bears a burden for the benefit of the community. Second, property owners often water adjacent trees (as the Dusseaults did) which impacts the trees'

characteristics; in contrast, homeowners do not generally maintain other classic works of public improvement. Third, there is a specific public policy to encourage public entities to plant trees and develop urban forests. (California Urban Forestry Act of 1978 (CUFA), Public Resources Code (PRC) §§ 4799.06 et seq.)

IV. IN ORDER TO ESTABLISH THAT A PUBLIC ENTITY IS LIABLE IN INVERSE CONDEMNATION FOR DAMAGE CAUSED BY A TREE, A PLAINTIFF MUST ESTABLISH THAT THE TREE WAS PLANTED BY OR AT THE DIRECTION OF THE GOVERNMENT ENTITY AS PART OF A PLANNED PROJECT OR DESIGN SERVING A PUBLIC PURPOSE.

Until *Mercury Casualty*, no California appellate decision had directly addressed whether a tree is a work of public improvement. Two previous appellate decision touched on that question: *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 39 Cal.4th 507 (2006) ("*Regency*") and *City of Pasadena v. Superior Court*, 228 Cal.App.4th 1228 (2014) ("*City of Pasadena*"). The *Mercury Casualty* Court discussed both decisions at length, and both are discussed immediately below.

In *Regency*, a billboard company (Regency) sued Los Angeles in inverse condemnation claiming that trees planted along Century Boulevard near LAX for a city roadway beautification project made Regency's billboards less visible from the road, diminishing their value. (*Regency, supra,* 39 Cal.4th at 512.) Affirming the lower courts, the Court held this did not give rise to inverse condemnation because Regency's sole claim was impaired visibility of its billboards. It thus failed to surmount the liability hurdle. (*Id*. at 520.)

Regency was decided on a narrow issue: impaired views, without more, do not satisfy the liability hurdle. Liability did not depend on whether the object blocking the billboard was a tree, freeway overpass, city billboard, or weather balloon. *Regency* did not discuss whether the trees were a work of public improvement under inverse condemnation law. However, "[a]s part of its analysis, the court assumed that the planting of trees along a city-owned street as part of a highway beautification project constituted a public improvement for purposes of an inverse condemnation claim." *Mercury Casualty, supra,* 14 Cal. App. 5th at 922. (Citation omitted.)

Notably, *Regency* involved palm trees that Los Angeles *deliberately* planted on City-owned property as *part of a highway improvement project*. *Id.* at 512. Thus, the palm trees were part of the "deliberate design and construction" of that project. Thus, *Regency* is easily distinguishable when used in most cases involving street trees owned by public entities.

The *Mercury Casualty* Court also discussed *City of Pasadena*. That decision involved a different inverse liability claim brought by Mercury against Pasadena.[2] In *City of Pasadena*, the appellate court reviewed an order denying the City's motion for summary adjudication of Mercury's claim for inverse condemnation arising out of residential damage caused by a different City-owned tree that fell during the 2011 Windstorm. In that case, the City argued that a tree is not a work of public improvement for purposes of an inverse condemnation action. Ultimately, the court denied the City's writ petition because a triable issue of fact existed as to whether the City's tree that damaged the insured's home was a work of public improvement. (*Id*. at

[2] Both *Mercury Casualty* and *City of Pasadena* were decided by the same court – Second Appellate District, Division 3. However, the panel of judges differed.

pp. 1235–1236.) Specifically, the court relied on *Regency*, and determined that the City failed to present any evidence demonstrating that the tree was *not* part of the construction of a public project. (*Id*. at p. 1235.) Put simply, the City argued that a street tree was not a work of public improvement as a matter of law; the Court of Appeal held that the City would have to present facts concerning whether the tree was planted as part of a construction project, as in *Regency*.

Unlike *City of Pasadena*, *Mercury Casualty* was decided by the Court of Appeal following a trial, so there was ample evidence in the record concerning the tree that fell. Both the trial court and the Court of Appeal found that the trees in front of the Dusseaults' residence "were planted in the late 1940s or early 1950s by an unknown party." *Mercury Casualty*, *supra,* 14 Cal.App.5th at p. 923. It also noted that the tree that planted was not the species that was designated as the official street tree for that particular street. (*Id*. at 929.)

After considering these decisions, the *Mercury Casualty* Court articulated a holding that is consistent not only with both *Regency* and *City of Pasadena*, but also with *Albers* which required that damage must be caused by an improvement as "deliberately designed and constructed." *Albers*, *supra*, 62 Cal.2d at p. 263.

> "Based on Regency and City of Pasadena, we hold that a tree constitutes a work of public improvement for purposes of inverse condemnation liability if the tree is **deliberately planted by or at the direction of the government entity as part of a planned project or design serving a public purpose** or use, such as to enhance the appearance of a public road. Our holding comports with the requirement for inverse condemnation claims that the complained-of damage must be caused by an improvement that was "deliberately designed and constructed." (See *Albers*, supra, 62 Cal.2d at p. 263.) Indeed,

> in virtually every case affirming inverse condemnation liability, the responsible public entity, or its predecessor, **deliberately constructed** the improvement that caused damage to private property. (See, e.g., id. at pp. 254–255 [a county's construction of roads caused a landslide]; *Pacific Bell*, *supra*, 81 Cal.App.4th at pp. 599–601, 607–610 [water main pipes constructed and maintained by a city burst and flooded private property]; *Cal. State Automobile Assn.*, supra, 138 Cal.App.4th at pp. 476–484 [sewage pipes constructed and maintained by a city backed up and flooded private property]; *Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 269–271 [drainage structure constructed and maintained by a public entity flooded private property*]; Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 872–874 [power lines constructed and maintained by public entity sparked and caused a fire that damaged private property].)" *Mercury Casualty*, *supra*, 14 Cal. App. 5th at p. 928–29 (unofficial citations omitted).

The Court stated that its holding was "consistent with a fundamental justification for inverse liability: the public entity, acting in furtherance of a public objective, took a calculated risk that damage to private property may occur. (Citations omitted.)" (*Id*. at p. 929.) The Court found there was no evidence "to suggest that the City planted the tree as part of a planned project or design to beautify its roads, or to serve some other public purpose." (*Ibid*.) So there was no "construction."

Additionally, the *Mercury Casualty* Court found no evidence of a design. The Court of Appeal specifically rejected Mercury's "argument that the City's adoption of the [Tree] Ordinance converted Tree F-2 into a work of public improvement because the Ordinance promotes the public's interest in maintaining trees." (*Ibid*.) The Court agreed with Pasadena's argument that its Tree Ordinance was not a "design".

> "[A]lthough one of the Ordinance's general goals is to preserve and grow the City's canopy cover, it does not establish specific design standards or parameters for the planting or removal of street trees, nor does it include any maintenance or pruning

> schedules for street trees like Tree F-2. … Quite simply, **the Ordinance does not constitute a design for a public project or improvement, nor does it convert Tree F-2 into a work of public improveme**nt, that subjects the City to inverse condemnation liability." *(Id.* at pp. 929–30.)

In conclusion, if a tree is planted as part of a large-scale construction project as in *Regency*, it may be a work of public improvement giving rise to inverse liability. If it is a street tree, planted by an unknown person, it is not. Future litigation will address the numerous other factual scenarios which can arise in the context of urban forests.

However, even if a tree is found to be a work of public improvement, it will be very difficult to overcome the next hurdle – which is to tie the "deliberate design and construction" of the tree to the damage caused.

V. INVERSE CONDEMNATION WILL BE DIFFICULT TO PROVE IN MOST CASES INVOLVING PROPERTY DAMAGE CAUSED BY FALLING TREES.

Even if a tree is a work of public improvement, i.e. it was deliberately planted by a public entity as part of a construction project, it will be difficult for most plaintiffs to satisfy the causation element to hold a public entity liable in inverse condemnation. This is because most trees fail because of either inadequate maintenance or conditions beyond the control of the public entity (like the 2011 Windstorm), not because of the deliberate design of the tree.

More than 50 years ago, the California Supreme Court established a general rule of inverse condemnation that "any actual physical injury to real property proximately *caused by the improvement as deliberately designed and constructed* is compensable under article I, section [19] of our Constitution whether foreseeable or not." *Albers*, 62 Cal.2d at 263-264

(italics added). To prevail, a plaintiff in an inverse condemnation action must demonstrate a causal link between the "deliberate design and construction" of the public work and the resulting damage.

Inverse condemnation liability for unintentional physical damage caused by a public improvement (assuming there is one) requires a detailed analysis of the evidence to determine whether a causal relationship exists between the deliberate design and construction and the resulting damage. The causal link between design and damage is examined below in connection with appellate decisions involving a road, a power line, and a sewer line.

For example, *Albers* involved road construction and design that "included the making of extensive cuts and the deposition of substantial quantities of fill material" caused a landslide. 62 Cal.2d at 264. In affirming judgment against the county in inverse condemnation, the California Supreme Court found the damage was "the proximate result of the construction of a public work deliberately planned and carried out" by the county. *Id.* at 262. *See, also*, *Holtz v. Superior Court*, 3 Cal.3d 296 (1970) (extensive excavation under city street to build a subway system results in land subsidence); *Blau v. City of Los Angeles*, 32 Cal.App.3d 77 (1973) (city's excavation and brush removal for construction of a public road caused a landslide). Put simply, there was a direct link between the cuts and fills as deliberately designed and constructed, and the damage caused.

Aetna Life & Casualty Co. v. City of Los Angeles, 170 Cal.App.3d 865 (1985), demonstrates the type of analysis needed to tie the design of a public work to a particular damage. In *Aetna*, the court found a power line as "deliberately designed and constructed" caused property damage. Power lines created sparks that caused a fire. The court thoroughly examined the

design and found that the deliberate design and construction of the power lines caused the fire. The Court explained:

> "[T]he evidence established that the power lines in question were designed to sag 22 inches between polls. As deliberately spaced 26 inches apart on the cross-arms, two of the wires sagging 22 inches could be blown into contact with each other by winds blowing at about 42 miles per hour. Clearly, by defendants' own design standards, the construction of the power lines carried some risk of arcing in strong winds. Moreover, the sag of the power lines in question exceeded the defendants' 22-inch design guideline by approximately 30 inches. The risk that these lines, sagging 51 inches or more, could come into contact with each other in moderate to high winds is much greater than if they had been tightened to a sag of only 22 inches. The evidence showed that the lines were deliberately constructed at a greater sag and remained that way through routine semi-annual maintenance inspections. Thus, the design, construction and maintenance of the sagging high voltage cables permitted intercable contact during windy conditions which resulted in a disastrous fire." (*Id.* at 874.)

Put simply, there was a direct link between the spacing of the power lines as deliberately designed and constructed, and the damage caused.

Similarly, in *California State Automobile Assn. v. City of Palo Alto*, 138 Cal.App.4th 474 (2006), the court found a sewer line as "deliberately designed and constructed" caused a sewer back up and resulting property damage. Plaintiff presented evidence of three possible causes of the backup, all of which related to the *deliberate* design and construction of the line: "(1) the existence of tree roots invading the porous clay pipe of the sewer main… (2) the .455 percent slope of the [City's] main …; and (3) the existence of standing water filling one half of the main…." *Id.* at 478. The Court found there was "a substantial cause and effect relationship between factors entirely within the city's control, namely, tree roots, slope and standing water in the main that contributed to the backups…" *Id*. at 484. Put simply, there was a

direct link between the material used for the pipe, and the slope of the pipe, as deliberately designed and constructed, and the damage caused.

Each of these decisions demonstrate that the causation element in inverse condemnation requires detailed analysis of *why* the public work failed. In contrast, in the overwhelming majority of cases involving damage caused by falling trees, the issue of why the tree failed will usually be a maintenance issue which, in almost all cases, is not the proper subject of an inverse condemnation action.

At trial in *Mercury Casualty*, Mercury argued that the fact that the tree was tall enough to strike the adjacent house satisfied causation. However, lawyers representing public entities that encounter a similar argument in the future should distinguish between the cause of damage (a tree), and the cause of the failure (e.g. a windstorm). In every case involving damage caused by a work of public improvement, it is axiomatic that whatever was damaged by the public work was close enough to it to be damaged. The relevant inquiry is, instead, what caused the failure. Under existing law, there must be a link between the design and the tree failing.

A helpful case for lawyers representing public entities on this point is *Ingram v. City of Redondo Beach*, 45 Cal.App.3d 628 (1975). In *Ingram*, "the earthen wall of [a] sump collapsed, [and] water came from the sump, across a park adjacent to it and onto plaintiffs' properties and into their homes. [¶] The sump was not designed for all rains. An overflow pipe was installed in the sump by the city. There was some evidence that the pipe had been blocked by a sandbag or piece of burlap." *Id* at 631. The trial court found for the city. The Court of Appeal reversed and remanded because it did "not know the basis for the trial court's finding that no damages occurred

to plaintiffs as a proximate result of a deliberately designed and constructed public work." *Id*. at 633.

> "There is no finding that this rain storm was the sole cause of the damages, or, to adopt Professor Van Alstyne's language, that it 'alone' produced the injury. Nor is there any finding concerning the role played by a sandbag or piece of burlap allegedly blocking the overflow pipe. We do not hold that either such a blockage, if it existed, or the storm, are enough, singly or in combination, to have constituted the sole cause of the flooding. That is a question for the trial court's determination. On remand, that court may proceed as it deems best, by amending its findings and conclusions after hearing, or by retrying the matter in full." *Id*. at 634.

Applying this language to the *Mercury Casualty* case, the City did not dispute that a City tree failed in the 2011 Windstorm and Mercury's insureds' real property suffered damage. Similarly, it was undisputed in *Ingram* that the city's sump wall failed in a rainstorm and plaintiffs' real property suffered damage. If the law were as Mercury contended, the *Ingram* court should have ended its inquiry and instructed the trial court to rule for plaintiff.

Unfortunately (or perhaps fortunately), the trial court did not need to reach the issue of causation, because it ruled Mercury could not demonstrate the tree was a work of public improvement. This issue may be decided in future litigation.

VI. A PUBLIC ENTITY CANNOT BE LIABLE IN INVERSE CONDEMNATION FOR INADEQUATE MAINTENANCE UNLESS THERE IS AN INADEQUATE *PLAN* OF TREE MAINTENANCE

Courts have extended the *Albers* rule in certain very limited circumstances to allow inverse condemnation liability if physical damage is caused, not by the *design or construction* of a public improvement but rather,

by inadequate *maintenance* of a public improvement. See, e.g., *Pacific Bell supra,* 81 Cal.App.4th at p. 609. Specifically, if a public entity has an inadequate *plan* of maintenance, which the evidence shows is the substantial cause of damage, liability may lie. In contrast, if damage is caused by "negligent acts committed during the routine day-to-day operation of the public improvement having *no relation to the functioning of the project as conceived* does not create a claim in inverse condemnation." *Id.* at 608-609 (italics added).

Thus, appellate courts have imposed inverse condemnation liability for an inadequate plan of maintenance where public entities adopted a "wait until it breaks" maintenance program to avoid costs. In *Pacific Bell, supra,* a severely corroded cast-iron water pipe burst when a fire hydrant connected to the pipe was struck, damaging plaintiff's property. Plaintiff sought inverse condemnation damages, alleging that because the city of San Diego had no preventive maintenance plan to monitor the corrosion of its cast-iron pipes, the damage to plaintiff's property was an "inevitable consequence of City's water delivery system as designed, constructed and maintained." 81 Cal.App.4th at 599. The Court concluded that San Diego's "wait until it breaks" program of pipe maintenance gave rise to inverse condemnation liability. *Id.* at 608. San Diego's "knowledge of the limited life of such mains and failure to adequately guard against such breaks caused by corrosion is as much a 'deliberate' act as existed in *Albers* ..." *Id.* at 609 (citation omitted.)

The *Pacific Bell* court found dispositive an earlier decision, *McMahan's v. City of Santa Monica,* 146 Cal.App.3d 683 (1983). In *McMahan's,* Santa Monica decided it would be more cost efficient to repair water lines when they failed than replacing them throughout the city. The

city knew its water lines would fail but did not know when or where they would fail. A pipe ruptured and damaged plaintiff's property and plaintiff sued in inverse condemnation.

Santa Monica argued that "the rupture of the pipe was caused by negligent maintenance and daily operations and not by a deliberate plan of construction, and that negligent maintenance is not a deliberate act that constitutes a taking." *Id*. at 609. The *McMahan's* court rejected this argument, reasoning that "damage *resulting from a maintenance program* that involves 'a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole' satisfies the 'deliberately designed and constructed' requirement." *Id.* (italics added).

Thus, *Pacific Bell* and the earlier decisions upon which it relied squarely address the "deliberate act" of adopting a *defective* plan of maintenance of a public improvement. Each of these decisions arose in the context of water lines, which are recognized public improvements. That was not the case in *Mercury Casualty*.

Based on these decisions, if a tree falls due to alleged poor maintenance, that may subject the public entity to liability for dangerous condition of public property, but it will not give rise to an inverse condemnation claim. Indeed, most tree maintenance decision are made by employees in the field based on conditions unique to a particular tree. As such, they are maintenance decisions, not design decisions.

VII. CONCLUSION

Mercury Casualty is a favorable decision for public entities. However, the next important decision in this area will involve the issue of causation, and we expect that decision will also favor public entities.

Social Media Challenges: Applying Existing Case Law to New Technology

Thursday, May 3, 2018 General Session; 2:00 – 3:30 p.m.

Deborah J. Fox, Principal and Chair of First Amendment Practice Group, Meyers Nave Riback Silver & Wilson
David Mehretu, Meyers Nave Riback Silver & Wilson

Notes:_____

League of California Cities

2018 City Attorneys' Spring Conference
San Diego, California

Public Records & Public Forums: How to Apply Established Case Law With Rapidly Emerging Social Media Platforms

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Public Records & Public Forums: What Happens when Established Case Law Encounters Rapidly Emerging Social Media Platforms and New Forms of Electronic Communications?

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I. Introduction

The ubiquitous use of social media, email, text messaging and other communication technology and practices is transforming government. Whether it's the board member who communicates with agency staff by text messaging to get real time guidance during meetings, the elected official using Twitter to address her constituents, or the municipality that maintains a Facebook or Nextdoor page to make public announcements and facilitate enhanced engagement between the city and its residents, the use of technology is making public entities more efficient, effective, dynamic, and connected to the communities and constituents they serve. Although some of these technologies and platforms are newer than others, there is invariably a delay in the increasing prevalence of such technologies and practices and the application of established laws and procedures to regulate them. That does not mean, however, that courts have been reluctant to apply old laws to the use of new technologies by public entities when the opportunity presents itself. To the contrary, established and familiar laws and regulations are being utilized by courts in California and throughout the country to ensure that, as used by governments, social media and other communication technology are subject to the same regulations as their traditional counterparts. This paper explores two important instances where this is happening – forum classification of social media under the First Amendment of the U.S. Constitution, and the application of California's Public Records Act to content residing on social media and the personal accounts and devices of public entity employees.

II. First Amendment Concerns For Governmental Social Media Platforms

The Free Speech Clause of the First Amendment of the United States Constitution provides "Congress shall make no law…abridging the freedom of speech, or of the press…." Under the Fourteenth Amendment, municipal regulations and policies are within the scope of this limitation on governmental authority.[1] The rise of social media platforms presents a new and evolving arena for public discourse and First Amendment scrutiny. While it remains to be seen exactly how First Amendment jurisprudence will be applied to these digital platforms, forum classification will be at the forefront of the debate.

A. Categories Of Forum Classification

The forum classification doctrine is a system of categorizing places, and then determining the rules according to the specified category. Forum classification is crucial because the level of scrutiny and the leeway afforded the government differs based upon the type of forum being

[1] *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

regulated.[2] There are two main categories for forum classification, the public forum and the nonpublic forum. A traditional public forum is a place such as a park, public street or sidewalk, where people have traditionally been able to express ideas and opinions. In contrast to the public forum, a nonpublic forum is government property that has traditionally not been open to the free exchange of ideas, such as a courthouse lobby, a prison or a military base. These two main categories of government property have been expanded to cover circumstances that do not fall neatly into either primary category – namely, the designated public forum and the limited public forum. Both of these forum classifications apply to nonpublic fora that the government opens to expressive activity, but the terms under which the fora may constitutionally operate differ significantly.

Specifically, a designated public forum is created when the government intentionally opens (or "designates") non-traditional areas for First Amendment activity pursuant to policy or practice.[3] Examples of situations where courts have found a designated public forum include: state university meeting facilities where the university had an express policy of opening the facilities to registered student groups; school board meetings where the state statute provided for open meetings; a municipal auditorium and a city-leased theater where the city dedicated the property to expressive activity; and the interior of a city hall where the city opened the building to display art and did not consistently enforce any restrictions.[4] Regulations for a designated public forum are subject to the same level of review as a public forum.

A limited public forum is created when the government opens a non-public forum to First Amendment activity but limits such access to certain groups or topics.[5] Examples of situations where courts have found a limited public forum include: public library meeting rooms where policy limited it to certain uses; public school property where policy limits use to only certain groups; and the state's specialty license plate program.[6] A property classified as a limited public forum is subject to the same more lenient rules as a nonpublic forum.[7] The government is not required to indefinitely keep a designated public forum or a limited public forum open, but so

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[2] *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992); see also *PMG Int'l Div., L.L.C. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959 (9th Cir. 2002); *Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001).

[3] *See Cornelius*, 473 U.S. at 800, 803; *Perry*, 460 U.S. at 45-46.

[4] *Widmar v. Vincent*, 454 U.S. 263, 267 (1981); *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174 (1976); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 555 (1975); *Hopper*, 241 F.3d at 1075-6.

[5] *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1049 (9th Cir. 2003).

[6] *Faith Center Church v. Glover*, 480 F.3d 891, 908 (9th Cir. 2007); *Good News Club v. Milford Center School*, 553 U.S. 98, 102, 106 (2001); *Arizona Life Coalition v. Paisley*, 515 F.3d 956, 969 (9th Cir. 2008).

[7] *Id.*; *Perry*, 460 U.S. at 46; *United States v. Kokinda*, 497 U.S. 720, 725-27 (1990); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999).

long as the forum remains open it must comply with the requisite standards for its forum classification.[8]

Finally, in certain limited circumstances, government-owned and controlled property falls outside the scope of the Free Speech Clause and the forum classification doctrine. These are instances where the government has not opened a forum to general discourse and engages in its own speech and is entitled to "speak for itself" and "select the views it wants to express."[9]

B. Standard Of Review Based On Forum Classification

The classification of the forum at issue can be pivotal as to whether government policies or regulations pass constitutional muster. This is because in a public forum, or a designated public forum, restrictions are subject to an exacting review standard where content-based restrictions are subject to strict scrutiny and only pass muster if they are the least restrictive means for achieving a compelling government interest.[10] Content-neutral restrictions in a public forum (or designated public forum) are subject to the time, place and manner standard where they must be narrowly tailored to serve a significant government interest and must leave open ample alternatives for communication.[11] In a public (or designated public) forum, First Amendment activities generally may not be prohibited; rather, "speakers can be excluded ... only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[12] By contrast, in a nonpublic forum or limited public forum, the government is given more leeway and its regulations need only be reasonable and viewpoint neutral to pass muster.[13] Only viewpoint neutrality and not content-neutrality is required for regulations of a nonpublic or limited public forum.[14]

Given the different standards of review, it is critical to determine whether a non-traditional public forum that has been opened to expressive activity is operating as a designated public forum or a limited public forum. In order to determine the proper classification of the forum, courts typically examine the terms on which the forum operates.[15] Courts critically examine the actions and policies of cities to determine whether a designated public forum or a limited public forum has been created.[16] The more consistently enforced and selective

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[8] *Perry*, 460 U.S. at 46.

[9] *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009).

[10] *Perry Education Assn. v. Perry Local Educator's Assn*., 460 U.S. 37, 46 (1983); *DiLoreto v. Downey Unified School Dist. Bd. of Educ*., 196 F.3d 958, 965 (9th Cir. 1999).

[11] *Id*.

[12] *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

[13] *Id*.

[14] *Id*.

[15] *Hopper*, 241 F.3d at 1074, 1075.

[16] *Hopper,* 241 F.3d at 1076.

restrictions are, the more likely the forum will be deemed a limited public forum.[17] By contrast, where restrictions are not enforced, or if exceptions are haphazardly permitted, the more likely the forum will be deemed a designated public forum.[18]

Courts have carved out specific forum classifications and standards for certain venues such as council meetings, which when open to the general public are treated as a limited public forum.[19] Moreover, the Supreme Court has recognized the difficulty of applying forum classification to newly developing fora.[20] In regards to cyberspace, courts, including the Supreme Court, have explained that the Internet in general, and social networking sites like Twitter in particular, are akin to "the modern public square."[21] The Supreme Court has recognized the powerful communication potential provided by the Internet noting it allows anyone "to become a town crier with a voice that resonates farther than it could from any soapbox."[22] The Court has also commented that social media in particular provides "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard" and that Twitter enables people to "petition their elected representatives and otherwise engage with them in a direct manner."[23] In short, the courts recognize the importance of social media as a vital, newly developing forum and it appears they will be protective of First Amendment rights in this forum and wary of governmental restrictions.

C. Forum Analysis Of Social Media Platforms

Overlaying the forum classification doctrine on top of the social media platforms used by public entities, such as Facebook or Twitter, highlights the importance for cities to proactively set forth the policies and standards for public engagement on these platforms. The critical inquiry will be whether municipalities have opened these fora for expressive activity and on what terms. It is possible for public entities to operate social media platforms such as Facebook in a manner where the public entity provides information but does not open the forum for any public discussion or comments. For instance, on Facebook, page owners can choose to restrict users from leaving their own updates. Under such a scenario, there is a strong argument that the government has not opened the forum for any type of public discourse and is engaging purely in its own speech where the Free Speech Clause of the First Amendment does not apply, Thus, operating a Facebook page on these terms presents a low risk of a First Amendment challenge.

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[17] *Id.* at 1076-78; *Cornelius*, 473 U.S. at 804-05; *See also Perry*, 460 U.S. at 47; *Lehman v. Shaker Heights*, 418 U.S. 298, 302-04 (1974); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

[18] *Id.*; *Hills*, 329 F.3d at 1049.

[19] *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (2013).

[20] *See Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 739-743 and 763-766 (1996)

[21] *Packingham v. North Carolina*, 137 S.Ct. 1730, 1737 (2017); *hiQLabs Inc v. LinkedLin Corp.*, 273 F.Supp.3d 1099 (N.D. Cal. 2017); *Twitter, Inc. v. Sessions*, 263 F.Supp.3d 803, (N.D. Cal. 2017)

[22] *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

[23] *Packingham*, 137 S.Ct. at 1735 & 1737.

Instead, the forum remains limited to government speech for items such as public service announcements or updates about city activities.

Social media platforms, however, are engineered to allow for the flow of public comments and discussion, so it is common for them to be used to engage in civil discourse. Cities, however, need to evaluate whether these platforms are the appropriate forum to discuss issues with constituents. Municipalities may try to place restrictions on a social media platform, such that it will be viewed as a limited public forum. This poses the dual challenge of crafting reasonable and viewpoint neutral restrictions such as limiting discourse to city-related events, as well as the challenge of enforcing the limitations in an evenhanded fashion. On the other hand, with no limitations and no stated policy in place, the social media platforms are likely to be viewed as public forums open for the free exchange of ideas where the government will retain little ability to restrict, block or delete offensive comments.

In addition, it is ubiquitous for elected officials to use Twitter accounts to communicate with their constituents, likely opening this medium to First Amendment scrutiny as well. If these accounts are used by elected officials to make or comment on official policies, such accounts will likely come within the scope of the forum classification analysis, and public officials run the risk of engaging in prohibited viewpoint-based discrimination if they block certain users. This very issue is currently pending in a Manhattan federal court before Judge Buchwald in a recently filed case brought by a group of Twitter users against President Trump for blocking them on his official social media account, which the plaintiffs allege is a violation of their First Amendment rights.[24] Trump's lawyers have argued that his social media account is a private venue, while lawyers for the blocked Twitter users have compared the forum to a public town hall type of meeting. It remains to be seen how the court will rule in the case, but given the general recognition of social media as "the modern public square" it seems likely that at a minimum the government restriction at play (namely the blocking of certain Twitter users) will be carefully scrutinized.

The forum classification jurisprudence is in the process of evolving to address the particular issues at play for social media platforms. For now, the most cautious approach is for cities to disallow users from leaving comments and messages on official social media platforms, such as city Facebook pages, so as to prevent the medium from becoming a forum for public discussion. Council meetings or town halls are the traditional means for discussing contentious or sensitive issues with citizens and cities should carefully consider if they want social media platforms to also take on that role. If elected officials are going to use their social media platforms, such as Twitter, to comment on official business, they too need to be aware that they may have a limited ability to restrict or block comments on their accounts. This can raise complicated issues of whether, and to what extent, public officials can block aggressive internet trolling on their social media accounts.[25] The courts have typically been very permissive in

[24] *Knight First Amendment Institute at Columbia University, et al. v. Trump, et al.*, No. 17-cv-5205 (NRB) (S.D.N.Y. 2017).

[25] Wikipedia defines an internet troll as "a person who sows discord on the Internet by starting quarrels or upsetting people by posting inflammatory, extraneous, or off-topic messages in an online community . . .

allowing provocative or inflammatory speech in public fora such as parks and in some limited public fora such as city council meetings.[26] By analogy, it is quite likely the courts will also find such speech cannot be prohibited across the board on City or elected City officials social media sites where public business is being discussed. But while the courts expect public officials to have thick skins, they are likely to be more receptive to narrowly tailored restrictions for trolling directed at "fighting words" or actual and real threats of bodily harm.[27] Such limitations in turn trigger thorny issues of how to determine what qualifies as "fighting words" or real threats of bodily harm and how to evenhandedly enforce any limitations.

III. Electronic Messages Fall Within The Scope Of The California Public Records Act.

In addition to the First Amendment concerns noted above, social media platforms and the messages generated there, also fall within the purview of the California Public Records Act ("PRA"). The long-arm of the PRA reaches not just to the social media platforms maintained by public entities, but also to emails and text messages sent through the personal accounts and devices of public officials and employees pursuant to the California Supreme Court's recent decision in *City of San Jose v. Superior Court.*[28]

A. Overview Of The PRA

The PRA grants access to public records held by state and local agencies.[29] Modeled after the federal Freedom of Information Act (5 U.S.C. § 552 et seq.), the PRA was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies.[30] The PRA declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[31] In 2004, voters made this principle part of the California Constitution.[32]

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with the intent of provoking readers into an emotional response or of otherwise disrupting normal, on-topic discussion, often for the troll's amusement."

[26] *See Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006); *see also White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (2013).

[27] "'Fighting words' are those that by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[28] *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.

[29] Gov't. Code § 6250 et seq.; *Los Angeles Cty. Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 290.

[30] *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425.

[31] Gov't. Code § 6250.

[32] *City of San Jose*,2 Cal.5th at 615.

The fundamental rule announced by the PRA is that "every person has a right to inspect any public record" unless an express statutory exception to such access applies.[33] The PRA defines "public record" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[34] A "writing" is also defined under the PRA as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."[35] Courts have recognized that what will constitute a record relating to the "public's business" will not always be clear. Gripes about coworkers, for example, will not typically be "public records." Generally, a record relates to the conduct of the "public's business" – and therefore constitutes a "public record" – where it is kept by an officer because it is necessary or convenient to the discharge of [her/his] official duty".[36]

Enacted in 1968, the PRA clearly predated the prevalence of electronic communications such as email, text messaging, as well as social media platforms such as Twitter, Facebook and Nextdoor. Unlike the traditional paper records the PRA was designed to address, electronic communications can be generated, copied, and transferred with far greater ease and efficiency. Whereas before the age of electronic communications, a public employee or officer might have to ask her or his assistant to type a letter to communicate about government business – which letter would then more likely be saved in an official file – with email and other such electronic communication methods, a public employee can easily prepare correspondence herself/himself and facilitate the transfer of the correspondence to others with the click of a button, possibly circumventing more traditional administrative processes and record keeping.[37] Indeed, with electronic communications, public entity employees have myriad means of disseminating, storing, and duplicating information pertaining to government business without having to rely on or utilize the facilities or resources of the public entity itself. For example, although public entities provide their employees with official email accounts and computing resources to facilitate the use of electronic communication for government work, such employees can effectively just as easily use their own personal email accounts and computing facilities – smart phones, laptops, etc. – for conducting their work.

Despite the potential for government business to be conducted through personal electronic means of communication, storage, and processing, the issue of whether content on personal electronic communication accounts and personal computing devices is subject to the PRA had not been addressed by the California Supreme Court. That changed last year with the case of *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017).

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[33] Gov't. Code § 6253.

[34] Gov't. Code § 6252(e).

[35] Gov't. Code § 6252(g).

[36] *City of San Jose*, 2 Cal.5th at 618.

[37] *Id.* at 625.

B. The *City of San Jose* Case Extended The Reach Of The PRA.

In the *City of San Jose* case, an individual, Ted Smith, submitted a request to the City of San Jose, seeking public records related to downtown San Jose redevelopment. He specifically requested "[a]ny and all voicemails, emails or text messages sent or received on private electronic devices" used by the mayor and members of the City Council or their staff. The City produced information responsive to Smith's requests, but refused to produce any information contained on any private devices. The City took the position that these items were not public records within the meaning of the PRA.[38]

Smith brought an action for declaratory relief seeking an order that he was entitled to disclosure of the responsive information on the private devices. The Superior Court granted Smith's requested relief, but the City prevailed on its ensuing petition for a writ of mandate to the Court of Appeal. The California Supreme then took up the matter on appeal, overturning the judgment of the Court of Appeal.

Explaining that under the California Constitution, the PRA must be broadly construed to further the people's right of access,[39] the high Court interpreted several key provisions of the PRA to find that "writings concerning the conduct of public business [are not] beyond CPRA's reach merely because they were sent or received using a nongovernmental account."[40] Several of the key PRA provisions the Court interpreted to support its holding are discussed below.

First, the Court addressed an ambiguous provision concerning the definition of "local agency" that the City argued supported its position that records sent through personal accounts did not constitute records "prepared by" a local agency.[41] Although the PRA defines "public records" to include those "prepared by" any state or local agency, the City argued that this provision did not reach records transmitted through a public entity employee's *personal* account because the PRA's definition of "local agency" does not expressly include "individual government officials or staff members."[42] The Court rejected this "narrow" interpretation of the PRA to find that a "writing prepared by a public employee conducting agency business has been 'prepared by' the agency within the meaning of section [6252(e)], even if the writing is prepared using the employee's personal account."[43] The Court explained that "[i]t is well established that a governmental entity, like a corporation, can act only through its individual officers and employees. A disembodied governmental agency cannot prepare, own, use, or retain any record. Only the human beings who serve in agencies can do these things."[44]

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[38] *City of San Jose v. Superior Court* (2014) 225 Cal.App.4th 75, 80.

[39] *City of San Jose,* 2 Cal.5th at 617.

[40] *Id.* at 616.

[41] *Id.* at 619.

[42] *Id.*

[43] *Id.* at 621.

[44] *Id.* at 620-621 (citations excluded).

The City also argued that the PRA's provision requiring the disclosure of records "owned by, used, or retained" by a public entity does not apply to records residing on the personal device or account of a governmental employee or officer, because such material, the City argued, is beyond the governmental entity's reach.[45] The Court rejected this argument as well, mainly on the precept that "an agency's public records 'do not lose their agency character just because the official who possesses them takes them out the door.'"[46] The Court concluded that a "writing retained by a public employee conducting agency business has been 'retained by' the agency within the meaning of section [6252(e)], even if the writing is retained in the employee's personal account." [47]

As a policy matter, the Court observed that allowing public entities to avoid disclosure under the PRA simply because their employees can "click" into a personal account to send or receive the records would undermine the "whole purpose" of the PRA because it would allow – and even encourage – public entities to hide their most sensitive and potentially damning discussions from public access.[48]

Despite its holding, the Court recognized that subjecting records on personal accounts and devices to the PRA implicates privacy concerns for public entity employees, but found that such privacy concerns should be resolved on a case-by-case basis rather than categorically as the City proposed.[49] The Court then provided guidance for searching for public records that reside on personal accounts and personal devices in a manner that would fulfill the objectives of the PRA while not trampling on the privacy rights of public employees. Specifically, the Court explained, that although the PRA does not prescribe specific methods of searching for documents, and that public entities may develop their own internal policies for conducting searches, "once an agency receives a CPRA request, it must 'communicate the scope of the information requested to the custodians of its records,' although it need not use the precise language of the request.[50] The Court explained that once the request has been communicated to the "employees in question," the "agency may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material."[51]

The Court went on to describe a procedure adopted by the Washington Supreme Court for its public records law that allows a public agency to demonstrate that it has performed an adequate search under Washington's PRA. Under that procedure, employees who "withhold" personal records from their employer "must submit an affidavit with facts sufficient to show the

[45] *Id.* at 622.

[46] *Id.* at 623.

[47] *Id.* at 623.

[48] *Id.* at 625.

[49] *Id.* at 626.

[50] *Id.* at 628.

[51] *Id.*

information is not a 'public record' under [Washington's PRA]."[52] The California Supreme Court stated that it agreed that this procedure "when followed in good faith, strikes an appropriate balance" for complying with the PRA while protecting employees' privacy concerns.[53] The Court concluded, however, by stating that "[w]e do not hold that any particular search method is required or necessarily adequate.[54]

C. Complying With The PRA Following the *San Jose* Case – Implications, Unanswered Questions, And Practical Tips.

1. *Implications of San Jose*

The Supreme Court's decision in *San Jose* is well-reasoned and clearly settled the specific issue before it – whether content that otherwise constitutes "public records" remains subject to the PRA when it has been transmitted through personal accounts or resides on personal devices. The Court also provided useful guidance concerning how to approach searching for public records on personal accounts and devices in ways that preserve the privacy rights of government employees. As with most decisions, however, the holding has certain implications beyond that rule expressly announced, and also leaves some relevant questions unanswered – in this case, concerning compliance with the PRA when it comes to personal accounts and devices. Some of these implications and open questions are discussed below.

(a) Increased Risk of PRA Liability

One thing seems clear – the *San Jose* decision will result in an increased risk of liability for public entities in PRA lawsuits. This is because due to the rule announced, the systems public entities use to ensure compliance with the PRA now apply to a larger scope of records and record-keeping processes and practices. Whereas prior to *San Jose*, public entities did not even have to think about whether "public records" might reside on personal accounts and devices for purposes of complying with the PRA, now they do, or face the prospect of an adverse ruling in a PRA lawsuit, including the imposition of attorneys' fees.[55] Indeed, although the Supreme Court provided guidance on how public entities can balance their obligations to search for public records while avoiding an undue intrusion in to the privacy rights of their employees, the Court did not announce any specific searching prescriptions or bright-line rules. Nothing stated in the *San Jose* decision allows public entities to be certain their procedures and practices for searching personal accounts and devices will comply with the PRA.[56]

Indeed, a government agency might *attempt* to institute appropriate procedures and practices, but could still find itself running afoul of the PRA for failing to disclose public records residing on personal accounts and devices. For example, unlike in the case where public records

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[52] *Id.*

[53] *Id.* at 628.

[54] *Id.*

[55] Gov't. Code § 6259(d).

[56] *City of San Jose*, 2 Cal.5th at 629.

reside on agency-controlled accounts and devices – where the agency can run searches for responsive content across multiple employees or all employees – when dealing with personal accounts and devices, an agency must rely exclusively on its employees to conduct adequate searches. The agency must also ensure that its procedures for *notifying* appropriate employees and for *training* them to search for public records are themselves adequate and defensible. This is less of a concern with searching agency controlled servers and accounts, where the agency can simply search all content for responsive documents, either in the first instance or to ensure that employees have adequately identified responsive documents.

(b) PRA Applies To Social Media – Such as Facebook, Twitter, and Nextdoor

Another implication of *San Jose* is that content transmitted through, or contained on, social media – such as Facebook, Facebook Messenger, Twitter, and Nextdoor – is also subject to the PRA. Although the requester in San Jose did not ask the City to disclose public records contained on social media,[57] and the Supreme Court's holding in *San Jose* referred only to "personal accounts," without specifying if social media fell within the ruling's purview, the rationales behind the rule announced, as well as other language in the decision, make clear that the PRA applies with equal force to social media. For example, if a communication by a public entity employee is transmitted through her/his Facebook Messenger to another party, that content is still a "writing" "prepared by" the agency's employee, and therefore subject to the PRA in the event the communication concerns the "public's business."[58] Likewise, the mere fact that an otherwise "public record" is transmitted through social media should not mean it loses its "agency character" any more so than a public record that an employee takes with them "out the door."[59] The fact that the Court's holding applies to social media as well as more traditional electronic communications that were the subject of the specific request at issue in the case – email and text messaging – is evident from the Court's generic references throughout the decision to terms such as "electronic communications," "personal accounts," and "other electronic platforms.[60] Although the holding never expressly referred to social media, public entities should treat social media as subject to the PRA.

2. *Open Questions After San Jose*

The Court's decision in *San Jose* also leaves some unanswered questions, particularly as to what agencies must specifically do to ensure their search for public records on personal accounts and devices (including social media) will comply with the PRA, and how public

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[57] *City of San Jose*, 225 Cal.App.4th at 80.

[58] *City of San Jose*, 2 Cal.5th at 621 ("A writing prepared by a public employee conducting agency business has been "prepared by" the agency within the meaning of section 6252, subdivision (e), even if the writing is prepared using the employee's personal account.").

[59] *Id.* at 623 ("an agency's public records 'do not lose their agency character just because the official who possesses them takes them out the door.'").

[60] *See, e.g., id.* at 618 ("Today, these tangible, if laborious, writing methods have been enhanced by electronic communication. Email, text messaging, and other electronic platforms, permit writings to be prepared, exchanged, and stored more quickly and easily."

entities' records retentions obligations are affected (if at all) by the extension of the PRA to private accounts.

(a) What Do Agencies Need to Do To Perform Defensible Searches For Public Records on Personal Accounts?

Although the Court in *San Jose* addressed how agencies might go about complying with the requirement to search for public records on personal accounts, it laid down no definite prescriptions or rules.

For example, the Court explained that once a public entity has notified the "employees in question" of a public records request, the agency may then "reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material.[61] But who the "employees in question" are, begs the question.

In *San Jose*, the "employees in question" were specifically identified in the request itself, which called for communications from the mayor and specific council members. But many PRA requests do *not* identify any particular employees or class of personnel or officials, leaving it up to the target agency to make this determination based on its own analysis of the request. Where the PRA request does not identify specific custodians, as is most often the case, what steps does the agency have to take to identify the specific employees who might have responsive information on their personal accounts? Where an agency is dealing with electronic files and accounts it can access directly – *i.e.*, those hosted on its own servers – identifying the "employees in question" at the outset is less of a concern because the content on the agency's servers can be searched using keywords to identify responsive documents. But where the agency must rely on individual employees to do the searching – as will be the case with personal accounts and devices – each individual likely to have responsive information will have to be identified at the outset. What must agencies, therefore, do to identify those employees who have opted to use personal accounts to transmit and store public records relevant to the request?

On a similar note, what must an agency do to discharge its obligation to ensure employees who *are* identified, and who must search their own personal accounts and files for "public records," are "properly trained" to do so?[62] Not all employees possess the same technical acumen or skills. Employees A and B may both prefer to use their Gmail accounts for conducting agency business, but Employee A may have no clue how to search his inbox while Employee B has a degree in computer science and can be relied upon to conduct such a search with ease. Some employees might not have the basic technical ability to effectively search their personal accounts and devices for "public records" even when instructed to do so and even if they attempt to do so in good faith. What must agencies do to ensure this is not an appreciable risk?

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[61] *Id.* at 628.

[62] *Id.* (referring to the procedure to comply with FOIA whereby employees must be "properly trained" to do searches for public records).

Another question is, to what extent can public entities rely on their employees' representation concerning searching for public records on their personal accounts and devices? The Court in *San Jose* explained that agencies may "reasonably" rely on their employees to search for responsive documents on their personal accounts, and described a procedure under which agencies could establish that an adequate search has been performed provided their employees swear under penalty of perjury that they have not withheld public records.[63] At the same time, the Court held that such a procedure could only be compliant when conducted in "good faith," and the Court noted that no particular search method or approach it discussed was "necessarily adequate" for compliance with the PRA.[64] Given this backdrop, what should a public entity do if one or more of its employees or officials represent they have no public records on their personal accounts, but other agency personnel believe that they do? What level of "policing" of an agency's procedure for identifying public records on a personal account (if any) is required for compliance with the PRA? In the case of records that are directly accessible to an agency, such as on its servers, this is less of an issue because the agency can always conduct its own searches. Decisions following *San Jose* may clarify these issues depending on whether they become practical concerns to public entities and requesters litigating PRA disputes.

(b) How Are Existing Records Retention Requirements Affected By The Extension of the PRA to Records On Private Accounts and Devices?

The PRA does not govern what records public entities must *retain* – only what records they must *disclose*.[65] Record retention is addressed by other various state laws depending on the nature of the records. Generally, however, cities must retain records for at least two years.[66] Regardless of the *specific* records retention rules that might apply, presumably they apply to public records that reside on personal accounts and devices, which raises the difficult practical problem for cities of how to ensure that employees and officials know about and conform their behavior to applicable records retention laws concerning records residing on personal accounts and devices.

As discussed below in the practical tips section, there are two primary ways cities can go about securing compliance. First, they can prohibit employees and officials from using personal accounts for official business. Assuming such policies are adhered to, they circumvent the practical challenges of ensuring compliance with retention and disclosure laws for public records on personal accounts. The second general approach is to ensure employees and officials understand the applicable retention rules that apply. For example, a city could permit the use of personal accounts for conducting official business but require that all records be forwarded to an official account, or require that employees and officials abide by any applicable records retention

[63] *Id.* at 627.

[64] *Id.* at 629.

[65] *Los Angeles Police Dep't v. Superior Court* (1977) 65 Cal.App.3d 661, 668 (PRA "itself does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records. Its sole function is to provide for disclosure.")

[66] Gov. Code§ 34090(d).

laws – such as requiring employees to maintain records for at least two years, or longer as the case may be, and possibly to purge such records when no longer required to be retained.

One type of record that is likely to be maintained on personal accounts – transitory social media such as Snapchat – presents a particularly novel problem for cities trying to comply with their retention and disclosure obligations in the aftermath of *San Jose*. Although transitory social media almost certainly falls within the ambit of the PRA, there is also an inherent conflict with retaining such communications that are, by nature, *intended* to be temporary.

As discussed elsewhere, one means of dealing with such transitory records is to simply develop policies prohibiting public business from being conducted on privately maintained social media, and requiring that any communications that do arise on private accounts about public business be forwarded to official public accounts. Another potential solution is for cities to simply exclude such transitory and temporary records from the city's definition of public records for purposes of state public records retention laws. This is possible because what constitutes a public record for purposes of state records retention laws is not defined under state law, giving officials a modicum of discretion in this domain. Cities may be able to justify not treating transitory social media as a public record subject to retention due to the temporary nature of such media. This is something to be explored as the law in this area continues to develop.

3. *Practice Tips For Decreasing The Risk of Failing To Comply With the PRA Concerning Public Records On Personal Accounts and Devices*

Public entities attempting to ensure their practices concerning personal accounts and devices comply with the PRA should consider the following practice tips, particularly while the law in this arena – and the extent of the *San Jose* holding – are further established:

First, government agencies should ensure all employees and officials understand that use of personal electronic communication accounts and devices, as well as social media platforms and systems, will not shield any content from being subject to the PRA. Similarly, they should understand and comply with any records retention requirements in the event they chose to use their personal accounts and devices for public business.

Second, agencies should consider policies requiring all public or official business to be conducted using official government accounts and devices, and should consider instituting policies for monitoring such compliance – for example with periodic training, reminders, and employee statements of compliance.

Third, public entities should consider developing specific procedures for ensuring that appropriate employees are notified of a PRA request that might implicate their records, and develop a procedure for determining whether it is a reasonable possibility that such employees might have transmitted or saved public records through and to their personal accounts and devices, respectively. For example, an employee could be required to complete a questionnaire indicating whether they ever use a personal account or device for conducting any communication or work connected to their official responsibilities. Depending on their answers, the questionnaire would guide them through further topics and inquiries with the goal of facilitating a more robust and defensible search for public records on personal accounts and devices.

IV. Conclusion

Public entities need to ensure that as they and their employees increasingly leverage social media and other communication technologies, they stay appropriately on top of the ways in which established laws are being extended to address these changes in government practices.

Issues of Local Control and Wireless Telecommunication Facilities

Thursday, May 3, 2018 General Session; 3:45 – 5:15 p.m.

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Wireless Infrastructure In Public Rights-of-Way:

Federal Broadband Initiatives and Recent California Case Law

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I. Introduction

The wireless industry has shifted the focus of new investment towards deploying wireless facilities such as small cells and distributed antenna systems ("DAS"), with many facilities proposed for installation in public rights-of-way. This is driven in large part by the industry's desire to create additional capacity to meet the growing demand for broadband and data services, and the onset of "5G" networks.[1] These developments have strained existing regulatory frameworks, while at the same time Congress, the Federal Communications Commission ("FCC"), and the state legislature have imposed new rules and constraints on local authorities. This paper examines some of the latest infrastructure-related developments at the federal level and in recent case law, and provides some guiding principles on addressing industry requests in an environment of regulatory uncertainty.

II. Overview of Relevant Federal and State Laws and FCC Regulations

A. Key Telecommunications Provisions of Federal and California Law.

47 U.S.C. § 332 ("Section 332")[2] preserves local authority over local decisions regarding the placement, construction and modification of wireless communications facilities, subject to the limitations on that authority set forth in that section. Among other things, regulation of the placement, construction, and modification of personal wireless service facilities may not unreasonably discriminate among providers of functionally equivalent services; or prohibit or have the effect of prohibiting the provision of personal wireless services. Section 332 provides that local authorities must take action on a wireless application within a "reasonable period of time" after the request is filed, taking into account the nature and scope of the request. In 2009, the FCC established "presumptively reasonable periods"—referred to as "shot clocks"—for local action:[3] 90 days for collocation requests, and 150 days for other requests. These shot clocks apply to small cells and DAS.[4] Local authorities may not regulate siting based on RF emissions but may require that facilities comply with FCC RF standards.

47 U.S.C. § 1455(a) (commonly referred to as "Section 6409(a)" of the Spectrum Act) provides in part that "a State or local government *may not deny, and shall approve*, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." The term "eligible facilities request" refers to "any request for modification of an existing wireless tower or base station that involves…collocation of new transmission equipment;…removal of transmission equipment; or…replacement of transmission equipment." The FCC developed comprehensive

[1] Small Cell Forum, *Small cells market status update*, 14 February 2018 Version: 50-10-02.
[2] Section 332(c)(7)(A) reads: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."
[3] See *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165, 24 FCC Rcd 13994 (WTB. 2009), https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf ("2009 Declaratory Ruling").
[4] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, et al., 30 FCC Rcd. 31 (WTB 2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1.pdf ("2014 Report and Order").

rules on how to apply Section 6409(a) in a Report and Order released October 21, 2014.[5] There, the FCC laid out the criteria for determining whether or not an application qualified for treatment as an "eligible facilities request" and adopted a 60-day shot clock for approving those requests, with a "deemed granted" remedy for applicants to invoke if the locality failed to timely act.

47 U.S.C. § 253 ("Section 253") preempts state and local governments requirements that prohibit or having the effect of prohibiting any entity from providing telecommunications services. Generally speaking this provision applies to wireline facilities.[6] However, even otherwise preempted provisions survive if they are within one of two safe harbors.[7] Section 253(b) provides that local governments may "impose, on a competitively neutral basis…requirements necessary to preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service." Additionally, Section 253(c) protects state and local authority to "manage the public rights of way" and "require fair and reasonable compensation from telecommunications providers" for public rights-of-way use on a competitively neutral and nondiscriminatory basis.

AB 57 (Quirk), codified under Gov. Code § 65964.1, and effective January 1, 2016, is increasingly being raised by wireless applicants. AB 57 essentially provides a path for applicants to pursue a "deemed granted" remedy related to applications subject to the Section 332 FCC shot clocks. Under AB 57, once the applicable timeline period has expired and as long as all public notices have been provided, applicants may claim that the application is "deemed granted" by providing written notice to the local authority (assuming the locality has not acted on the application before the notice is provided). Local governments may then challenge a "deemed granted" assertion by seeking judicial review within 30 days of receiving the applicant's notice.

California Public Utility Code sections 7901 & 7901.1. California Public Utility Code section 7901 ("Section 7901") has been characterized as a "continuing offer extended to telephone and telegraph companies…which offer is accepted by the construction and maintenance of lines…to use the public highways for the prescribed purposes without the necessity for any grant by a subordinate legislative body."[8] The provision allows telephone companies to place "poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines" in the public rights of way, subject to local control to

[5] *Id*. The 2014 Report and Order also adopted new or modified rules for environmental and historic preservation review of small wireless facilities, including DAS and codified an exception to advance notice of the placement of temporary towers under the Antenna Structure Regulation requirements. These changes are outside the scope of this paper. As discussed above, the 2014 Report and Order also clarified some provisions of the Shot Clock.

[6] Section 253(a) provides as follows: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

[7] *BellSouth Telecomns., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2001), *quoting In re Missouri Municipal League*, 16 FCC Rcd. 1157, 2001 (2001) ("it is clear that subsections (b) and (c) are exceptions to (a), rather than separate limitations on state and local authority in addition to those in (a)."); *In re Minnesota*, 14 FCC Rcd. 21,697, 21,730 (1999); *In re American Communications Servs., Inc.*, 14 FCC Rcd. 21,579, 21,587-88 (1999); *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14,191, 14,203 (1997).

[8] The full text of the statute reads as follows: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

ensure placements do not "incommode" the public. California Public Utility Code Section 7901.1 is a companion provision; it provides that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed…" Cases have extended Section 7901 rights to comingled facilities and to personal wireless service providers seeking to deploy in the public rights-of-way.[9]

B. Overview of Historic and Environmental Review Requirements.

The construction of wireless communication facilities can be subject to environmental and historical review under both federal and state law. Until recently, federal historic preservation and environmental reviews would occur for most wireless projects, including small cells and DAS. However, as discussed in the next section, the FCC has issued an order largely eliminating these federal historical reviews for small cells and DAS. The FCC did not, however, preempt state and local environmental review rules.

In California, at the state level, environmental review of wireless communication facility projects is controlled by the California Environmental Quality Act ("CEQA"). General Order 159A leaves the California Public Utilities Commission ("CPUC") with no role to play in the siting of macro cell sites, so any CEQA review is typically done in the context of issuing discretionary permits at the local level with the local authority acting as the lead agency. However, the CEQA review with respect to small cells and DAS in the public rights-of-way is less clear, in part because the CPUC routinely issues certificates of public convenience and necessity ("CPCNs") that make preliminary findings as to whether the deployments will qualify for categorical exemptions—but also may require telephone companies to go back to the CPUC on a project-by-project basis for final CEQA determinations. The review period for the CPUC is only 21 days, and once reviewed, a project will receive a notice to proceed from the CPUC which it issues as "lead agency". However, applicants do not always undertake the CPUC review before other project applications have been submitted at the local level, and some argue that the local authorities could also serve as lead agency. The CPUC started but never finished a proceeding that examined potentially changing CEQA review responsibilities.[10] In any case, The CPUC's CEQA determinations may not replace local law unless the CPUC states in no uncertain terms that its CEQA determinations will supersede local law, accompanied by an explicit examination of whether local law is valid under statewide law and policy.[11]

[9] *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 587-8; *see GTE Mobilenet of Cal. Ltd. V. City of San Francisco* (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1103; *see also Williams Communs. v. City of Riverside* (2003) 114 Cal.App.4th 642 (applying Section 7901 to comingled services on same facilities).

[10] *Order Instituting Rulemaking on the Commission's own motion into the application of the California Environmental Quality Act to applications of jurisdictional telecommunications utilities for authority to offer service and construct facilities,* Decision 10-05-050, Rulemaking 06-10-006, CAL. PUB. UTIL. COMM'N (rel. May 27, 2011) (granting a stay of GO 170 pending resolution of applications of rehearing).

[11] *City of Huntington Beach*, 214 Cal.App.4th at 592 (In other words, "[t]he commission cannot bootstrap a limited, conditional approval . . . into an order that preempts local ordinances.").

III. Federal Developments - FCC's Broadband Deployment Advisory Committee and Pending Dockets

A. Formation and Work of BDAC.

At the FCC, the latest infrastructure-related developments are framed within the context of efforts to spur broadband deployment—the key underlying premise being that local governments are a "barrier" to such deployments. On January 31, 2017, the FCC created the Broadband Deployment Advisory Committee ("BDAC"), a federal advisory committee to advise regarding formal and informal measures the Commission might take to "accelerate the deployment of high-speed Internet access."[12]

The BDAC is dominated by industry or industry-affiliated parties. When the BDAC was announced in April 2017, only three of the thirty initial BDAC committee members represented local government interests. The Commission later appointed local government representatives to the working groups, and additional local appointments were made after the Chairman was criticized on the dearth of local and state BDAC membership. Nonetheless, private interests form the overwhelming majority of members, both on the BDAC and throughout its working groups.[13]

The BDAC has churned out a series of industry-favorable recommendations. As of the publication date of this paper, the BDAC has approved a report and recommendation from the following working groups: Competitive Access to Broadband Infrastructure,[14] Removing State and Local Regulatory Barriers,[15] and Streamlining Federal Siting.[16] On January 23-24, 2018, the BDAC met and considered discussion drafts from both the Model Code for States[17] and Model Code for Municipalities working groups.[18] The next BDAC meeting is on April 25, 2018.

The lack of local government representation has led to serious fractures within the Removing State and Local Regulatory Barriers Working Group. On January 23, 2018, the Cities of San Jose, CA, McAllen, TX, and New York, NY filed with the FCC a substantive Minority Report to address the industry-driven recommendations contained in the main report issued by the Removing State and Local Regulatory Barriers Working Group.[19] The Minority Report offered a local government perspective, and called into question the FCC's legal authority to take certain actions related to preempting local authority to regulate the public rights-of-way. On January 25, 2018, Mayor Sam Liccardo of San Jose resigned from the BDAC.[20] Miguel Gamino Jr. of the New York City Mayor's Office followed suit on March 28, 2018, citing concerns about

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[12] https://www.fcc.gov/broadband-deployment-advisory-committee.

[13] The working groups are: Model Code for Municipalities; Model Code for States; Competitive Access to Broadband Infrastructure; Removing State and Local Regulatory Barriers; Streamlining Federal Siting; and Rates and Fees (*Ad Hoc Committee; formed in 2018*).

[14] https://www.fcc.gov/sites/default/files/bdac-competitiveaccess-report-012018.pdf.

[15] https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-report-012018.pdf.

[16] https://www.fcc.gov/sites/default/files/bdac-federalsiting-report-012018-2.pdf.

[17] https://www.fcc.gov/sites/default/files/bdac-modelcode-012018.pdf.

[18] https://www.fcc.gov/sites/default/files/bdac-municipalcode-012018.pdf.

[19] https://ecfsapi.fcc.gov/file/101232920908470/30469970_1.PDF.

[20] http://www.sanjoseca.gov/DocumentCenter/View/74464. In his resignation letter, Mayor Liccardo stated that "the industry-heavy makeup of the BDAC will simply relegate the body to being a vehicle for advancing the interests of the telecommunications industry over those of the public. The apparent goal is to create a set of rules that will provide industry with easy access to publicly funded infrastructure at taxpayer-subsidized rates, without any obligation to provide broadband access to underserved residents."

the BDAC's industry-dominated makeup.[21] On April 10, 2018, David Young, a National League of Cities representative who works as the fiber infrastructure and right of way manager for the City of Lincoln, Nebraska, was appointed to the BDAC.

B. Pending FCC Infrastructure Proceedings.

The BDAC was established while the FCC was conducting three FCC infrastructure proceedings addressing, in large part, the same issues slated for the BDAC's examination. The first proceeding began under then-Chairman Wheeler with the December 22, 2016 release of a Public Notice setting comment dates in response to a Petition for Declaratory Ruling filed by Mobilitie—a fairly new market entrant focused on making deployments in the public rights-of-way on behalf of its wireless provider customer.[22] This Petition asked the Commission to interpret Section 253(c) (the public rights-of-way compensation and management savings clause) and to rule that (1) "fair and reasonable compensation" for right of way use includes only those fees sufficient to allow a local authority to "recoup its costs" related to issuing permits and "managing the rights of way;" and (2) "competitively neutral and nondiscriminatory" fees means "charges that do not exceed those imposed on other providers for similar access;" and (3) local authorities must make publicly available public rights-of-way charges previously imposed on other applicants.[23] The Public Notice the FCC released setting comment and reply deadlines greatly expanded the scope of this inquiry. The FCC released a fifteen-page public notice inviting stakeholders "to develop a factual record that will help us assess whether and to what extent the process of local land-use authorities' review of siting applications is hindering, or is likely to hinder, the deployment of wireless infrastructure," as well as the extent the FCC may use Sections 253, 332, and Section 6409(a), to address any "barriers to deployment."[24] The record generated in response to this item largely involved lengthy, technical debate between industry parties and local authorities regarding the scope of FCC's authority to act under the statute and a policy debate as to whether right of way fees should or need to be more acutely regulated by the FCC. Many local governments and associations representing local authorities, including the League of California Cities, filed comments[25] and reply comments.[26]

Chairman Pai, shortly after assuming leadership of the FCC in January 2017, released two new items—a Notice of Proposed Rulemaking and Notice of Inquiry under a docket entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure

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[21] https://assets.documentcloud.org/documents/4426173/NYC-CTO-Miguel-Gami%C3%B1O-BDAC-Resignation.pdf.

[22] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling, Public Notice*, WT Docket No. 16-421, 31 FCC Rcd. 13360 (WTB 2016), https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1427A1_Rcd.pdf ("Streamlining Public Notice").

[23] Mobilitie, LLC, *Petition for Declaratory Ruling*, 1 (filed Nov. 15, 2016), https://ecfsapi.fcc.gov/file/122306218885/mobilitie.pdf.

[24] Streamlining Public Notice at 2.

[25] Joint Comments of League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities & SCAN NATOA, Inc., WT Docket No. 16-421 (filed Mar. 8, 2017), https://ecfsapi.fcc.gov/file/10309065854390/joint%20comments%20AZCT%20CACities%20CSAC%20NMML%20ORCities%20and%20SCAN%20WT%2016-421%20(filed%2020170308).pdf.

[26] Joint Reply Comments of the National League of Cities, League of California Cities, et. al., WT Docket No. 16-421 (filed April 7, 2017), https://ecfsapi.fcc.gov/file/10407758005427/NLC%20SML%20FCC%20WT%2016%20421%20reply%20comments.pdf.

Investment,"[27] and a Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment under a docket entitled "Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment."[28] These two FCC items addressed a wide variety of topics, some of which do not directly involve local government interests. The discussion of those that do generally assumes industry positions as tentative conclusions or asks questions that appear to assume industry points of view. The Accelerating Wireless Broadband NPRM & NOI, for example, sought comment on different legal theories to justify imposing a "deemed granted" remedy on application "shot clocks"[29] even though that remedy had already been considered and rejected by the FCC twice as beyond its legal authority.

The two items also sought comment on new areas not previously the focus of FCC proceedings. For example, the Wireline NPRM, NOI, & RFC sought comment on whether various right-of-way management practices, in the wireline context—such as right-of-way access agreements or non-cable telecommunications franchise agreements—should be controlled by FCC-imposed negotiation time limits and fee-related rules.[30] In the Wireless NPRM & NOI, the FCC sought comment on the "proper role of aesthetic considerations in the local approval process" and whether aesthetic considerations could be found to "prohibit" deployment.[31] The FCC also implied there are instances where a municipality's fees and charges for use of property *outside the public rights-of-way* could "prohibit" deployments within the meaning of Section 332.[32] The FCC also raised the specter of abbreviating existing FCC shot clocks[33] and sought comment on how "batch" applications might be treated if the Commission indeed adopts new shot-clock-related rules. The record generated in these two proceedings is voluminous and there was significant local government participation, again including the League of California Cities.[34]

The FCC has released three orders under these two dockets already. In March 2018, the FCC adopted new rules narrowing the scope of deployments that require environmental and historic review under the National Historic Preservation Act ("NHPA") and the National

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[27] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, 32 FCC Rcd. 3330 (rel. Apr. 21, 2017), https://ecfsapi.fcc.gov/file/0421294395880/FCC-17-38A1.pdf ("Accelerating Wireless Deployment NPRM & NOI").

[28] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, 32 FCC Rcd. 3266 (rel. Apr. 21, 2017), https://ecfsapi.fcc.gov/file/0421885402163/FCC-17-37A1.pdf ("Accelerating Wireline Deployment NPRM, NOI & RFC").

[29] Accelerating Wireless Deployment NPRM & NOI at paras. 8-17.

[30] Accelerating Wireline Deployment NPRM, NOI, & RFC at paras. 103-105.

[31] Accelerating Wireless Deployment NPRM & NOI at para. 92.

[32] *Id* at paras. 93-94.

[33] *Id* at para. 18.

[34] Joint Comments of League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities, WT Docket No. 17-79 (filed June 15, 2017), https://ecfsapi.fcc.gov/file/10616785802234/joint%20comments%20AZCT%20CACities%20ORCities%20(wt%20docket%20no%2017-79)%20signed.pdf; Joint Comments of League of Arizona Cities and Towns, League of California Cities and League of Oregon Cities, WC Docket No. 17-84 (filed June 15, 2017), https://ecfsapi.fcc.gov/file/1061617549647/joint%20comments%20AZCT%20CACities%20ORCities%20(wc%20docket%20no%2017-84)%20signed.pdf; Consolidated Joint Reply Comments of League of Arizona Cities and Towns, League of California Cities & League of Oregon Cities, WT Docket No. 17-79, WC Docket No. 17-84 (filed July 17, 2017), https://ecfsapi.fcc.gov/file/10616785802234/joint%20comments%20AZCT%20CACities%20ORCities%20(wt%20docket%20no%2017-79)%20signed.pdf.

Environmental Preservation Act ("NEPA").[35] The FCC amended its rules to provide that the deployment of certain wireless facilities by private parties is not either a "federal undertaking" within the meaning of NHPA or a "major federal action" under NEPA. Accordingly, federal review for qualifying deployments is not mandated. The FCC excluded from review under the NHPA facilities that satisfied certain height and size limits, including where "the antenna associated with the deployment…is no more than three cubic feet in volume."[36] Additionally, wireless equipment associated with the structure must be no larger than 28 cubic feet.[37] These wireless facilities deployments would continue to be subject to currently applicable state and local government approval requirements, including CEQA.

Some of the most controversial items for local governments were introduced in Notices of Inquiry, suggesting further rounds of rulemaking proceedings are coming, although declaratory rulings, like the one that established the initial FCC "shot clocks" in 2009, are also possible. BDAC recommendations may well figure into these proceedings.[38]

IV. FCC Reclassification of Broadband

On December 14, 2017, the FCC adopted the Restoring Internet Freedom Declaratory Ruling, Report and Order, and Order ("Restoring Internet Freedom Order").[39] The Restoring Internet Freedom Order is best known for the controversial decision to reclassify broadband Internet access services under the Telecommunications Act of 1996 ("TCA") from a "telecommunications service" to an "information service" and thereby do away with "common carrier" and "net neutrality" rules adopted by the Wheeler FCC. This order, however, has other significant ramifications including for wireless deployments.

In the Restoring Internet Freedom Order, the FCC stated that facilities used to provide "comingled" services—both telecommunications and broadband services—remain subject to Section 332, which by its terms only applies to facilities used to provide common carrier type services. Particularly, the FCC stated that Section 332(c)(7), despite the reclassification of broadband, "applies to facilities, including DAS or small cells, deployed and offered by third-parties for the purpose of provisioning communications services that include personal wireless services."[40] This begs the question, however, as to whether a denial is actionable as an "effective prohibition" when a facility is only necessary in order to provide broadband service.

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[35] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79, 2018 WL 1559856, para. 71 (rel. March 30, 2018), https://ecfsapi.fcc.gov/file/033033113547/FCC-18-30A1.pdf ("NHPA & NEPA Order").
[36] NHPA & NEPA Order at para. 71.
[37] *Id.* at para. 76.
[38] For example, the FCC's BDAC-related public documents feature a refrain that the BDAC's recommendations will "enhance the Commission's ability to carry out its statutory responsibility to encourage broadband deployment to all Americans." *See, e.g.*, Letter to the Hon. Ryan Costello, https://apps.fcc.gov/edocs_public/attachmatch/DOC-344645A1.pdf; *and* Statement of Chairman Pai on Broadband Deployment Advisory Committee, https://www.fcc.gov/document/statement-chairman-pai-broadband-deployment-advisory-committee.
[39] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, 2018 WL 305638 (rel. Jan. 4 2018), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf.
[40] *Id.* at para. 190.

V. Recent Cases Relevant to Wireless Deployments in the Public Rights-of-Way

***Extenet Systems, California, LLC v. City of Burlingame*, San Mateo County Super. Ct. No. CIV508756 (filed Nov. 9, 2017)**

Extenet applied for eight encroachment permits for a proposed DAS project in the public right-of-way of a residential neighborhood. The City denied 6 of 8 applications based on aesthetic considerations. The Court upheld the City's decision finding that a denial properly made on aesthetic grounds—even alongside improper grounds for denial—is sufficient to support a denial. It further held that the "large number of public comments expressing aesthetic objections" to the proposed DAS nodes provided substantial record evidence for the City's denials. The Court also explained that the objective aesthetic standards contained in the City's ROW Regulations, "provided a safeguard against wholly subjective and arbitrary decision-making." The Court also found that the City did not violate Section 253: its denial was permitted under (1) its Section 332(c)(7)(A) authority to regulate the "placement, construction, and modification of personal wireless service facilities," and (2) under Section 253(c), which provides a "safe harbor" to Section 253(a)'s service prohibition language where a local authority exercises its right to "manage the public rights-of-way." In particular, no prohibition was found *since City had specifically encouraged Extenet to reapply and continue working with the City to find a solution.*

***Pacific Bell Telephone Co. vs. City of Livermore,* Alameda County Super. Ct. No. RG11607409 (filed Dec. 28, 2017)**

The appeals court reversed the trial court's judgement and directed issuance of a writ allowing Pacific Bell Telephone Co. ("AT&T") to bundle its fiber optic cable with existing telephone lines on existing poles, even where the local zoning ordinance required undergrounding. While the Court upheld the City's authority under Section 7901 to regulate the installation of lines on an aesthetic basis, the City's denial was based on "insufficient" evidence given that the three existing poles at issue in AT&T's application had existing copper telephone lines, as well as cable television and electrical wires—and AT&T had proposed to "bundle" its new lines with existing above-ground lines. Evidence did not support a claim that the aesthetics of the street would be affected since (the court found) the street in question was already "cluttered" with other utility and telecommunications facilities. The Court implied the "sufficient evidence" standard is not fulfilled where a local government considers a project in terms of the cumulative impact of many similar projects in the future.

The Court acknowledges that granting AT&T's "bundling" request would have violated the express terms of the undergrounding ordinance, but ruled that the City should have recognized that its undergrounding rules are "preempted by state law" and used its power to nullify its "invalid regulation" at an administrative hearing.

***Aptos Residents Association v. County of Santa Cruz, Crown Castle Inc.*, Santa Cruz County Super. Ct. No. CV179176 (filed Feb. 5, 2018)**

The Court affirmed a lower court decision rejecting the Aptos Residents Association's ("ARA") petition for a writ of mandate under CEQA. The writ would have overturned the County's approval of 10 permit applications for placement of antennas in the public rights-of-

way. The County deemed the project categorically exempt, without exception, from CEQA under the Class 3 "small structure" exemption,[41] and otherwise found the visual impact of the 10 microcells would be "negligible," even when considered in conjunction with a nearby PG&E project and a prospective AT&T project. The Court found the Class 3 exemption was properly applied where the County considered all 10 microcells as a single project, as the text of the exemption explicitly contemplates "structures," plural, and does not mandate consideration of each structure individually—even though applicant Crown Castle filed a separate application for each antenna.

Under CEQA Guidelines, Section 15300.2, a Class 3 exemption may not apply if the location of the project would result in an "ordinarily insignificant" project making a "significant" impact on the surrounding environment ("location" exception); or the cumulative impact of "successive projects of the same type in the same place, over time is significant ("cumulative impact" exception); or where "there is a reasonable possibility that the activity will have a significant effect on the environment due to "unusual circumstances" ("unusual circumstances" exception). The Court found that the ARA presented only speculative evidence insufficient to prove each exception might apply, and did not justify overturning the County's decision.

***T-Mobile West LLC v. City and County of San Francisco,* 3 Cal.App.5th 334 (2016)**

This decision confirms that cities may apply discretionary review processes to requests under Section 7901 for permanent wireless installations in the public rights-of-way by telephone companies, and those may be decided based on a consideration of aesthetics, as well as other factors. The term "incommode" in Section 7901 is "broad enough 'to be inclusive of concerns related to the appearance of a facility.'" The case is precedent for not only requiring discretionary review, but also for denying or conditioning applications for particular locations in the public rights-of-way on aesthetic grounds, including concerns regarding pole heights or underground districts. This case is currently on appeal to the California Supreme Court.[42]

***T-Mobile S., LLC v. City of Roswell, Ga.,* 135 S. Ct. 808, 190 L. Ed. 2d 679 (2015)**

T-Mobile brought an action against the City of Roswell, challenging its denial of provider's application to build a cell phone tower as a violation of Telecommunications Act. The Supreme Court noted that under Section 332, a locality must, when it denies a siting application, provide reasons clear enough to enable judicial review. A locality's reasons for denying a siting application need not appear in the same writing that conveys the locality's denial, but the locality must provide or make available its written reasons at essentially the same time as it communicates its denial. The relevant "final action" triggering judicial review is the issuance of the written denial notice, not the subsequent issuance of reasons explaining the denial.

VI. How Can Local Governments Respond To This Regulatory Uncertainty?

Local governments should revisit their codes and property leasing models to ensure that small cells and DAS are properly addressed, especially in public rights-of-way. It may seem

[41] 14 CCR § 15303 (exemption for small structures).
[42] *T-Mobile W. v. City & Cty. of San Francisco*, 385 P.3d 411 (Cal. 2016).

logical to impose a moratorium on new applications during this review period, but moratoria do not toll the FCC's deadlines for actions. Consider and be prepared to answer the following:

- Does your zoning ordinance apply to wireless facilities in the public rights-of-way?
- Will your regulatory process allow you to, within the FCC shot clocks, process a request to place a number of facilities at multiple sites in the right-of-way?
- Have you taken steps to ensure that small facilities, once approved, will not expand into larger facilities?
- Have you developed an approach to leasing government-owned property for new wireless uses that protects the community and recognizes the value of your assets?
- Does your site-specific permitting process appropriately provide for what happens if a facility must be removed, replaced, modified, or abandoned in place?

If the answers to these questions are not immediately apparent for a particular local authority, that authority will face increased risk throughout the siting process. Local governments should also continue to monitor developments, particularly at the federal level where much action is anticipated in coming months, and be prepared to advocate strongly to support local control and local interests.

Distinctions with a Difference: Leasing and Licensing Municipal Infrastructure for Wireless Facilities

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League of California Cities
City Attorneys’ Spring Conference - 2018

Distinctions with a Difference: Leasing and Licensing Municipal Infrastructure for Wireless Facilities

I. INTRODUCTION

The rise in so-called “small cells” installed in the public rights-of-way has been accompanied by regulatory and legislative efforts to limit the compensation local governments may require for attachments to their infrastructure. The FCC has three open dockets with proposals to impose a cost-based compensation scheme. Since 2016, at least 18 states adopted legislation that restricts local compensation to cost (or in some cases, below-cost) recovery, and similar legislation has been proposed in at least 12 other states. California narrowly defeated small cell preemption when, on October 14, 2017, Governor Brown vetoed SB 649 (Hueso), which would have implemented a ministerial permit process for small cells, and would have required local agencies to accept below-market rates and less-than-full cost reimbursement for attachments to their infrastructure.

Most local government officials and attorneys know that federal and state law significantly curb local *regulatory* authority over wireless facilities. However, whether and to what extent these laws affect local *proprietary* authority is less well understood. This paper surveys the various federal and state laws that affect local authority over wireless facilities, and explains the basis for the freer hand local agencies have in their proprietary capacities.

II. RELEVANT FEDERAL AND STATE LAWS

A. Telecommunications Act

1. Section 332(c)(7)

Section 332(c)(7) of the Federal Telecommunications Act generally preserves local authority over personal wireless service facilities, subject to certain substantive and

procedural limitations.[1] Local governments may not (1) prohibit or effectively prohibit personal wireless services; (2) unreasonably discriminate among functionally equivalent service providers; or (3) regulate personal wireless service facilities based on the environmental effects from radio frequency emissions to the extent such emissions meet FCC guidelines.[2] Local authorities must act within a reasonable time on requests for authorization to construct or alter personal wireless service facilities.[3] Denials—and the reasons for the denial—must be in writing and based on substantial evidence in the written record.[4]

Courts routinely interpret the preemptive effect under § 332(c)(7)(B) as cabined to land-use decisions or similar governmental acts undertaken in a regulatory capacity.[5] In the first reported case to address the issue, the Second Circuit in *Sprint Spectrum LP v. Mills* drew upon the market participant doctrine to hold that § 332(c)(7)(B)(iv) did not preempt school district's authority to enforce a lease provision that limited the total output power from Sprint's antennas. The court found that nothing in § 332(c)(7) suggested that Congress intended to preempt local proprietary decisions, and that the school district's

[1] *Compare* 47 U.S.C. § 332(c)(7)(A) (preserving local authority), *with id.* § 332(c)(7)(B) (listing exceptions to the local authority preserved in subsection (A)); *see also Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192, 195 (9th Cir. 2013) ("We conclude that § 332(c)(7)(A) functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations.").
[2] *See* 47 U.S.C. §§ 332(c)(7)(B)(i), (iv).
[3] *See id.* § 332(c)(7)(B)(ii).
[4] *See id.* § 332(c)(7)(B)(iii); *see also T-Mobile So. LLC v. City of Roswell*, --- U.S. ---, 135 S.Ct. 808, 816 (2015) ("Because an entity may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial of its application, and because a court cannot review the denial without knowing the locality's reasons, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial.").
[5] *See, e.g.*, *Huntington Beach*, 738 F.3d at 199–200; *Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 607 (6th Cir. 2004); *Sprint Spectrum LP v. Mills*, 283 F.3d 404, 420 (2nd Cir. 2002).

conduct was “plainly proprietary” because it concerned a single lease rather than some broader public policy.[6]

Two years after the *Mills* case, the Sixth Circuit held in *Omnipoint Holdings, Inc. v. City of Southfield* that personal wireless service providers cannot force municipalities to convey municipal property for wireless facilities.[7] VoiceStream applied for a permit to build a 150-foot tower on a residential lot surrounded by low-rise single-family homes, which Southfield ultimately denied as inconsistent with the neighborhood.[8] Although VoiceStream considered a municipal park as an alternative location, it abandoned that option because Southfield insisted on higher rents than the residential property owner.[9] When VoiceStream attempted to argue that Southfield’s refusal to accept lower rents violated § 332(c)(7)(B), the court held that “the plaintiff simply cannot compel the City to sell or lease a portion of the park if it chooses not to.”[10]

The Ninth Circuit’s approach in *Omnipoint Communications, Inc. v. City of Huntington Beach*, evaluates whether a particular act under review qualifies as an adjudicative or regulatory land-use decision Congress intended to regulate under § 332(c)(7)(B). The litigation in this case concerned whether Huntington Beach could enforce a provision in the city charter that required voter approval for large construction projects on municipal land. T-Mobile wanted to build two towers in a city park. Rather than seek voter approval, T-Mobile sued on the theory that the charter provision, as applied to leases for wireless facilities, violated § 332(c)(7).[11] The Ninth Circuit held that the voter-

[6] *See Mills*, 283 F.3d at 420–21.
[7] *See Southfield*, 355 F.3d at 607.
[8] *See id.* at 603.
[9] *See id.*
[10] *See id.* at 607.
[11] *See Huntington Beach*, 738 F.3d at 198–99.

approval requirement was not a "land use regulation or decision" preempted by § 332(c)(7) because it merely prescribed the mode by which the city may lease or sell municipal property for certain construction projects.[12] "By its terms, the [Telecommunications Act] applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner."[13] Although the Ninth Circuit cited *Mills* as consistent with the outcome in *Huntington Beach*, it expressly declined to base its decision on a "freestanding 'market participant exception'."[14]

2. Section 253(a)

Section 253(a) bars any "State or local statute, regulation, or other State or local legal requirement" that prohibits or effectively prohibits any person's or entity's ability to provide any telecommunications service.[15] However, a safe harbor provision preserves State and local authority to manage the public rights-of-way and to require "fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis . . . if the compensation required is publicly disclosed by such government."[16]

Whether the preemption in § 253(a) reaches contractual relationships remains subject to some significant dispute, but appears to depend on whether the agreement takes on a regulatory character.[17] In 1999, the FCC weighed in on this notion when Minnesota sought a declaratory ruling on whether its plan to grant an exclusive franchise over the entire state highway system to a single fiber optic cable provider violated § 253(a). The FCC indicated that it would find that the statutory phrase "legal requirement"

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[12] *See id.* at 199–200.
[13] *See id.* at 201.
[14] *See id.* at 201 fn.7.
[15] *See* 47 U.S.C. § 253(a).
[16] *See id.* § 253(c).
[17] *See, e.g.*, *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (finding that § 253 preempts only "regulatory schemes").

would cover to franchise agreements, but noted that preemption depends on the agreement's impact on other providers' ability compete in a fair and balanced regulatory environment.[18]

Consistent with the FCC's guidance in *Minnesota Preemption Order*, federal courts routinely review challenges to local franchise requirements under § 253(a). This approach appears to be premised on the idea that proprietary decisions and the impacts on the market may be indistinguishable from regulatory decisions when the government controls all or substantially all the economic inputs.[19] Although several lower courts have found that § 253(a) does not preempt agreements between public agencies and telecommunications providers, these cases involved narrower agreements that either were, or operated like, a lease.[20]

3. Section 6409(a)

In 2012, Congress passed the Middle Class Tax Relief and Job Creation Act, which included the so-called "Spectrum Act". The Spectrum Act contains § 6409(a), which mandates that State and local governments approve "eligible facilities requests" for

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[18] *See* In the Matter of the Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in the State Freeway Rights-of-Way, CC Docket No. 98-1, *Memorandum Opinion and Order*, 14 FCC Rcd. 21697, 21708–21716, ¶¶ 20–36 (Dec. 23, 1999); *accord* In the Matter of Amigo.net, CC Docket No. 00-220, *Memorandum Opinion and Order*, 17 FCC Rcd. 10964, 10967, ¶ 8 (June 13, 2002) (finding that the agreement in the *Minnesota Preemption Order* "would violate section 253(a) because it gave to one party exclusive physical access to the only feasible and cost-effective rights-of-way, and therefore potentially deprived other parties, specifically facilities-based competitors, of the ability to provide telecommunications services.").

[19] *See Reeves, Inc. v. Stake*, 447 U.S. 429, 453 (1980) (Powell, J., dissenting); *see also* David S. Bogen, *The Market Participant Doctrine and the Clear Statement Rule*, 29 Sea. Univ. L. Rev. 543, 544 (2006).

[20] *See, e.g.*, *Superior Communications v. City of Riverview*, 230 F. Supp. 3d 778, 794-95 (E.D. Mich. 2017) (relying in *Mills* to find that a city's refusal to approve an upgrade to a tenant's equipment did not violate § 253(a) because the denial could not be properly characterized as "regulation"); *T-Mobile W. Corp. v. Crow*, No. CV08-1337-PHX-NVW, 2009 WL 5128562, at *16 (D. Ariz. Dec. 17, 2009) (finding that ASU's "grant of an exclusive right to NextG to install the DAS and manage facilities is the proprietary decision of a property owner, not a 'regulation' or 'legal requirement' under § 253(a)").

collocations and modifications to existing wireless towers and base stations so long as such projects did not result in a substantial change.[21]

Section 6409(a) does not preempt local proprietary decisions.[22] A government landlord may not be obligated to approve a wireless tenant's request to expand its permitted use under the lease, even when § 6409(a) would require the same government to approve permit applications for the same modification.

B. California Public Utilities Code § 7901

Section 7901 is among the oldest laws in the state.[23] In its current form, the statute provides that:

> Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.[24]

Early court decisions interpreted § 7901 as a "statewide franchise" for telephone and telegraph companies. Local governments cannot require telephone corporations to

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[21] *See* Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156. (Feb. 22, 2012) (codified as 47 U.S.C. § 1455(a)).

[22] *See* In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, *Report and Order*, 29 FCC Rcd. 12865 at ¶ 239 (Oct. 17, 2014).

[23] In 1850, the same year California entered the Union as the 31st state, the legislature adopted an "Act Concerning Corporations" that granted telegraph corporations "the right to construct lines . . . along the public roads." *See* Act Concerning Corporations, Stats. 1850, ch. 128, p. 369; *Los Angeles Cnty. v. So. Cal. Tel. Co.*, 196 P.2d 773, 776 (Cal. 1948) (en banc). In 1872, the legislature codified the act as Civil Code § 536 and, in 1905, amended § 536 to extend the same rights to telephone corporations. *See Los Angeles Cnty. v. So. Cal. Tel. Co.*, 196 P.2d 773, 776 (Cal. 1948) (en banc). In 1959, the legislature recodified § 536 as § 7901 in the then-new Public Utilities Code, and added § 7901.1 as a sister statute to reaffirm and bolster local authority to regulate the time, place and manner in which telephone corporations access the public rights-of-way. *See* CAL. PUB. UTILS. CODE § 7901.1; *see also T-Mobile West LLC v. City & Cnty. of San Francisco*, 208 Cal. Rptr. 3d 248, 256 (Ct. App. 2016), *rev. granted*, 385 P.3d 411 (Cal. 2016).

[24] CAL. PUB. UTILS. CODE § 7901.

obtain a local franchise fee as a precondition to access.[25] Likewise, municipalities cannot charge a revenue-generating fee in connection with encroachment or other permits issued to telephone corporations.[26] These limitations extend to wireless service providers.[27]

However, the so-called statewide franchise covers only the real property that comprises the public rights-of-way and does not compel municipalities to grant access to their personal property, such as street lights, traffic signals and other street furniture.[28] This is a distinction with an important difference. Whereas § 7901 may preclude market-rate compensation for the general right to use the public rights-of-way, municipalities may charge a market rate for telecommunications equipment attached to their infrastructure within the public rights-of-way. Indeed, the California Constitution regards government property leased at below-market rates as potentially improper gifts.[29]

III. CONCLUSION

Distinctions between regulatory and proprietary authority make a big difference. Whereas federal and California state laws significantly limit local regulatory authority over wireless facilities, these same laws generally do not affect local proprietary authority over the same installations. Although California state law generally exempts wireless providers who seek access to the public rights-of-way from local franchise fees, this limitation does

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[25] *See Western Union Tel. Co. v. Hopkins*, 116 P. 557, 561 (Cal. 1911).
[26] *See* CAL. GOV'T CODE § 50030; *Williams Communications, LLC v. City of Riverside*, 8 Cal. Rptr. 3d 96, 106 (Ct. App. 2003) (invalidating fees charged as "rent or an easement or license fee in consideration for such use of the City's streets").
[27] *See GTE Mobilnet of Cal. Ltd. P'ship v. City & Cnty of San Francisco*, 440 F. Supp. 2d 1097, 1103 (N.D. Cal. 2006).
[28] *See, e.g.*, *NextG Networks of Cal., Inc. v. City of Newport Beach*, No. SACV 10–1286 DOC (JCx), 2011 WL 717388, at *8 (C.D. Cal. Feb. 18, 2011).
[29] *See* CAL. CONST., ART. XVI, § 6; *see also Allen v. Hussey*, 225 P.2d 674, 684 (Cal. Ct. App. 1950) (finding that a $1-per-year lease from an irrigation district to a private person to operate an airport constituted a "gift").

not apply to the jurisdiction's infrastructure. As wireless technologies evolve and increasingly rely on access to existing structures in the public rights-of-way, California local governments should pay close attention to these important distinctions.

Latest Developments in Cannabis Regulation

Thursday, May 3, 2018 General Session; 3:45 – 5:15 p.m.

Tim Cromartie, Senior Advisor, HdL Companies
Jeffrey V. Dunn, Best Best & Krieger

Notes:_____

LOCAL POLICE POWER AUTHORITY AND THE STATE'S DECRIMINALIZATION OF PERSONAL CANNABIS CULTIVATION

Prepared by:

Jeffrey V. Dunn, Best Best & Krieger LLP

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LOCAL POLICE POWER AUTHORITY AND THE STATE'S DECRIMINALIZATION OF PERSONAL CANNABIS CULTIVATION

OVERVIEW

The Medical and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA") (like its predecessor, the Adult Use of Marijuana Act ["AUMA"]) decriminalizes cannabis cultivation of up to six plants by individuals 21 years of age and older in their private residences and for their personal use. MAUCRSA provides, however, that "[a] city, county, or city and county may enact and enforce reasonable regulations to regulate" such activity. For that reason, cities throughout the State began considering and adopting ordinances using this express authorizing language and their police powers leading up to and after the passage of Proposition 64 in November 2016.

One of the first lawsuits to challenge local regulatory authority over personal cultivation since the passage of Proposition 64, is *Harris v. City of Fontana* (San Bernardino County Superior Court Case No. CIVDS 1710589). This paper provides an overview of the history of decriminalization of personal cannabis cultivation and a discussion of the legal challenges in the pending *Harris* litigation.

FEDERAL LAW

Any analysis of state and local regulatory authority should begin with a review of applicable federal law. (E.g., *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926 ["No state law could completely legalize marijuana . . . because the drug remains illegal under federal law."]) Cannabis is an illegal Schedule I narcotic under the Federal Controlled Substances Act. (21 U.S.C. § 812.) Over the last several years, the federal government has issued various memoranda regarding enforcement of the federal law in states with purported legalized cannabis use, and signaled recently a policy shift towards stricter enforcement against cannabis-related activities. (Memorandum from Attorney General Jefferson B. Sessions, III Regarding Marijuana Enforcement, January 4, 2018.) Federal law provides for no medical use defense or exception. (*Gonzales v. Raich* (2005) 545 U.S. 1; *United States v. Oakland Cannabis Buyers' Coop*. (2001) 532 U.S. 483.) The federal government continues to enforce the Controlled Substances Act in California. (http://www.thecannifornian.com/cannabis-news/northern-california/us-seizes-marijuana-growing-houses-tied-china-based-criminals/)

STATE LAW

Despite the federal government's stance on cannabis, California has continued to regulate and allow cannabis-related activities by decriminalizing certain cannabis use and related activities. California's decriminalization of particular cannabis-related activities dates back to 1996, when California voters approved Proposition 215, which was codified as Health & Safety Code section 11362.5 *et seq.* and entitled the Compassionate Use Act of 1996 ("CUA"). The CUA decriminalized the use of cannabis for medical purposes. In 2003, the California Legislature adopted Senate Bill No. 420, entitled the Medical Marijuana Program ("MMP"), codified as Health and Safety Code section 11362.7 *et seq.*, which further permitted qualified patients and primary caregivers to associate collectively or cooperatively to cultivate cannabis for medical purposes without being subjected to criminal prosecution.

The California Supreme Court has held that neither the CUA nor the MMP preempts local land use authority regarding medical marijuana, leaving public agencies with the authority to "allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana." (*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 762 [*"City of Riverside*"].)

Accordingly, while California has continued to decriminalize additional cannabis-related activities, the state has also consistently acknowledged that such decriminalization is subject to local police power and land use regulatory authority.

Of course, local authorities retain their police power under the California Constitution, regardless of what action the State takes to decriminalize cannabis-related activities.

Moreover, cannabis remains a Schedule I controlled substance that constitutes contraband and is subject to seizure by the State. (Health & Saf. Code, § 11475 ["[c]ontrolled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this division are contraband and shall be seized and summarily forfeited to the state"]; Health & Saf. Code, § 11054(d)(13) [listing cannabis as a Schedule I controlled substance]; see also *People v. Wexler* (2014) 224 Cal.App.4th 712, 721.) Accordingly, while cannabis is colloquially "legalized", as a legal matter, it is "decriminalized" under State law and only within in particular parameters.

CALIFORNIA DECRIMINALIZES PERSONAL CULTIVATION OF CANNABIS, SUBJECT TO LOCAL REGULATION

On June 28, 2016, the Secretary of State announced that Proposition 64, the Adult of Marijuana Act, had obtained sufficient valid petitioner signatures to be include on the 2016 General Election ballot.

On November 8, 2016, California voters approved Proposition 64 with 57.13 percent voter approval statewide, and a slimmer margin of voter approval in San Bernardino County and in the City of Fontana – 52.5 and 53.5 percent, respectively.

On June 27, 2017, the Governor approved Senate Bill No. 94, MAUCRSA. MAUCRSA did not change the substance of the decriminalization of personal cultivation of cannabis.

As of November 2016, individuals 21 years of age and older can do any of the following without running afoul of state or local law:

- Carry, obtain, or give away (to other individuals 21 years of age or older) up to 28.5 grams of cannabis, or 8 grams of concentrated cannabis, or cannabis accessories. (Health & Saf. Code, §§ 11362.1, subds. (a)(1), (a)(2), (a)(5).)

- Cultivate indoors up to 6 plants for personal use, subject to local regulations. (Health & Saf. Code, §§ 113621.1, subd. (a)(3), 11362.2.)

- Consume cannabis or cannabis products. (Health & Saf. Code, § 11362.1, subd. (a)(4).)

Relevant here is the provision pertaining to personal cultivation. Under MAUCRSA, adults 21 years of age and older may cultivate cannabis for personal use – up to six plants within or on the grounds of a single private residence free from prosecution by state or local authorities:

> [I]t shall be lawful under state and local law, and shall not be a violation of state law or local law, for persons 21 years of age or older to . . . (3) Possess, plant, cultivate, harvest, dry, or process not more than six living cannabis plants and possess the cannabis produced by the plants.

(Health & Saf. Code, § 11362.1.)

Importantly, the decriminalization of personal cannabis is left subject to local regulation.

> (b) (1) A city, county, or city and county may enact and enforce reasonable regulations to regulate the actions and conduct in paragraph (3) of subdivision (a) of Section 11362.1.
> (b) (2) Notwithstanding paragraph (1), a city, county, or city and county shall not completely prohibit persons engaging in the actions and conduct under paragraph (3) of subdivision (a) of Section 11362.1 inside a private residence, or inside an accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure.

(Health & Saf. Code, § 11362.2, subd. (b).)

There are two restrictions placed on a local agency's ability to regulate, that (1) the regulations be reasonable and (2) the regulations not completely prohibit personal indoor cultivation.

In the wake of the passage of Proposition 64's passage, many local authorities adopted ordinances to regulate the personal indoor cultivation. These ordinances varied greatly – from amendments to roll back outdated restrictions that prohibited any cannabis cultivation (which would violate the mandates of Health and Safety Code section 11362.2, subdivision (b)(2)) to registration requirements, inspection requirements, and the like.

CITY OF FONTANA REGULATIONS

The City of Fontana, like other cities, was confronted with several options to regulate personal residential indoor cultivation of a schedule I narcotic.

Some of the health and safety concerns associated with such activities include security risks to occupants and adverse effects to the health and safety of the occupants (including structural damage to the building due to increased moisture and excessive mold growth which can occur and

can pose a risk of fire and electrocution, and chemical contamination within the structure due to the use of pesticides and fertilizers).

Several California cities reported that negative impacts of cannabis cultivation, processing and distribution uses, include offensive odors, illegal sales and distribution of cannabis, trespassing, theft, etc. Based on these potential public safety and nuisance risks, Fontana considered options to safeguard individuals engaging in this potentially risky endeavor and use. To that end, the City adopted its Residential Indoor Marijuana Cultivation ("RIMC") permitting scheme. The RIMC permitting scheme included a number of key components, including (1) a permit requirement; (2) an inspection requirement; (3) a fee requirement; and (4) a background check requirement.

In compliance with the two restrictions placed on a local agency's ability to regulate, the City regulations were as limited in nature but still achieve the City's public health, safety, and welfare goals while not completely prohibiting individual cannabis cultivation.

DRUG POLICY ALLIANCE CHALLENGES LOCAL REGULATION

In December 2016, the Drug Policy Alliance sent a letter to a number of cities challenging locally adopted ordinances. The Drug Policy Alliance letters outlined four broad challenges: (1) preventing categories of people from engaging in personal cultivation violates AUMA; (2) local permits or fees to engage in personal cultivation violates AUMA; (3) requiring a permit to engage in personal cultivation violates the Fifth Amendment to the U.S. Constitution; and (4) requiring a warrantless inspection of a private home violates the Fourth Amendment to the United State Constitution.

While the Drug Policy Alliance focused on what it considered to be impermissible local regulations, there was no indication of what the Alliance would consider to be a permissible regulation under Health and Safety Code section 11362.2. This lack of information raises the question of whether the Drug Policy Alliance thinks *any* personal cannabis cultivation regulations are reasonable.

MIKE HARRIS V. CITY OF FONTANA

On June 5, 2017, Mike Harris ("Petitioner") filed a petition for writ of mandate and a complaint for declaratory relief ("Petition") against the City of Fontana for its adoption of regulations related to personal indoor cultivation.

The Petition alleges eight causes of action: (1) preemption, (2) violation of the Fifth Amendment to the U.S. Constitution, (3) violation of the Fourth Amendment of the U.S. Constitution, (4) violation of Article I, section 1 of the California Constitution, (5) violation of Health and Safety Code section 11362.2, (6) violation of Penal Code sections 11076 and 11125, (7) declaratory relief, and (8) taxpayer action to prevent illegal expenditures of funds.

The eight causes action are duplicative of one another and can better be understood as challenges to the key provisions of the City's regulations: (1) permit requirement; (2) inspection requirement; (3) fee requirement; and (4) background check requirement.

- Permit Requirement. Due to the inherent risks in the activity and danger posed by unregulated cultivation, it is reasonable to require a permit prior to allowing indoor cultivation. The permit requirement allows the City to impose reasonable conditions to ameliorate the risks inherent to an indoor grow, including by prohibiting storage of explosive chemicals near cannabis and a requirement to secure cannabis such that unauthorized individuals do not gain access.
- Inspection Requirement. The only inspection authorized by the City's regulations is an inspection conducted with the applicant's consent. This inspection is no different from any other inspection preceding the issuance of a permit and is no different from any other building permit the City issues.
- Fee Requirement. The fee requirement is tied to the amount of staff time and resources that would be expended in reviewing and processing a permit application.
- Background Check Requirement. This requirement allows authorized personnel in the City's Police Department to examine an applicant's criminal background and to provide a recommendation to the City's Planning Department to approve or deny a permit for a person with a criminal history related to drug possession or sales.

Fontana is not alone in its adoption of residential indoor cannabis cultivation regulations, and what is reasonable in one community may not be reasonable in another. Close to 60 counties and 500 cities in California have been left to determine what it means to reasonably regulate in general and what it means specifically to regulate indoor cannabis cultivation.

The crux of Petitioner's challenge appears to be that the City's police power must yield to a claimed "right" to cultivate cannabis. There is no unqualified "right" to cultivate a schedule I narcotic – any activity that remains illegal under both federal and state law. What State law provides is limited decriminalization of cultivation by adults 21 years of age and older for their personal use if such cultivation complies with State law and local regulations. In other words, any use that does not comply with both State law and local regulations is illegal. And, of course from a federal law perspective, there is no legal protection – qualified or otherwise.

While the issue of personal indoor cultivation has not yet been addressed by appellate courts, courts have recognized local authorities' power to regulate cannabis activity under their police power authority. In *City of Riverside*, the California Supreme Court acknowledged as much in the context of land use regulations prohibiting medical cannabis dispensaries: "While some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities within their borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens." (*City of Riverside*, 56 Cal.4th 729, 756.)

In *Maral v. City of Live Oak*, the Court of Appeal acknowledged that cannabis cultivation necessarily "ha[s] significant impacts or the potential for significant impacts on the City. These impacts included damage to buildings, dangerous electrical alterations and use, inadequate ventilation, increased robberies and other crime, and the nuisance of strong and noxious odors." (*Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 978-979.)

Cities continue to monitor ongoing statutory and case law developments involving cannabis. The trial court hearing on the *Harris* case is scheduled for September 14, 2018.

The presenters wish to thank Marc Tran and Victor Ponto of Best Best & Krieger LLP for their significant contributions to this paper.

Land Use and CEQA Litigation Update

Friday, May 4, 2018 General Session; 9:00 – 10:15 a.m.

Sabrina V. Teller, Remy Moose Manley

Notes:_____

CEQA AND LAND USE LAW UPDATE: August 2017 – March 2018

Prepared by Sabrina Teller

Remy Moose Manley LLP

Sacramento, California

May 4, 2018

[Current as of April 10, 2018]

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I. OPINIONS ON ISSUES UNDER CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Scope of CEQA

❖ ***Bridges v. Mt. San Jacinto Community College District*** **(2017) 14 Cal.App.5th 104.**

The Fourth Appellate District held that CEQA did not apply to a Community College District's decision to enter into a conditional purchase agreement for an 80-acre piece of unimproved rural property. The court found that the agreement did not constrain the District's discretion to fully comply with CEQA before committing to the purchase.

In 2014, the Mt. San Jacinto Community College District entered into a purchase agreement to buy an 80-acre plot of land from the Riverside County Regional Park & Open-Space District in order to build new campus facilities near the Interstate 15 corridor in southwest Riverside County. The agreement conditioned the opening of escrow on both parties' compliance with CEQA, and held that the parties were not bound by the agreement unless and until the CEQA process was complete and there was no more possibility of any legal challenges. The college district's board considered and approved the agreement at a public meeting, the agenda for which listed a motion to approve the purchase agreement as an open agenda item and invited the public to comment. There were no public comments on the item. Three months later, the college approved a resolution to place a bond measure on the ballot to pay for several new improvements to the college, including a "new campus along the I-15 corridor to serve additional students." The bond measure did not commit the college to any particular project and qualified that some of them may be delayed or not completed due to cost and funding issues. Immediately upon voter approval of the bond measure, two residents near the potential new campus site sued the college and the regional park districts, seeking orders directing the college to set aside the purchase agreement and to adopt local CEQA implementing guidelines. The trial court dismissed the suit, finding the first cause of action unnecessary because CEQA requires an EIR before the purchase is final, but not before executing the agreement, and because the purchase agreement expressly required an EIR to initiate escrow for the purchase. The trial court also found the college exempt from adopting local implementing procedures because it used the same guidelines that Riverside County and the California Community College Chancellor's Office have adopted. The regional park district argued the case should be dismissed because of the petitioners' failure to exhaust administrative remedies by objecting to the purchase agreement first, but the trial court declined to address the exhaustion issue in light of its rulings on the applicability of CEQA. Petitioners appealed.

The court of appeal first considered the exhaustion defense reasserted by the regional park district on appeal. Appellants alleged the college did not give proper notice of the meeting at which the Board approved the agreement and therefore they were excused from objecting to the purchase agreement. The court noted that CEQA provides an exception to the exhaustion

requirement where "there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law." (Pub. Resources Code, § 21177, subd. (e).) But the court further explained that notice in this context can be constructive; it need not be actual. The relevant notice in these circumstances was the 72-hour publicly posted notice required by the Brown Act. (Gov. Code, § 54954.2, subd. (a).) The record contained the agenda for the college district board's meeting listing the purchase agreement as an action item and inviting the public to comment, but no proof that the agenda was properly posted under the Brown Act. The court noted it was the appellants' burden to demonstrate that the no-notice exception applied to them and they could only allege, but not prove, that the college did not properly notice the meeting. In the absence of any evidence that the college failed to meet the deadline under the Brown Act, the court followed the presumption required under Evidence Code section 664 that an "official duty has been regularly performed." Applying that presumption, the court concluded that the appellants could not show CEQA's exhaustion exception for lack of notice applied to them and therefore they were barred from raising their objection in a CEQA suit.

The court further considered the merits of the appellants' CEQA claims, despite the exhaustion bar. Appellants argued it was not enough for the college to commit to completing an EIR before escrow on the land purchase opened; they argued an EIR was required before approval of the purchase agreement. The court disagreed, relying in these circumstances on the criteria described by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128 and the exception in CEQA Guidelines section 15004, subdivision (b), allowing agencies to designate a "preferred site" for a land acquisition agreement and conditional future use dependent on CEQA compliance. The court found nothing in the purchase agreement or other record documents that committed the college to any type of construction plan or definite course of development and no funds had been committed to the project; the college retained its full discretion to consider alternatives under CEQA.

The court also rejected the appellants' contention that the college violated CEQA by failing to adopt local implementing guidelines as required by Public Resources Code section 21082. Noting that school districts are exempt from this requirement if they utilize the guidelines of another public agency whose boundaries are coterminous with or entirely encompass the school district (CEQA Guidelines, § 15022, subd. (b)), the court found the college's "utilization," not formal adoption, of the same guidelines adopted by Riverside County and the state Chancellor's Office (the CEQA Guidelines), was all that was required under these circumstances.

Categorical Exemptions

- ***Respect Life South San Francisco v. City of South San Francisco*** **(2017) 15 Cal.App.5th 449**

The First Appellate District found that the potential for protests against a health clinic does not constitute substantial evidence of impacts under "unusual circumstances" exception to categorical exemptions. In the absence of an explicit determination by the lead

agency that no unusual circumstances existed, the court applied the less-deferential fair argument standard, but still concluded no fair argument of potentially significant impacts had been made.

The City of South San Francisco approved a conditional use permit for the conversion of an existing office building to a medical clinic to be used by Planned Parenthood, finding the project was categorically exempt from CEQA under the Class 1 (existing facilities), Class 3 (conversion of small structures) and Class 32 (infill) exemptions. The City made no explicit determinations about the application of the potential exceptions to categorical exemptions (CEQA Guidelines, § 15300.2), including the "unusual-circumstances" exception. An unincorporated association, Respect Life South San Francisco, and other petitioners sued. The trial court denied the petition. Respect Life appealed.

Respect Life argued that the permit was not exempt from CEQA because the unusual-circumstances exception applied to the project, theorizing that protests against Planned Parenthood's services would ensue, causing environmental impacts including traffic, parking, and public health and safety concerns. After noting that it was Respect Life's burden to establish that the exception applied, the court explained that different standards of review govern an agency's determination of the applicability of the exception and a court's review of that determination, citing the California Supreme Court's decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 ("*Berkeley Hillside*"). For the standard governing the City, the *Berkeley Hillside* court explained that a party seeking to establish that the unusual-circumstances exception applies to a project must show two elements: (1) "that the project has some feature that distinguishes it from others in the exempt class, such as size or location" and (2) that there is "a reasonable possibility of a significant effect due to that unusual circumstance." (*Id.* at p. 1115.) Thus, there must be both unusual circumstances and a potentially significant effect.

For the standard governing the court's review of the city's determination, the court explained that, under *Berkeley Hillside*, when an agency *explicitly* determines whether the unusual-circumstance exception applies, a court reviews that determination under the abuse of discretion standard in Public Resources Code section 21168.5. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1114.) The agency's determination of whether there are "unusual circumstances" is a factual inquiry and thus reviewed under section 21168.5's substantial evidence prong. But the agency's finding as to whether such unusual circumstances give rise to a reasonable possibility of a significant environmental effect is reviewed under the fair argument standard. (*Ibid*.)

But the court announced that where an agency only makes an *implied* determination that the unusual-circumstance exception is inapplicable, the court's review is constrained and ultimately less deferential. Without an explicit agency determination, the court concluded, it cannot say with certainty whether the agency found that there were no unusual circumstances, or whether the agency found there were, but that the record did not contain substantial evidence supporting a fair argument of a reasonable possibility of a significant environmental effect. To affirm an implied determination that the unusual-circumstances exception is inapplicable, the court assumed that the agency found the project involved unusual circumstances then concluded that the record contained no substantial evidence to support either a finding that any unusual

circumstances exist, or a fair argument that any purported unusual circumstances identified by the petitioner will have a significant effect on the environment.

Applying these assumptions, the court concluded that Respect Life failed to identify any substantial evidence of a potential significant environmental effect to support a fair argument. There was evidence that protests were likely, but no evidence that the number of protestors would be large, particularly disruptive, or that any resulting increase in traffic, sidewalk use, noise or business disruptions would be consequential.

The decision adds two important points to the already substantial body of case law interpreting and applying the "unusual-circumstances" exception. First, the case reinforces the general principle in CEQA discouraging impact conclusions founded on mere speculation. "We decline to hold, as Respect Life would apparently have us do, that the possibility of 'foreseeable First Amendment activity' establishes the applicability of the unusual-circumstances exception because the activity might lead to unsubstantiated and ill-defined indirect or secondary environmental effects." The second, perhaps more notable takeaway for agencies applying categorical exemptions is to make explicit determinations regarding the applicability of the exceptions in CEQA Guidelines section 15300.2, especially the unusual-circumstances exception. Failure to do so could result in the court's application of the less-deferential "fair argument" standard of review to the project's administrative record.

❖ ***Protect Telegraph Hill v. City and County of San Francisco*** **(2017) 16 Cal.App.5th 261**

The First Appellate District upheld San Francisco's reliance on the Class 1 and Class 3 categorical exemptions for the restoration of an existing small cottage and the construction of three new residential units and parking. The court found that the agency's determination that there were no unusual circumstances was supported by substantial evidence showing that steep slopes were not uncommon in San Francisco. The court also rejected the petitioner's claims that the project would impair views from Telegraph Hill, applying the relatively new section in CEQA providing that aesthetic impacts of certain residential urban infill projects within a transit priority area shall not be considered significant impacts on the environment.

The property at issue is a 7,517-square-foot lot on the south side of Telegraph Hill bordering the Filbert Street steps in San Francisco. The lot was unimproved except for a small uninhabitable 1906 cottage at the rear of the property. At one time, the property had five buildings on it, but four were demolished in about 1997. The proposed project was a new three-unit condominium fronting on Telegraph Hill Boulevard, the restoration of an existing small cottage at the back of the property, and three off-street parking spaces. The city planning department determined that the renovation of the cottage was categorically exempt from CEQA under the Class 1 exemption (CEQA Guidelines, § 15301, subd. (d)), and construction of the new building was exempt under the Class 3 exemption as a residential structure totaling no more than four dwelling units (CEQA Guidelines, § 15303, subd. (b)). The planning commission approved a conditional use authorization with some conditions on construction activity. A neighborhood

group appealed both decisions to the San Francisco Board of Supervisors. The board approved the exemption and the conditional use authorization, with additional conditions on the construction activity. Protect Telegraph Hill filed a petition for writ of mandate, arguing that the city's findings relating to the exemptions and approval of the conditional use authorization were unsupported by the evidence, the city failed to consider the entire project, and unusual circumstances and the inclusion of mitigation measures made the reliance on categorical exemptions improper. The trial court denied the petition, and the petitioner appealed.

On appeal, the petitioner argued that granting the exemptions was unlawful because the conditions of approval imposed by the city were intended to mitigate environmental impacts from the project's construction, indicating that the project would have significant impacts and thus could not be exempt from CEQA. The petitioner also argued that the project description was inadequate to determine whether the project was truly exempt and that the unusual circumstances exception applied.

The court concluded that while some of the conditions of approval addressed traffic and pedestrian safety, they were attached to the approval of the conditional use authorization, and not the exemptions. The exemptions were initially approved by the planning department without qualification, while the conditional use authorization was originally approved by the planning commission with certain conditions. The petitioner had to appeal both decisions separately to the Board of Supervisors, which voted separately on each decision, attaching further conditions to the conditional use authorization only. The court also found that there was no substantial evidence in the record suggesting that the project would have significant effects on traffic and pedestrian safety. The court stated that the appellant's "expressions of concern" in the record were not substantial evidence. The court also rejected attacks on the project description, finding that the included description complied with the requirements in the San Francisco Administrative Code and there was no evidence in the record suggesting the description was deficient.

Turning to the unusual circumstances exception, the court applied the two-part test announced by the California Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. The city's conclusion that the unusual circumstances exception was not met is reviewed for substantial evidence. But, if there are unusual circumstances, the court considers whether there is a fair argument that there is a reasonable possibility that the project will have a significant effect.

The petitioner argued that the location of the project on Telegraph Hill was itself an unusual circumstance. But the court found that the city's determination that there were no unusual circumstances was supported by substantial evidence. While Telegraph Hill is described in the design element of the general plan, the project conformed to the zoning requirements for that area and was similar in proportion to the immediately adjacent buildings. The petitioner also argued that the area was heavily traveled because of its proximity to the Coit Tower landmark, but the court agreed with the city that large traffic and pedestrian volumes was "more commonplace than unusual" in San Francisco.

Next, the petitioner argued that the project would impair views of the downtown skyline from the public stairway. The court rejected this argument in part by applying new Public Resources Code section 21099, subdivision (d), which applies to residential urban infill projects

in transit priority areas, and requires that aesthetic impacts "shall not be considered significant impacts on the environment." Additionally, the city considered the project's impact on views from Coit Tower and Pioneer Park and concluded it would not have an adverse effect. The petitioner also argued that the 30% slope of the lot was an unusual circumstance. The court again agreed with the city that the slope was not unusual for San Francisco and found that the city's engineering report provided substantial evidence supporting its decision. The petitioner also submitted an engineering report that provided conflicting evidence, but that report did not negate the substantial evidence supporting the city's conclusion.

Lastly, the petitioner argued that the conditional use authorization finding was unsupported because of the project's potential to obscure views of the downtown skyline. The court held that even if there were some conflict with one policy in the general plan, the policies were not strictly construed and the project was consistent with other policies and the Urban Design Element for Telegraph Hill. Ultimately, the court found that the record supported the conclusion that the character of Telegraph Hill would be unchanged, and denied the petition.

❖ ***Aptos Residents Association v. County of Santa Cruz*** **(2018) 20 Cal.App.5th 1039**

The Sixth Appellate District upheld a county's reliance on the Class 3 categorical exemption for approval of a microcell transmitter project involving the installation of 13 antennas on existing utility poles in a rural residential area, and found that cumulative impact, location, and "unusual circumstances" exceptions did not apply.

The county zoning administrator considered 11 applications for the installation of 13 microcell transmitters in the Day Valley Aptos area finding that the project fell within the Class 3 categorical exemption that applies to small structures and that no exceptions to the exemption applied. Petitioner appealed to the planning commission, which denied the appeal—and the county board declined to take jurisdiction over the appeal. Petitioner challenged the project alleging that the county had improperly segmented the project and that the exceptions applied to the project thereby defeating the county's use of the Class 3 categorical exemption. Petitioner also alleged that the county board had abused its discretion in declining to take jurisdiction of petitioner's appeal.

With respect to "piecemealing," the court held that the county had not improperly segmented the project. The applicant's filing of separate permit applications and the county's issuance of a separate permit and exemption for each project were not evidence of piecemealing. The court found that throughout the administrative proceedings, the county had considered the entire group of microcell units to be one project. It stated that "[t]he nature of the paperwork required for approval of the project is immaterial."

Next, the court held that the board had not abused its discretion in finding that new evidence submitted by petitioner about a possible future AT&T project was not significant new evidence relevant to its decision. The petitioner had submitted a declaration from petitioner's attorney stating that county staff had been contacted by AT&T about a cell transmitter project in

the same area. The court found that the evidence was too vague to support a finding that a possible AT&T project would be of "the same type in the same place."

The court then held that the location exception to the exemption did not apply. The court rejected petitioner's argument that the Residential Agricultural zoning classification designated the area "an environmental resource of hazardous or critical concern" because nothing in the statement of the purpose for that zoning district indicated as much.

Finally, the court found that the unusual circumstances exception also did not apply because petitioner produced no evidence that it is unusual for small structures to be used to provide utility extensions in a rural area or in an area zoned Residential Agricultural.

❖ ***Don't Cell Our Parks v. City of San Diego*** **(2018) ___ Cal.App.5th ___ (Mar. 15, 2018; D071863)**

The Fourth Appellate District upheld San Diego's reliance on the Class 3 categorical exemption for approval of a project involving the installation of a wireless telecommunications tower in a dedicated park, finding that the project did not constitute a changed use or purpose for the park that would require voter approval under the city's charter. The court further held that the wireless tower, disguised as a tree, fell within the scope of facilities contemplated in the Class 3 exemption, and that the location and unusual circumstances exceptions did not apply.

In June 2014, Verizon applied to construct a wireless telecommunications facility on the outskirts of Ridgewood Neighborhood Park, a dedicated park in the community of Rancho Peñasquitos and adjacent to the Los Peñasquitos Canyon Preserve in the City of San Diego. The project consists of a 35-foot-tall faux eucalyptus tree and a 220-square-foot landscaped equipment enclosure with a trellis roof and a chain link lid, to be installed in an existing stand of tall trees. The record showed there was a substantial gap in cell service coverage in the area and that the park was the only property within the intended coverage area that was not an open space preserve or developed with residential uses.

The City determined the project qualified for the Class 3 categorical exemption from CEQA, for construction and location of "new, small facilities or structures" and "installation of small new equipment and facilities in small structures." The petitioner group appealed the City's CEQA exemption determination to the City Council, which denied the appeal and unanimously determined the project was exempt from CEQA.

The petitioner argued in its petition for writ of mandate and complaint for declaratory and injunctive relief that placing a wireless facility in the park was not a permissible park or recreational use under City Charter section 55, which provides that real property formally dedicated in perpetuity "for park, recreation or cemetery purposes" shall not be used for any uses but those without such changed use or purpose having been authorized or ratified by two-thirds of the City voters. The petitioner also argued that the project did not qualify for the Class 3 exemption. The trial court denied the petition and ruled in favor of the respondents, and the petitioner appealed.

The court of appeal first interpreted City Charter section 55, applying the legal principles requiring the court to give effect to the plain meaning of the language of the section. The section gives the city manager "control and management of parks" and "recreation activities held on . . . parks." It also allows the city council "by ordinance [to] adopt regulations for the proper use and protection of said park property." The next paragraph of the charter restricts the City's control and management authority by providing that dedicated parks "shall not be used for any but park, recreation or cemetery purposes" without a vote of two-thirds of the City's voters (the "changed use restriction"). The court determined that deciding whether, as here, an addition to a dedicated park constitutes a "changed use" necessarily falls within the City's control and management authority.

The court examined the record to determine whether it supported a conclusion that the wireless facility does not change the use or purpose of the park. The court noted that the 8.5-acre park contained basketball courts surrounded by a 12-foot fence, circuit training stations, a play structure and picnic tables bounded by a cement path. The court further noted that the wireless equipment would be installed in an existing stand of trees and would be designed to blend into the existing environment. Furthermore, the court acknowledged evidence supporting a conclusion that the project would benefit park visitors by providing enhanced cell coverage, especially for 911 calls.

On the CEQA issues, the petitioner argued that the project did not fit within the meaning or use of the Class 3 exemption as a matter of law, that the unusual circumstances exception applied, and that the placement of the project in a dedicated park precluded the use of the categorical exemption because such a location is of critical concern. The court rejected all of the petitioner's CEQA arguments.

The court concluded that while none of the examples listed in the Class 3 exemption expressly contemplated the type of equipment in the project at hand, the project was much smaller than the examples listed in the exemption—single family residence, store, motel, office or restaurant, and as such, as a matter of law it was a "new small facility or structure" within the scope of the exemption.

The court also rejected the argument that the project would have significant impacts under the unusual circumstances exception, relying on evidence in the record showing there were at least 37 similar facilities in other dedicated parks. Further, the project was designed and located so as not to interfere with park and recreation uses, it would not impact any special status species, and it would not cause a significant adverse change to aesthetics. Finally, the court found no evidence that the park was a location "designated" as an "environmental resource of hazardous or critical concern" by any federal, state or local agency, and thus, the lack of such designation defeated the application of the location exception in CEQA Guidelines section 15300.2, subdivision (a).

❖ ***Clews Land and Livestock v. City of San Diego*** **(2017) 19 Cal.App.5th 161**

The Fourth District Court of Appeal upheld the trial court's decision denying a challenge to the City of San Diego's approval of construction of a secondary school and adoption of a mitigated negative declaration. Notwithstanding the court's conclusion that the petitioner had failed to properly exhaust its administrative remedies, the court found that the record did not support a fair argument that the project could have potentially significant impacts relating to fire hazards, traffic and transportation, noise, recreation, and historical resources.

The City of San Diego adopted an MND and approved a project to build the 5,340-square-foot Cal Coast Academy, a for-profit secondary school, on property adjacent to the plaintiffs' (Clews Land and Livestock, LLC, et al. ["Clews"]) commercial horse ranch and equestrian facility. Clews filed a petition for writ of mandate and complaint alleging the project would cause significant environmental impacts relating to fire hazards, traffic and transportation, noise, recreation, and historical resources. Clews also argued that CEQA required recirculation of the MND, that the project was inconsistent with the applicable community land use plan, and that the City did not follow historical resource provisions of the San Diego Municipal Code. The trial court determined that Clews had failed to exhaust its administrative remedies, and ruled in favor of the City on the merits. Clews appealed and the Court of Appeal upheld the trial court's determinations.

The court first held that Clews failed to exhaust its administrative remedies. The San Diego Municipal Code appeal process provides for two separate procedures—one for appeal of a hearing officer's decision to the Planning Commission, and one for appeal of an environmental determination to the City Council. Because Clews filed only an appeal of the hearing officer's decision, the court determined that Clews failed to exhaust its administrative remedies with respect to adoption of the MND. Clews argued that the City's bifurcated appeal process violated CEQA, but the court found the process was valid. Clews also argued that the City had not provided proper notice of the appeal procedures under Public Resources Code section 21177, subdivision (a), thereby excusing Clews' failure to appeal the environmental determination. The court explained, however, that section 21177 did not apply because Clews' failure to appeal was not a failure to raise a noncompliance issue under that section. Where, like here, a public agency has accurately provided notice of a public hearing, but it misstates the applicable procedures to appeal the decision made at that hearing, the only available remedy is to prevent the public agency from invoking an administrative exhaustion defense through equitable estoppel. Clews had pursued a claim for equitable estoppel in the trial court and was unsuccessful, and Clews did not challenge that determination with the Court of Appeal. Therefore, the court found, Clews' failure to exhaust could not be excused on an equitable estoppel basis.

Notwithstanding its determination that Clews failed to exhaust its administrative remedies, the court also considered the merits of Clews' claims. The court determined that Clews did not make a showing that substantial evidence supported a fair argument that the project may

have a significant effect on the environment. In making its determination, the court emphasized that the project is "relatively modest" and located on already-developed land.

Clews argued that the City was required to prepare an EIR due to potentially significant impacts on fire hazards, traffic and transportation, noise, recreation, and historical resources. The court rejected each of Clews' arguments. In part, the court was unpersuaded by Clews' expert's comments because they were "general" and did not have a specific nexus with the project, they focused on the effects of the environment on the students and faculty at the school rather than on the effects of the school on the environment, and they were conclusory and speculative. In addition, quoting *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 684, the court noted that "dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence." The court also found that a possibility that noise from the project would impact the adjacent business's operations was insufficient to require an EIR under CEQA. The court explained that the question is not whether the project would affect particular persons, but whether the project would affect the environment in general. In addition, the court explained that the fact that a project may affect another business's economic viability is not an effect that must be analyzed under CEQA unless the project may result in a change in the physical environment, such as by causing urban decay.

Clews argued that by adding a shuttle bus plan and describing the school's intent to close on red flag fire warning days *after* circulation of the MND, the City substantially revised the MND and was required to recirculate the draft prior to certification. The court rejected these contentions, explaining that the added plans were purely voluntary, and thus could not constitute mitigation measures. In addition, the court explained, Clews did not show that the plans were added to the project to reduce *significant* effects on the environment. According to the court, all revisions to the MND were clarifying and amplifying in nature and did not make substantial revisions to the project, and therefore, did not warrant recirculation.

Clews argued that City did not follow its historical resource regulations and guidelines. The court explained that the City relied on an exemption contained within the regulations, but Clews did not address the substance of that exemption, nor did Clews show that the City was actually required to apply the specific procedures contained in the regulations. Instead, Clews simply critiqued the City's reliance on the exemption as a post hoc rationalization; the court found this was not enough to meet Clews' burden to show failure on the part of the City.

Clews argued that the project conflicted with the Carmel Valley Neighborhood 8 Precise Plan because the plan designates the site as open space. Clews' argument was two-fold. First, Clews argued the site could not be developed because of the plan's open space designation. Second, Clews argued the plan's designation was in conflict with the multifamily residential zoning at the project site.

With respect to the plan's open space designation, the court held that Clews failed to meet its burden to show that the City's consistency finding was an abuse of discretion. The court explained that the standard is whether no reasonable person could have reached the conclusion made by the City. In making its determination, the City relied on the fact that the property was already developed—the school would be sited at the location of a previously-capped swimming

pool, and the project would not impact or be developed on undisturbed open space. The court found that the City's determination was reasonable, and that Clews did not address the City's reasoning or explain how the City abused its discretion. With respect to the site's zoning, the court explained that consistency of the zoning ordinance with the plan was not at issue—instead, the issue was whether the *project* is consistent with the Precise Plan's open space designation.

❖ ***Covina Residents for Responsible Development v. City of Covina*** **(2018) ___ Cal.App.5th ____ (Feb. 28, 2018, published Mar. 22, 2018; B279590)**

The Second Appellate District upheld the adoption of a tiered mitigated negative declaration for the approval of a 68-unit mixed use project, affirming that parking impacts are statutorily exempt from consideration for a transit-oriented infill project. The court also rejected the petitioner's arguments under the Subdivision Map Act, sustaining the city's findings that the tentative map was consistent with the applicable specific plan, including with respect to compliance with the plan's parking standards.

In 2000, the city adopted a general plan and certified a program EIR for it. Four years later, the city adopted the Town Center Specific Plan and certified a second-tier EIR, which identified the facilitation of infill development and redevelopment of deteriorated properties, particularly for housing, and reducing vehicle trips, as primary objectives for the specific plan area. In 2012, a developer proposed the redevelopment of a 3.4-acre site within the specific plan area, comprised of an entire block of parcels located a quarter-mile from the Covina Metrolink station and served by a major bus line. The paved, deteriorating site was previously used by a car dealership and surrounded by developed residential and commercial uses. Over the next two years, the developer worked with city staff, the planning commission and city council to repeatedly redesign a mixed use project that could satisfy the city's concerns about the amount of parking proposed on and around the site. The city council ultimately adopted a mitigated negative declaration for the project, tiered from the second-tier EIR certified for the applicable specific plan.

The site's former and adjacent property owner objected to the project, repeatedly commenting on the project's failure to provide adequate parking. Late in the process, attorney Cory Briggs appeared on behalf of the competing property owner and the eventual petitioner group, alleging that the council had failed to provide the public with an opportunity to review last-minute revisions to the project, and alleging violations of the Brown Act provisions pertaining to closed sessions. The Council voted unanimously to approve the project, adopt the MND and make the required findings for approval of a subdivision tentative tract map.

The petition for writ of mandate alleged three causes of action: a CEQA claim that the city should have prepared an EIR and improperly tiered the MND from the specific plan EIR; a claim that the city had violated the Subdivision Map Act by failing to make the necessary findings for approval of the project; and a claim that the city had violated due process by failing to allow a meaningful opportunity to respond to last-minute revisions in the project. The CEQA claim centered on the project's allegedly inadequate parking. The trial court denied the petition finding: no fair argument to support the claim that a parking shortage would result in any

environmental impacts; any parking impacts were exempt from environmental review under Public Resources Code section 21099; the city properly tiered its review from the specific plan EIR; the city did not violate the Subdivision Map Act; and the record did not indicate anyone had been prevented from speaking at the final council meeting.

Engaging in a lengthy discussion of section 21099, the court of appeal found that the statute exempted the alleged parking impacts of the project from environmental review. The court reached this result notwithstanding the fact that this statute was not in effect when the city prepared its environmental review and therefore the city did not rely on it when it adopted the MND and approved the project. The court distinguished previous decisions dealing with parking impacts and pre-dating the enactment of section 21099, finding that the Legislature endorsed the approach of the First District in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, which held that the project's location near a transit hub justified the EIR's conclusion that parking shortfalls relative to demand are not in and of themselves impacts in an urban context. Rather, the court noted, CEQA only requires the agency to consider the secondary environmental impacts resulting from any parking deficits, such as air quality, noise and other issues associated with transportation. Here, the petitioner failed to submit any evidence of secondary impacts associated with the alleged parking shortfall, focusing instead on competitive impacts to downtown businesses.

The court also considered but rejected the petitioner's argument that the city's tiering from the specific plan EIR was flawed as to the MND's analysis of traffic impacts, because that argument was centered on the claim that the project's parking impacts were not adequately analyzed. The court noted that the project as ultimately approved actually complied with the applicable parking requirements, and in any event, the petitioner had failed to identify any deficiencies or omissions in the project-specific trip analysis the city performed for the project.

Lastly, the court rejected the petitioner's claim that the tentative map was inconsistent with the specific plan, again because the claim was centered on the alleged parking deficiency, which the court had determined was not an impact and found that the project complied with the applicable requirements anyway.

Environmental Impact Reports

- ***Washoe Meadows Community v. Department of Parks and Recreation*** **(2017) 17 Cal.App.5th 277**

The First District Court of Appeal upheld the trial court's decision directing the Department of Parks and Recreation and the State Park and Recreation Commission to set aside project approvals where the draft EIR analyzed five alternative projects in detail, but did not identify one "preferred" alternative during the EIR process.

In 1984, the Department of Parks and Recreation acquired 777 acres of land in the Lake Tahoe Basin—608 acres of the property were designated as Washoe Meadows State Park and the remainder contained an existing golf course. Studies conducted in the early 2000s indicated that

the layout of the golf course was contributing to sediment running into Lake Tahoe, which contributed to deterioration of habitat and water quality in the lake.

In 2010, the Department circulated a draft EIR to address the concerns about the golf course. The draft EIR analyzed five alternatives in equal detail, with the stated purpose of "improv[ing] geomorphic processes, ecological functions, and habitat values of the Upper Truckee River within the study area, helping to reduce the river's discharge of nutrients and sediment that diminish Lake Tahoe's clarity while providing access to public recreation opportunities …." The draft EIR did not identify one preferred alternative. In the final EIR, the Department identified the preferred alternative as a refined version of the original alternative 2, which provided for river restoration and reconfiguration of the golf course. In 2012, the Department certified the EIR and approved the preferred alternative.

Framing the issue as a question of law, the court found that the draft EIR did not "provide the public with an accurate, stable and finite description of the project," because it did not identify a preferred alternative. The court found that by describing a range of possible projects, the Department had presented the public with "a moving target," which required the public to comment on all of the alternatives rather than just one project. The court determined that this presented an undue burden on the public.

The court compared the draft EIR to *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, where the court found an EIR insufficient because the project description described a much smaller project than was analyzed in other sections of the EIR. The court in *Washoe Meadows* found that rather than providing inconsistent descriptions like in *County of Inyo*, the draft EIR had not described a project at all. Thus, the court directed the Department to set aside the project approvals.

❖ ***Los Angeles Conservancy v. City of West Hollywood*** **(2017) 18 Cal.App.5th 1031**

The Second Appellate District upheld the trial court's denial of a petition for writ of mandate, finding that the EIR's treatment of alternatives was sufficient and that the city adequately responded to comments. The court afforded substantial deference to the city's determination that the petitioner's preferred alternative was infeasible based on its inability to meet the city's policy goals and vision for the site's redevelopment.

In 2014, the city certified an EIR for a mixed–use development in the Melrose Triangle section of West Hollywood. The project was the product of city incentives to redevelop the area in order to create a unified site design with open space, pedestrian access, and an iconic "gateway" building to welcome visitors and promote economic development. The EIR concluded that a significant and unavoidable impact would result from the demolition of a building eligible for listing as a California historic resource.

One alternative would have preserved the building in its entirety, by reducing and redesigning the project. The preservation alternative was ultimately rejected as infeasible because it was inconsistent with project objectives, and would eliminate or disrupt the project's critical design elements.

After circulating the draft EIR, the project's architects developed a site design which incorporated the building's façade and mandated this design as a condition of approval. Furthermore, a subsequent fire destroyed 25 percent of the building, but left the façade intact. The final EIR and conditions were approved in 2014. Petitioners immediately filed suit.

In the court below, petitioner argued that the EIR's analysis of the preservation alternative was inadequate, the city did not respond to public comments, and that the city's finding that the alternative was infeasible was not supported by substantial evidence. The respondents prevailed on all claims and petitioner appealed.

Finding for respondents, the court reiterated the *Laurel Heights* standard that an analysis of alternatives does not require perfection, only that the EIR provide sufficient information to support a reasonable range of alternatives. The court rejected petitioner's contention that the EIR was required to include a conceptual drawing of the preservation alternative. Furthermore, the EIR's statement that preservation of the building would preclude construction of other parts of the project was self-explanatory and did not require additional analysis. The EIR's use of estimates to calculate how the preservation alternative would reduce the project's footprint did not create ambiguities that would confuse the public. Such imprecision is simply inherent in the use of estimates.

The court also found that the city's responses to the three comments cited by the petitioner were made in good faith and demonstrated reasoned analysis. The court reiterated that a response is not insufficient when it cross-references relevant sections of the draft EIR, and that the level of detail required in a response can vary. Here, the West Hollywood Preservation Alliance and the President of the Art Deco Society of Los Angeles opined in comments that the building could be preserved while achieving the project's objectives. The city adequately responded to these comments by referencing, and expanding upon, the EIR's analysis of the preservation alternative, where this option was considered. The last comment was of a general nature, so the city's brief, general response was appropriate.

Finally, the court found sufficient evidence to support the city's finding that the preservation alternative was infeasible. An alternative is infeasible when it cannot meet project objectives or when policy considerations render it impractical or undesirable. An agency's determination of infeasibility is presumed correct and entitled to deference, if supported by substantial evidence in the record. The court found that the city's conclusion that the alternative was infeasible was supported by substantial evidence in the record. Development plans, photographs, and testimony from senior planning staff supported the city's conclusion that retaining the building and reducing the project would not fulfill the project objectives of creating a unified site design, promoting pedestrian uses, and encouraging regional economic development. That another conclusion could have been reached did not render the city's decision flawed.

A consistent theme underlying the court's decision was the city's clear goal of revitalizing the entire site, in order to create a functional and attractive gateway for West Hollywood. Critical to the project's success was removing the specific building that the petitioner sought to preserve. The court appeared reluctant to overcome such a strong mandate by flyspecking the EIR's analysis of this acknowledged significant impact.

❖ ***Placerville Historic Preservation League v. Judicial Council of California*** **(2017) 16 Cal.App.5th 187**

The First Appellate District upholding the San Francisco County Superior Court's denial of a petition for writ of mandate challenging the Judicial Council of California's decision to certify a Final EIR and approve the New Placerville Courthouse Project. The court found that the record supported the Judicial Council's conclusion that it was not reasonably foreseeable that the closure of the existing courthouse would cause urban decay in downtown Placerville.

El Dorado County's court facilities are currently divided between the Main Street Courthouse, a historic building in downtown Placerville, and the County administrative complex. The Judicial Council proposed to consolidate all court activities in a new three-story building to be built on undeveloped land adjacent to the County jail, less than two miles away from the existing Main Street Courthouse.

In October 2014, the Judicial Council published a draft EIR for the proposed new courthouse. The draft EIR acknowledged that retiring the downtown courthouse could have an impact on downtown Placerville. The EIR also recognized that the Judicial Council was required address neighborhood deterioration as a significant environmental effect under CEQA if urban decay was a reasonably foreseeable impact of the project. The draft EIR defined "urban decay" as "physical deterioration of properties or structures that is so prevalent, substantial, and lasting a significant period of time that it impairs the proper utilization of the properties and structures, and the health, safety, and welfare of the surrounding community." The draft EIR concluded that urban decay, so defined, was not a reasonably foreseeable consequence of the new courthouse project.

Comments received both during and after the public review period on the draft EIR voiced the concern that closing the historic Main Street Courthouse could negatively affect businesses in downtown Placerville. In response to such concerns, the Judicial Council reiterated the draft EIR's conclusion that the project was not likely to lead to urban decay. In support of this conclusion, the Judicial Council observed that it was working with both the city and county to develop a re-use strategy for the building that would support the downtown businesses and local residences. The Judicial Council also cited evidence of the City and County's efforts to find a new use for the historic courthouse building.

Following the Judicial Council's certification of the final EIR, the Placerville Historic Preservation League (League) filed a petition for writ of mandate, which the trial court denied. The Court of Appeal affirmed.

On appeal, the League argued that the Judicial Council erred in concluding that urban decay is not a reasonably foreseeable indirect effect of relocating the courthouse activities from downtown Placerville to their new location. The court held that substantial evidence in the record supported the Judicial Council's conclusion that the type of physical deterioration contemplated in the term "urban decay" is not reasonably foreseeable. The court explained that there is no presumption that urban decay would result from the project. To the contrary, as defined by

CEQA—which focuses on the physical environment—urban decay "is a relatively extreme economic condition." Evidence in the record, including comments submitted by the public, suggested that downtown Placerville was an economically stable area, and could withstand business closures without falling into urban decay.

The League also characterized the likelihood of the re-use of the historic courthouse building as an "'unenforceable and illusory"' commitment. The court explained, however, that the lack of a binding requirement for the re-use of the building does not undermine the EIR's reasoning. Specifically, the issue before the Judicial Council was whether urban decay was a reasonably foreseeable effect of the project, not whether its occurrence was a certainty. It would be the best interest of the City of Placerville and the County of El Dorado to re-use the historic courthouse building, suggesting that the building was likely to be put to a new use. While the re-use was by no means guaranteed, it was reasonably likely. Therefore, the Judicial Council did not err in relying on the possibility of re-using the building as one basis for concluding that urban decay was not reasonably foreseeable.

The League also argued that the administrative record contained evidence, in the form of comments submitted by local residents and businesses, of the impact of moving the courtroom activities outside of downtown Placerville. The court held that although these letters and comments provided credible grounds to conclude that relocating the courthouse activities would constitute a hardship for some local businesses, it was not substantial evidence to support the conclusion that such economic effects would lead to substantial physical deterioration of the downtown.

The League further argued that the Judicial Council should have prepared an economic study evaluating the effects of removing the courthouse functions from downtown. The court disagreed, noting that in "any endeavor of this type, financial resources are limited, and the lead agency has the discretion to direct resources toward the most pressing concerns." Just because a financial impact study might have been helpful does not make it necessary.

❖ ***Visalia Retail, L.P. v. City of Visalia*** **(2018) 20 Cal.App.5th 1**

The Fifth Appellate District upheld the City of Visalia's certification of an Environmental Impact Report (EIR) for its general plan update, finding that although the EIR did not analyze the potential for urban decay, the record contained no substantial evidence that a land use policy restricting the size of commercial tenants in a neighborhood commercial area would result in urban decay. The court also found that the general plan was not internally inconsistent and that the City had not violated the relevant Planning and Zoning Law notice provisions.

The City prepared an EIR for an update to its general plan, which included updating the land use policy at issue. Under that policy, commercial tenants in neighborhood commercial areas may not be larger than 40,000 square feet. Petitioners argued that the size restriction would cause significant physical impacts in the form of urban decay, and therefore the EIR was inadequate for failing to address those impacts. In support of their argument, Petitioners

submitted a report prepared by a real estate broker, which opined that the 40,000 square-foot cap would cause grocers to refuse to locate in the neighborhood commercial centers, which would cause vacancies and would then, in turn, result in urban decay.

The court rejected this argument finding that the report did not provide the requisite basis for petitioners' challenge because its analysis of causation was speculative and the potential economic consequences does not mean that urban decay would result. The court distinguished *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, where it had held that the EIR in that case was fatally defective for failing to analyze the individual and cumulative potential to indirectly cause urban decay resulting from the development of two shopping centers. But there, the court emphasized, the analysis of urban decay is required when there is evidence suggesting that the economic and social effects caused by development could result in urban decay. Here, the court found no such evidence in the record.

The court also found that the size restriction was not inconsistent with the general plan's stated goal of encouraging infill development. Finally, the court held that the City did not violate the 10-day notice requirement set forth in Planning and Zoning Law by failing to re-notice additional meetings on the general plan amendment.

- ***Association of Irritated Residents v. Kern County Bd. of Supervisors*** **(2017) 17 Cal.App.5th 708**

In a partially published decision, the Fifth Appellate District upheld an EIR's treatment of project baseline and greenhouse gas emissions, but determined that the county erred in relying on federal preemption to avoid analyzing and mitigating impacts under CEQA from off-site rail activities for an oil refinery modification project.

The project involved modifications proposed by Alon USA to an existing petroleum refinery northwest of the City of Bakersfield. The refinery had undergone several ownership changes since 1932, with Alon USA purchasing it from Flying J and its subsidiary during the latter's 2008 bankruptcy proceedings. Alon USA sought to expand existing rail, transfer and storage facilities, including the construction of a double rail loop connected to the BNSF railway. The expanded train facilities would allow the transport of crude oil from the Bakken formation in North Dakota to the refinery for processing. The Association of Irritated Residents, Center for Biological Diversity, and Sierra Club filed suit after the County certified an EIR and approved the project.

First, the court dealt with plaintiffs' arguments about the use of year 2007 as the baseline for air pollution emissions instead of using year 2013 – the year that the County published the notice of preparation. In discussing *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 457 ("*Neighbors*"), the court established that it was interpreting *Neighbors* to only require heightened scrutiny of baselines that use hypothetical future conditions and not of those that use data from past, fluctuating conditions. Based on this interpretation, the court found no error in the County's use of data from year 2007 because substantial evidence supported this deviation from the "normal" baseline. The court concluded that it was reasonable

to include an operating refinery in the baseline because: (a) existing permits and entitlements allow for the processing of up to 70,000 barrels per day; (b) Flying J's bankruptcy filing in 2008 only temporarily halted processing of hydrocarbons; (c) refinery operations have been subject to prior CEQA review; and (d) the processing of crude oil could begin again without the currently proposed project. The court then turned to whether the County's choice of year 2007 was supported by substantial evidence, and found that it was because 2007 was the last full year of refinery operations, and was not some hypothetical, maximum authorized amount. The court even included its own calculations of the average barrels per day for the period of 2001 through 2008 to show that the year-2007 figure of 60,389 barrels-per-day was less than the average of 60,994 barrels-per-day.

Second, the court addressed GHG emissions arguments. The court started by analyzing under the de novo review standard a question of first impression: can the volume of a project's estimated GHG emissions be decreased to reflect the use of allowances and offset credits under the state's cap-and-trade program? The court concluded that this use of the cap-and-trade program did not violate CEQA because Section 15064.4, subd. (b)(3), effectively directed the County to consider the project's compliance with the state's cap-and-trade program as a "regulation[] or requirement[] adopted to implement a statewide . . . plan for the reduction of mitigation of greenhouse gas emissions." And the court concluded that the project's compliance with the cap-and-trade program could be part of the substantial evidence supporting a finding of less-than-significant impacts from GHG emissions even though surrender of allowances would not result in the project emitting fewer GHG molecules than if the allowance had not been surrendered. The court explained that the cap-and-trade program is designed so that the "limited allocation and use of allowances means they are not available for use elsewhere" in the state.

In the final published section, the court dealt with federal preemption and off-site rail impacts. Claiming that the Interstate Commerce Commission Termination Act of 1995 (ICCTA) preempted CEQA review, the County had excluded analysis of some of the impacts from off-site main line rail operations that will deliver crude oil to the refinery. The court disagreed. Interpreting the California Supreme Court's direction in *Friends of Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 722, the court of appeal concluded that the development of information pursuant to CEQA is not categorically preempted but may be preempted on an as-applied basis. Then, as an alternative to that broad legal conclusion, the court considered whether categorical preemption applied to the specific circumstances in this case. It concluded that no categorical preemption applied because analysis of indirect environmental effects "would impose no permitting or preclearance by a state or local agency upon the delivery of crude oil to the project site by a rail carrier," and "would not control or influence matters directly regulated under federal law." The court also concluded that there was no as-applied preemption because the environmental analysis of off-site rail activities "would not prevent, burden, or interfere with BNSF Railway's operation." Finally, the court directed the County on remand to use the tests stated in this opinion to determine whether particular mitigation measures may be preempted by the ICCTA.

❖ ***City of Long Beach v. City of Los Angeles*** **(2018) 17 Cal.App.5th 277**

The First Appellate District upheld an EIR's project description and analysis of indirect impacts and GHG emissions for the Southern California International Gateway intermodal cargo project, but ruled that the EIR's analysis was deficient on the issue of air quality impacts, including cumulative impacts. The court also ruled that the Attorney General was not required to comply with CEQA's exhaustion requirement before intervening on behalf of the petitioner.

The project would construct a "near-dock" railyard within five miles of the Port to Los Angeles, to receive intermodal cargo (the Southern California International Gateway project or SCIG facility). Intermodal cargo is cargo that is transferred in an intact shipping container directly from a port to railyard. Once complete, 95% of this cargo, which is currently processed at the real parties' Hobart Yard facility will be transferred to the SCIG facility. Petitioners alleged multiple deficiencies in the EIR, including the project description, and its analysis of indirect impacts to Hobart Yard, cumulative impacts to air quality, and GHG emissions. After filing suit, the attorney general intervened on behalf of petitioners. After the trial court found for petitioners on all issues, this appeal followed. Additionally, appellant respondents alleged that the attorney general, who had not participated in the EIR process, failed to exhaust as to his identify and issues, and thus those claims were barred.

First, after taking judicial notice of the legislative history of CEQA's exhaustion requirements, the court ruled that the attorney general was not required to exhaust as to identity or issues, and that the statutory language was not ambiguous. The unqualified exhaustion exemption for the attorney general is consistent with attorney general's unique authority to protect California's environment and people.

Second, reversing the court below, the court found that the project description was not confusing or misleading. Contrary to petitioner's assertion that a complete project description should have included the project's effect on Hobart Yard, the project description included all activity that was subject to discretionary review. The court distinguished it from other cases, where the project description was contradicted by facts contained in the EIR.

The court also upheld the EIR's analysis of indirect impacts to Hobart Yard. The freed-up capacity at Hobart Yard as a result of the project will not give rise to indirect environmental impacts that the EIR was required to analyze. These increases will occur whether or not the SCIG facility is built, and substantial evidence supports the EIR's finding that Hobart Yard can absorb these increases until 2035. These are not unsupported assumptions, but reasoned predictions by experts upon which the city was entitled to rely.

In an extensive discussion, the court struck down the EIR's analysis of direct and indirect impacts to air quality. While the composite model methodology utilized in the EIR was not misleading, the analysis was incomplete. The project may decrease emissions overall, but could increase the concentration of emissions in the project area, and this impact was not analyzed. Without an understanding of the effects of these concentrated emissions, the public and decision-makers could not intelligently balance competing concerns before adopting a statement of

overriding considerations, nor could the EIR effectively craft mitigation measures and alternatives. Similarly, the EIR's analysis of cumulative impacts to air quality was also deficient. The court also took issue with the range of composite modeling provided, which only included a single modeling run, for a 50 year time horizon. While declining to specify how many models would be adequate, the court stated that a "reasonable selection of benchmark years, may be acceptable."

Finally, the court upheld the EIR's analysis of GHG emissions, finding that it comported with *Newhall Ranch.* As in *Newhall Ranch,* this EIR utilized a "business-as-usual model" (BAU). The court declined the petitioner's invitation to rule that, as a matter of law, if a project will result in an increase in GHG emissions, it does not comply with AB 32 and related statutes. The BAU model was permissibly applied here, because it was utilized not to demonstrated that the project was consistent with state mandates to reduce emissions by 29% from BAU, but rather, to inform the public that while emissions will exceed baselines levels, resulting in a significant impact, the project is consistent with state and local policies that encourage the adoption of the more efficient use of fossil fuels in transportation. The use of BAU is particularly apt here, as the purpose of the project is to decrease the length of truck trips from 25 miles from the port to under five miles, with attendant decreases in tailpipe GHG emissions.

- ***Cleveland National Forest Foundation v. San Diego Association of Governments*** **(2017) 17 Cal.App.5th 413 (remand decision)**

The Fourth Appellate District invalidated the 2011 Program EIR for SANDAG's 2050 Regional Transportation Plan/Sustainable Communities Strategy after remand from the Supreme Court's decision regarding the EIR's GHG thresholds of significance. The court found multiple flaws in the EIR's GHG and air quality mitigation, alternatives analysis, baseline information on toxic air contaminants, correlation of air quality effects to health effects, and impacts on agricultural lands.

SANDAG certified a programmatic EIR for its 2050 Regional Transportation Plan/Sustainable Communities Strategy in 2011. Petitioners challenged that EIR, alleging multiple deficiencies under CEQA, including the EIR's analysis of greenhouse gas (GHG) impacts, mitigation measures, alternatives, and impacts to air quality and agricultural land. The Court of Appeal held that the EIR failed to comply with CEQA in all identified respects. The Supreme Court granted review on the sole issue of whether SANDAG was required to use the GHG emission reduction goals in Governor Schwarzenegger's Executive Order S-3-05 as a threshold of significance. Finding for SANDAG, the Court left all other issues to be resolved on remand.

First, the Court of Appeal ruled that the case was not moot, although the 2011 EIR had been superseded by a new EIR certified in 2015, because the 2011 version had never been decertified and thus could be relied upon. The court also found that petitioners did not forfeit arguments from their original cross-appeal by not seeking a ruling on them. And, even if failing

to raise the arguments was a basis for forfeiture, the rule is not automatic, and the court has discretion to resolve important legal issues, including compliance with CEQA.

Second, the court reiterated the Supreme Court's holding, that SANDAG's choice of GHG thresholds of significance was adequate for this EIR, but may not be sufficient going forward. Turning to SANDAG's selection of GHG mitigation measures, the court found that SANDAG's analysis was not supported by substantial evidence, because the measures selected were either ineffective ("assuring little to no concrete steps toward emissions reductions") or infeasible and thus "illusory."

Third, also under the substantial evidence standard of review, the court determined that the EIR failed to describe a reasonable range of alternatives that would plan for the region's transportation needs, while lessening the plan's impacts to climate change. The EIR was deficient because none of the alternatives would have reduced regional vehicles miles traveled (VMT). This deficiency was particularly inexplicable given that SANDAG's Climate Action Strategy expressly calls for VMT reduction. The measures, policies, and strategies in the Climate Action Strategy could have formed an acceptable basis for identifying project alternatives in this EIR.

Fourth, the EIR's description of the environmental baseline, description of adverse health impacts, and analysis of mitigation measures for air quality, improperly deferred analysis from the programmatic EIR to later environmental review, and were not based on substantial evidence. Despite acknowledging potential impacts from particulate matter and toxic air contaminants on sensitive receptors (children, the elderly, and certain communities), the EIR did not provide a "reasoned estimate" of pollutant levels or the location and population of sensitive receptors. The EIR's discussion of the project's adverse health impacts was impermissibly generalized. The court explained that a programmatic EIR improperly defers mitigation measures when it does not formulate them or fails to specify the performance criteria to be met in the later environmental review. Because this issue was at least partially moot given the court's conclusions regarding defects in the EIR's air quality analysis, the court simply concurred with the petitioners' contention that all but one of EIR's mitigation measures had been improperly deferred.

The court made two rulings regarding impacts to agricultural land. In finding for the petitioners, the court held that SANDAG impermissibly relied on a methodology with "known data gaps" to describe the agricultural baseline, as the database did not contain records of agricultural parcels of less than 10 acres nor was there any record of agricultural land that was taken out of production in the last twenty years. This resulted in unreliable estimates of both the baseline and impacts. However, under de novo review, the court found that the petitioners had failed to exhaust their remedies as to impacts on small farms and the EIR's assumption that land converted to rural residential zoning would remain farmland. While the petitioners' comment letter generally discussed impacts to agriculture, it was not sufficiently specific so as to "fairly apprise" SANDAG of their concerns.

Justice Benke made a detailed dissent. Under Benke's view, the superseded 2011 EIR is "most likely moot" and in any event, that determination should have been left to the trial court on

remand. This conclusion is strengthened, when, as here, the remaining issues concern factual contentions. As a court of review, their record is insufficient to resolve those issues.

CEQA Litigation

❖ ***Center for Biological Diversity v. California Department of Fish & Wildlife*** **(2017) 17 Cal.App.5th 1245**

On remand from the California Supreme Court, the Second Appellate District upheld the lower court's judgment and order on remand held that (1) a trial court has the authority to partially decertify an EIR under CEQA following a trial, hearing, or remand; (2) a trial court has the power to leave an agency's project approvals in place after partially decertifying an EIR; and (3) the trial court acted within its discretion in declining to set aside all project approvals after court suspended project activity pending correction of partially-decertified EIR. The court upheld the trial court's judgment mandating (1) the partial decertification of the Final EIR for the Newhall Ranch project and (2) the suspension of only two out of six project approvals.

This was the second appeal of the EIR for the Newhall Ranch development project. It follows the Supreme Court's decision in *Center for Biological Diversity v. California Department of Fish & Wildlife* (2015) 62 Cal.4th 204, where the Court determined that the EIR's analysis of GHG emissions improperly relied on a "business-as-usual" model and that mitigation adopted for the stickleback fish (catch and relocate) was itself a prohibited taking under the California Fish and Game Code. Subsequently, the Second District affirmed in part and reversed in part its original decision. The appellate court remanded the matter to the trial court, with instructions to issue an order consistent with the Supreme Court's opinion, but otherwise granting the trial court discretion to resolve all outstanding matters under Public Resources Code section 21168.9.

After additional briefing and a hearing, the trial court issued a limited writ. The writ decertified those sections of the EIR concerning GHG emissions and mitigation measures for the stickleback; enjoined all project activity, including construction; and suspended two of the six project approvals. This appeal followed.

In the unpublished portion of the opinion, the court found that the writ was not a separate appealable post-judgment order or injunction, and therefore the court had jurisdiction to hear the appeal under Code of Civil Procedure section 904.1.

The court reviewed the lower court's interpretation of section 21168.9 de novo. The court determined that the trial court did not abuse its discretion in partially decertifying the EIR, as section 21168.9 expressly permits decertification of an EIR "in whole or in part." The court also held that after partial decertification, it is permissible to leave in place project approvals that do not relate to the affected section of the EIR. This is consistent with the statute's implicit mandate that project activities that do not violate CEQA must be permitted to go forward.

The court found that the trial court did not abuse its discretion in issuing the limited writ. The lower court adequately supported its findings and demonstrated that project activities were severable, that severance would not prejudice compliance with CEQA, and that the remaining activities complied with CEQA. The court noted that prejudice with CEQA compliance is particularly unlikely here, given the court's injunction against further construction.

Finally, the court rejected petitioners' contention that the writ, issued under CEQA, does not provide an adequate remedy for California Fish and Game Code violations. While acknowledging that section 21168.9 is part of CEQA, the streambed alteration agreement, which remains in place, already prohibits the taking of sticklebacks. Furthermore, the injunction barring project construction provides a suitable remedy for this violation.

❖ ***CREED-21 v. City of Wildomar*** **(2017) 18 Cal.App.5th 690**

The Fourth District Court of Appeal held that civil discovery may properly be conducted on the issue of a plaintiff's standing in a CEQA writ proceeding, and a terminating sanction may properly be imposed where the plaintiff attempts to thwart such discovery by refusing to comply with trial court orders.

In April 2015, a non-profit, social advocacy organization named Creed-21, represented by the Briggs Law Corporation ("Briggs"), filed a petition for writ of mandate under CEQA and the Planning and Zoning Law challenging the City of Wildomar's approval of a Walmart retail center. Creed-21's petition alleged that one of its members lived in or near the city. The city asserted in its answer that Creed-21 lacked standing. The trial court set a merits briefing schedule under which the city's and Walmart's joint opposition brief was initially due in January 2016, although, as will be seen, this date apparently "slipped" somewhat as a result of procedural disputes and maneuvers.

To try to obtain evidence to support the "lack of standing" affirmative defense, Walmart noticed the deposition of Creed-21's person most qualified (PMQ) to testify on standing issues for September 2015, in Costa Mesa. Creed-21 objected to the date, asserted that discovery was categorically not allowed in a mandamus action, and stated without much explanation that the deposition location was 75 miles from the PMQ's residence. Creed-21 did not respond to Walmart's further meet-and-confer attempts. Walmart noticed another deposition for the next month, and Creed-21 responded less than a week before the scheduled date, objecting on the same grounds and refusing to produce the PMQ for deposition. Creed-21 further asserted its membership was irrelevant, and that its corporate standing could be verified with the Secretary of State, and it recommended letting the trial court decide the issue.

As Creed-21 suggested, Walmart moved to compel Creed-21 to produce its PMQ, submitting a recent hearing transcript from another trial court action in which Creed-21 was also represented by Briggs. There, Creed-21's president, Richard Lawrence, testified that: there was only one other officer of Creed-21, he had no idea how many members the group had, Briggs prepared all of the group's tax returns, the group shared an address with Briggs' Upland office, that the group had no money, assets, or employees, and that Briggs "fronted" the money for the group's lawsuits and paid any fees it owed. Armed with this information and other "alter ego"

evidence that Creed-21 was just a front for Briggs, Walmart wanted to further explore the standing issue through civil discovery.

Walmart's motion was scheduled to be heard on January 5, 2016. Creed-21's attorney failed to give proper notice of its intent to appear, however, and was not allowed to argue. The court adopted its tentative ruling ordering Creed-21 to produce its PMQ and all requested documents within 10 days, and to pay Walmart $3,000 in attorneys' fees and costs. One week later, Creed-21 sought relief based on its attorney's ignorance of the relevant local rule on giving notice of intent to appear, alleging that if allowed to argue it would have argued discovery was inappropriate. Creed-21 further alleged for the first time that its PMQ was Richard Lawrence, who it claimed lived 90 miles away, and presented a declaration from a Ms. Jiminez, declaring that she and other Creed-21 members lived and worked in Wildomar. The trial court denied the motion for relief after a February 1, 2016 hearing and directed that the PMQ deposition go forward on February 8. Creed-21 filed a writ petition requesting that the Court of Appeal vacate the trial court's order and deny or narrow Walmart's discovery, but the appellate court denied all relief before the deposition date.

Meanwhile, Creed-21 also filed an ex parte application with the trial court on February 3 seeking to continue the PMQ deposition date to February 24 on the basis that Briggs' parent recently underwent major surgery and Briggs would need three weeks off work to care for his parent as the sole caregiver. In opposition, Walmart noted that Creed-21 was seeking to extend the deposition past the date that defendants' opposition brief on the merits was due, thereby depriving the defendants of using any helpful information from the deposition unless briefing were also delayed. Walmart further argued that Briggs failed to explain why his associate attorney who had appeared at every other hearing could not defend the deposition, and he failed to explain why a temporary caregiver could not assist Briggs with his parent during a one-day deposition.

The trial court denied the requested continuance, but Creed-21 still failed to produce its PMQ on February 8, so the defendants filed their opposition brief without being able to complete the discovery that Walmart had noticed. They argued that Creed-21's petition should be denied for these procedural obstructions as well as on the merits, and that the petitioner was only a shell corporation with no money, bank account, or assets that existed solely for its alter ego Briggs to recover fees from litigating against deep-pocketed defendants.

Walmart moved for issue and monetary sanctions against Creed-21 for its violations of the trial court's discovery orders compelling it to produce the PMQ for deposition on the standing issue. The trial court granted the motion, finding defendants had attempted to work with Creed-21, but that Creed-21 did not attempt to resolve the issues in good faith. Rather, Creed-21 continued to raise the same unmeritorious issues, make inadequate showings in its requests for relief, and disobey the Court's orders, including failing to pay the $3,000 in monetary sanctions to Walmart. The trial court expressed frustration: "Nothing has worked. Multiple orders have been made. Sanctions have been imposed. Nothing except further delay in the proceedings. And I don't think at this point in light of the history, the defense should have to choose between getting the deposition and delaying the hearing on the merits." Accordingly, while it did not issue additional monetary sanctions, it "issued an issue sanction against Creed-21 that it lacked

standing in the action," which was the same as a terminating sanction, and again ordered Creed-21 to pay the previously imposed $3,000 monetary sanctions.

On appeal, Creed-21 argued that the "severe issue sanction" imposed by the trial court "should only be granted against a litigant who persists in outright refusal to comply with discovery obligations," and that its action should not have been dismissed absent "a showing of bad faith, which was not supported by the evidence." Creed-21 argued that its counsel's "family emergency" excused its noncompliance and asserted that it tried to cooperate in the discovery process to the extent it was able.

The Court of Appeal had no trouble affirming the trial court's judgment of dismissal under the "abuse of discretion" standard of review. Code of Civil Procedure section 2023.030 authorizes monetary, issue, evidence or terminating sanctions against anyone misusing the discovery process, and issue, evidence or terminating sanctions for a party's or party-affiliated deponent's failure to obey an order compelling attendance, testimony and production. (Code Civ. Proc., § 2025.450, subd. (d).) The courts have explained that the discovery statutes employ an "incremental approach to discovery sanctions," starting with monetary sanctions and ending with termination, under which the sanction should be "appropriate to the dereliction" and not exceed that required to protect the party entitled to but denied discovery. Imposition of this ultimate sanction is justified where the totality of circumstances show a willful violation, preceded by a history of abuse, and where lesser sanctions would not produce compliance.

Under the abuse of discretion standard of review, an appellate court resolves all evidentiary conflicts most favorably to the trial court's ruling, reversing only when the "order was arbitrary, capricious or whimsical." Under these rules, the court found that Creed-21 failed to carry its burden to affirmatively demonstrate error by the court below. The entire record supported the "issue sanction, granted by the trial court based on the group's consistent refusal to comply with court orders on discovery," and after lesser monetary sanctions and orders did not result in compliance. The imposition of the terminating sanction was not arbitrary or capricious. The court held that Creed-21's citation to case law preceding the Civil Discovery Act of 1986 as requiring "bad faith" conduct to justify "outright dismissal" was misplaced, as only post-1986 cases are relevant to the analysis.

II. LAND-USE OPINIONS

Planning and Zoning Law

❖ ***Kennedy Commission v. City of Huntington Beach*** **(2017) 16 Cal.App.5th 841**

The Fourth District held that a charter city is exempt from the statutory requirement that its specific plans and zoning ordinances be consistent with its general plan absent an express, unequivocal statement of intent in the city charter to adopt the consistency requirement. The appellate court reversed the lower court, finding for defendants on the first cause of action under state housing element, zoning, and planning laws. The court of appeal

allowed plaintiffs leave to refile their third to sixth causes of actions, which had been dismissed without prejudice in the court below.

The California Department of Housing and Community Development (HCD) determines each region's Regional Housing Need Allocation (RHNA), including each region's share of lower income housing. HCD then determines if the housing element of a general plan is compliant and reflects the agency's share of the RHNA. HCD approved Huntington Beach's general plan housing element in 2013. At the time, the majority of lower income housing was zoned for the Beach Edinger Corridor Specific Plan area (BECSP). Residents complained about the rapid pace of development in this area. In response, in 2015, the city amended the BECSP, cutting the amount of housing in this area by half. This resulted in a 350-unit shortfall of lower income housing for Huntington Beach. The city then sought to amend the housing element of the general plan to provide for lower-income housing in other areas of the city.

Plaintiffs, a fair housing advocacy organization and two lower-income Huntington Beach renters, filed a writ of mandate with six causes of action. The first cause of action arose under state housing element law, for adopting a specific plan that was inconsistent with an approved general plan. The second cause of action alleged a failure to implement the general plan. The third and fourth causes of action were based on Article XI, section 7 of the California Constitution, alleging that the amended BECSP was preempted by state law. The fifth and sixth causes of action alleged housing discrimination, for adverse impacts to racial and ethnic minorities.

In an expedited trial, the trial court found that the amended BECSP violated state housing law because it no longer complied with the general plan (plaintiffs' first cause of action). The trial court found that under Government Code section 65454, a municipality may not amend a specific plan unless the amendment is consistent with the general plan. The court found the city in violation of this provision when it amended the specific plan without *first* amending the housing element to find other areas where lower income housing could be built. Under this holding, the BECSP amendment was void when passed and could not be enforced. The third through sixth causes of action were dismissed without prejudice. The second cause of action was not pursued on appeal.

For the first time on appeal, the city raised the defense that as a charter city, Huntington Beach was exempt from the requirements under Government Code sections 65860 and 65454 that zoning ordinances and specific plans be consistent with the general plan. Charter cities with less than two million residents are exempt from these requirements, per Government Code 65803 (zoning) and 65700 (local planning). An exception to this exemption is when the charter city expressly states, in either its charter or by ordinance, that it intends to adopt the consistency requirement, which Huntington Beach alleged that it had not done. Therefore, the city argued, while it was required to provide for its share of lower income housing as determined by the RHNA, it was permitted to amend the general plan to be compliant. To support this argument, the city requested judicial notice of the city's charter and population, providing the factual basis for the city's charter city exemption.

As a threshold matter, the court of appeal exercised its discretion to take judicial notice of documents that were not before the trial court, that are of substantial consequence in the

determination of the action. The court chose to exercise its discretion here, because the trial court had not restricted the issues in its expedited hearing. Although this was not a justification for defendants' failure to raise the issue below, this decision afforded the defendants some latitude in this regard.

On the merits, the court found that the city met the requirements for the charter city exemption, and that the exception to this exemption was inapplicable. First, the court found that the consistency requirement was not adopted by the city in its charter. The court then examined the city's zoning ordinance concerning specific plans and determined that the city did not intend to adopt a consistency requirement there, either. In making this determination, the court heavily relied on its decision in *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259. In *Garat*, Riverside, also a charter city, enacted two voter initiatives which changed the zoning to favor agricultural uses in specified areas, creating an inconsistency with the general plan.

In *Garat*, the court rejected the argument that the adoption of *any* specific plans, even if they were intended to be consistent with the general plan, creates either a presumption that *all* specific plans in the general plan area must also be consistent, or that a city has generally adopted the consistency requirement in its land use planning.

More importantly, *Garat* established that Government Code section 67000 exempts charter cities from local planning requirements, in virtually the same way that section 65803 exempts charter cities from the provisions requiring consistency with specific plans, and these exemptions are strictly construed.

Turning to Huntington Beach's zoning ordinance, the city did not explicitly state that any specific plan that was not consistent with the general plan was void. The ordinance did use language concerning consistency, but fell short of expressly adopting the language of Government Code section 65454. The court explained that to adopt the consistency requirement, a zoning ordinance must state that "[n]o specific plan may be adopted or amended" unless it is consistent with the general plan, or else it is void. Without this statement, plaintiffs' attempt to imbue a consistency requirement in the zoning ordinance must fail, as it did in *Garat.*

The court also rejected plaintiffs' argument that even if the charter city exemption applied, the amended BECSP should be considered void, as violating state law. Even if the court were to accept that the BECSP violated state law, the court explained that the remedy would not be to render the BECSP void. Rather, the proper remedy would be to grant the city time to amend its housing element. The court noted that the city was already implementing this remedy. The amendment process could proceed, while leaving the amended BECSP in force.

The court noted that while one may question the wisdom of creating the charter city exemption for certain aspects of land use planning, this was clearly the legislative intent.

The ruling is notable for several reasons. It set a high bar for plaintiffs in the Fourth District who are seeking to establish that a charter city has adopted specific plan consistency requirements, absent express adoption of the language of Government Code section 65454. Additionally, the city's victory may be pyrrhic. As the city conceded, and the court concurred, the general plan's housing element will ultimately require amendment to provide the city's

designated share of the RHNA. While the city achieved its goal of slowing down the pace of development, plaintiffs might refile and potentially prevail on their claims of housing discrimination, incurring liability for the city. Finally, although the court did decide to exercise its discretion and take judicial notice of the city's charter, if it had not, the court would have had no basis for finding merit in the city's defense under the charter city exemption. Municipalities would do well to note if they are a charter city, and be prepared to argue that defense where applicable in the very first instance.

❖ ***Save Lafayette v. City of Lafayette*** **(2018) 20 Cal.App.5th 657**

The First District held that a city had mandatory duty to submit a citizen referendum to public vote. The court concluded that a certified voter referendum must be placed on the ballot, and rejected the city's argument that doing so would conflict with Planning and Zoning Law.

In August 2015, the City of Lafayette adopted a resolution amending the general plan to re-designate the subject parcel from administrative professional office (APO) to low-density single-family residential (R-20). After the general plan amendment became effective, the city approved an ordinance codifying the zoning change. The updated zoning would allow for the development of 44 single-family homes, as proposed by a developer. Subsequently, the appellants timely certified a referendum seeking to repeal the ordinance, or alternatively, have the ordinance submitted to a public vote. The city refused to place it on the ballot. The city maintained that it had discretion to do so, because the referendum was de facto invalid. The city reasoned that if passed, the referendum would result in an inconsistency between the general plan (R-20 zoning) and the municipal code (which would revert it to APO). Under the Government Code, a zoning ordinance that conflicts with the general plan is invalid. The appellants filed a petition for writ of mandate to compel the city to place the referendum on the ballot. After finding for the city, this appeal followed.

In finding for the appellants, the court relied on the Sixth District's recent decision under similar facts in *City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34 (**review granted Aug. 23, 2017** [see Section III below]). Key to the *Bushey* court's decision was the difference between a referendum and an initiative. An initiative is the power of electorate to propose new laws. In contrast, a referendum grants the electorate the power to approve or reject existing laws. A referendum which vacates an ordinance, like the one at issue here, maintains the status quo. If the voters approve the referendum, then the city must adopt alternative zoning which is consistent with the general plan. If the voters reject the referendum, then no inconsistency is created.

Furthermore, the city does not have discretion to unilaterally keep a properly certified referendum off of the ballot. When presented with the certified referendum, the city's options were to repeal the zoning ordinance, place the referendum on the ballot and suspend the ordinance, or after placing the referendum on the ballot, file a writ of mandate to have the referendum removed. When a local agency inappropriately refuses to place a referendum on the ballot, this refusal, although improper, may be retroactively validated by the court. Here, the city should have placed the referendum on the ballot, then filed a writ of mandate. Nevertheless, for

reasons stated, the court did not validate the city's decision. The issue of the appellant's attorneys' fees was remanded to the trial court.

III. PENDING CALIFORNIA SUPREME COURT CEQA AND LAND-USE CASES

There are four CEQA and land-use cases pending at the California Supreme Court. The cases, listed newest to oldest, and the Court's summaries are as follows:

City of Morgan Hill V. Bushey (River Park Hospitality), S243042. (H043426, 12 Cal.App.5th 34.) The issue to be briefed and argued is: Can the electorate use the referendum process to challenge a municipality's zoning designation for an area, which was changed to conform to the municipality's amended general plan, when the result of the referendum-if successful-would leave intact the existing zoning designation that does not conform to the amended general plan?

Union of Medical Marijuana Patients, Inc. v. City of San Diego, S238563. (D068185; 4 Cal.App.5th 103; San Diego County Superior Court.) Petition for review after the Court of Appeal affirmed the judgment in an action for administrative mandate. This case presents the following issues: (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?

T-Mobile West LLC v. City and County of San Francisco, S238001. (A144252; 3 Cal.App.5th 334, mod. 3 Cal.App.5th 999c; San Francisco County Superior Court.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: (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"?

Sierra Club v. County of Fresno, S219783. (F066798, 226 Cal.App.4th 704; Fresno County Superior Court.) Petition for review after the court of appeal reversed the judgment of the trial court in an action for writ of administrative mandate. 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.)

IV. CEQA GUIDELINES UPDATE

On November 27, 2017, the Governor's Office of Planning and Research transmitted a set of proposed amendments to the CEQA Guidelines to the Natural Resources Agency. This is the first comprehensive update to the Guidelines since the late 1990s. The proposed package contains changes or additions involving nearly thirty different sections of the CEQA Guidelines, addressing nearly every step of the environmental review process. In addition to the regular updates required by Public Resources Code section 21083, this package also includes new provisions required by recent legislation, including SB 743, which required OPR to develop new methodology for addressing transportation impacts. Among these provisions is new Guideline section 15064.3, which proposes "vehicle miles traveled" as the most appropriate measure of a project's transportation impacts in light of the goals of Senate Bill 743. Once that section is adopted, automobile delay (often called "level of service") will no longer be considered an environmental impact under CEQA, particularly in the context of land use projects.

Other examples of proposed changes include:

- Updated exemptions for residential and mixed-use developments near transit and redeveloping vacant buildings;
- Clarifications for the use of existing environmental documents to cover later projects;
- New provisions to address energy efficiency and the availability of water supplies;
- Simplified requirements for responding to comments; and
- Modified provisions to reflect recent CEQA cases addressing baseline, mitigation requirements and greenhouse gas emissions.

The Natural Resources Agency will conduct a formal administrative rulemaking process on the CEQA Guidelines. That rulemaking process will entail additional public review, and may lead to further revisions. The Natural Resources Agency published its Notice of Proposed Rulemaking at the end of January 2018, and conducted public hearings to take public comments on the amendments in mid-March. The process is expected to conclude before the end of 2018. The updated CEQA Guidelines will apply prospectively only, and would not affect projects that have already commenced environmental review. Additionally, while a public agency could immediately apply the proposed new Guidelines section regarding the evaluation of transportation impacts (proposed Guidelines section 15064.3), statewide application of that new section would not be required until January 1, 2020.

Municipal Water Reuse in an Increasingly Complex Regulatory Environment

Friday, May 4, 2018 General Session; 9:00 – 10:15 a.m.

Stephanie O. Hastings, Brownstein Hyatt Farber Scheck
Dylan K. Johnson, Brownstein Hyatt Farber Scheck

Notes:_____

League of California Cities
City Attorneys' Conference

May 4, 2018
San Diego, CA

Municipal Water Reuse
In An Increasing Complex Regulatory Environment

Prepared by

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This paper summarizes the key regulatory framework for the discharge of wastewater and the delivery and use of recycled water as of March 1, 2018. It also identifies emerging issues in this area. The law regarding recycled water is rapidly evolving. Potential changes in the law are noted throughout this document. Attorneys should confirm the accuracy of the law at the time of consideration and perform an independent evaluation of the issues raised in this paper. Neither this paper, nor its contents, is not offered as or intended to be legal advice.

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SUMMARY OF KEY TERMS[1]

Antidegradation Policy: State Water Resources Control Board (SWRCB) policy that applies to the disposal of waste to high-quality surface water and groundwater. This policy requires that the quality of existing high-quality water be maintained unless the State finds that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water, and will not result in water quality less than that prescribed in policies as of the date on which such policies became effective. (SWRCB Resolution 68-16.)

Master Recycling Permit (MRP): As an alternative to issuing WRRs, a Regional Water Quality Control Board may issue an MRP to a supplier or distributor of recycled water. Like WRRs, an MRP prescribes the conditions and requirements related to the treatment and use of recycled water.

National Pollutant Discharge Elimination System (NPDES) permit: NPDES permits prescribe conditions and requirements for the discharge of pollutants to waters of the U.S. The Clean Water Act provides that no person may discharge pollutants through a point source (discrete conveyance such as a pipe) without first obtaining an NPDES permit.

Recycled water: "water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is therefore considered a valuable resource." (Wat. Code § 13050(n).) A form of water reuse that includes primary, secondary and tertiary treatment of wastewater to produce water suitable for a variety of non-potable applications, most notably for landscaping irrigation and industrial uses. Recycled water is synonymous with "reclaimed water," "Title 22 Water" (water that conforms to the Uniform Statewide Recycling Criteria), and "treated wastewater."

Policy for Water Quality Control for Recycled Water (Recycled Water Policy): SWRCB policy to increase the use of recycled water from municipal wastewater sources in a manner that implements state and federal water quality laws. (SWRCB Resolution 2013-0003 (Effective April 25, 2013).)

Uniform Statewide Recycling Criteria: Regulations implementing the Water Recycling Law (See Wat. Code § 13521 *et seq*.). The Uniform Statewide Recycling Criteria establish permissible uses for recycled water, along with treatment, control, monitoring, reporting, engineering and operational requirements applicable to producers, providers and users. (22 CCR § 60301 *et seq*.)

Wastewater: Sewage that comes from homes, industry or businesses and which is collected and treated at wastewater treatment plants; needed for water reuse.

Waste Discharge Requirements (WDRs): WDRs prescribe conditions and requirements for the discharge of waste that could affect the quality of the waters of the state. No person may discharge waste without obtaining WDRs. In some instances, WDRs also serve as an NPDES permit. WDRs are typically issued by the RWQCBs.

Water Reclamation Requirements (WRRs): WRRs prescribe conditions and requirements related to the treatment and use of recycled water. No person may recycle water or use recycled water for any purpose without obtaining WRRs. WRRs are typically issued by the RWQCBs.

[1] Key terms and all defined terms are bolded throughout.

I. SUMMARY OF REGULATORY FRAMEWORK

A. Key Statutes/Regulations

The discharge of waste to waters of the state, including surface water and groundwater, is regulated by the Porter-Cologne Water Quality Control Act. Recycled water in California is regulated by the State through the Health and Safety Code, the Water Code, the Government Code, the Public Resources Code, the Public Utilities Code, and Titles 17 and 22 of the California Code of Regulations.[2]

B. Primary Regulatory Agencies[3]

1. State Water Resources Control Board (SWRCB)

The SWRCB establishes general policies governing the permitting of recycled water projects consistent with its role of protecting water quality and allocating water supplies. The SWRCB:

- establishes the **Uniform Statewide Recycling Criteria**;[4]
- develops general **water reclamation requirements (WRRs)** for production and use of recycled water;
- develops a general permit for irrigation uses of recycled water; exercises general oversight over recycled water projects, including review of **Regional Water Quality Control Board (RWQCB)** permitting practices;
- leads the effort to meet the state's recycled water use goals; and
- provides financial assistance to local agencies for recycled water projects.

The Uniform Statewide Recycling Criteria (22 CCR § 60301 *et seq*.) address:

- allowable uses of recycled water based on treatment categories and potential for human contact,
- infrastructure and other delivery requirements, including the use of purple pipes,
- operational requirements, including monitoring and reporting requirements, and
- protection of water supply.

a. Division of Drinking Water (DDW)

The DDW has statewide responsibility for protecting public health with respect to the use and application of recycled water. The DDW establishes statewide recycling criteria based on water

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[2] The SWRCB has compiled all statutes and regulations relating to recycled water in the following documents: SWRCB, Recycled Water-Related Statutes (last updated Jan. 13, 2017) and SWRCB, Recycled Water-Related Regulations (last updated July 16, 2015), available at: https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/Lawbook.html (last visited March 20, 2018).

[3] Other agencies with some role in the regulation of the use of recycled water include: the Department of Water Resources, the Public Utilities Commission, the Department of Housing and Community Development, and the Building Standards Commission.

[4] Previously, the Department of Public Health had this responsibility. In 2014, the Legislature transferred responsibility for adopting water recycling criteria to the SWRCB. (Wat. Code § 174(b); Health & Saf. Code § 116271.)

source and quality, and specifies sufficient treatment based on intended use and human exposure. (Wat. Code § 13521.)

b. Division of Financial Assistance (DFA)

The DFA administers the implementation of SWRCB financial assistance programs that include loan and grant funding for construction of municipal sewage and water recycling facilities.

c. Division of Water Rights

The Division of Water Rights oversees changes in water rights, including changes in the place of use, point of diversion and discharge of treated wastewater. (Wat. Code § 1210 *et seq*.)

2. RWQCB

The RWQCBs regulate the treatment and discharge of wastewater and the subsequent re-use (or recycling) of wastewater for beneficial purposes. The Water Recycling Law directs the state's nine RWQCBs to establish requirements for the use of recycled water that are in conformance with the Uniform Statewide Recycling Criteria to protect the public health, safety, or welfare. (Wat. Code § 13523.)

RWQCBs are empowered to issue three types of permits relevant to recycled water: **waste discharge requirements (WDR)** for the discharge of treated wastewater into receiving waters, WRRs and **master recycling permits (MRP)** for the re-use of treated wastewater.

II. REGULATION OF WASTEWATER DISCHARGES

A. Statutes

The Porter-Cologne Water Quality Control Act (Wat. Code §§ 13000–16104) regulates the discharge of wastewater, including recycled water, to waters of the state to protect the use and enjoyment by the people of the state. The SWRCB and RWQCBs are the principal state agencies with responsibility for the control of water quality. (Wat. Code § 13001.) The Clean Water Act (33 USC § 1251 *et seq*.) regulates the discharge of pollutants to waters of the U.S. The authority to issue **National Pollutant Discharge Elimination System (NPDES)** permits pursuant to the Clean Water Act for discharges to waters of the U.S. has been delegated to the SWRCB and RWQCBs.[5]

B. Permits

Any person proposing to discharge waste water that could affect the quality of waters of the state, including surface water and groundwater (other than into a community sewer system), must file with the appropriate RWQCB a report of waste discharge in order to obtain WDRs. (Wat. Code § 13260(a)(1).) When the discharge would affect waters of the U.S., WDRs also serve as an NPDES permit.

[5] SWRCB, National Pollutant Discharge Elimination System (NPDES) – Wastewater, available at: https://www.waterboards.ca.gov/water_issues/programs/npdes/ (last visited April 9, 2018).

A report must also be filed for "any material change or proposed change in the character, location, or volume of the discharge." (Wat. Code § 13260(c).) Since the use of recycled water necessarily involves the discharge of wastewater that may affect waters of the state, permitting recycled water production, distribution and use requires compliance with the WDRs requirements. Failure to file a report of waste discharge can result in civil or criminal liability. (Wat. Code § 13261.)

The WDRs requirements are set forth in Water Code §§ 13260–13276. WDRs "shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance…." (Wat. Code § 13263.)

WDRs typically contain discharge prohibitions, management plan requirements, and water quality monitoring and reporting requirements. (See Wat. Code § 13267(b)(1).) If the WDRs also serve as a NPDES permit, it will include effluent limitations that establish numeric limitations for discharges of specified parameters (pollutants). (33 USC § 1311.) WDRs/NPDES permits require compliance with effluent water limitations through implementation of Best Available Technology Economically Achievable and Best Conventional Pollutant Control Technology. WDRs/NPDES permits typically also include receiving water limitations that establish maximum limits for specified pollutants in the water into which the permittee discharges.

The SWRCB or a RWQCB may prescribe general WDRs for a category of discharges if the board finds that: (1) the discharges are produced by the same or similar operations, (2) the discharges involve the same or similar types of waste, (3) the discharges require the same or similar treatment standards, and (4) the discharges are more appropriately regulated under general discharge requirements than individual discharge requirements. (Wat. Code § 13263(i).) When a board has established general WDRs, a prospective permittee enrolls under the permit by filing a Notice of Intent. Prior to the adoption of the WRRs General Order (discussed below), recycled water was permitted through a WDRs General Order (Order WQ 2014-0090-DWQ).

Unless requested by a RWQCB, a report of waste discharge need not be filed by a user of recycled water that is being supplied by a supplier for whom an MRP has been issued. (Wat. Code § 13260.)

C. Regulations

Title 23, Division 3, Section 9 of the California Code of Regulations sets forth additional requirements for filing reports of waste discharge and processing and specifications for WDRs.

WDRs must ensure that all discharges of waste are consistent with state's **Antidegradation Policy** (SWRCB Resolution No. 68-16), adopted in accordance with federal law under Title 40, Chapter I, Subchap. D, Part 131, Subpart B, section 131.12 of the Code of Federal Regulations. The Antidegradation Policy requires that existing quality of waters be maintained unless it has been demonstrated to the state that any change will be consistent with the maximum benefit to the people of the state, will not unreasonably affect present and anticipated beneficial use of the water, and will not result in water quality less than that prescribed in the policies.

The Antidegradation Policy requires that any activity that produces a waste or increased volume or concentration of waste and discharges to existing high quality waters will be required to meet WDRs that will result in the best practicable treatment or control of the discharge necessary to assure pollution or nuisance will not occur, and the highest water quality consistent with the maximum benefit to the people of the State will be maintained.

III. REGULATION OF WATER RECYCLING

A. State Policy Promoting Use Of Recycled Water

California law encourages the use of recycled water because it maximizes the beneficial use of the state's water resources (see Cal. Const. Art. X, § 2; Wat. Code § 100; see also Wat. Code § 275).[6] Specifically:

- The Legislature has "declared that the primary interest of the people of the state in the conservation of all available water resources requires the maximum reuse of reclaimed water in the satisfaction of requirements for beneficial uses of water." (Wat. Code § 461.)
- "It is hereby declared that the people of the state have a primary interest in the development of facilities to recycle water containing waste to supplement existing surface and underground water supplies and to assist in meeting the future water requirements of the state." (Wat. Code §13510.)
- "The Legislature finds and declares that a substantial portion of the future water requirements of this state may be economically met by beneficial use of recycled water. The Legislature further finds and declares that the utilization of recycled water by local communities for domestic, agricultural, industrial, recreational, and fish and wildlife purposes will contribute to the peace, health, safety and welfare of the people of the state." (Wat. Code §13511.)
- "It is the intention of the Legislature that the state undertakes all possible steps to encourage development of water recycling facilities so that recycled water may be made available to help meet the growing water requirements of the state." (Wat. Code §13512.)
- . . . . "The use of recycled water is a cost-effective, reliable method of helping to meet California's water supply needs. . . . Retail water suppliers and recycled water producers and wholesalers should promote the substitution of recycled water for potable water and imported water in order to maximize the appropriate cost-effective use of recycled water in California." (Wat. Code §13576.)

In fact, the Legislature has declared that using potable water for numerous nonpotable uses, including, but not limited to, cemeteries, golf courses, parks, highway landscaped areas, and industrial and irrigation uses, "is a waste and unreasonable use of water within the meaning of Section 2 of Article X of the California Constitution" when recycled water meeting specified requirements is available to the user. (See Wat. Code § 13550.)

[6] "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. . . ." (Cal. Const., Art. X, § 2.)

In furtherance of this policy promoting the use of recycled water, the Legislature:

- established a statewide goal to recycle 700,000 acre-feet of water per year by the year 2000 and 1,000,000 acre-feet of water per year by the year 2010 (Wat. Code § 13529(e)).
- directed the SWRCB to "identify and report to the Legislature on opportunities for increasing the use of recycled water … and identify constraints and impediments … to increasing the use of recycled water" (Wat. Code § 13578).
- directed "retail water suppliers" (which includes public agencies providing retail water), to "identify potential uses for recycled water within their service areas, potential customers for recycled water service within their service areas, and, within a reasonable time, potential sources of recycled water" (Wat. Code § 13579).

In response to these directives, the SWRCB has adopted a **Policy for Water Quality Control for Recycled Water (Recycled Water Policy)**.[7] The purpose of the Recycled Water Policy is to increase the use of recycled water from municipal wastewater sources in a manner that implements state and federal water quality laws. It calls for the development of salt and nutrient plans for each basin and establishes requirements for control of incidental runoff, requirements for streamlined permitting for recycled water projects, and criteria for groundwater recharge projects.

As a component of the Recycled Water Policy, the SWRCB has adopted the goal of increasing the use of recycled water over 2002 levels by at least one million AFY by 2020 and by at least two million AFY by 2030. (Recycled Water Policy, Preamble.) To achieve this goal, the SWRCB has found that the use of recycled water that supports the sustainable use of groundwater and/or surface water, which is sufficiently treated so as not to adversely impact public health or the environment and which substitutes for use of potable water, is presumed to have a beneficial impact. (Recycled Water Policy, p. 3.) The SWRCB has also established a mandate to increase the use of recycled water in California by 200,000 AFY by 2020 and by an additional 300,000 AFY by 2030.

To date, California is far from meeting these mandated annual targets. According to the SWRCB's and Department of Water Resources' recent recycled water survey, the total increase in recycled water use between 2001-2015 was only 189,000 AF, lower than the SWRCB's annual mandate over a 14 year period. Between 2009 and 2015, recycled water use increased by only 45,000 AF in total.[8]

1. Proposed Amendments

In December 2016, the SWRCB adopted Resolution No. 2016-0061, which directed staff to reconvene the Science Advisory Panel to update its recommendations for monitoring Constituents of Emerging Concern in recycled water and update the Recycled Water Policy

[7] SWRCB Resolution 2013-0003, Policy for Water Quality Control for Recycled Water, Preamble (Effective April 25, 2013).
[8] California Recycled Water Use in 2015 (July 2017), available at: https://www.waterboards.ca.gov/water_issues/programs/grants_loans/water_recycling/munirec.shtml (last visited March 20, 2018).

considering changes that have taken place since 2013. The draft amendment to the Recycled Water Policy is expected to be released for public comment in April 2018.[9]

B. Statutes Governing Water Recycling

Water suppliers must provide recycled water for non-potable purposes when it is available. A person or public agency "shall not use water from any source of quality suitable for potable domestic use for nonpotable uses … if suitable recycled water is available as provided in Section 13550." (Wat. Code § 13551.) The SWRCB may order a party to use recycled water or to cease using potable water after notice and a hearing. (Wat. Code § 13550.)[10]

The **Water Recycling Law** (Wat. Code §§ 13500–13557) provides the primary statutory authority governing recycled water production and use. It includes policies calling for use of recycled water to supplement water supplies, authorization for the SWRCB to provide loans for development of reclamation facilities, mandates for establishing recycling criteria setting levels of constituents in recycled water to protect public health, and requirements for reporting and permitting recycled water use.

The **Water Recycling Act of 1991** (Wat. Code §§ 13575–13583) encourages retail water suppliers and customers of recycled water to enter into recycled water delivery agreements and, further, mandates the use of recycled water when available. Specifically:

- a "retail water supplier that has identified a potential use or customer … may apply to a recycled water producer or recycled water wholesaler for a recycled water supply" (Wat. Code § 13580).
- "a customer may request, in writing, a retail water supplier to enter into an agreement or adopt recycled water rates in order to provide recycled water service to the customer" (Wat. Code § 13580.7(b)).
- a "retail water supplier that receives a request from a customer … shall enter into an agreement to provide recycled water, if recycled water is available, or can be made available, to the retail water supplier for sale to the customer" (Wat. Code § 13580.5 (emphasis added)).

The law also provides procedures for dispute resolution (Wat. Code § 13581(a)) and appeal of a public agency's failure to comply with these directives (Wat. Code § 13583).

The **Water Recycling in Landscaping Act** (Gov't. Code § 65601 et seq.) provides that if any local public or private entity that produces recycled water determines that within 10 years it will provide recycled water within the boundaries of a city or county, it shall notify the city or county

[9] Recycled Water Policy, available at: https://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/ (last visited March 20, 2018).

[10] See also Water Code §§ 13552.2–13554 (declaring the following uses of potable water a waste and unreasonable use when recycled water is available: residential landscaping; trap priming; cooling towers; air-conditioning devices; and toilet and urinal flushing in structures). Any public agency may require the use of recycled water for these uses, if recycled water is available to the user and meets the requirements set forth in Section 13550 and other specified requirements are met. See also Water Code §§ 32601–32602 (declaring uses for cemeteries, parks, highway landscaped areas, new industrial facilities, landscaped common areas of residential developments maintained by a homeowner's association, and golf course irrigation is a waste and an unreasonable use.)

of that fact and shall identify in the notice the area that is eligible to receive the recycled water, and the necessary infrastructure that the recycled water producer (or retail water supplier) will provide to support delivery of the recycled water. (Gov't. Code § 65604.)

Within 180 days of notification that recycled water will be available, the city or county must adopt and enforce a recycled water ordinance. The ordinance must include provisions stating that (1) it is "the policy of the local agency that recycled water … shall be used for nonpotable uses within the designated recycled water use area … when the local agency determines that there is not an alternative higher or better use for the recycled water, its use is economically justified, and its use is financially and technically feasible for projects under consideration by the local agency; (2) designate the areas within the boundaries of the local agency that can or may in the future use recycled water, …; (3) establish general rules and regulations governing the use and distribution of recycled water"; (4) "establish that the use of the recycled water is available in new industrial, commercial, or residential subdivisions located within the designated recycled water use areas for which a tentative map or parcel map is required"; and (5) "require a separate plumbing system to serve nonpotable uses in the common areas of the subdivision, including, but not limited to, golf courses, parks, greenbelts, landscaped streets, and landscaped medians." (Gov't. Code § 65605.)

The Water Recycling in Landscaping Act also required the SWRCB to adopt a general permit for landscape irrigation uses of recycled water, which the SWRCB has done (see below). (Wat. Code § 13552.5(a).)

C. Permitting

A water recycling project has three permitting options: (1) obtaining coverage under the SWRCB General WRRs, (2) obtaining individual WRRs/WDRs from the relevant RWQCB, or (3) obtaining an MRP from the relevant RWQCB.

1. General Permits

On June 7, 2016, the SWRCB adopted a General Order establishing statewide WRRs entitled **Water Reclamation Requirements for Recycled Water Use (Order WQ 2016-0068-DDW) (General WRRs)**.[11] The General WRRs serves as a statewide permit authorizing beneficial, non-potable recycled water uses that are consistent with the Uniform Statewide Recycling Criteria (discussed below). An applicant who can meet the requirements to enroll under the General WRRs and whose proposed recycled water use complies with the statewide uniform criteria, may obtain permit coverage under the General WRRs to distribute and use recycled water (production facilities require separate individual permitting under individual WDRs/WRRs or an MRP). The General WRRs is the sole permit coverage required for any permittee enrolled under the order.

[11] Order WQ 2016-0068-DDW replaces and supersedes Order WQ 2014-0090-DWQ. (Order WQ 2016-0068-DDW, at p. 18 (providing WQ 2016-0068-DDW is rescinded except for enforcement purposes).) The General WRRs are available at: https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/requirements.shtml (last visited April 9, 2018).

The General WRRs contains prohibitions on certain uses, requirements for application of recycled water, engineering requirements for production and delivery of recycled water, inspection requirements, and monitoring and reporting requirements.

Producers, distributors, and users may seek coverage under the General WRRs for use of recycled water. An applicant obtains coverage by submitting a **Notice of Intent (NOI)** to enroll under the permit. Appendix A to the General WRRs sets forth the requirements for submitting an NOI. In general, the applicant must submit a description of the treatment, storage, and distribution facility (including a Title 22 engineering report under 22 CCR § 60323), a description of proposed use, description of the applicant's water recycling program, and a description of personnel organization and responsibilities.

An applicant may seek to enroll as an administrator of its recycled water program, in which case it has conditional authority to grant permits to users of the recycled water it provides and establish rules for recycled water use.

The SWRCB has also adopted a general order specific to use of municipal recycled water for landscape irrigation. (Order No. 2009-0006-DWQ, General Waste Discharge Requirements for Landscape Irrigation Uses of Municipal Recycled Water.)[12]

Additionally, some RWQCBs have adopted general orders applicable to distribution and use of recycled water within their region. (See, e.g., Los Angeles RWQCB Order No. R4-2009-0049, General Waste Discharge and Water Recycling Requirements for Title 22 Recycled Water for Non-Irrigation Uses Over the Groundwater Basins Underlying the Coastal Watersheds of Los Angeles and Ventura Counties;[13] Colorado River Basin RWQCB Order No. 97-700, General Waste Discharge Requirements for Discharge of Recycled Water for Golf Course and Landscape Irrigation.[14]) Like the SWRCB General WRRs, proponents of recycled water projects may seek permit coverage by submitting an NOI to the relevant RWQCB. However, in adopting the General WRRs, the SWRCB declared its intent that RWQCBs would terminate their general orders within three years and that permit coverage would be transferred to the General WRRs. (General WRRs, p. 15.)

2. Individual Permits

a. Individual Water Recycling Requirements

Sections 13520–13557 of the Water Recycling Law provide the primary statutory authority for delivery and use of recycled water.

[12] The general order is available at: https://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/landscape_irrigation_general_permit.shtml (last visited April 9, 2018).
[13] The general WDRs/WRRs is available at: https://www.waterboards.ca.gov/losangeles/board_decisions/adopted_orders/ (last visited April 9, 2018).
[14] The general WDRs is available at: https://www.waterboards.ca.gov/coloradoriver/board_decisions/adopted_orders/general_board_orders.html (last visited April 9, 2018).

The law authorizes any public agency to "acquire, store, provide, sell, and deliver recycled water for any beneficial use, including, but not limited to, municipal, industrial, domestic, and irrigation uses, if the water use is in accordance with statewide recycling criteria and regulations established pursuant" to sections 13500–13557 of the Wat. Code (Water Reclamation). (Wat. Code § 13556.) There is a presumption that use of recycled water in accordance with the recycling criteria does not cause, constitute, or contribute to, any form of contamination. (Wat. Code § 13522.)

Similar to the requirement to file a report of waste discharge, any person producing or using recycled water, or making a change in the character of recycled water or its use, must file with the appropriate RWQCB a report containing information required by the board. (Wat. Code § 13522.5.) The RWQCBs may prescribe WRRs for recycled water production and use. (Wat. Code § 13523.) No person may recycle water or use recycled water until requirements have been established. (Wat. Code § 13524.)

WRRs may be issued to the person recycling water, the user, or both. The requirements must be established in conformance with the Uniform Statewide Recycling Criteria (discussed below). Generally, WRRs include effluent limits, specifications for recycled water being produced including treatment standards, approved uses, engineering requirements for the production and distribution of recycled water, requirements for the area of recycled water use, and monitoring requirements.

An RWQCB may require the submission of a preconstruction report for the purpose of determining compliance with the recycling criteria. The requirements for a use of recycled water not addressed by the recycling criteria are considered on a case-by-case basis. (Wat. Code § 13523(b).)

b. Master Recycling Permits

In lieu of issuing WDRs and/or WRRs for recycled water production and use, a RWQCB may issue an MRP to a supplier or distributor, or both, of recycled water. (Wat. Code §§ 13523.1, 13263(h).) An MRP allows a purveyor of recycled water to deliver recycled water to multiple users in the purveyor's service area. A user of recycled water that is being supplied pursuant to a master recycling permit need not file a report of waste discharge. (Wat. Code § 13260(l).)

An MRP must include WDRs, a requirement that the permittee establish rules and regulations for users, and inspection and reporting requirements. (See Wat. Code § 13523.1 for a complete list of requirements.)

D. Regulations

1. Uniform Statewide Recycling Criteria

The Uniform Statewide Recycling Criteria (Title 22, Div. 4, Chp. 3 of the Code of Regulations) implement the Water Recycling Law and establish permissible uses for recycled water, along with treatment, control, monitoring, reporting, engineering and operational requirements applicable to producers, providers, and users.

Permissible uses are divided by treatment level. For non-potable use, there are four types of recycled water based on levels of treatment: non-disinfected secondary, disinfected secondary-23, disinfected secondary 2.2, and disinfected tertiary. Non-disinfected secondary recycled water has the lowest level of treatment and is suitable for applications that have a very minimal public exposure level, such as irrigation for fodder crops. Disinfected tertiary recycled water has the highest level of treatment, which is deemed sufficient for applications with more public exposure, such as irrigation of parks, decorative fountains, or artificial snowmaking for commercial outdoor use.

The following provides an illustrative example of uses allowed by treatment level:

- Tertiary treatment (defined at 22 CCR § 60301.230): surface irrigation of food crops where the water comes into contact with edible portions of the crops, parks and playgrounds, school yards, and residential landscaping. (22 CCR § 60304(a).)
- Disinfected to at least a secondary-2.2 level (defined at 22 CCR § 60301.220): surface irrigation of food crops where the edible portion is produced above ground and not contacted by the recycled water and restricted recreational impoundments. (22 CCR §§ 60304(b), 60305(d).)
- Disinfected to at least a secondary-23 level (defined at 22 CCR § 60301.225): cemeteries and freeway landscaping. (22 CCR § 60304(c).)
- Undisinfected secondary recycled water (defined at 22 CCR § 60301.900): surface irrigation of orchards where the recycled water does not come into contact with the edible portion of the crop and flushing sanitary sewers. (22 CCR §§ 60304(d), 60307(c).)

A complete list of permissible uses by treatment level is found at 22 CCR §§ 60303–60307. The following are also included in the criteria:

- Use area requirements (22 CCR § 60310).
- Plumbing and delivery requirements (22 CCR § 60313).
- Sampling and analysis requirements (22 CCR § 60321).
- Engineering and operational requirements (22 CCR §§ 60323–60331).
- Design requirements (22 CCR §§ 60333–60337).
- Alternative treatment and reliability requirements (22 CCR §§ 60320.5, 60339, 60341–60355).

The Uniform Statewide Recycling Criteria apply only to recycled water from sources that contain domestic waste. (22 CCR § 60302.) They do not apply to the use of recycled water onsite at a water recycling plant, or wastewater treatment plant, provided that access by the public to the area of onsite recycled water use is restricted. (22 CCR § 60303.)

Title 17 sets forth additional engineering and management requirements applicable to public water systems, including systems providing recycled water. (See 17 CCR § 7583 *et seq*.)

2. Model Water Efficient Landscape Ordinance

Beginning December 1, 2015, the **Model Water Efficient Landscape Ordinance** (Title 23, Div. 2, Chap. 2.7 of the Code of Regulations) took effect. Local agencies, including cities, had the

option of adopting the ordinance by reference, adopting their own ordinance with requirements at least as stringent as the model ordinance, or taking no action, which allows the model ordinance to become applicable within the agency's jurisdiction. The model ordinance imposes requirements for landscaping at commercial, residential, industrial, and institutional projects of specified size. The model ordinance includes a requirement that recycled water irrigation systems installed shall allow for the current and future use of recycled water. (22 CCR § 492.14.) It also provides for additional water allowances for certain irrigation with recycled water. (22 CCR § 491(tt).)

3. Potential Changes in the Law

NPDES discharge permits issued by State agencies cannot exceed five years in duration. (33 USC § 1342(b)(1)(B).) The Trump Infrastructure Plan released on February 12, 2018, proposes lengthening the permit time limit from five years to fifteen years and providing for automatic renewals of such permits, if the water quality needs do not require more stringent permit limits, to bring more stability to projects subject to permits.

For WDRs associated with recycled water projects that also function as NPDES permits, this could elongate the duration of these permits and provide more long-term certainty for the projects.

E. Permitted Recycled Water Uses

To date, there are three permitted uses of recycled water: direct non-potable use, indirect potable reuse and surface water augmentation.

1. Direct Non-Potable Use

Recycled water may be delivered directly to customers to serve non-potable demands. Recycled water for direct non-potable use is delivered in purple pipes. (Health & Saf. Code § 116815 [pipes installed after June 1, 1993 that are designed to carry recycled water, shall be colored purple or distinctively wrapped with purple tape].)

Recycled water may be used for the following direct non-potable uses, depending on treatment level, as discussed above:

- Irrigation: food crops, orchards and landscaping.
- Cooling or air conditioning: industrial and commercial.
- Impoundment (lakes/ponds): non-restricted recreational impoundments (swimming), fish hatcheries, landscape impoundments.
- Other uses: flushing toilets and urinals, industrial-process water that may contact workers, structural and nonstructural firefighting, decorative fountains, commercial laundries, consolidation of backfill material, creation of artificial snow, industrial boiler feed, soil compaction, mixing concrete, dust control on roads and streets, flushing sanitary sewers, and cleaning roads, sidewalks and outdoor work areas.

a. Sample Project(s)

Direct non-potable use is perhaps the most common use of recycled water today statewide. Agencies are making recycled water available for landscape and golf course irrigation, industrial cooling, sewer flushing, street sweeping, and a variety of other authorized non-potable uses.

2. Indirect Potable Use

Recycled water may also be used to replenish and/or augment groundwater supplies—**Indirect Potable Use (IPR)**. This may be accomplished indirectly, via the discharge to percolation ponds or directly by injection into a groundwater aquifer. (Wat. Code §§ 13540(b), 13562.)

Prior to operating a **Groundwater Replenishment Reuse Project (GRRP)** using surface application, a project sponsor must obtain approval of a plan to supply an alternative drinking water supply to all users of a drinking water well that becomes unsafe to use as drinking water or fails to meet applicable drinking water standards as a result of the GRRP. The recycled wastewater must meet disinfection standards and be retained underground for a period specified in the regulations. Technical reports regarding the GRRP and the hydrogeologic setting must be provided as part of obtaining approval. (22 CCR § 60320.100.) Approval of a GRRP requires a noticed public hearing. (22 CCR § 60320.102.) The criteria contain technical monitoring, reporting, and control requirements. (See 22 CCR § 60320.104–.128.)

When a GRRP involves subsurface application, the project must incorporate full advanced treatment of an oxidized wastewater using a reverse osmosis and an oxidation treatment process that, at a minimum, meets the requirements set forth in the criteria, prior to application of the recycled water. (See 22 CCR § 60320.200–.228.)

a. Sample Project(s)

Orange County Water District's Groundwater Replenishment System is the world's largest indirect potable reuse system. The system purifies treated wastewater using a three-step advanced treatment process consisting of microfiltration, reverse osmosis and ultraviolet light with hydrogen peroxide. According the OCWD, the process produces high-quality water that meets or exceeds all state and federal drinking water standards. The purified water is injected into a seawater barrier and pumped to recharge basins where it naturally percolates into the Orange County Groundwater Basin and supplements Orange County's drinking water supplies. The system currently produces 100 MGD, with ultimate capacity projected at 130 MGD.[15]

Chino Basin Recycled Water Groundwater Recharge Program (GWR) is operated jointly by Inland Empire Utilities Agency, Chino Basin Watermaster, Chino Basin Water Conservation District, and San Bernardino County Flood Control District. Among other water sources, recycled water is directed to 16 recharge sites most of which consist of multiple recharge basins. These recharge basins are located throughout a 245 square mile area. The basins are designed to

[15] Orange County Water District, Groundwater Replenishment System technical brochure, available at https://www.ocwd.com/media/4267/gwrs-technical-brochure-r.pdf (last visited April 9, 2018).

hold the water so that it can percolate into the ground and replenish the groundwater supply. The GWR annually recharges about 10,000 acre feet of recycled water.[16]

3. Use of Recycled Water For Augmentation of Surface Water Supplies

On March 6, 2018, the SWRCB adopted regulations authorizing use of recycled water to augment surface water supplies, including reservoirs, pursuant to legislative mandates. (SWRCB Resolution 2018-0044; Wat. Code §§ 13562(a)(2)(A); Health & Saf. Code § 116551.)

The regulations allow the placement of recycled municipal wastewater into a surface water reservoir that is used a source of domestic drinking water supply. (22 CCR § 64320.300.) The project sponsor(s) must submit a plan to the State and Regional Board for approval. The plan must contain corrective actions to be taken if the recycled water does not standards required by the regulations and procedures for notification. (22 CCR § 60320.301.) The same categories of standards regarding monitoring, reporting, control, and treatment that apply to groundwater augmentation through subsurface application (discussed above) apply to surface water augmentation. (See 22 CCR § 60320.301–.330.)

The recycled municipal wastewater stream must be treated using a reverse osmosis and an oxidation treatment process meeting the requirements established by the regulations prior to delivery into the augmented reservoir. (22 CCR § 60320.302.) The water supplier must obtain a domestic water supply permit to use the augmented reservoir as a water source. (22 CCR § 64668.20.) Before use as an augmented surface reservoir, the reservoir must have been in operation for a period of time sufficient to establish a baseline record of the reservoir's water quality not less than five years. (22 CCR § 64668.30(a).) Regulations establish required retention times for recycled water and maximum limits of recycled water to be supplied during specified time periods. (22 CCR § 64668.30(c).)

a. Sample Project(s)

San Diego Water Purification Demonstration Project: From 2009 to 2013, the City of San Diego embarked on a demonstration project to determine whether advanced water purification technology could provide a local and safe drinking water supply for San Diego. The project evaluated the feasibility of a full-scale reservoir augmentation project, where purified water could be blended with imported water supplies in the San Vicente Reservoir before going to a standard drinking water treatment plant. According to the City, the project's operational testing and monitoring verified the water purification process consistently produces water that meets all state and federal drinking water standards. The purified water is similar in quality to distilled water.[17]

Pure Water San Diego – Miramar Reservoir Project: San Diego has plans to convey 30 MGD of treated water to Miramar Reservoir as part of the City's Pure Water project (a plan to provide

[16] Inland Empire Utilities Agency, "Groundwater," available at: www.ieua.org/water-sources/groundwater (last visited April 9, 2018).
[17] City of San Diego, Water Purification Demonstration Project, available at: https://www.sandiego.gov/water/purewater/demo (last visited April 9, 2018).

one-third of San Diego's water locally by 2035). The City expects the Miramar Reservoir project to be operational by 2021.[18]

IV. CHANGES IN USE OF TREATED WASTEWATER

A. Water Code Section 1211

A wastewater treatment facility owner has the exclusive right to all treated wastewater generated, unless a contract provides otherwise. (Wat. Code § 1210; see, e.g. *In the Matter of Wastewater Petition WW0095 (San Bernardino Valley Mun. Wat. Dist.)*, at § 9.4.4.) The owner's exclusive right extends to treated wastewater that has been discharged to a watercourse. Downstream users may not appropriate the supply. (Wat. Code § 1212.) However, SWRCB approval is required before a wastewater treatment facility owner may make changes to the use of treated wastewater that result in the reduction of flow to a watercourse, including for example, the direct delivery of recycled water to customers in lieu of discharge of the supply to a watercourse.

> Prior to making any change in the point of discharge, place of use, or purpose of use of treated wastewater, the owner of any wastewater treatment plant shall obtain approval of the board for that change. The board shall review the changes pursuant to the provisions of Chapter 10 (commencing with Section 1700) of Part 2 of Division 2. (b) Subdivision (a) does not apply to changes in the discharge or use of treated wastewater that do not result in decreasing the flow in any portion of a watercourse.

(Wat. Code § 1211.) A petition is not needed for changes in the discharge or use of treated wastewater that do not result in decreasing the flow in any portion of a watercourse, or when the discharge is directly to the ocean or a bay. Also, reductions in discharge associated with reduced plant influent due to water conservation measures are not subject to the petition requirement.[19]

B. Change Petition Process

The process for obtaining SWRCB approval includes submission of a Petition for Change, notice of the Petition for Change to the California Department of Fish and Wildlife and the public, the opportunity for any party to protest the proposed change on the grounds of injury to legal user, investigation by the SWRCB and compliance with CEQA, as applicable. (See Wat. Code § 1700 *et seq*.; see also 23 CCR § 791.) [20] A hearing may be required if one or more protests to the petition have been made and remain unresolved. (Wat. Code § 1704.)

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[18] City of San Diego, Pure Water San Diego, available at: https://www.sandiego.gov/water/purewater/purewatersd (last visited April 9, 2018).

[19] SWRCB, Wastewater Change Petition Program, available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/ wastewaterchange/ (last visited March 20, 2018).

[20] SWRCB, Wastewater Change Petition Program, available at: https://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/ wastewaterchange/ (last visited March 20, 2018). The following diagram illustrates the change petition process: https://www.waterboards.ca.gov/waterrights/board_info/docs/petprocess.pdf (last visited March 20, 2018).

The SWRCB may approve, deny or condition a Petition for Change. (Wat. Code § 1704.) To approve a Petition for Change, including a Wastewater Change Petition, the SWRCB must find that the proposed change will not injure other legal users of water, will not unreasonably harm instream uses, and is not contrary to the public interest. (Wat. Code §§1210, 1702; *see generally* Wat. Code § 1700 *et seq*.) Under the "no injury" rule, only parties with rights to the supply can claim injury, and they can show injury only by demonstrating that the proposed change will injure those rights. (*SWRCB Cases* (2006) 136 Cal.App.4th 674, 740, cert. denied 549 U.S. 889.) Parties who introduce foreign or developed water into a watercourse have exclusive rights to that water. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 259-62; *City of Los Angeles v. City of Glendale* (1943) 23 Cal.2d 68, 77-78.) Therefore, a Wastewater Change Petition that seeks to reuse tertiary treated wastewater derived from the use of foreign water supplies cannot operate to injure any legal user of water. (See *In the Matter of Wastewater Change Petition WW-45 (City of Riverside)*, SWRCB Ord. WR 2008-0024, at § 7.1 [downstream water right holders are protected from injury only to the extent that the source of the return flow to a stream is native water]).) Conversely, where a treated wastewater supply is derived from the native supply, users with rights in the native supply will likely have legal standing to object to changes that would result in interference with their water right. (*Scott v. Fruit Growers Supply Co*. (1972) 202 Cal. 47, 55.)

The SWRCB has determined that fish and wildlife qualify as a "legal use." Accordingly, the SWRCB has compelled the continued discharge of treated wastewater as necessary to avoid injury to fish and wildlife. (See *In the Matter of Treated Waste Water Change Petition WW-20 (El Dorado Irr. Dist.)*, SWRCB Ord. WR 95-9; *In the Matter of Water Right Application 29408 and Waste Water Change Petition WW-6 (City of Thousand Oaks)*, SWRCB Dec. 1638.)

C. Proposed Amendments

It is anticipated that the forthcoming amendments to the Recycled Water Policy will include clarification regarding the process for complying with Wat. Code section 1211, including inter- and intra-agency coordination, and may also address cumulative impacts resulting from multiple wastewater change petitions.[21]

V. FUNDING

The mission of the **Water Recycling Funding Program (WRFP)** is to promote the beneficial use of treated municipal wastewater (water recycling) in order to augment fresh water supplies in California by providing technical and financial assistance to agencies and other stakeholders in support of water recycling projects and research.

[21] SWRCB Presentation at Stakeholder Meeting, Proposed Amendments to Recycled Water Policy, Topic 6 (Jan. 4, 2018), available at: https://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/docs/2018/stakeholder_workshop_presentation.pdf (last visited March 20, 2018).

According to the SWRCB's Water Recycling Funding Programs Guidelines adopted in 2015,[22] the primary sources of funding for the WRFP are the following:

A. The Safe Drinking Water, Clean Water, Watershed Protection, and Flood Protection Act

Proposition 13, the 2000 Water Bond, was approved by voters in 2000. (Wat. Code § 79135 *et seq*.) It provides financial assistance through loans and grants for planning and construction activities. Proposition 13 primarily provides for water recycling facilities planning grants. These planning grants are funded through a small revenue stream generated by repayments from previously financed projects. Periodically, construction grants and loans may be available. The funding capacity under Proposition 13 is now limited because a majority of the original funding has been awarded and ongoing revenue streams are small.

B. The Water Quality, Supply, and Infrastructure Improvement Act of 2014

Proposition 1 (2014 Water Bond) provides for $625 million in funding for recycled water projects. (Wat. Code § 79700 et seq.) It makes available grant and low interest financing for planning and construction activities for water recycling projects. The SWRCB may dedicate up to two percent of the Proposition 1 funding allocated to recycled water, as well as two percent of repayments from Proposition 1 funded water recycling construction loans, to recycled water research and development as set forth in Water Code section 79144.

C. Clean Water State Revolving Fund

The **Clean Water State Revolving Fund (CWSRF)** program was established by the 1987 amendments to the Clean Water Act as a financial assistance program for a wide range of water infrastructure projects. (33 USC § 1383.) Under the CWSRF, EPA provides grants to all 50 states plus Puerto Rico to capitalize state CWSRF loan programs. The state loan programs function like environmental infrastructure banks by providing low interest loans to eligible recipients for water infrastructure projects. States are responsible for the operation of their CWSRF program. In California, the CWSRF provides low interest (generally one half the State of California's most recent general obligation bond rate) financing for planning, design, and construction activity.

D. Title XVI

Title XVI of P.L. 102-575, as amended (Title XVI), provides authority for the **United States Bureau of Reclamation's (USBR)** water recycling and reuse program. Through the Title XVI program, USBR identifies and investigates opportunities to reclaim and reuse wastewaters and naturally impaired ground and surface water in the 17 Western States and Hawaii. Title XVI includes funding for the planning, design, and construction of water recycling and reuse projects, on a project specific basis, in partnership with local government entities. In recent years,

[22] The Water Recycling Funding Programs Guidelines are available at: https://www.waterboards.ca.gov/water_issues/programs/grants_loans/water_recycling/docs/wrfp_guidelines.pdf (last visited March 20, 2018).

program funds have been provided for recycled water projects by the cities of Anaheim, Benicia, and Mountain View.[23]

VI. EMERGING ISSUES

A. Challenges/Litigation Risks

Environmental plaintiffs are increasingly challenging RWQCB permits approving recycled water projects on novel grounds. The objective of these suits is to target municipal decisions about water supply indirectly through the water quality permitting process – i.e., the RWQCB's issuance of WDRs/WRRs.

Following the Los Angeles RWQCB's issuance of WDRs and WRRs to the City of Oxnard in 2015, the Wishtoyo Foundation sued the SWRCB and Los Angeles RWQCB to challenge the city's use of recycled water. Wishtoyo claimed the RWQCB violated the law by: (1) failing to analyze whether the use of recycled water authorized by the WDRs/WRRs is reasonable and not wasteful in violation of Article X, Section 2 of the California Constitution, and (2) by failing to exercise a mandatory duty under the Public Trust Doctrine to protect in-stream flows. The court denied Wishtoyo's petition for writ of mandate and ruled: (1) a WDRs/WRRs permit imposes requirements on the applicant to ensure the delivery and use of recycled water does not adversely affects its water quality – it does not allocate a water supply; accordingly, the RWQCB does not have a mandatory duty to ensure reasonable use and avoid waste; and (2) the recycled water at issue was not a public trust resource subject to the Public Trust Doctrine. The case – which raises questions of first impression – is currently on appeal in *Wishtoyo Foundation v. State Water Resources Control Board*, 2nd Dist. Court of Appeals, Case No. BS159479 (filed Sept. 22, 2017).)

Recently, Los Angeles Waterkeeper and Lawyers for Clean Water sued the SWRCB and the Los Angeles RWQCB again challenging the RWQCB's issuance of WRDs and WRRs to the Cities of Los Angeles, Burbank and Glendale for their operation of four wastewater treatment facilities on the grounds that the RWQCB failed to consider whether the Cities' continued discharges into the Los Angeles River constituted a waste and unreasonable use and for failing to undertake a feasible alternatives analysis pursuant to CEQA. (See *Los Angeles Waterkeeper v. State Water Resources Control Board, et al.*, Los Angeles County Superior Court Lead Case No. BS171009, related to: BS171010, BS171011 and BS171012.) A hearing date has not yet been scheduled.

Separately, a number of petitions recently filed with the SWRCB pursuant to Water Code section 1211 for changes in discharges of wastewater have faced objection on the grounds of project-related and cumulative environmental impacts to instream beneficial uses resulting from associated reduced discharges to streams.

These cases illustrates that cities embarking on recycled water projects may face opposition when the project makes alternative water supplies available for non-potable uses perceived to be non-essential, reduces instream flows and/or fails to maximize beneficial use of recycled water – all of which potential conflict with each other.

[23] See USBR, Feasibility Review Study for Title XVI (January 2018).

B. Direct Potable Reuse (DPR)

The Water Recycling Law required the SWRCB to "investigate and report to the Legislature on the feasibility of developing uniform water recycling criteria for direct potable reuse" on or before December 31, 2016. (Wat. Code § 13563(a).) "Direct potable reuse" is defined as the introduction of recycled water either directly into a public water system or into a raw water supply immediately upstream of a water treatment plant. It includes both raw water augmentation (placement of recycled water into a system of pipelines or aqueducts that deliver raw water to a drinking water treatment plant that provides water to a public water system) and treated drinking water augmentation (placement of recycled water into the water distribution system of a public water system). (Wat. Code § 13561(b).)

In December of 2016, the SWRCB issued a report titled "Investigation on the Feasibility of Developing Uniform Water Recycling Criteria for Direct Potable Reuse." The SWRCB convened an expert panel, which found that it is "technically feasible to develop uniform water recycling criteria for DPR [direct potable reuse] and that those criteria could incorporate a level of public health protection as good as or better than what is currently provided by conventional drinking water supplies and IPR [indirect potable reuse]." The panel concluded that the protection normally provided by an environmental buffer between recycled water and potable water could be addressed by enhancing the reliability of mechanical systems and treatment plant performance. While the panel found no need for additional research prior to developing criteria for DPR, it provided certain research recommendations and recommended filling in the knowledge gap related to system reliability.[24]

In the meantime, the operator of an advanced water purification facility may cause advanced purified demonstration water to be bottled and distributed as samples for educational purposes and to promote water recycling, without complying with certain legal requirements for bottled water provided in the Health and Safety Code, subject to the requirements specified in the statute. (Wat. Code § 13570(d).) The water must be treated by means of microfiltration, ultrafiltration, or other filtration processes to remove particulates before reverse osmosis; reverse osmosis; and advanced oxidation. The water must meet or exceed all federal and state drinking water standards.

1. Raw Water Augmentation

The Water Recycling Law provides that, on or before December 31, 2023, "the state board shall adopt uniform water recycling criteria for direct potable reuse through raw water augmentation. In adopting the initial uniform recycling criteria … the state board must comply with all of the following:"

- "develop the uniform water recycling criteria using information from the recommended research described in the law after soliciting stakeholder input from water agencies, wastewater agencies, local public health officers, environmental organizations, environmental justice organizations, public health nongovernmental organizations, and the business community;" and

[24] SWRCB, Investigation on the Feasibility of Developing Uniform Water Recycling Criteria for Direct Potable Reuse (Dec. 2016), p. IV–V.

- Submit the proposed "uniform water recycling criteria … to the expert review panel established pursuant to the law. The expert review panel shall review the proposed criteria and shall adopt a finding as to whether, in its expert opinion, the proposed criteria would adequately protect public health."

(Wat. Code § 13561.2.) Raw water augmentation means "the planned placement of recycled water into a system of pipelines or aqueducts that deliver raw water to a drinking water treatment plant that provides water to a public water system, as defined in Section 116275 of the Health and Safety Code." (Wat. Code § 13561(b)(1).)

2. Treated Drinking Water Augmentation

As discussed above, in 2016 the SWRCB issued a report finding it feasible to develop uniform water recycling criteria for DPR. At this point, there is no statutory mandate to adopt regulations for treated drinking water augmentation in California.

3. Sample Project(s)

Spurred by an unprecedented drought, two DPR systems were recently opened in the Texas. The Colorado River Municipal Water District in Big Spring opened in 2013. The plant treats the wastewater effluent using microfiltration, reverse osmosis (RO), and ultraviolet disinfection (UV). The water is then added to a raw water pipeline that also sources water from an area lake. This mix (20 percent recycled water, 80 percent raw water) is then distributed to five drinking water facilities in the region (serving a total of 250,000 people) where it is treated again using conventional drinking water treatment techniques.

In 2014, a second DPR system was started up in Wichita Falls, Texas, not far from Big Spring. The Wichita Falls system operates differently. The plant mixes its treated effluent with raw water. Their mix is 50-50 and takes places at the same facility where it is treated again using conventional drinking water treatment techniques. The end result is distributed to roughly 150,000 people.

C. Onsite Wastewater Systems

In 2012, the City and County of San Francisco adopted the Onsite Water Reuse for Commercial, Multi-Family, and Mixed Use Development Ordinance (commonly referred to as the Non-Potable Water Ordinance). The ordinance added Article 12C to the San Francisco Health Code allowing collection, treatment and use of alternate water sources for non-potable application in individual buildings and at the district-scale. In July 2015, Article 12C became a mandatory requirement for large development projects (commercial building developments larger than 250,000 square feet), thereby requiring these projects to construct onsite[25] wastewater treatment and recycling systems.

[25] "Onsite" means that the water recycling occurs in individual buildings, as opposed to utility-scale water recycling.

1. Sample Project(s)

In compliance with the ordinance, San Francisco's newest skyscraper, Salesforce Tower, will house the largest water recycling system in a commercial high-rise building in the United States – capable of treating grey water and black water onsite.[26]

2. Proposed Legislation

As a result of a lack of permitting standards for onsite recycled water systems, cities and other "local governments are often stymied in creating local programs to expand the use of graywater, blackwater, rainwater, stormwater, foundation drainage and other reused water." [27] In February, 2018, SB 966 was introduced to facilitate the creation of onsite recycled water systems. SB 966 directs the SWRCB to develop risk-based water quality standards for use by local governments when regulating the treatment of alternate water sources. According to the bill's author, a recent report by the Water Research Foundation titled: *Risk-Based Framework for the Development of Public Health Guidance for Decentralized Non-Potable Water Systems*[28] lays the foundation for creating these standards.

[26] Water Deeply, San Francisco's Tallest Building Makes Big Water Recycling Statement (Jan. 31, 2018), available at: https://www.newsdeeply.com/water/community/2018/01/31/san-franciscos-tallest-building-makes-big-water-recycling-statement (last visited March 20, 2018).
[27] Senator Wiener Announces Bill to Expand On-site Water Recycling in All California Cities (February 1, 2018) available at: http://sd11.senate.ca.gov/news/20180201-senator-wiener-announces-bill-expand-site-water-recycling-all-california-cities (last visited March 20, 2018),
[28] The Water Research Foundation report is available at: https://www.werf.org/a/ka/Search/ResearchProfile.aspx?ReportId=SIWM10C15 (last visited March 20, 2018).

Municipal Tort and Civil Rights Litigation Update

Friday, May 4, 2018 General Session; 10:30 a.m. – 12:15 p.m.

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

Notes:_____

MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

SPRING CONFERENCE

May 4, 2018

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

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

A. *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577 (2018).

- **Wrongful arrest and qualified immunity.**

In *District of Columbia v. Wesby*, __U.S. __, 138 S.Ct. 577 (2018), the Supreme Court clarified what constitutes probable cause for arrest and emphasized that officers have broad discretion in undertaking investigations and making credibility assessments in making a decision to arrest. The Court also reaffirmed that qualified immunity must be granted to officers in the absence of clearly established law imposing liability under circumstances closely analogous to those confronted by the defendant.

In *Wesby*, District of Columbia police officers responded to a complaint about loud music and illegal activities in a vacant house. *Id*. at 583. They entered and found the house nearly barren and in disarray. *Id.* Officers smelled marijuana, and there were beer bottles and cups of liquor on the floor, which was dirty. *Id.* There was a make-shift strip club in the living room, a used condom on a window sill, and a naked woman and several men in an upstairs bedroom. *Id.* Several partygoers scattered when they saw the uniformed officers, and others hid. *Id.* The officers questioned everyone and got inconsistent stories. Some partygoers said they were there for a bachelor party, but did not know the name of the bachelor. *Id.* Others did not know who had invited them. *Id.* Two women identified "Peaches" as the house's tenant and said that she had given the partygoers permission to have the party. *Id.* However, Peaches was not there. *Id.* Officers spoke by phone to Peaches, and she seemed nervous, agitated, and evasive. *Id.* at 583-84. She claimed that she was renting the house and had given the partygoers permission to have the party, but eventually admitted that she did not have permission to use the house. *Id.* The police reached the owner, who confirmed that he had not given anyone permission to be there. *Id.* at 584. The officers then arrested 21 partygoers for unlawful entry. Id. The charges were subsequently dismissed. *Id.*

Sixteen partygoers sued the police officers for unlawful arrest. The district court granted summary judgment to the plaintiffs, finding that there was no probable cause for arrest given that officers had no reason to believe that the plaintiffs knew that Peaches was not authorized to grant them entry, and denied qualified immunity, finding the law concerning probable cause to be clearly established. *Id*. at 584. A jury awarded the plaintiffs $680,000 in damages, and the court awarded attorneys' fees of nearly $1 million. *Id*. at 585. Defendants appealed, and the D.C. Circuit affirmed.

The Supreme Court reversed on both issues. Writing for the Court, Justice Thomas noted that the test for probable cause here was whether, "[c]onsidering the totality of the circumstances, the officers made an 'entirely reasonable inference' that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party." *Id.* at 586. He observed that there was plenty of evidence for the officers to conclude that the partygoers were knowingly there without permission. As a threshold matter, police had been told by neighbors that the house had been vacant for months, and although partygoers said that Peaches had just moved in, there were no moving boxes or clothes showing anyone had moved in. *Id*.

In addition, the way the partygoers treated the house did not seem consistent with invited guests. As Justice Thomas observed: "Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized." *Id.* at 587.

Moreover, the behavior of the partygoers indicated they knew they did not have permission to be there. Many initially fled the police or hid. Partygoers also gave vastly different accounts as to how they came to be there. "Based on the vagueness and implausibility of the partygoers' stories, the officers could have reasonably inferred that they were lying and that their lies suggested a guilty mind." *Id.* Similarly, the evasive

and contradictory statements Peaches made about having authority to grant permission for entry supported the officers' actions. "[T]he officers could have inferred that Peaches told the partygoers (like she eventually told the police) that she was not actually renting the house, which was consistent with how the partygoers were treating it." *Id.* at 588.

The Court noted that the lower court had erred in failing to evaluate the totality of the circumstances confronting the officers and instead improperly focused on each bit of evidence individually—erroneously concluding that if no single piece of evidence by itself constituted probable cause, none existed. *Id.* The Court emphasized that the lower court "mistakenly believed that it could dismiss outright any circumstances that were 'susceptible of innocent explanation.'" *Id.* The Court observed that "[P]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts. As we have explained, 'the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.'" *Id.* The lower court "should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a 'substantial chance of criminal activity.'" *Id.*

Although it did not need to reach the issue, the Court also addressed qualified immunity. Once again noting that it had not yet specifically stated what constitutes clearly established law other than its own decisions (*id*. at 591 n.8), nonetheless, the Court found that the law concerning probable cause in the situation confronting the officers here was not clearly established. The Court again emphasized that other than in the most obvious cases, a robust consensus of cases imposing liability under factually analogous circumstances so as to put the lawfulness of defendant's conduct beyond debate, would be necessary to constitute clearly established law in order to defeat qualified immunity. Here, the lower court only identified only a single, inapposite case

from its own circuit purportedly addressing the issue, which was insufficient to render the law clearly established for purposes of qualified immunity. *Id*. at 591.

Wesby is a major victory for law enforcement and municipalities in the area of wrongful arrest claims. By making it clear that an officer need not accept every innocent explanation for a suspect's conduct, and underscoring the fact that officers may view the available evidence in light of the totality of the circumstances *Wesby* greatly aids defendants in defending wrongful arrest claims. This is especially true given the Ninth Circuit's somewhat equivocal case law on the issue of probable cause and the nature and extent of an officer's obligation to make credibility determinations in the arrest context. *Wesby* also reaffirms the Court's direction that qualified immunity should be granted unless the plaintiff can point to a line of cases imposing liability under very similar circumstances.

B. *Kisela v. Hughes*, __U.S.__, 2018 WL 1568126 (2018)

- **Officer entitled to qualified immunity for use of force based on perceived threat of harm to third party because no prior case law imposed liability under closely analogous circumstances.**

In *Kisela v. Hughes*, __U.S. __. 2018 WL 1568126 (2018), the defendant police officer and his partner received a 911 call and report that a woman was hacking a tree with a kitchen knife. Id. at *1 They were flagged down by the 911 caller who gave them a description of the woman and told them that she was acting erratically. *Id.* The officers saw a woman standing in a driveway of a nearby house, with a chain link fence separating her from the officers. *Id.* A woman matching the description given to the officers by the 911 caller emerged from the house carrying a knife, and advanced towards the woman, stopping six feet from her. *Id.* The officers drew their weapons and twice ordered the woman to drop the knife, but she did not even acknowledge the officers' presence. *Id.* Believing she was about to stab the other woman, the defendant officer fired four shots, wounding her. *Id.*

The plaintiff sued for excessive force, and the district court granted summary judgment to the officer based on qualified immunity. *Id.* the Ninth Circuit reversed, holding that there was a factual issue as to whether the force was excessive under the Fourth Amendment, and that prior Circuit precedent gave fair warning that the conduct in question would violate the constitution and hence qualified immunity was inapplicable. *Id.* at *2.

In an 8-2 per curiam opinion, the Supreme Court summarily reversed the Ninth Circuit. The Court again emphasized that excessive force cases are generally fact specific, and as a result officers are entitled to qualified immunity unless existing precedent "squarely governs the specific facts at issue." *Id.* at *3. The Court noted that in order to defeat qualified immunity, existing case law must "provide an officer notice that a *specific use of force* is unlawful." *Id.;* emphasis added. Noting that "[t]his is far from an obvious case," the Court held that the officer was entitled to qualified immunity. *Id.*

Kisela is the most recent of a steady drumbeat of reversals – including summary reversals – admonishing the Circuit courts, and particularly the Ninth Circuit, for failing to adhere to the Supreme Court's command that qualified immunity must be granted unless the law is clearly established in light of the specific factual circumstances confronting an officer. Indeed, *Kisela*'s description of clearly established law as case law that "*squarely* governs the *specific facts* at issue," is probably the Court's most stringent application of qualified immunity. *Kisela* should strongly bolster qualified immunity arguments for officers, particularly in excessive force cases.

C. *Bonivert v. City of Clarkson*, 883 F.3d 865 (9th Cir. 2018).

- **Unlawful entry where only one occupant of a residence consents to search; "Integral Participation" liability does not require officer to have actually committed an unconstitutional act.**

In *Bonivert v. City of Clarkson,* 883 F.3d 865 (9th Cir. 2018), the Ninth Circuit clarified that where one resident of jointly occupied premises refuses permission to enter,

absent exigent circumstances, police must obtain a warrant, even if the other occupant of the premises gave the police permission.

In *Bonivert*, police responded to a domestic disturbance call at the home of the plaintiff, Bonivert. *Id*. at 869. Bonivert occupied the residence with his girlfriend, Ausman, and their nine year old daughter. *Id.* Police were advised that Ausman had told Bonivert that she was leaving with their daughter, he became angry, tried to physically stop her from leaving, but was restrained by others in the residence. *Id.* Police found Ausman with the child in a car at the scene, and when they went to speak with Bonivert, he refused them entry into the home. Desiring to assess his mental state, they asked Ausman for permission to enter the residence and she agreed. *Id*. at 870. When Bonivert refused to allow them to enter, they waited for back up, formulated a plan, eventually forced their way in and ultimately subdued Bonivert with a Taser. *Id.* at 870-71.

Bonivert sued the officers for unlawful entry and excessive force. The district court granted summary judgment to the officers based on qualified immunity. *Id*. at 871. The Ninth Circuit reversed.

With respect to the warrantless entry, citing *Georgia v. Randolph*, 547 U.S. 103 (2006), the court found that it was clearly established at the time of the events that where a co-occupant of jointly occupied property grants consent, but another occupant refuses to allow entry, police cannot enter without a warrant, absent recognized exceptions to the warrant requirement. *Id*. at 874-76. The court observed that none of exceptions applied here, as there were no exigent circumstances in that Ausman and the child were outside, and there was no indication Bonivert was a danger to himself or others. *Id.* at 876-79.

In holding that two officers who arrived at the scene after the decision to enter had been made and only provided "back up" could nonetheless be held liable, the court re-affirmed the Ninth Circuit's "Integral Participation" doctrine. Under the Ninth Circuit rule, an officer whose own conduct did not rise to the level of a constitutional violation

can nonetheless be held liable as an "integral participant" so long as they are an "active participant" in the underlying activity. *Id.* at 879.

The court also reversed summary judgment on the excessive force claim, concluding that the district court had improperly ignored sharply conflicting evidence on whether Bonivert had physically resisted the officers in a manner that would justify the use of force employed by the officers. *Id*. at 880-81.

Bonivert further clarifies a principle that is fairly well-established, but often ignored—that every occupant of a residence (at least permanent resident) has the right to refuse entry to law enforcement, and that a single occupant cannot give effective consent when others at the scene refuse it. The case also reaffirms the Ninth Circuit's unique and questionable "Integral Participation" doctrine which would seem ripe for Supreme Court review in an appropriate case.

D. *Smith v. City of Santa Clara*, 876 F.3d 987 (9th Cir. 2017).

- **Special needs exception to warrant requirement allows entry of probationer's home for investigation of recent crime, even where co-occupant of the property does not consent to entry.**

In *Smith v. City of Santa Clara*, 876 F.3d 987 (9th Cir. 2017), the court addressed the scope of the Fourth Amendment as applied to a very common scenario—a residence shared with a person on probation who has consented to a search as a condition of probation.

In *Smith*, the plaintiff's daughter was on probation for a serious felony and one of the conditions of her probation was consent to a search her residence. *Id.* at 989. Officers had information the daughter was involved in a recent auto theft and stabbing, and went to the address she listed as her residence in her last probation report. *Id*. Police found her mother there, who denied her daughter lived there, and refused to allow police to enter, even though they announced that they were conducting a probation search. *Id*.

When the officers stated they would enter by force unless admitted, plaintiff relented. The daughter was not there. *Id.*

Plaintiff sued the officers for violation of the Fourth amendment under 42 U.S.C. § 1983, and the Bane Act, Cal. Civ. Code § 52.1. *Id*. at 989-90. The district court granted summary judgment to the officers on the section 1983 claim based on qualified immunity, and a jury eventually found for the defendants on the Bane Act claim. *Id*. at 990.

Plaintiff appealed only on the Bane Act claim. She asserted that the trial court erred in refusing to instruct the jury that the entry violated the Fourth Amendment as a matter of law, in that it was based on the daughter's consent to search as a condition of probation, and that in *Georgia v. Randolph*, 547 U.S. 103 (2006), the Supreme Court had held that where premises were jointly occupied, consent by one occupant did not allow the police to make a warrantless search where the other occupant had denied permission to enter. *Id*. at 990-91.

The Ninth Circuit affirmed, finding that the warrantless search was proper under the special needs exception. It acknowledged that the California Supreme Court had analyzed probation related searches as consent searches, but noted that the Supreme Court itself had never upheld such searches on that basis. Instead, the high court had viewed probation related searches as an aspect of the special needs doctrine i.e. that the reasonable suspicion of recent criminal activity, coupled with a probationer's diminished expectation of privacy, justified a search without need of a warrant. *Id*. at 991-95. "[O]nce the government has probable cause to believe that the probationer has actually reoffended by participating in a violent felony, the government's need to locate the probationer and protect the public is heightened. This heightened interest in locating the probationer is sufficient to outweigh a third party's privacy interest in the home that she shares with the probationer." *Id.* at 994.

Although helpful to law enforcement in that it underscores the propriety of probation related searches, nonetheless there is some tension between *Smith* and the decisions of the California Supreme Court as to the rationale for such searches. If, as the California courts have indicated, such searches are justified by a consent rationale, there may be some tension with *Randolph*. On the other hand, if such searches are not conducted on a routine basis, but only when police are investigating a probationer's possible involvement in recent criminal activity, then they should be upheld under *Smith's* analysis.

E. *Zion v. County of Orange,* 874 F.3d 1072 (9th Cir. 2017).

- **Continued use of force against a suspect who is no longer resisting, constitutes excessive force violating the Fourth Amendment and Due Process, even if initial use of force was justified.**

In *Zion v. County of Orange*, 874 F.3d 1072 (9th Cir. 2017), police were called when Connor Zion suffered several seizures, after which he bit his mother and cut her and his roommate with a kitchen knife. *Id.* at 1075. One deputy arrived and was promptly stabbed in the arms by Zion. *Id.* Another deputy, Higgins, saw the attack, and when Zion attempted to flee towards an apartment complex, Higgins fired nine shots from a distance of 15 feet. *Id.* Zion fell to the ground, and Higgins came to within 4 feet of Zion and fired another nine rounds into him, emptying his weapon. *Id.* As Zion lay writhing and curled up on the ground, Higgins slowly walked in a circle for several seconds and then took a running start and stomped Zion in the head three times. *Id.* Zion died at the scene. *Id.*

Members of Zion's family filed suit, asserting an excessive force claim under the Fourth and Fourteenth Amendments. *Id.* The trial court granted summary judgment to the defendants. *Id.*

The Ninth Circuit reversed, holding that the law was clearly established, insofar as it was plain that an officer cannot use force against a suspect that is no longer resisting, and that a jury could conclude that the second set of nine shots, as well as the head stomps, were excessive in that a video recording of the incident indicated that Zion was no longer capable of resistance at the time the force was employed. *Id.* at 1076.

Although the officer had testified that he perceived that Zion was attempting to get up, the court noted that the video belied the officer's testimony. *Id.* It concluded that in light of what appeared to be Zion's inability to further resist arrest or pose any threat, the subsequent use of force—the second volley of shots and/or the head stomps constituted unreasonable use of force for purposes of the Fourth Amendment claim. *Id*. As to the Fourteenth Amendment claim, the court noted that liability could only be imposed if the officer had time to reflect on his actions, and given that the second volley followed almost immediately after the first, a jury could not find a Due Process violation. *Id.* at 1077. However, the court concluded that given the lapse in time between the second volley and the head stomping, a jury could find that the latter action was taken after reflection, and was unrelated to any legitimate law enforcement purpose, and therefore supported a Due Process claim by surviving family members. *Id.*

Although *Zion* largely reaffirms existing law, the basis for the court's decision is important. The video evidence is highly compelling, given the point blank range of the second set of shots, and the relatively long period of reflection before the officer took a running start and inflicted three head stomps on a prone figure. It is a reminder that strong, although somewhat technical arguments, often yield to the intuitive pull of facts. In addition, *Zion* also underscores the clear distinction the Ninth Circuit draws in analyzing use of force claims under the Fourth and Fourteenth Amendments, with the latter generally requiring plaintiffs to overcome a tougher standard of liability, i.e., that the defendant's conduct was unrelated to any legitimate law enforcement purpose.

F. *Thompson v. Rahr,* No. 16-35301, 2018 WL 1277400 (9th Cir. March 13, 2018).

- **Defendant police officer entitled to qualified immunity for pointing loaded weapon at head of unresisting, complacent felony suspect where plaintiff could not identify clearly established law in the form of appellate decisions addressing a directly analogous factual situation.**

In *Thomas v. Rahr*, 2018 WL 1277400 (9th Cir. March 13, 2018), the plaintiff was pulled over by the defendant for reckless driving. *Id*. at *1. The defendant ran plaintiff's license plate and determined he was a convicted felon driving on a suspended license, whose last conviction was for unlawful possession of a firearm. *Id.* at *2. Defendant decided to arrest the plaintiff for driving on a suspended license and to impound the vehicle. *Id.* Plaintiff exited the vehicle and defendant gave him a pat down search, finding no weapons. Defendant called for backup, and had plaintiff sit on the car bumper. *Id.* During an inventory search the defendant found a pistol in the car. Drawing his pistol, he pointed it at the plaintiff's head and told him he was under arrest. *Id.*

Plaintiff filed suit, asserting excessive force under the Fourth Amendment. The district court granted summary judgment for defendant, finding that the amount of force used was reasonable, and that in any event the officer was entitled to qualified immunity because the law was not clearly established with respect to the right to employ such force in the course of an arrest. *Id.*

The Ninth Circuit affirmed. The court concluded that pointing a loaded weapon at the head of a compliant arrestee who was not armed and posed no risk of flight, was not an objectively reasonable use of force under the Fourth Amendment. *Id.* at *3-4. However, the court agreed that the defendant was entitled to qualified immunity because the law was not clearly established with respect to the specific circumstances confronted by the defendant. *Id*. at *4. Although a number of Ninth Circuit cases had held that

weapons should not be pointed at persons who did not pose a threat, the court stated that "we cannot say that every reasonable officer in Copeland's position would have known that he was violating the constitution by pointing a gun at Thompson. Thompson's nighttime, felony arrest arising from an automobile stop, in which a gun was found, coupled with a fluid, dangerous situation, distinguishes this case from our earlier precedent." *Id.*

Thompson is among the strongest of recent Ninth Circuit cases which apply the Supreme Court's decision in *White v. Pauly*, __ U.S. __, 137 S. Ct. 548 (2017) with vigor in requiring a plaintiff to point to highly analogous case law in order to show that the law was clearly established for purposes of overcoming qualified immunity.

G. *Estate of Lopez v. Gelhaus,* 871 F.3d 998 (9th Cir. 2017).

- **Officer not entitled to qualified immunity for shooting teenager who turned towards officer while raising the barrel of what appeared to be an assault rifle.**

In *Estate of Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017), patrolling Deputies Gelhaus and Schemmel observed a male who appeared to be in his mid to late teens (Mr. Lopez) walking on the sidewalk away from them in a dark hooded sweatshirt. *Id*. at 1002. Lopez carried what appeared to be an AK-47 assault weapon in his hand, held by the pistol grip, with the barrel pointed toward the ground. *Id*. Gelhaus knew this neighborhood had a history of violent gang and weapon related crimes, he had previously confiscated that type of weapon nearby and knew about the destructive capabilities of an AK-47—it could discharge its 30-round magazine in seconds, the bullets capable of penetrating car doors and armored vests. *Id*.

Gelhaus radioed "Code 20," the highest emergency call to request immediate assistance by other units. *Id*. Schemmel, the driver, "chirped" the siren and activated all emergency lights/flashers to alert the individual to their police presence. *Id*. Schemmel proceeded through the intersection and stopped the patrol car at an angle, approximately

40 feet from Lopez. *Id*. When slowing, Gelhaus opened his door, drew his firearm and positioned himself outside his open passenger door when they stopped, preparing to confront the individual. *Id*.

Lopez, still holding the pistol grip of the weapon, continued to walk away from the patrol car. *Id*. at 1002-03. Now outside of the car, Gelhaus gave at least one loud command (or more per witnesses) to Lopez to "Drop the gun!" *Id*. Rather than dropping the gun, Lopez turned his body towards the deputies in a clockwise direction while simultaneously bringing the barrel of the AK-47 up and towards them. *Id*. at 1003. In response, believing he was about to be shot, Gelhaus fired eight rapid gunshots—seven of which hit Lopez from a distance of around 60 feet. *Id*. After the shooting, it was determined that the gun was a plastic pellet gun made to look identical to an AK-47, but missing the legally mandated orange tip on the barrel. *Id*.

The Estate of Andy Lopez filed suit against Gelhaus and the County of Sonoma, alleging various claims, including a claim against Gelhaus under 42 U.S.C. § 1983 premised upon a violation of the Fourth Amendment through use of excessive force. *Id*. at 1004. Gelhaus filed a motion for summary judgment, asserting that the Fourth Amendment claim was barred by qualified immunity. *Id*. The district court denied the motion, finding that there were triable issues of fact as to whether Gelhaus had reasonably perceived a serious threat of harm from Lopez, noting that while it was undisputed that Lopez started to turn towards the deputies, with the barrel of the gun rising, a reasonable jury could conclude that the barrel had not risen far enough up to present a threat to the officers. *Id*. The district court also found that the law was clearly established that an officer could not use force as against someone who was not immediately threatening the officer or others. *Id*.

Gelhaus appealed, and in a 2-1 decision, the Ninth Circuit affirmed. The majority emphasized that it would follow the Ninth Circuit's general principle that "'summary judgment should be granted sparingly in excessive force cases,'" particularly where, as

here, "'the only witness other than the officers was killed during the encounter'" noting that the court has to "'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead— is unable to testify.'" *Id*. at 1006 (citing *Gonzalez v. City of Anaheim*, 747 F.3d 789, 795 (9th Cir. 2014) (en banc)). In concluding that a jury could find that Gelhaus's use of force was unreasonable, the majority found that there was a triable issue of fact as to whether or not Lopez had turned his head in response to the "chirp" of the police vehicle siren, which may have indicated Lopez had not heard the siren, which would somehow make Lopez's subsequent turn towards the officers "less aggressive" in that he may have simply been confused about what he was hearing. *Id*. at 1006-07. The majority also opined that there was a factual dispute as to the number of times that Gelhaus shouted—it could be only once or multiple times—and that if a jury determined there was only one command, Lopez might have been wondering if it was directed at him, or could have been "processing Gelhaus's order" before he was shot. *Id*. at 1007.

The majority also concluded there was an issue of fact as to whether Lopez was holding the gun in his right or left hand, asserting it would make a difference whether Lopez turned the one way or the other, without explaining why that would be so. *Id.* Indeed, the majority asserted that the officers' dispute on this issue "provides an important basis for a jury to question the credibility and accuracy of the officers' accounts," *id.*—without explaining what other relevant inference a jury could draw, in light of the fact that the officers both testified the barrel of the weapon was moving upwards as Lopez turned.

As to the barrel of the gun moving upwards as Lopez turned, the majority acknowledged that the district court had found that it was undisputed that "'the rifle barrel was beginning to rise,'" but agreed with the district court that given that it started in a position where it was pointed down to the ground, it could have been raised to a slightly higher level (although not specifying what that might be), without posing any

threat to the officers. *Id*. at 1008. The majority noted that neither officer ever stated "how much the barrel 'began' to rise" as Lopez commenced his turn, and speculated that "one would expect the barrel to rise an inch or so as the momentum of Andy's clockwise turn moved his left arm slightly away from his body" and "that incidental movement alone would not compel a jury to conclude that Gelhaus faced imminent danger giving the starting position of the gun." *Id*.

The majority found it significant that Gelhaus never testified that he knew where the barrel of the rifle was pointing at the time he shot Lopez, but at most, that the barrel of the rifle was being raised towards him. *Id*.

The majority also stated that although "ambiguous," *id*. at 1003 n.4, a reenactment Gelhaus performed in his videotaped deposition somehow contravened his statements that he fired with the barrel of the weapon coming up, *id*. at 1009—even though review of the cited deposition establishes that Gelhaus was simply simulating Lopez's turning movement, and not the movement of the rifle, and indeed noted that he could not reproduce that movement because a table was in the way, *id*. at 1003 n.4.

The majority also found it significant that a witness who had encountered Lopez earlier and drove within 50 feet of him thought the gun looked fake. *Id*. at 1009. It also found it important that Gelhaus had previously encountered individuals with replica guns, and that Lopez had been carrying the weapon in broad daylight in a residential neighborhood at a time when children of his age—mid to late teens—could reasonably be expected to be playing. *Id*. at 1010.

Based on these facts, the majority concluded a jury could find that the force used by Gelhaus was excessive. *Id*. In addition, the court found that the law was clearly established that officers could not use deadly force unless they reasonably perceived that they were about to be attacked, and here there was an issue of fact as to the threat posed by Lopez. *Id*. at 1011, 1021.

Significantly, the Honorable Judge Clifford Wallace dissented, noting that the multiple purported factual disputes identified by the majority were irrelevant to the qualified immunity analysis. *Id.* at 1022-23. Judge Wallace observed that the key, and undisputed fact, was that the gun barrel was beginning to rise as Lopez turned towards the officers, with no evidence that it had stopped, or would stop at any particular point. *Id.* at 1023-24. As Judge Wallace noted, "the most natural reading of the district court's finding, and the only reasonable one, is that the gun was beginning to rise (i.e., in the process of rising) immediately before Deputy Gelhaus shot Andy." *Id*. at 1023. The dissent noted that the "majority has thus identified no evidence that even suggests that the gun had stopped rising at the time Deputy Gelhaus resorted to deadly force." *Id.* at 1024.

As Judge Wallace observed, with respect to the clearly established law on qualified immunity, none of the cases cited by the majority addressed a situation where "the victim's gun 'was beginning to rise' towards the officer." *Id*. at 1025.

Estate of Lopez is a troubling decision for law enforcement defendants in several respects. First, it reaffirms the Ninth Circuit's unique approach to deadly force cases where officers are the only witnesses—applying an extremely stringent review of the evidence and an almost total disregard of evidence submitted by the officers. As the dissent notes, this approach essentially requires a defendant moving for summary judgment to not only prove his or her version of what occurred, but affirmatively negate any other version, no matter how hypothetical the alternative version might be. *Id.* at 1024.

Second, it underscores the Ninth Circuit's wildly inconsistent application of the Supreme Court's decision in *White v. Pauly*, 137 S. Ct. 548 (2017), in terms of requiring a plaintiff to identify case law imposing liability in factual circumstances highly analogous to those confronted by the defendant in order to overcome qualified immunity.

H. *Byrd v. Phoenix Police Department,* No. 16-16152, 2018 WL 1352916 (9th Cir. March 16, 2018).

- **_Heck v. Humphrey,_ 512 U.S. 477 (1994) does not bar civil rights suit for excessive force or unlawful search where plaintiff plead guilty to an offense unrelated to the use of force or the evidence unlawfully seized.**

In *Byrd v. Phoenix Police Department*, No. 16-16152, 2018 WL 1352916 (9th Cir. March 16, 2018) police officers stopped the plaintiff while he was riding a bike without a headlight at night— a violation of local law. *Id.* at *1. According to plaintiff, the officers searched his belongings and then "beat the crap" out of him, resulting in a 70% vision loss. *Id.* Plaintiff eventually pled guilty to conspiracy to commit possession of a dangerous drug. *Id.*

Plaintiff filed a pro se complaint asserting claims for excessive force and wrongful search against the officers and their employer. The district court eventually dismissed the action for failure to state a claim. It found that the allegations of excessive force were too vague and hence inadequate, and that the unlawful search claim was barred by the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) which prohibits section 1983 claims where success on the merits would necessarily imply the invalidity the plaintiff's state court criminal conviction. *Id.*

The Ninth Circuit reversed. It found that plaintiff had adequately alleged that he had been the victim of excessive force: "We disagree with the district court that the allegation that the officers 'beat the crap out of' Byrd was 'too vague and conclusory' to support a legally cognizable claim. Byrd's use of a colloquial, shorthand phrase makes plain that Byrd is alleging that the officers' use of force was unreasonably excessive; this conclusion is reinforced by his allegations about the resulting injuries." *Id.* at *3.

The court also found that plaintiffs' claims were not barred by *Heck*. *Id.* *3-4. The excessive force claim had nothing to do with the crime to which plaintiff plead

guilty—conspiracy to possess drugs. Moreover, the allegedly unlawful search occurred after the defendants had found the evidence which formed the basis of the criminal charge. *Id*. at *4. The court observed that *Heck* will generally not bar an action asserting claims for unlawful search where the underlying conviction is the result of a plea agreement, because no evidence is introduced in such cases. *Id.*

Byrd continues a trend both in the Ninth Circuit and other courts across the nation, of narrowing application of *Heck* in cases where the underlying conviction is premised on a plea agreement. A consensus appears to be growing that *Heck* will not bar a claim based on unlawful search and seizure unless the plea agreement itself specifies the factual basis of the plea and the record unmistakably demonstrates that the allegedly unlawfully seized evidence forms the basis of the charges.

I. *Cornell v. City & County of San Francisco*, 17 Cal. App. 5th 766 (2017).

- **Penal Code section 847(b) does not immunize an officer from liability for an arrest without probable cause nor incorporate the federal doctrine of qualified immunity; where an unlawful arrest is properly pleaded and proved, the "Threat, Intimidation, or Coercion" element of a Bane Act claim under California Civil Code section 52.1 requires a specific intent to violate protected rights.**

In *Cornell v. City & County of San Diego*, 17 Cal. App. 5th 766 (2017), the plaintiff, an off-duty police officer trainee dressed in street clothes, went for a morning run in Golden Gate Park, stopping for a brief rest on a knoll called Hippie Hill. *Id.* at 771. Two uniformed patrol officers in the area spotted him, thought he looked "worried," and grew suspicious because the bushes on Hippie Hill are known for illicit drug activity. *Id.* As the patrolmen began to approach Cornell, but before they reached him or said anything to him, he resumed his run. *Id.* The officers chased him, joined in pursuit by two other officers who responded to a call for backup. *Id.* One of the officers, with his

gun drawn, eventually caught up to Cornell on a trail in some nearby woods. *Id.* Cornell claims he had no idea he was being chased or that the officers wished to speak with him. On the trail, he says he heard a shout from behind, "I will shoot you," and looked over his shoulder to see a dark figure pointing a gun at him. *Id.* He darted away, ultimately finding what he thought was refuge with a police officer awaiting his arrival some distance away at the top of a stairway in AIDS Memorial Grove. *Id.* However, he was surprised when that officer ordered him to the ground. *Id.* He was arrested at gun-point and searched, taken in handcuffs to a stationhouse for interrogation, and eventually to a hospital for a drug test, which was negative. *Id.* No evidence of any crime was found at the park. He was charged with violation of Penal Code section 148—interference with a police officer—and although the charges were dismissed, he was terminated from his probationary position as a police trainee. *Id.*

Cornell sued the City and officers for violation of the Bane Act, Cal. Civ. Code § 52.1, negligence, assault and battery, false arrest and imprisonment, and tortious interference with contract and/or economic advantage. *Id.* at 776. The trial court submitted the case to the jury in two phases. In the first phase the jury found for defendants on the assault claim, but were otherwise deadlocked on the remaining substantive question and made specific findings that alternatively favored one side or the other. *Id.* at 777-78. Based on the jury's findings, the trial court ruled as a matter of law that defendants did not have reasonable suspicion to detain Cornell and that he was arrested without probable cause. *Id.* at 778. Defendants then stipulated to liability on the negligence claim. *Id.* The tortious interference and section 52.1 claims then went to the jury, which found in favor of the Cornell on both claims, and awarded over $575,000 in damages. *Id.* The trial court subsequently awarded more than $2 million in attorneys' fees on the 52.1 claim. *Id.* Defendants appealed.

In affirming the judgment, the Court of Appeal found that the trial court had correctly concluded that the officers had no probable cause to arrest Cornell, and that

indeed, there was no evidence to support even a reasonable suspicion that Cornell was engaging in any unlawful activity in the first place. *Id.* at 781-82.

The Court of Appeal also rejected defendants' contention that they were shielded from liability for an unlawful arrest under Penal Code section 847(b). That provision immunizes police officers from liability where the "arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful." Cal. Penal Code § 847(b)(1). The defendants contended that even if there was no probable cause to arrest Cornell, they could have reasonably *believed* that there was probable cause and hence were entitled to immunity under section 847—essentially contending that the provision incorporated the qualified immunity doctrine of federal law. 17 Cal. App. 5th at 785-86. The court noted that neither the language of the statute nor its legislative history indicated that it was designed to shield officers from liability for an arrest made without probable cause, and that the case law used the terms "probable cause" and " reasonable cause" interchangeably. *Id.* at 788-90.

The court upheld the judgement on the Bane Act claim, rejecting defendants' contention that because the jury found for defendants on the assault claim, that there was no "threat, intimidation or coercion" accompanying the underlying constitutional violation of unlawful arrest, which would be a requirement for liability under section 52.1. *Id.* at 793-94. It concluded that there were various acts of force by the officers short of assault that could be coercive—display of a weapon for example—and that in any event, at the time the jury decided the assault claim, the trial court had not yet correctly concluded that the arrest was unlawful, thus rendering any use of force improper. *Id.*

The court also noted that this was more than a false arrest claim and that plaintiff had submitted evidence showing that the officers acted with a specific intent to demean him and cause him to lose his job. *Id.* at 794-95. In so holding, the court rejected the notion that section 52.1 requires proof of some coercive or intimidating act separate from

the underlying constitutional violation, in order to impose liability. Instead, a plaintiff need only introduce evidence sufficient to show that the defendants had the specific intent to threaten, intimidate or coerce the plaintiff by virtue of the unconstitutional conduct. *Id.* at 799-800. Here, plaintiff satisfied that burden: "Considering the evidence surrounding Cornell's arrest in its full context, it seems to us a rational jury could have concluded not only that Officer Brandt and Sergeant Gin were unconcerned from the outset with whether there was legal cause to detain or arrest him, but that when they realized their error, they doubled-down on it, knowing they were inflicting grievous injury on their prisoner." *Id.* at 804.

The *Cornell* court's holding on the section 52.1 claim creates even more confusion concerning the elements of a Bane Act claim. As the court noted, federal courts in California often confront such claims coupled with federal claims under section 1983, and have varied widely in interpreting California law with respect to requiring proof of an act of intimidation, threat or coercion, separate from the underlying unconstitutional act. *See id.* at 801. And the *Cornell* court distinguished *Shoyoye v. County of Los Angeles* (2012) 203 Cal. App. 4th 947, which had held that proof of a separate act was required, on the ground that it involved an over-detention after a lawful arrest. 17 Cal. App. 5th at 797. Although the California Supreme Court denied review in *Cornell*, at some point the Court will have to address the issue, given the large number of section 52.1 claims being litigated throughout the state.

II. CLAIMS STATUTE.

A. *Santos v. Los Angeles Unified School District*, 17 Cal. App. 5th 1065 (2017).

- **Concealment of involvement in underlying incident may estop public entity from asserting claim presentation requirement to bar lawsuit.**

In *Santos v. Los Angeles Unified School District*, 17 Cal. App. 5th 1065 (2017), the plaintiffs were injured when their vehicle was struck by a Los Angeles School Police Department (LASPD) vehicle. Plaintiffs' attorney initially filed a claim with the City of Los Angeles, which rejected the claim, noting that LASPD was a separate public entity and not part of the City. *Id*. at 1068. Plaintiffs' counsel then contacted the LASPD and was told it was an independent public entity, and that a claim form could be downloaded from the Department website and submitted to the LASPD. *Id*. The attorney submitted a claim to the LASPD, which was denied, and then filed suit, naming the Department as a defendant. *Id.*

Shortly thereafter, plaintiffs' attorney received a copy of the accident report, which noted that the owner and insurer of the LASPD vehicle was the Los Angeles Unified School District (LAUSD). Counsel then filed an amended complaint naming the LAUSD as a defendant. *Id.* at 1069. The LAUSD successfully moved for summary judgment on the ground that plaintiffs had failed to file a claim with LAUSD as required by Government Code sections 911.2 and 945.6, and that submitting claim to LASPD was ineffective because the latter was simply a department of LAUSD. *Id.* at 1069-72.

The Court of Appeal reversed, holding that a jury could determine that LASPD employees may have misrepresented the nature of the Department and concealed LAUSD responsibility for the actions of LASPD officers, thus estopping the LAUSD from asserting the claims statute to bar the action. *Id.* at 1075-77.

Santos is a reminder that public entities need to be careful in terms of their public communications concerning the nature of public agencies. A key fact in *Santos* was that the LASPD website indicated it was an independent agency, and not an arm of the LAUSD—even going so far as to provide a claim form that could be downloaded from the LASPD website. It is not difficult to imagine a similar estoppel claim arising where a plaintiff submits a claim to a municipal agency or department, which then fails to forward the claim to the City clerk for processing.

III. IMMUNITIES.

A. *Arvizu v. City of Pasadena*, __Cal.App. 5th __, 2018 WL 1452235 (2018).

- **Trail immunity of Government Code section 831.4(b) shields City from liability for failure to provide a guard rail on a retaining wall adjacent to an unpaved trail in a City park.**

In *Arvizu v. City of Pasadena*, __Cal.App. 5th __, 2018 WL 1452235 (2018) the plaintiff and his friends decided to go ghost-hunting in a closed city park at approximately 3:00 am. *Id.* at *3. As the group descended a slope to get to an unpaved trail in the park, the plaintiff lost his footing, slid down the slope, across the trail and off the edge of a retaining wall adjacent to the trail, resulting in severe injuries. *Id.* Plaintiff sued the City, asserting that the absence of a guard rail on the retaining wall constituted a dangerous condition on public property, because people using the property with due care would not perceive that the wall and drop-off were there, thus creating a hazard. *Id.* at *4. The trial court granted the City's motion for summary judgment, finding that the suit was barred by the trail immunity of Government Code section 831.4 (b), and that, in any event, the property was not in a dangerous condition. *Id.*

The Court of Appeal affirmed. The court declined to reach the dangerous condition issue, as it concluded that the suit was clearly barred by section 831.4(b). *Id.* The court noted that the provision shielded public entities from any liability arising from use of an unpaved trail used for hiking and access to recreational and scenic areas, and

that the trail in question squarely fell within the immunity. *Id.* It rejected plaintiff's contention that he was not using the trail, and that his injuries arose not as a result of any condition of the trail, but stemmed from the condition of the retaining wall next to the trail. *Id.* The court observed that plaintiff had been trying to get to the trail, and that his lawsuit was ultimately premised on the proximity of the retaining wall to the trail. *Id.* at *5-6. As a result, under section 831.4(b), the City "is immune from claims that warnings or guardrails are required to protect against falls from the Trail over the concrete retaining wall, or that the Trail should be relocated to a safer location, because these claims concern the location and design of the trail." *Id.* at *6.

Arvizu, is a very helpful case in clarifying the broad scope of section 831.4(b) immunity and underscoring the strong public policy considerations underlying the immunity. It is also useful in that it distinguishes *Garcia v. American Golf Corp.* (2017) 11 Cal.App.5th 532 which held that a plaintiff who was injured by an errant golf ball while walking on a trail adjacent to a City owned golf course, could recover, notwithstanding the immunity of section 831.4(b). The *Arvizu* court noted that the plaintiff's injury in *Garcia* stemmed from the lack of safeguards at the commercially run golf course and not the trail itself. 2018 WL 1452235 at *7-8.

Gender Issues in Policing from the Law and Order Perspectives

(MCLE Specialty Credit for Recognition and Elimination of Bias)
Friday, May 4, 2018 General Session; 10:30 a.m. – 12:15 p.m.

Susan E. Coleman, Burke, Williams & Sorensen
Sandra Spagnoli, Chief of Police, Beverly Hills Police Department

Notes:_____

Gender Issues in Policing From the Law and Order Perspective

League of California Cities
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I. INTRODUCTION

In the wake of sexual harassment and assault allegations against powerful individuals in politics, media and business, the City of Los Angeles implemented a new policy in December 2017 requiring all departments to report sexual harassment incidents within 48 hours of learning about them.

Reports of sexual harassment among workers for the City of Los Angeles have increased after the introduction of a new data collection system in December. The city's personnel department received 26 reports of harassment in the two months after the new protocol was introduced in mid-December. In comparison, the department had received only 35 reports of harassment in a five-year stretch between 2013 and 2017.[1]

Cities and counties across the state can anticipate an increase in sexual harassment and assault reports as these issues continue to permeate the national discourse and the #metoo movement continues. Within cities and counties, law enforcement agencies typically have the greatest exposure to these claims. For example, since 2011, more than three-quarters of the sexual harassment and assault settlement payments in the City of Los Angeles have been connected to the police department.[2]

There are several explanations for this. One is simply the sheer size and scope of police departments, which are typically among the largest entities within the city. Another is that complaints about sexual harassment and assault arise both internally (between employees) and externally (from members of the public against the employee), and law enforcement has significant public interface. Another is that law enforcement agencies have historically grappled with gender issues and a historic attitude of machismo.

Addressing gender issues in law enforcement can help the quality of policing by ensuring that the best candidates are hired and retained. It can also reduce potential liability for cities and counties.

[1] https://www.scpr.org/news/2018/02/21/80997/why-la-city-received-more-sexual-harassment-claims/
[2] https://www.scpr.org/news/2018/02/22/81014/sexual-harassment-a-persistent-and-costly-problem/

II. HISTORY OF WOMEN IN LAW ENFORCEMENT

- 1845: New York City hired two women to work as matrons in the city's two jails.

- 1881: The Chicago Police Department assigned Marie Owen as a "patrolman." She worked mainly with women and children. Despite her title, her duties did not include patrol.

- 1905: Lola Baldwin in Portland, Oregon becomes the first female sworn police officer. Her duties were primarily social work. In 1908, she gained the power to conduct arrests.

- 1910: The Los Angeles Police Department swore in Alice Stebbin Wells as the country's first "policewoman" with badge number 1. Five years later, Wells founded the International Association of Police Women.

- 1912: Los Angeles Sheriff's Department swore in Margaret Adams as the nations' first female deputy sheriff.

- 1930-1940s: Opportunity for women to compete for law enforcement roles diminished as Great Depression and World War II increased competition for jobs.

- 1950-1960: Number of police women more than doubles from 2,600 to 5,617.

- 1968: Indianapolis Police Department makes history by assigning two female officers, Elizabeth Robinson and Betty Blankenship, to patrol.

- 1985: Penny Harrington became the first woman Chief of Police for a major city, in Portland, Oregon.

- 1990s: Several law enforcement associations devoted to women were established including the National Association of Women Law Enforcement Executives and the National Center for Women and Policing in 1995, and Women in Federal Law Enforcement in 1999.

- 2012: Bureau of Labor Statistics reports that women make up 12.6% of all sworn police officers in the United States.

- 2017: For the first time in its 167-year history, Los Angeles County has seven female police chiefs leading local law enforcement agencies.

III. WHY DO GENDER ISSUES IN POLICING MATTER?

A. Benefits of a Diverse Police Force

The International Association Chiefs of Police (IACP) defines the overall benefits of a diverse police agency as: "Having a department that reflects the community it serves helps to build trust and confidence, offers operational advantages, improves understanding and responsiveness and reduces the perception of bias."[3]

Further, a study published by the National Center for Women & Policing (2003)[4] identified six advantages of hiring and retaining more women:

1. Female officers are proven as competent as their male counterparts.
2. Female officers are less likely to use excessive force.
3. More female officers will improve law enforcement's response to violence against women.
4. Female officers implement "community-oriented policing."
5. Increasing the presence of female officers reduces problems of sex discrimination and harassment within a law enforcement agency.
6. The presence of women can bring about beneficial changes in policy for all officers.

B. Liability Exposure

Failure to address gender discrimination and harassment claims can expose cities and counties to legal exposure, and can be costly.

A recent study by the International Association of Chiefs of Police found that women have won more than one-third of the sexual harassment lawsuits and more than one-third of the gender discrimination lawsuits they filed against police departments.[5] Even if a city prevails in a lawsuit, the costs and negative publicity from dealing with such lawsuits can be significant.

These are just a sample of issues that have been raised within the past year:

- The City of Phoenix approved a $75,000 settlement in a lawsuit filed by a police officer over allegations of gender discrimination in the police force.

[3] http://www.theiacp.org/portals/0/pdfs/ASymbolofFairnessandNeutrality.pdf
[4] http://womenandpolicing.com/pdf/newadvantagesreport.pdf
[5] International Association of Chiefs of Police, "The Future of Women in Policing: Mandates for Action," (International Association of Chiefs of Police, 1998) 13-15.

- The City of Philadelphia paid $1.25 million to settle a lawsuit by a woman who claimed a veteran police commander sexually assaulted her when she was an officer in the department.

- Chicago police lieutenant who rose to become the first woman to ever command the department's Marine and Helicopter Unit filed a federal sex discrimination lawsuit, alleging she was harassed by a sexist boss and ultimately demoted because he didn't want a woman in her post.

- A 15-year veteran of the U.S. Capitol Police filed a lawsuit against the department in February 2018, alleging sex and disability discrimination and retaliation, claiming she was wrongfully dismissed from the elite and male-dominated K-9 unit during training after mistreatment by her supervisor.

- A former police officer in Texas claims she was fired in retaliation for filing sexual harassment complaints against her supervisor, who made "repeated sexual advances" toward her, according to a federal lawsuit.

Although most stories that make the headlines pertain to allegations of wrongful termination, there are several exposure points for police departments. These include the recruitment, hiring, promotion, and firing processes. Identifying issues at all these stages can help reduce exposure and increase the quality of policing.

IV. RECRUITMENT

In studying NYPD academy recruits, a 2004 study found that male and female recruits had similar motivations for becoming police officers. These motivations include the opportunity to help people, job security, job benefits, early retirement, and excitement of work. However, agencies across the country have found difficulty recruiting female applicants.

A. Potential Barriers to Recruiting Female Officers

1. Stereotypes of Law Enforcement

2. Strained relationships with the community

3. Reputation of the agency

4. Lack of awareness of opportunities

5. Lack of Women Law Enforcement Role Models

B. How to Improve Recruitment

Many departments rely on word of mouth, or recruit at areas such as military bases where there are more men than women. Some research has shown that targeted recruiting strategies may be useful in increasing the number of women in policing. These strategies may include:

1. Updated Job Descriptions & Recruitment Materials; and

2. Strategic Recruiting such as attending career fairs for women, connecting with Women in ROTC programs, and advertising at gyms and sports clubs with large female attendance.

In a 2009 study of 985 state, county, and municipal police agencies, researchers looked at the effect of two specific practices used to recruit women.[6]

- The first practice involved offering special entry considerations to women including lower education standards, lower fitness standards, exam exemptions, faster promotion, higher pay, preference on waiting lists, or pre-entry training.

- The second practice involved using special recruiting strategies aimed at women.

The study found that special entry considerations were not related to either increased number of female applicants or increased hiring of women; however, very few agencies gave such advantages to female applicants. Targeted recruiting strategies were not related to increased number of applications from women, but were related to increased female hires. Agencies utilizing targeted recruitment strategies hired an average of 2.2 times as many women as expected.

2. Austin Police Department Applies Targeted Recruiting

The Austin, Texas Police Department, in an effort to encourage more women to apply, organizes recruitment and information sessions specifically designed to explain the hiring process and career opportunities for women at the agency. Additionally, the department publishes YouTube videos, such as “Women of APD,” that feature women talking about their experience serving as officers in the police department.

[6] Taylor, B., Kubu, B., Fridell, L., Rees, C., Jordan, T., & Chaney, J. (2006). Cop crunch: Identifying strategies for dealing with the recruiting and hiring crisis in law enforcement. Police Executive Research Forum. USDOJ: Washington, DC.

3. Takeaway

Mindful recruiting is a way to increase diversity in a department. It should be emphasized that it is generally not permissible to recruit only members of one race, national origin, or gender. Programs that require meeting specific hiring goals for any particular group are generally prohibited under federal law except when necessary to remedy discrimination. However, there are several lawful ways to increase diversity.

The National Center for Women & Policing has identified several examples of permissible targeted recruitment and outreach including:

- Development of recruitment materials featuring women;
- Distribution of recruitment materials and applications to businesses owned or frequented by women, minority neighborhoods, community centers and churches, and health clubs or sports teams with primarily female membership;
- Advertisements in publications and on radio and television stations with a predominantly female audience;
- Attending career fairs and open houses featuring women.

V. HIRING & ANNUAL TESTING

Applicants to law enforcement agencies usually have to pass a written exam, psychological exam, oral interview, physical agility test, firearms qualification, polygraph test, medical examination, and background check to be considered eligible for hire by the department.

The fitness for duty test has been the focal point of litigation regarding gender discrimination. However, firearms qualification and medical examinations have also posed barriers, which many departments have addressed.

A. Fitness for Duty Tests

Fitness for duty tests replaced the previous height and weight requirements for law enforcement officers.[7] Many agencies use these tests in the hiring process and as annual exams to determine continuation of employment.

Although fitness for duty testing was intended to be more inclusive of females and minorities, some view rigid fitness for duty tests as still being discriminatory. In a

[7] *Hardy v. Stumpf* (1974) 37 Cal.App.3d 958, 112 Cal.Rptr. 739 (lawsuit challenging the reasonablesness of height and weight requirements for becoming Oakland police officers.)

1996 study of several police departments, 28% of female applicants passed the physical fitness test while 93% of male applicants passed.[8]

The results of this study fall within the Equal Employment Opportunity Commission's (EEOC) definition of disparate impact. Under the EEOC:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.[9]

If there is an adverse impact, the test and its use must be job-related and consistent with business necessity. Some physical ability tests that intend to simulate the tasks undertaken by police officers have been found to have an unlawful disparate impact on women where they are insufficiently related to actual job duties.[10]

For example, a physical test that included a stair climb, a run, and an obstacle course was found to have a disparate impact on women and be insufficiently related to the police officer's actual job. Similarly, tests that purport to measure overall physical fitness (such as push-ups, sit-ups, and running) but apply a unitary standard to men and women have been found to disproportionately exclude women from law enforcement positions and be insufficiently job-related. For example, the requirement that men and women perform the same number of push-ups and sit-ups in one component of a physical fitness test was found to violate Title VII.[11]

1. Colorado Springs Lawsuit & Settlement

In May 2015, twelve female police officers sued the City of Colorado Springs alleging that the City's annual physical ability test discriminated against them and was not related to their jobs.[12] The women brought their lawsuit under Title VII.

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[8] Birzer, M.L. & Craig, D.E. (1996). Gender Differences in police physical ability test performance. American Journal of Police 15, 93-108.
[9] Uniform Guidelines on Employee Selection Procedures Section 4(d).
[10] *See, e.g.*, *Thomas v. City of Evanston*, 610 F. Supp. 422, 428 (N.D. Ill. 1985) (concluding that physical agility tests for law enforcement officers had a disparate impact on women); but see *Lanning v. SEPTA*, 308 F.3d 286 (3d Cir. 2002) (finding a challenged test for minimum aerobic capacity to be Title VII-compliant after a demonstration of tailored job-related need).
[11] *United States v. City of Erie*, 411 F. Supp. 2d 524 (W.D. Pa. 2005); *United States v. City of Philadelphia*, Nos. 74-400, 74- 339, 1979 WL 302, at *2 (E.D. Pa. Sept. 5, 1979).
[12] *Rebecca Ardnt, et al. v. City of Colorado Springs* (D. Co. Case No. 15-cv-00922 RPM-MJW.)

The plaintiffs argued that mandatory police testing imposed disproportionate challenges on women over the age of 40. The testing included one-minute maximum sit-up and push-up tests, as well as two running tests, one of which focused on agility. Nearly 40 percent of the department's women in that demographic failed the test the first time around, compared with 9 percent of men, causing them to be stripped of their duties and placed on alternate assignments, the lawsuit said.

At the conclusion of a bench trial in July 2017, U.S. District Judge Richard Matsch concluded the test "shamed and ostracized" the 12 plaintiffs – many of them decorated officers with decades of service – while providing "meaningless" results. Matsch said the Police Department also erred in making the test a sole criterion for an officers' firing, rather than as "one component."

On January 19, 2018, the City of Colorado Springs settled the lawsuit for $2.5 million.[13] This does not include the City's legal fees over three years or $314,193 which was paid as worker's compensation to officers who suffered injuries because of the physical abilities test.[14]

2. Modifying Fitness for Duty Tests

In his book *Taking Back Our Streets: Fighting Crime in America*, former LAPD Chief Willie Williams stated that among his top priorities within the LAPD was to hire more women and minorities.

Chief Williams determined, among other things, that some pre-employment tests were disproportionately hampering women from becoming officers. One such test was a requirement to climb over a six-foot wall before the candidate could continue in the hiring process. Since men naturally have more upper body strength, this step was found to discriminate against women and many women failed as a result. In response, Williams had the six-foot wall climb moved to the police academy portion of the process rather than at the onset. By doing this, recruits were first properly trained on effective techniques for scaling a wall before being assessed.[15]

Other cities have also found alternative ways to test the fitness of their officers. In addition to targeted recruiting, the City of Austin Police Department also recently replaced the pushup requirement on its physical fitness test, which deterred some women from applying, with a rowing machine exercise to measure upper body strength.

[13] https://www.csindy.com/TheWire/archives/2018/01/19/city-of-colorado-springs-settles-female-police-officer-lawsuit-for-25-million
[14] https://www.csindy.com/coloradosprings/city-pays-for-controversial-police-physical-ability-test/Content?oid=3482482
[15] Williams, W. (1996). Taking back our streets: fighting crime in America. New York: Scribner.

3. Takeaway

When law enforcement agencies use fitness for duty tests, they have to make sure there's a legitimate basis behind them. Agencies can find creative ways to ensure that their police force has the physical capabilities and skills to perform their duties, without discriminating against women.

B. Firearms Qualification & Proper Equipment

1. Proper Handgrips for Women

22 percent of the female respondents indicated that firearms qualifications were the most challenging aspect of their training, and 25 percent reported receiving extra scrutiny/negative attention during their training.

LAPD noticed that many female recruits were failing their firearms qualification due to low scores. Many people were quick to assume that this was evidence that women did not belong in law enforcement. However, LAPD reviewed the issue and found that the larger handgrips on firearms were too big for most women, making it harder to grip the guns for women. Once smaller handgrips were put in place, the shooting scores for women increased.[16]

2. Properly Fitting Vests

Some agencies and departments have been known to issue men's bulletproof vests to women. This can both be unsafe and send the wrong message. For both men and women, if body armor does not fit correctly and provide adequate coverage, it can affect safety and effectiveness.

3. Takeaway

Law enforcement agencies are encouraged to maintain a supply of alternative grips to accommodate smaller hands and short triggers to reduce distance from the back of the grip to the front of the trigger. Both are relatively inexpensive and can be easily installed by an armorer.

Further, it is important to ensure that all officers have properly fitting equipment to ensure safety and promote inclusiveness.

[16] Williams, W. (1996).

VI. RETENTION

According to the International Association of Chiefs of Police, retention remains one of the largest barriers to increasing the number of women in policing. While women generally enter policing for many of the same reasons men do, studies have shown that the reasons why women leave are different. These include lack of training, lack of promotional opportunity, inflexible working patterns, and administrative policies that disadvantage female officers.

A. Mentoring

Mentoring can assist in the retention and promotion of female employees, as well as help with job performance. And it can provide a financial benefit for agencies. One typical medium-sized county agency estimated that it costs $40,000 to recruit, hire, and train a new officer.[17]

B. Developing and Promoting Comprehensive Policies

Employment discrimination on the basis of pregnancy, childbirth, or a related medical condition is discrimination on the basis of sex.[18]

As a starting point, it is important for cities to follow and provide employees with information regarding Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Further, the Pregnancy Discrimination Act (PDA) requires that pregnant women and women disabled by childbirth or related medical conditions be treated at least as well as employees who are not pregnant but who are similar in their ability or inability to work.

It is also important for cities to work with their attorneys and police departments to develop specific policies and provide their employees information on such important issues as notification procedures, availability of light duty assignments, paid and unpaid leave benefits, range qualification for pregnant employees, maternity uniforms, flexible work options, and other issues.

There are several considerations that cities should discuss with their attorneys when developing their policies. For example, In *UAW v. Johnson Controls*,[19] the Supreme Court ruled that employers were prohibited from adopting fetal protection policies that exclude women of child-bearing age from certain hazardous jobs. This decision as well as others has established that employers are prohibited from forcing a

[17] April Kranda, "A Mentoring Program to Help Reduce Employee Turnover," The Police Chief, June 1997, 51-52
[18] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 276-77, 107 S. Ct. 683, 687 (1987).
[19] 499 U.S. 187 (1991).

pregnant employee to take disability leave as long as the employee is still physically fit to work.

An Example of FMLA & PDA Liability: *Hicks v. City of Tuscaloosa*

In *Hicks v. City of Tuscaloosa*[20], the Eleventh Circuit upheld a $161,319.92 jury award for a female law enforcement officer who alleged that she was forced to quit police work after she returned to work following her pregnancy.

The officer, Stephanie Hicks was an investigator on the narcotics task force when she became pregnant in January 2012. Hick's commanding officer, Lieutenant Teena Richardson, said that she would only give Hicks six weeks of FMLA leave, but Hicks took the full twelve weeks from August 2012 to November 2012.

Prior to her FMLA leave, Hicks received "exceeded expectations" from Lieutenant Richardson. On Hick's first day back from leave, she was written up. Hicks overheard Richardson talking to Captain Robertson saying 'that b****,' and claiming she would find a way to write Hicks up and get her out of here. Another officer overheard Richardson talking loudly about Hicks saying 'that stupid c*** thinks she gets 12 weeks. I know for a fact she only gets six.'"

Eight days after her return, on the recommendation of Captain Robertson, Hicks was reassigned to patrol duty. The city asserted that Hicks was reassigned based on poor performance. As a result of the transfer to patrol, Hicks "lost her vehicle and weekends off," was "going to receive a pay cut and different job duties," and would be required to wear a ballistic vest while on duty.

Before starting back in the patrol division, Hicks took time off when a physician diagnosed her with postpartum depression. Lieutenant Richardson admitted that she asked Hicks if she was suffering postpartum because "something was different about [her]…[she] was a new mom and …new moms go through depressed states." During this leave for postpartum depression, Hick's doctor wrote a letter to the Chief recommending that Hicks be considered for alternative duties because the ballistic vest she was now required to wear on patrol duty was restrictive and could cause breast infections that lead to an inability to breastfeed. In response, Chief Anderson told Hicks that she could continue to patrol her beat without a vest or with a specially fitted one. Hicks claimed that not wearing a vest was dangerous and even the "specially fitted" vests were ineffective because they left gaping holes. Hicks resigned that day.

Hicks sued the department and won at trial on three theories: (1) discriminatory reassignment under the Pregnancy Discrimination Act (PDA), (2) PDA constructive discharge, and (3) FMLA retaliation.

[20] 870 F.3d 1253 (2017).

On the reassignment claim (under the PDA and FMLA), the City maintained that Hicks was reassigned for poor performance. However, the jury found, and the Eleventh Circuit agreed, that there was sufficient evidence of discrimination. The Eleventh Circuit held that "multiple overheard conversations using defamatory language plus the temporal proximity of only eight days from when [Hicks] returned to when she was reassigned support the inference that there was intentional discrimination."

On the constructive-discharge claim, the City argued that Chief Anderson did not harbor any discriminatory animus, and that he offered Hicks access to lactation rooms, priority in receiving breaks, and a tailored vest. However, the Eleventh Circuit held that the jury could have found that the accommodations for breastfeeding that the city offered were so inadequate, that "any reasonable person" in Hicks's position "would have been compelled to resign."

Finally, the Eleventh Circuit held that lactation is a "medical condition" related to pregnancy or childbirth, and is thus protected by the PDA. The Eleventh Circuit ruled that while the City may not have been required to provide Hicks with *special* accommodations for breastfeeding, the City's action in refusing an accommodation afforded to other employees compelled Hicks to resign, and thus constituted constructive termination. In her case, Hicks showed that other employees with temporary injuries were given "alternative" duty, and she was merely requested to be granted the same alternative duty but was denied.

Takeaway: The Hicks case highlights issues that arise when an employee takes FMAL leave and returns. In this case, it appears that the City made multiple missteps, which caused Hicks to resign. This case also demonstrates that discrimination against women is not limited to male employees. Here, Hicks' supervisor was a female.

C. Performance Evaluations and Promotion Opportunities

According to the Bureau of Justice Statistics, women accounted for approximately 12% of full-time local police officers in 2013 (the latest data available). Women made up an even smaller share of department leadership: About one-in-ten supervisors or managers and just 3% of local police chiefs were women in 2013.[21]

The nationwide survey of 7,917 police officers in departments with at least 100 officers finds that many female officers think men in their department are treated better than women when it comes to assignments and promotions. About four-in-ten female officers (43%) say this is the case, compared with just 6% of male officers.[22]

[21] http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/
[22] http://www.pewresearch.org/fact-tank/2017/01/11/police-report-q-and-a/

A fair and unbiased performance system is essential to a law enforcement agency since performance evaluations are frequently used as the basis for making decisions regarding transfers, specialty assignments, and promotions. The National Center for Women & Policing has identified several ways to monitor bias in performance evaluations[23]:

- Compare how supervisors rate women employees in relation to male employees. Whenever a woman receives a low rating, carefully examine the basis for that rating and determine if men are receiving the same ratings for the same performance.

- Note the areas in which women receive low ratings. Evaluate whether women are receiving lower ratings for subjective characteristics.

- Monitor the performance evaluations of any women who have complained of discrimination or harassment to ensure that the performance evaluation is not being used as a tool for retaliation. For example, an agency can compare evaluations before and after the employee made the complaint.

Biased reviews can open a city up to discrimination lawsuits. The courts have held that "adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions…."[24]

Fair performance evaluations are also important for retention. One reason cited by women for leaving law enforcement is that they see less promotional opportunities than their male counterparts.[25]

D. Preventing Sexual and Gender Harassment, Discrimination, and Retaliation

Research has shown that sexual harassment is much more likely to occur in male-dominated workplaces and in fields that have been traditionally considered masculine.[26] Within the law enforcement field, studies found that anywhere from 60-70% of women officers experienced sexual/gender harassment. However, only about 4-6% ever reported the harassment.[27] Further, 40% of women indicated that sexually

[23] https://www.ncjrs.gov/pdffiles1/bja/185235.pdf
[24] See *Yanowitz v.L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1055-56.
[25] Kim Adams, "Women in Senior Police Management" (Australasian Centre for Policing Research, 2001).
[26] Mary P. Koss, Lisa A. Goodman, Angela Browne, Louise F. Fitzgerald, Gwendolyn Puryear Keita and Nancy Felipe Russo, No Safe Haven: Male Violence Against Women at Home, at Work, and in the Community (Washington DC: American Psychological Association, 1994).
[27] National Center for Women & Policing, Recruiting & Retaining Women: A Self-Assessment Guide for Law Enforcement 133 (2000)

oriented materials or sexually oriented jokes are a daily occurrence, and many of those responding said they believe it is their plight to endure otherwise unacceptable working conditions if they want to maintain a career in law enforcement.[28]

The Fair Employment and Housing Act (FEHA) requires employers to take "all reasonable steps necessary to prevent discrimination and harassment from occurring."[29] There are several ways that cities can address this issue, such as:

- Publicizing and Enforcing a Strong Sexual Harassment Policy.

- Training: California law mandating that public employers (and private employers with 50 or more employees) provide at least two hours of training and education regarding sexual harassment to all supervisory employees once every two years.

  Many firms (such as Burke, Williams & Sorensen, LLP) offer training that is engaging and entertaining, and is customized to meet the unique needs of public safety agencies.

- Ensuring an Adequate Complaint and Investigation Process: Law enforcement agencies should ensure that people know how to file sexual harassment complaints, and that their internal affairs investigators are trained to understand sexual harassment and relevant laws.

- Discipline of wrongdoers: It is important to discipline offenders in a timely manner. California Government Code section 12940(j) provides that it is "unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." The law also provides that employers are liable if they "fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."[30]

- Preventing Retaliation: The reason women most often give for not reporting sexual harassment and discrimination is their fear of retaliation from co-workers and the administration. Men may also fail to report harassment and discrimination due to a fear of being retaliated against. Some examples of reported retaliation amongst law enforcement agencies include being ostracized, being the subject of rumors, denial of transfers and promotions, and failure to receive back-up in emergency situations. This both creates safety issues and is unlawful.

[28] George V. Robinson, "Sexual Harassment in Florida Law Enforcement: Panacea or Pandora's Box," (Ocala Police Department).
[29] Cal. Gov't. Code section 12940(k).
[30] Gov. Code section 12940(k).

In addition to ensuring that their sexual harassment and discrimination policies prohibit retaliation, cities should ensure that that these policies are enforced. A city can be held liable for failing to prevent retaliation under state and federal law.

Sexual harassment and discrimination allegations can be tricky. For example, it is crucial that a complainant feels safe in her current assignment. However, cities will have to determine if removing the alleged harasser from the workplace will implicate personnel policies and/or labor contracts. Therefore, it is advisable to contact counsel to assist in handling these situations.

Takeaway: Sexual and gender harassment can expose a city to liability and cause law enforcement agencies to lose quality employees. Sexual and gender harassment are two of the top reasons women most often give for leaving their law enforcement careers.

In addition to exposure for interactions between employees, cities can also be liable for their employees' interactions with inmates, persons in their custody or under supervision, and members of the public. These can lead to both tort claims in state court and constitutional claims in federal court.

Cities should be pro-active to ensure that their employees, internal affairs staff, and supervisors are well versed regarding sexual and gender harassment policies, discrimination policies, and anti-retaliation policies.

VII. CONCLUSION

Women have made great strides in the areas of law enforcement. The number of women in law enforcement has grown over time, and the increase in number of female police chiefs, particularly in Southern California, show great progress.

However, women are still underrepresented and the percentage of women in policing has plateaued at about 12.6% and cities can take several pro-active steps to ensure that departments are recruiting and retaining the best candidates. Doing so both benefits police departments, and reduces a city's potential liability.

The Sovereign Next Door: California Native American Tribal Governments 101

(MCLE Specialty Credit for Recognition and Elimination of Bias)

Friday, May 4, 2018 General Session; 10:30 a.m. – 12:15 p.m.

Merri Lopez-Keifer, Tribal Counsel, San Luis Rey Band of Mission Indians
Holly A. Roberson, Kronick Moskovitz Tiedemann & Girard

Notes:_____

KRONICK
MOSKOVITZ TIEDEMANN & GIRARD

A PRIMER ON TRIBAL GOVERNMENT RELATIONS FOR CITY ATTORNEYS

Developed for the League of California Cities, City Attorneys' Conference

Last updated April 18, 2018

PREPARED BY:

Merri Lopez-Keifer
Holly Roberson

KRONICK
MOSKOVITZ TIEDEMANN & GIRARD

Tribal Government Relations for City Attorneys: Overview of Materials

1. Introduction: A Note About the Role of a City Attorney in Constructive Tribal Government Relations

2. Checklist: Tribal Government Relations for City Attorneys

3. Appendix: Resources

Part I: Knowledge Baseline

A. California Tribal Court-State Court Forum FAQ

B. Prof. Edward D. Castillo, Cahuilla-Luiseno. California Indian History

C. Selected Sources on California's History with Native People

1. Madley, Ben. *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873*. Yale University Press. 2017.

2. Phillips, George Harwood. *Chiefs and Challengers: Indian Resistance and Cooperation in Southern California, 1769-1906.* University of Oklahoma, Norman Press. 2014.

3. Carrico, Richard. *Strangers in a Stolen Land.* Sunbelt Publications, Inc. 2008

4. Miranda, Deborah. *Bad Indians: A Tribal Memoir*. Heyday. 2013.

Part II: Legal Background

D. California Statutes

1. AB 52 (Tribal Cultural Resources and CEQA)

2. SB 18 (Tribal Consultation and General Plans)

E. Selected Case Law

1. Desert Water Agency v. Agua Caliente Band of Cahuilla Indians, 138 S. Ct. 469

2. Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal. 4th 1086, 1117

3. Citizens for the Restoration of L Street v. City of Fresno (2014) 229 Cal.App.4th 340

4. Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48
5. Clover Valley Foundation v. City of Rocklin (2011) 197 Cal.App.4th 200
6. Valley Advocates v. City of Fresno (2008) 160 Cal.App.4th 1039
7. Pueblo of Sandia v. United States (1995) 50 F.3d 856
8. Muckleshoot Indian Tribe v. United States Forest Service (1999) 177 F. 3d 800

Part III: Tools

F. Selected Websites

1. California Office of Historic Preservation (OHP)
2. California Native American Heritage Commission (NAHC)
3. NAHC's Compilation of State Laws and Codes Relevant to California Native American Tribes
4. The Governor's Office of Planning and Research (OPR) AB 52 Trainings and Materials

G. State Agency Guidance Documents

1. AB 52 Governor's Office of Planning and Research Technical Advisory
2. SB 18 Tribal Consultation Guidelines, Supplement to the General Plan Guidelines
3. NAHC Tribal Consultation Under AB 52: Legal Requirements and Best Practices for Tribes
4. DWR Guidance Document for the Sustainable Management of Groundwater Engagement with Tribal Governments

H. Maps

1. California Indian Pre-Contact Tribal Territories
2. California Indian Tribal Homelands and Trust Land Map

I. Examples from Tribal Governments and Local Governments

1. Northern California: Karuk Tribe Consultation Policy
2. Central California: Santa Barbara County
3. Southern California: City of Carlsbad Guidelines

4. Creative Mitigation Measures (See: 2018 League of Cities, City Attorney Conference PowerPoint Presentation, Lopez-Keifer and Roberson)
5. Creative Non-Invasive Assessment Techniques (See: 2018 League of Cities, City Attorney Conference PowerPoint Presentation, Lopez-Keifer and Roberson)
6. Standard mitigation measures (See: 2018 League of Cities, City Attorney Conference PowerPoint Presentation, Lopez-Keifer and Roberson)

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Introduction: A Note About the Role of a City Attorney in Constructive Tribal Government Relations

This primer on Tribal Government relations (Primer) was developed for use by California's City Attorneys as a practical reference guide. This Primer is not legal advice.

The authors have years of experience working constructively with California Native American Tribal Governments and Cities throughout the State. Merri and Holly have spoken together on Tribal Cultural Resources issues pertaining to the California Environmental Quality Act (AB 52) many times.

Merri Lopez-Keifer is Luiseño and a member of the San Luis Rey Band of Mission Indians. She is the Chief Legal Counsel for the San Luis Rey Band of Mission Indians and has successfully fought for the protection and preservation of her tribe's Native American tribal cultural resources and burial grounds. Merri has also been instrumental in building meaningful relationships with local, state and federal government agencies within her tribe's traditionally and culturally affiliated territory. In her role as Chief Legal Counsel, Merri has successfully conducted hundreds of government-to-government consultations with CEQA lead agencies, local governments, state government agencies and federal government agencies. In June of 2015, Merri was appointed by Governor Brown as a Commissioner to the Native American Heritage Commission, a 9-member, all California Native American commission charged with the responsibility of protecting California's Native American tribal cultural resources and sacred places. On September 23, 2016, Merri was honored with a Resolution by the California Legislature for her exemplary service as a Commissioner and her diligent efforts in protecting and preserving California's tribal cultural resources. In 2017, Merri became the Secretary of the Native American Heritage Commission.

Holly Roberson is an Attorney at Kronick, Moskovitz, Tiedemann and Girard, a full service law firm. Prior to joining the firm, Holly was appointed by Governor Brown as Land Use Counsel at the California Governor's Office of Planning and Research (OPR). At OPR, she lead the effort to incorporate tribal cultural resources into the California Environmental Quality Act (CEQA) Guidelines and develop the OPR AB 52 Technical Advisory. She also worked on General Plan Guidelines, military land use compatibility planning, infill streamlining, utility scale solar siting, complex mediation, drought issues, and the Sustainable Groundwater Management Act (SGMA), with a focus on intergovernmental law. Holly has experience working with environmental laws on the National, State, and Local level. She has provided technical assistance and training to lead agencies, the private sector, and tribal governments throughout the state. Holly works with Cities to help them with implementation of AB 52 (Gatto, 2014). She believes passionately that a better understanding of California's history with Native people and understanding of the importance of cultural resource protection will allow Cities to make better informed decisions and have more collaborative working relationships with California Native American Tribes- the Sovereigns Next Door- for the betterment of both governments.

This Primer goes beyond AB 52. It is designed to give City Attorneys with a basic understanding of planning and environmental law an overview of not just what their City should be doing to comply with the law, but also a sense of why it is important, and the history of California's

treatment of Native people that informs the context of tribal relations today. Importantly, this Primer also goes beyond the past to highlight ways that local and tribal governments can work collaboratively today to benefit their citizens. For example, fire safety, mutual aid agreements, economic development, and groundwater management are of concern to both Tribal and City governments.

This Primer assumes that City Attorneys have a working knowledge of CEQA and General Plan law. Please note that Tribal governments are diverse, just like California's Cities. This is not an attempt to characterize all Tribal governments in the State, but rather to give helpful pointers to City governments to assist in their own relationship development with the Tribal governments with which they interact.

First, we provide a checklist that City Attorneys can use to assess their City's readiness for constructive Tribal relations. These items are not requirements in AB 52 so much as practical suggestions based on our experience that should help your City meet both the intent and the spirit of the law, reduce risk, improve confidentiality, and increase consistency across projects in your Tribal government relations.

In part one, the Primer's Appendix provides an overview of sources for information on California's history with Native people. Understanding this historical context is important for the development of constructive relationships moving forward. This Primer provides key facts and figures to help create a baseline of understanding for tribal government relations.

In part two this Primer provides the key laws City Attorneys need to understand for tribal government relations: AB 52 and SB 18. Relevant case law is provided, although there may be other relevant cases and you should conduct timely research in your own practice.

In part three we provide a curated list of websites, tools, and public resources to assist with tribal relations. Detailed guidance documents are available for these topics from OPR and the California Native American Heritage Commission. We also provide examples from jurisdictions in Northern, Central, and Southern California to give examples of AB 52 implementation in practice.

Feel free to reach out to us with any questions at:

Merri Lopez-Keifer, lopezkeifer@gmail.com, 925-457-3395
Holly Roberson, hroberson@kmtg.com, 916-321-4517

Good Luck!

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City Attorney Checklist for Tribal Government Relations

CEQA (AB 52 implementation)

- ☐ Identify Tribal Government's areas of traditional and cultural affiliation that overlap with City boundaries, get contact list from Native American Heritage Commission
- ☐ Create process for appropriate staff to track incoming consultation letters, including postmark dates on envelopes and the date of response to comply with CEQA
- ☐ Establish confidentiality protocols for handling sensitive cultural information and train relevant staff in management of confidential information
- ☐ Identify a process for new listings and updates to the City's local register of historic resources
- ☐ Cultural awareness training for employees working with tribal governments on tribal cultural resources issues
- ☐ Identify consultation participants to represent City Government
- ☐ Develop consultation policy and protocols
- ☐ Decide how the costs of AB 52 compliance be will absorbed by the City or Development Applicants
- ☐ Determine process for assessing feasibility of proposed mitigation measures, such as monitoring expenses and land preservation or avoidance measures to ensure consistency across projects.
- ☐ Develop creative off-site mitigation measures for when tribal cultural resources may be impacted, such as contributing to tribal cultural resource databases, cultural centers, language or cultural programs.
- ☐ Coordinate with tribal governments for identification, avoidance, and protection of sensitive areas within the City for tribal cultural resources. Decide whom on City staff will have access to such information and train them in confidentiality protocols.

General Plan (SB 18 Implementation)

- ☐ Update General Plan to include SB 18 if not previously done (Note: SB 18 requirement originated in 2004)
- ☐ Understand and implement consultation process for SB 18 compliance
- ☐ Determine the City's process for handling of sensitive confidential cultural information
- ☐ Consider whether the City should develop internal and confidential overlays for its General Plan if there are sensitive tribal cultural resource areas within the City in consultation with traditionally and culturally affiliated tribal governments.

Water (SGMA Implementation)

- □ Tribal government Memorandum of Understanding (MOU) or Joint Powers Authority (JPA), if needed for participation in Groundwater Sustainability Agency work
- □ Data for Groundwater Sustainability Plan (GSP) includes Tribal water amounts and uses, if necessary
- □ Applications for grant funding from State- including engagement funds
- □ Apply for facilitation funding from Department of Water Resources, if needed
- □ Include tribal engagement in GSP engagement plan
- □ Plan for AB 52 consultation for GSP implementation, when CEQA applies during GSP implementation

Other

- □ Curriculum Development Partnerships
- □ Economic Development Partnerships
- □ Emergency Preparedness Partnerships

Speaker Biographies

Youstina N. Aziz, Richards, Watson & Gershon
Youstina advises and guides cities through the transition from at-large to district-based elections. She has assisted the cities of Buena Park, Yucaipa, Rancho Cucamonga, Jurupa Valley, Temecula, and Indio through this process. She has also defended cities, including the cities of Highland and Rancho Cucamonga, in lawsuits arising under the California Voting Rights Act (CVRA). Youstina represents cities in constitutional and civil rights issues, tort liability litigation, and code enforcement matters. She obtained a dismissal of an action filed against the City of South Pasadena that alleged civil rights violations relating to a City code enforcement action. She assisted the City of Temecula in obtaining a summary judgment in a tort liability action that alleged dangerous condition of public property based on street lighting configuration.

Robert C. Ceccon, Richards, Watson & Gershon

Bob Ceccon is Chairman of the Litigation Department at Richards, Watson & Gershon. Bob graduated from Columbia University in 1981, and from UCLA School of Law in 1984.

Bob has tried more than 25 lawsuits, and has arbitrated dozens more. Mr. Ceccon's primary area of practice involves representing governmental entities in litigation including: Barstow, Beverly Hills, Brea, Buena Park, Calimesa, Carson, Foothill Transit, Hesperia, Lynwood, Malibu, Palmdale, Pasadena, Rancho Cucamonga, Redondo Beach, Rialto, Stanton, Temecula, Upland, West Hollywood and the County of Ventura. He represents governmental entities in lawsuits involving a variety of claims including dangerous conditions of public property, civil rights, personal injury, inverse condemnation, construction defects, police liability, and employment.

The following is a sampling of the cases Bob has tried:

Fishback v. County of Ventura. Bob represented the County of Ventura as lead trial counsel in this significant environmental protection case involving illegal dumping of 8,000 truckloads of unpermitted construction debris. Bob obtained judgment in favor of the county ordering defendants to clean up all unpermitted fill material, and to pay $21.7 million in statutory penalties to the county.

Alvis v. County of Ventura. Bob represented the County of Ventura as a lead trial counsel in defense against two lawsuits brought by over 80 plaintiffs in connection with the 2005 landslide in La Conchita, California that resulted in 10 deaths and destruction of 16 homes. Bob prevailed against damage claims based on theories of dangerous condition of public property, wrongful death, nuisance, and inverse condemnation resulting from alleged negligence in approving plans for a retaining wall intended to protect against such a landslide.

Dunex, Inc. v. City of Oceanside. Bob represented the City of Oceanside as lead trial counsel in connection with an inverse condemnation lawsuit alleging that the city's mobile home rent control ordinance resulted in a taking that caused at least $30 million in damages. The Court ruled in favor of the city, holding the plaintiff could not prove a claim because it had made a reasonable return on investment for the plaintiff.

Collender v. City of Brea. Bob represented the City of Brea and its police officer as lead trial counsel in connection with an officer involved fatal shooting of an unarmed man. The decedent was reaching towards his pocket when the officer attempted to arrest him. The shooting was captured on video. Plaintiffs claimed that the city defendants used excessive force. The jury deliberated for less than a day and found in favor of defendants.

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

Tim Coates is a partner at the appellate firm of Greines, Martin, Stein & Richland LLP in Los Angeles, and over the past 34 years he has briefed and argued more than 250 matters in the state and federal appellate courts, including successfully arguing five cases in the United States Supreme Court, and obtaining a per curiam reversal in a sixth case. Tim's Supreme Court victories have addressed absolute and qualified immunity (Van de Kamp v. Goldstein, 555 U.S. 335 (2009), Messerschmidt v. Millender, 565 U.S. 535 (2012), Stanton v. Sims, 571 U.S. __, 134 S.Ct. 3 (2013)), Monell liability (Los Angeles County v. Humphries, 562 U.S. 29 (2010)) and warrantless arrests (County of Riverside v. McLaughlin, 500 U.S. 44 (1991)). He has been named a Southern California Super Lawyer in the area of appellate practice from 2007-2018, and has also been named in The Best Lawyers In America (Appellate Law) (2014-2018). The Los Angeles Daily Journal has repeatedly recognized Tim as one of the Top 100 Attorneys in California, he has received a California Lawyer Attorney of the Year award for his United States Supreme Court work, and Reuters News Service named him one of the "Top Petitioners" in the United States Supreme Court. Tim lectures widely on issues related to appellate practice, as well as section 1983 liability. He is also co-author of the chapter on federal civil rights liability in the CEB publication California Government Tort Liability Practice.

Michael G. Colantuono, City Attorney, Auburn and Grass Valley

("CALL - an - TOO – no") Michael G. Colantuono is a shareholder in Colantuono, Highsmith & Whatley, a municipal law firm with offices in Pasadena and Grass Valley. Chief Justice Ronald M. George presented him with the 2010 Public Lawyer of the Year award on behalf of the California State Bar Association. The Los Angeles Daily Journal named him one of "California's Top Municipal Lawyers" every year since its list began in 2011. The Supreme Court appointed him the first Chair of the Board of Trustees of the State Bar of California; he was previously President of the Bar. The State Bar has certified him as an Appellate Specialist and he is a member of the California Academy of Appellate Lawyers, a prestigious association of fewer than 100 of California's most distinguished appellate advocates. Michael is one of California's leading experts on municipal revenues and has appeared in all six Courts of Appeal in California. In addition, he has argued seven public finance cases in the California Supreme Court since 2004 and helped brief two others. He will argue another in the coming year. Michael is City Attorney of Auburn and Grass Valley and general counsel of a number of LAFCOs and special districts. He serves as special counsel to counties, cities and special districts around California. Michael served as President of the City Attorneys Department of the League of California Cities in 2003–2004 and established its first Ethics Committee. He served on the Commission on Local Governance in the 21st Century, the recommendations of which led to substantial revisions of the Cortese-Knox-Hertzberg Local Government Reorganization Act. Michael is General Counsel of the Calaveras and San Diego LAFCOs and serves as outside counsel to the Nevada, Orange, and Yolo County LAFCOs. Michael graduated magna cum laude from Harvard College with a degree in Government and received his law degree from the Boalt Hall School of Law of the University of California at Berkeley.

Susan E. Coleman, Burke, Williams & Sorensen
Susan Coleman is a Partner at Burke, Williams & Sorensen LLP with over 23 years litigation experience in civil rights and employment law. Ms. Coleman has defended law enforcement officers, officials, and government entities in over 45 civil jury trials in federal and state courts throughout California. She is an associate of the American Board of Trial Advocates (ABOTA) and a fellow of the Litigation Counsel of America. Before going into private practice, Ms. Coleman worked for the Department of Justice, Office of the Attorney General.

Tim Cromartie, Senior Advisor, HdL Companies

Tim Cromartie has been a Senior Advisor on Cannabis Policy to HdL Companies since February 2018. Prior to that he spent 5 years as the Public Safety Representative for the League of California Cities, during which time he helped craft the Medical Cannabis Regulation and Safety Act of 2015, and advocated for the maintenance of local control as well as the integrity of the overall regulatory system as California transitioned from a medical-only structure to one embracing cannabis for both medical and adult use. Prior to his time at the League, Tim held various positions in the Legislature, serving twice as a chief of staff, and was a legislative representative for CalPERS Governmental Affairs for two years.

Jeffrey V. Dunn, Best Best & Krieger

Jeffrey V. Dunn is a partner at Best Best & Krieger LLP. He is legal counsel to public agencies in complex litigation matters. He was selected as one of California Lawyer magazine's 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. He has 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.

Mara W. Elliott, City Attorney, San Diego

Mara W. Elliott was elected San Diego City Attorney in 2016 after serving as a Chief Deputy City Attorney and legal adviser to the City's Independent Audit Committee and Environment Committee. The first in her family to graduate from college, Mara worked her way through the University of California at Santa Barbara and McGeorge School of Law. Prior to joining the city, she was a Senior Deputy County Counsel, Deputy General Counsel to the San Diego Metropolitan Transit Development Board, and general counsel to K-12 and community college districts. Mara's priorities include cracking down on domestic violence and elder abuse, holding polluters accountable, and consumer protection. Mara is the City of San Diego's first female City Attorney.

Deborah J. Fox, Principal and Chair of First Amendment Practice

Deborah Fox is the Chair of Meyers Nave's statewide First Amendment and Trial and Litigation Practice Groups. She is one of California's foremost experts on First Amendment issues affecting the public sector, with a specialty focus on cases involving the convergence of First Amendment, land use, and zoning laws and regulations. Deborah has handled a broad range of First Amendment litigation on matters that attract intense media attention, including vending and solicitation/panhandling ordinances, newsrack restrictions, billboard and sign ordinances, public forum issues, parade and park regulations, adult use regulations, and matters relating to the Religious Land Use and Institutionalized Persons Act. Deborah is particularly skilled at advising on the development of constitutionally sound time, place and manner restrictions, and defending litigation challenging these types of rules and regulations. Deborah recently authored an amicus brief on behalf of the League of California Cities, the California State Association of Counties and the American Planning Association California Chapter in the high-profile Lamar Central Outdoor, LLC v. City of Los Angeles First Amendment related billboard case. In a landmark opinion in June 2016, the Second Appellate District upheld the ability of California cities and counties to continue using the onsite/offsite and commercial/noncommercial distinctions as a regulatory tool in their sign codes. Deborah is "AV" rated by Martindale-Hubbell and is a Fellow of the Litigation Counsel of America. She is named among Martindale-Hubbell's list of "Top Rated Lawyers in Land Use and Zoning," "Register of Top Rated Lawyers: Women Leaders in the Law," "Register of Preeminent Lawyers," and inaugural "Bar Register of Preeminent Women Lawyers." Deborah has also been named, twice, as one of California's "Top Women Litigators" by the Daily Journal.

Karen A. Getman, Remcho, Johansen & Purcell

Karen Getman is a partner at Remcho, Johansen & Purcell, LLP, a law firm specializing in all aspects of political law, including federal, state and local laws regulating elections and campaigns. She served as Chairman of the California Fair Political Practices Commission from 1999-2003, and co-taught the course on Regulating Public Integrity at U.C. Berkeley Law School from 2004-2011. She has lectured on campaign finance laws at the Stanford Director's College and previous League of California Cities programs, and recently testified at the Federal Election Commission hearing on the McCutcheon v. FEC proposed rulemaking. She is a graduate of Harvard Law School, and received her B.A. from Yale College.

James C. Harrison, Remcho, Johansen & Purcell

James has practiced law at Remcho, Johansen & Purcell, LLP, one of California's premier election and government law firms, for more than 20 years. He is widely recognized as one of the state's leading experts on the drafting and defense of complex ballot measures at both the state and local level. He also has expertise in complex conflict of interest matters, election law, and campaign finance issues of all types, and the laws governing public agencies and non-profits. James' litigation experience includes representing clients in state and federal trials and in the Ninth Circuit Court of Appeals, the California Supreme Court, and various California courts of appeal. James's ballot measure practice has included numerous pre- and post-election challenges, including the successful defense of Governor Brown's criminal justice reform measure, Proposition 57 (Brown v. Superior Court, 63 Cal.4th 335 (2016), in the first-ever challenge to newly enacted legislation allowing amendments of qualified ballot measures prior to their submission to the voters. He was involved in drafting and then successfully defending through trial and appeals Proposition 71, which established the first-ever state stem cell agency (California Family Bioethics Council v. California Institute for Regenerative Medicine, 147 Cal.App.4th 1319 (2007)) and Proposition 10, the tobacco tax that funds a state and regional system of early childhood education (California Assoc. of Retail Tobacconists v. State, 109 Cal.App.4th 792 (2003)). He was trial and appellate counsel in the successful federal court challenge to Proposition 208, a statewide campaign finance measure (California Prolife Council Political Action Committee v. Scully, 164 F.3d 1189 (9th Cir. 1999)) and successfully challenged Proposition 213 regarding auto insurance (Horwich v. Superior Court, 21 Cal.4th 272 (1999)).. He has also been instrumental in the drafting of Proposition 26 (2000), Proposition 82 (2006), Proposition 87 (2006), and Proposition 47 (2014). At the local level, James has provided drafting and litigation assistance on ballot measures in the cities of Sacramento, Malibu, Apple Valley, Alameda, Pleasanton, and Mountain View, among others. James' litigation practice includes representing governmental bodies and officials in a wide variety of cases. For example, he represented the California Legislature in litigation involving the census, redistricting, and the scope of the Governor's line-item veto authority; the State Controller in actions relating to the authority of retirement boards and the Unclaimed Property Law; and Governor Gray Davis in litigation challenging the statewide recall process. On election matters, James has been involved in litigation at every stage of the process. He successfully sought judicial relief to compel the counting of late-delivered ballots in Riverside County and represented Alameda County in litigation challenging its ballot counting methods. He has represented candidates in election contests and ballot designation challenges, and succeeded in a federal court challenge to an FPPC enforcement action that threatened to bankrupt a candidate in the middle of her re-election campaign. James has litigated all aspects of ballot pamphlet challenges at the local and state level. James is a trusted advisor to government agencies, candidates, committees, and non-profit organizations. He served as interim General Counsel for the California First 5 Commission (1999), and as Board Counsel (2004-2014) and General Counsel (2014-2017) for the

California Institute for Regenerative Medicine. James currently serves as outside counsel to the Consumer Attorneys of California, the American Civil Liberties Union, Alameda County First 5, and the California First 5 Association, and numerous ballot measure committees, among others. James is well known for his expertise in complex conflict of interest questions, and has advised many government officials and agencies, and their outside consultants, on their obligations under the Political Reform Act and Government Code 1090. He also represents individuals and entities in enforcement matters before the Fair Political Practices Commission and local ethics agencies. James was admitted to the California Bar in 1992. He is a graduate of Duke University (B.A., cum laude, 1988) and the University of California, Los Angeles School of Law (J.D., 1992). Prior to joining Remcho, Johansen & Purcell, Mr. Harrison was a litigation associate at Morrison & Foerster for four years.

Stephanie O. Hastings, Brownstein Hyatt Farber Scheck
Stephanie Hastings is a Shareholder with Brownstein Hyatt Faber Schreck LLP. She has played a leading role in several of California's most complex and precedent-setting water matters. With 20 years of specialized expertise in water law, her practice spans every aspect of California and national water law. Stephanie helps clients acquire, develop, monetize and protect water supply assets and infrastructure. She provides special counsel to numerous municipalities on matters including water right and water quality permitting requirements associated with the development and delivery of recycled water, water right and infrastructure permitting, groundwater management, water rights litigation, reorganization of water and wastewater enterprises, and environmental compliance. Stephanie is a regular presenter on water matters and is the co-founder of the California H20 Women Conference which brings together women in the water industry to collaborate, educate and support each other with the goal of empowering women to change the way we manage California's and the world's most important resource. Recognition for Stephanie includes Best Lawyers in America and Chambers USA. A longtime leader in the water community, Stephanie is a director of The Aquaya Institute, a nonprofit research and consulting organization dedicated to advancing public health by improving drinking water worldwide.

Jonathan V. Holtzman, Renne Public Law Group
Jonathan Holtzman is a founding partner of Renne Public Law Group, and was previously a founding partner of Renne Sloan Holtzman Sakai LLP. Since 2005 and every year since, Mr. Holtzman has been named a "Northern California Super Lawyer." He frequently speaks and writes on matters pertaining to municipal bankruptcy, ballot initiatives, interest arbitration, bargaining, fact finding, comparability, fiscal analysis for bargaining, and pension and retirement medical programs. Mr. Holtzman's practice focuses on assisting government agencies maintain and expand public services through strategic consulting, negotiations, fact finding, arbitration and litigation. Mr. Holtzman specializes in addressing long-term structural issues relating to pensions, health benefits, retirement health benefits, civil service reform, and other means of attaining greater managerial discretion and effectiveness through collective bargaining and reorganization. He has experience in virtually all aspects of employment law and labor relations. His labor expertise encompasses negotiations, fact finding, mediation, grievance and interest arbitration, and litigation related to bargaining obligations. Mr. Holtzman also practices government law, including general advice work, drafting ballot and other legislative measures and initiatives, litigating issues of constitutional and statutory interpretation, and electoral matters. He currently serves as District Counsel to the Moraga Orinda Fire District.

Dylan K. Johnson, Brownstein Hyatt Farber Scheck
Dylan Johnson is a senior associate at Brownstein Hyatt Farber Schreck, LLP who specializes in representing public agencies on environmental matters. He serves as legal counsel for the City of Carpinteria and multiple special districts. His practice focuses on water quality, land use, and CEQA. He has represented public agencies as special counsel on a variety of related issues including recycled water, water rights, utility reorganization, and associated litigation.

Douglas Johnson, President, National Demographics Corporation
Dr. Douglas Johnson is President of National Demographics Corporation, better known as NDC, and he is a Fellow at the Rose Institute of State and Local Government at Claremont McKenna College. Since 1979, NDC has assisted cities, counties, school districts and other California local governments with voting rights analysis, the transition between at-large and by-district election systems, and with post-Census redistricting projects. Their client list includes nearly all of the over 80 cities that have transitioned to by-district election systems following the adoption of the California Voting Rights Act, and districting and liability analysis for hundreds of other cities, school districts, water districts, and other California local governments. NDC has also aided community education and outreach efforts around the question of local governance options in Modesto, Corona, Goleta, Menifee and other jurisdictions in California. Dr. Johnson often also works as an expert witness in federal and California voting rights act-related lawsuits. As a Rose Institute Fellow, Dr. Johnson has published numerous studies on districting and redistricting; he has been a featured speaker at numerous meetings of the League of Cities, the Arizona League of Cities and Towns, the California School Board Association, and the National Conference of State Legislatures. He has been quoted in hundreds of news articles and has appeared as an expert commentator on CNN, Fox News, public television, public radio, and other news broadcasts.

Gail A. Karish, Best, Best & Krieger

Gail A. Karish is a partner at Best Best & Krieger LLP who focuses on telecommunications, assisting clients in California across the country with a wide range of regulatory and transactional matters involving broadband and fiber networks, wireless communications facilities deployments, advanced metering infrastructure and smart city infrastructure deployments, cable and telecom franchising, and public-private partnerships. Gail also advocates before the Federal Communications Commission and the California Public Utilities Commission. Gail's clients are mainly public agencies, such as local governments, water districts and municipal utilities. Public agencies can serve a variety of roles in relation to telecommunications infrastructure – regulator, owner, service provider, customer, partner – and Gail's clients come to her for advice and guidance on issues that arise in all of these contexts.

Lauren Langer, Assistant City Attorney, West Hollywood, Hermosa Beach and Lomita
Lauren Langer is a Partner at Best, Best & Krieger, and serves as Assistant City Attorney for the Cities of West Hollywood, Hermosa Beach and Lomita. She serves on the City Attorneys' Department Cannabis Regulation Committee. For the past several years, she has been facilitating the New Lawyers Meet and Greet at the City Attorneys' Spring Conference to provide newer lawyers an opportunity to connect with one another and learn about the resources and opportunities to participate in the City Attorneys' Department.

Margaret E. Long, County Counsel, Modoc and Trinity Counties, Assistant County Counsel, Alpine and Sierra Counties

Margaret Engelhardt Long, with an eye toward providing expert legal advice and service to small and rural public agencies, formed the municipal law firm of Prentice, Long & Epperson, P.C. and is managing partner of the firm's Redding California office. Ms. Long is public agency counsel with years of experience in all matters concerning public law. She currently serves as County Counsel to Modoc and Trinity counties. In addition, Ms. Long serves as Deputy County Counsel for Lassen County regarding dependency matters and special counsel to Lake County, City of Lakeport and City of Shasta Lake. Ms. Long is also a recognized expert in advising cities and other public agencies on issues relating to employment and labor and routinely advises her clients regarding required investigations. She gains much of her knowledge from her robust litigation practice, which includes both state and federal court published decisions. She holds a Juris Doctorate degree from the University of California, Davis, where she received the prestigious honor of becoming a member of The Order of the Barristers.

Merri Lopez-Keifer, Tribal Counsel, San Luis Rey Band of Mission Indians

Merri Lopez-Keifer is Luiseño and a member of the San Luis Rey Band of Mission Indians. Merri graduated from U.C. Santa Barbara in three years with a degree in Law and Society with a special emphasis on criminal justice. She earned her Juris Doctor degree from Boston College Law School and became a member of the California Bar in 1998. Merri started her legal career with the San Francisco District Attorney's Office as an Assistant District Attorney where she practiced criminal law for six years, specializing in domestic violence prosecutions. For the last nineteen years, Merri has been the Chief Legal Counsel for the San Luis Rey Band of Mission Indians. She has successfully fought for the protection and preservation of her tribe's Native American tribal cultural resources and burial grounds. Merri has also been instrumental in building meaningful relationships with local, state and federal government agencies within her tribe's traditionally and culturally affiliated territory. In her role as Chief Legal Counsel, Merri has successfully conducted hundreds of government-to-government consultations with CEQA lead agencies, local governments, state government agencies and federal government agencies. In June of 2015, Merri was appointed by Governor Brown to the Native American Heritage Commission, a nine-member, all-California Native American commission charged with the responsibility of protecting California's Native American tribal cultural resources and sacred places. On September 23, 2016, Merri was honored with a Resolution by the California Legislature for her exemplary service as a Commissioner and her diligent efforts in protecting and preserving California's tribal cultural resources. In 2017, Merri became the Secretary of the Native American Heritage Commission. Merri has been a contributing panelist for many trainings and seminars on how to effectively and respectfully consult with California Native American tribes. These seminars and trainings benefited many organizations and government agencies, such as the Environmental Law Section of the California Bar Association, the American Planning Association California, the California Historic Society, the California Preservation Foundation, CLE International, the Environmental Law Section of the Bar Association of San Francisco, the Native American Heritage Commission, the U.S. Bureau of Indian Affairs, Cal Trans, and the Society for California Archaeology. In 2016, Merri was given the honor of presenting the keynote address for the 31st Annual California Indian Conference held at San Diego State University. In 2017, Merri became the first tribal representative on the San Onofre Nuclear Generating Station (SONGS) Community Engagement Panel for the Decommissioning of SONGS.

James L. Markman, City Attorney, Brea, La Mirada, Rancho Cucamonga and Upland
Jim has served as City Attorney for the City of Brea since 1977, City Attorney for the City of La Mirada since 1980 and City Attorney for the City of Rancho Cucamonga since 1985. He is also the City Attorney for the City of Upland and General Counsel to the Beaumont-Cherry Valley Water District and the Central Basin Water Rights Panel. He also currently represents public agencies involved in active water negotiations and related matters in the Counties of Los Angeles, San Bernardino, Orange, Riverside, Santa Barbara, and San Luis Obispo. Jim serves as the Chair of the Firm's Water Rights and Water Law Practice Group, is a member of the Firms' Public Law Department, and spent sixteen years on the Firm's Management Committee. Jim also served as Deputy Attorney General for the State of California from 1968 through 1970, where he specialized in water rights and pollution matters. While with the Attorney General's office, he handled 53 cases unassisted in the state appellate courts, including three before the California Supreme Court. Jim personally represented California Regional Quality Control Boards, and, in that capacity, instituted four of the initial cases brought under the Porter-Cologne Water Quality Control Act, all related to the pollution of Monterey Bay. Jim has been accorded the highest peer rating of AV Preeminent provided by the Martindale-Hubbell nationwide legal directory. Jim is an active member of the Association of California Water Agencies and has presented papers on legal issues at its conferences. He also has made presentations at League of California Cities conferences and has served on that organization's Legal Advocacy Committee. That committee determines when the League will provide support to a city engaged in significant municipal litigation.

Robert ("Tripp") May III, Telecom Law Firm

Robert ("Tripp") May, Partner, specializes in telecommunications infrastructure, and represents both public agencies and private landlords in regulatory and transactional matters. Tripp advises local governments and public agencies on the scope of local authority in wireless facilities siting, on private property, public land and in the rights-of-way. He drafts and revises wireless ordinances, and counsels government staff and officials on federal and state rules for permit application processing. In addition, Tripp assists local governments develop permit applications, planner reference guides and other non-legislative materials for compliance with new federal regulations. His transactional practice focuses solely on representing landlords — both public and private. Tripp negotiates and drafts leases, licenses, easements, assignments, pole-attachment agreements, and other transfers related to wireless and other telecommunications infrastructure. He also assists landlords administer, enforce and amend existing infrastructure agreements. Tripp regularly speaks on panel discussions for governments, planning associations, wireless associations and at wireless facility conferences. He also writes articles on the subject for newspapers, trade press and other publications. He devotes significant pro bono efforts to represent public agencies in federal wireless proceedings. This year, he co-authored the amicus curie brief in Montgomery County v. FCC on behalf of the League of California Cities et al. In 2014, Tripp was recognized by the States of California and Nevada, National Association of Telecommunications Officers and Advisors (SCAN NATOA) as its Member of the Year for his outstanding pro bono federal advocacy on behalf of California local governments in Federal Communications Commission rulemaking proceedings. Mr. May is admitted to practice by the State Bar of California.

David Mehretu, Meyers Nave Riback Silver & Wilson

David Mehretu is Of Counsel at Meyers Nave and a member of the Trial and Litigation Practice Group. He has comprehensive experience in all phases of litigation in federal and state court, as well as administrative proceedings and alternative dispute resolution, with an emphasis on complex, high-stakes and precedent-setting matters. For public entities, including cities, counties and special districts, David handles civil rights, First Amendment, land use, public records, peace officer defense, and environmental litigation and appeals. He also has broad experience in commercial litigation matters involving class actions, intellectual property, real estate, and business fraud and unfair competition. Examples of David's recent work include: (1) prevailing on a dispositive pleadings motion on behalf of a City and eight police and fire department personnel in a federal civil rights lawsuit regarding a triple murder conviction and subsequent 18-year incarceration of the plaintiff (Ninth Circuit affirmed the District Court's dismissal of the case prior to any discovery), (2) representing five public entities against two large municipalities in a multi-phased administrative proceeding over a complex contractual dispute concerning a contested $2 billion capital improvement program for a wastewater treatment facility and (3) representing a City in a contractual dispute concerning a major water distribution public works project. David received his J.D. from New York University School of Law and earned his B.A. from New York University. He clerked for the Honorable Saundra Brown Armstrong, U.S. District Judge in the Northern District of California, and served as a post-doctoral legal fellow at the Institute for Policy Integrity.

Congressman Scott Peters, 52nd Congressional District

Congressman Scott Peters serves California's 52nd Congressional District, which includes the cities of Coronado, Poway and most of northern San Diego. First elected in 2012, Scott has worked across the aisle to fix a broken Congress and stand up for San Diego's military and veterans community. Scott Peters currently serves on the House Energy and Commerce Committee, where he advocates for investment in basic scientific research, supports the military's goals to enhance their energy security, and fights for commonsense healthcare reforms that work for families and small business owners. He also serves on the House Committee on Veterans' Affairs, where he advocates for improving the quality of care at VA medical centers, increasing collaboration in the federal government to end veterans homelessness, and encouraging the hiring of veterans for military construction projects. Scott Peters is a civic leader who has made improving the quality of life in San Diego his life's work. After a 15-year career as an environmental lawyer, Scott was elected to the San Diego City Council, where he later became the City's first City Council President. On the Council, Scott helped lead the $2 billion redevelopment of downtown San Diego, the cleanup of the city's beaches and bays, and the completion of a number of major infrastructure projects. He also pursued greater accountability and efficiency in government through the creation of a new Council/Mayor form of government with an independent budget review function. In 2001, the governor appointed Scott to the Commission on Tax Policy in the New Economy, and in 2002, the Speaker of the Assembly appointed Scott to the California Coastal Commission. Scott also later served as chairman of the San Diego Unified Port District – a major economic engine that supports over 40,000 high-skill, high-wage jobs for San Diegans, with $3.3 billion in direct regional economic impact. Scott earned his undergraduate degree from Duke University (magna cum laude, Phi Beta Kappa) and worked as an economist for the United States Environmental Protection Agency before attending New York University School of Law. He and his wife of 29 years reside in the La Jolla neighborhood of San Diego, California, where they raised their son and daughter. During his time in Congress, Scott has passed legislation to give the military the advanced technology it needs to fight terrorism and level the playing field for small businesses competing for government contracts, and has succeeded in getting the federal government to make changes to the homelessness funding formula that disadvantages San Diego. Ranked the 4th most independent Democrat in Congress by the National Journal, Scott Peters understands that business problems have bipartisan solutions, and is never afraid to work across party lines to build consensus and get things done.

David A. Prentice, City Attorney, Ione, County Counsel, Alpine and Sierra Counties
David A. Prentice (Dave) is a public law attorney with 30 years of experience. He graduated from the University of the Pacific, McGeorge School of Law with distinction earning the Order of the Coif. He has been appointed as County Counsel to four counties, currently County Counsel for both Sierra and Alpine counties. Dave has also served as a city attorney to three cities, currently for the City of Ione. He is a member of the Association of Workplace Investigators and an accomplished litigator (several published decisions) in matters of public employment and routinely advises clients regarding in-house investigations. Mr. Prentice founded Prentice, Long and Epperson along with Margaret Long and Jason Epperson for the sole purpose of providing expert personal legal advice and training to small and rural public agencies. Dave is known for his training skills which he developed as an adjunct professor. Currently, he and his partner Margaret Long provide trainings for many agencies and have authored many publications including An Introduction to Public Employment and Investigations and Walking Through the Disciplinary Process.

Margaret R. Prinzing, Remcho, Johansen & Purcell

Margaret R. Prinzing is a partner with Remcho Johansen & Purcell LLP who focuses on litigation involving government law, constitutional law, and public policy issues. She has defended the Governor and Director of Finance from a challenge to the State's use of its share of funds from the National Mortgage Settlement (National Asian American Coalition v. Brown, Sac. County Super. Ct., No. 34-2014-80001784) (pending on appeal); represented the California Department of Education and Board of Education in litigation addressing the State's role in providing students an equal education (Cruz v. State of California, Alameda County Super. Ct., No. RG14727139 (2015)); and defended the State Controller from a series of lawsuits challenging the constitutionality of California's Unclaimed Property program. Taylor v. Yee, 780 F.3d 928 (9th Cir. 2015) & Suever v. Chiang, No. 10-17172, 2012 WL 2190735 (9th Cir. 2012). In addition, Ms. Prinzing has expertise in the California budget process and state fiscal issues. Representative matters include representing nineteen counties in a challenge to a State directive that shifted financial responsibility for certain mental health services to the counties (County of Colusa v. Douglas, 227 Cal. App. 4th 1123 (2014)), and filing an amicus curiae brief in support of the State's efforts to restructure California's redevelopment agencies. California Redevelopment Association v. Matosantos, 53 Cal. 4th 231 (2011). Other notable cases include defending the constitutionality of the City of Mountain View's voter-approved rent control measure (California Apartment Association v. City of Mountain View, Santa Clara Super. Ct., No.: 16-CV-304253 (2017)); and defending the City of Watsonville's practice of allowing a departing council member to participate in the vote to appoint his successor. Martinez v. City of Watsonville, Cal. Ct. App., No. H038230 (2014). Ms. Prinzing also specializes in election law. She recently helped draft Proposition 63 (2016), which strengthened California's gun safety laws; Proposition 47 (2014), which requires misdemeanor rather than felony sentences for certain nonviolent offenses; and Measure D, the first voter-approved measure to tax the distribution of sugary beverages. (Berkeley, 2014). She advises government agencies, ballot measure committees, and candidates on election procedures, engaging in political communications, and candidates' ballot designations. She represents her clients in litigation as necessary, including winning emergency relief in the California Supreme Court to ensure that Proposition 57 appeared on the 2016 ballot (Brown v. Superior Court, 63 Cal. 4th 335 (2016)); and ensuring that Congressional candidate José Hernandez's was able to use his chosen ballot designation in the 2012 election. Dillman v. Bowen, Sac. County Super. Ct., No. 34-2012-80001093 (2012). In addition, Ms. Prinzing advises officials, interested persons, and officeholders on government law matters including conflicts of interest, the separation of powers, statutory interpretation, and administrative law. Prior to joining the firm, Ms. Prinzing was an associate with Bingham McCutchen where she specialized in civil and appellate litigation. From 1993 to 1997, she worked as a legislative assistant to U.S. Congressmen Martin Olav Sabo and Frank McCloskey, focusing on health care, welfare, and education matters. She graduated from University of California, Berkeley School of Law (Boalt Hall) (J.D. 2000) and Indiana University (B.A. with distinction 1992).

Javan N. Rad, Chief Assistant City Attorney, Pasadena

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.

Mary Beth Redding, Bartel Associates
With over 30 years in employee benefits, Mary Beth has served as retirement consultant for a wide range of public agencies, specializing in pension and retiree medical benefits. Mary Beth focuses on understanding benefit programs and clearly communicating long and short term considerations so clients can make the best decisions possible for their organizations. Most recently, Mary Beth has been involved with helping California public agencies, including CalPERS cost sharing plans, implement GASB Statement 68 and begin implementing Statement 75. She speaks on current topics including CalPERS contribution rates and supplemental pension trusts and well as the new GASB OPEB accounting rules to retirement boards, city councils, boards of directors, and employee and professional groups Mary Beth is a Fellow of the Society of Actuaries Member, American Academy of Actuaries Fellow, Conference of Consulting Actuaries Enrolled Actuary under ERISA. She earned a BS in Geology & Geophysics from Yale University.

Rachel H. Richman, City Attorney, Rosemead, Assistant City Attorney, Alhambra and Santa Clarita
Ms. Richman is a Partner with Burke, Williams & Sorensen, LLP and is the City Attorney for the Cities of Delano and Rosemead and Assistant City Attorney for the Cities of Alhambra and Santa Clarita.

Holly A. Roberson, Kronick Moskovitz Tiedemann & Girard
Holly Roberson represents Cities, public and private sector clients in the areas of natural resources, environment, land use, and water law. Her practice focuses on environmental law and policy, CEQA, land use, water, tribal relations, climate change, and renewable energy. Prior to joining Kronick, Ms. Roberson worked at Morrison Foerester LLP and served as Land Use Counsel at the California Governor's Office of Planning and Research (OPR). At OPR, she worked on tribal cultural resources and the California Environmental Quality Act (CEQA), the General Plan Guidelines, military land use compatibility planning, infill streamlining, utility scale solar siting, complex mediation, drought issues, and the Sustainable Groundwater Management Act (SGMA).

Ann Sherwood Rider, Assistant City Attorney, Pasadena
Ann Sherwood Rider received her undergraduate degree from Georgetown University's School of Foreign Service and her law degree from the two-year SCALE program at Southwestern University. She has been an attorney with the City of Pasadena for over 30 years specializing in litigation and the Public Records Act.

Stacey N. Sheston, Best Best & Krieger

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 2017, 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.

Kevin D. Siegel, Burke, Williams & Sorensen
Kevin represents cities and other local agencies regarding a wide range of public law matters, including land use and planning, CEQA and environmental law, open meeting and public records, taxes and assessments, eminent domain, contracting, elections, tort claims, due process, takings and other issues of constitutional law. Kevin provides litigation as well as advisory services. Kevin joined Burke, Williams & Sorensen in August 2012. Prior to joining Burke, Kevin was a Deputy City Attorney for the City of Oakland, where he specialized in writs and appeals. Previously, Kevin was a shareholder at McDonough Holland & Allen, where he litigated cases for public agencies across the state, and a Legal Research Attorney for the San Francisco Superior Court, where he advised judges regarding complex litigation.

Sandra Spagnoli, Chief of Police, Beverly Hills Police Department
Sandra Spagnoli, Chief of Police, is an accomplished law enforcement veteran with an outstanding reputation who brings to our City a tremendous record of law enforcement leadership, and integrity achieved throughout her career. Chief Spagnoli began her career with the San Carlos Police Department as a police explorer and was hired as a full-time police officer in 1990, then promoted to the rank of Sergeant in 1996 and to Commander in 1998. Prior to being appointed as San Leandro Police Chief in 2011, Chief Spagnoli served as Chief of Police for the Benicia Police Department for four years. She has served the City of Beverly Hills since 2016, is a board member for the International Association of Chiefs of Police, past president of California Peace Officers Association and an instructor for the LAPD Leadership program since 2000.

Sabrina V. Teller, Remy Moose Manley

Sabrina V. Teller has practiced environmental and land use law in California since 2001. Her practice focuses especially on the California Environmental Quality Act and the State Planning and Zoning Law. She represents agencies and applicants in land use and development matters all over the state and through all stages of the environmental review, project entitlement, and litigation processes.

Lisa A. Vidra, Senior Deputy Attorney, Culver City

Lisa Vidra has been practicing municipal law for close to 19 years, 11 of which have been with the City of Culver City. As the Senior Deputy, she handles all aspects of municipal law. She has extensive experience advising the City Council, the City's Commissions, Committees and Boards, and City staff on a wide range of legal issues, including those related to the Brown Act, charter cities, municipal elections, code enforcement, emergency preparedness, intergovernmental relations, public contracting, the civil service system and other related employment matters. In addition to general legal advice, she has recently drafted ordinances regulating cannabis businesses, massage establishments, and campaign finance. Lisa is also a member of the league's Cannabis Regulation Committee and has served since 2011 as General Counsel to a narcotics and major crime task force Joint Powers Authority. Prior to joining the public sector, Lisa was in private practice representing multiple cities, specializing in writs and receivers, public nuisance abatement, and land use litigation. She is a graduate of California State University-Fullerton, and Western State College of Law, where she was class valedictorian. Lisa originally hails from a small town outside of Pittsburgh, Pennsylvania and is a lifelong Steelers and Penguins fan.

Marc L. Zafferano, City Attorney, San Bruno
Marc was appointed City Attorney of San Bruno in February 2011, a few months after the PG&E explosion that devastated the city. Previously, he was a partner at the San Carlos firm of Aaronson, Dickerson, Cohn & Lanzone, where he had practiced municipal law and civil litigation since 1987. He was City Attorney for the City of Belmont for five years, District Counsel for the San Mateo Harbor District for ten years, and also represented the cities of San Carlos, Foster City, Half Moon Bay, and the Town of Woodside. He received a B.A. in political science, with distinction, and Honors in Values, Technology and Society from Stanford University in 1980 and graduated from Hastings College of The Law in 1983. In his free time, he created and heads a Math Club for the local middle school, coached high school students in Mock Trial competitions, enjoys tennis, and plays the violin.

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