



LEGAL ADVOCACY PROGRAM REPORT

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INTRODUCTION AND OVERVIEW

Cal Cities advocates before the courts through the Legal Advocacy Program because laws affecting cities are made in the courts as well as in the Legislature. Cal Cities weighs in on legal issues when participation is likely to affirmatively advance cities' collective legal interests by establishing legal precedent that will help cities more effectively serve their communities. The charge of the Legal Advocacy Committee (LAC) is to identify those cases and Attorney General opinions that are of such significance on a statewide basis as to merit the collective investment of city resources through Cal Cities participation.

This report summarizes notable rulings and legal victories, pending Cal Cities litigation, and cases in which Cal Cities filed amicus briefs or letters between **April 19, 2021 to June 23, 2021**. The report is provided to keep the Board informed of Cal Cities' legal advocacy. **No further Board action is required.** Cal Cities legal staff is available to answer any questions.

NOTABLE RULINGS AND LEGAL VICTORIES

- In [*Bezis v. City of Livermore*](#), the Ninth Circuit Court of Appeals affirmed that the city council meeting at issue in the case was a limited public forum, and therefore the Livermore city council members were empowered to interrupt a speaker to remind him to limit remarks to the agenda topic at hand without violating the First Amendment. Cal Cities filed a [friend-of-the-court brief](#) in the case supporting the City.
- In [*Newsom v. Gallagher*](#), a California Court of Appeal overturned a trial court ruling that called into question the validity of the executive orders cities have relied on to conduct business throughout the pandemic, including the order modifying the Brown Act. Cal Cities and the California State Association of Counties filed a joint [friend-of-the-court brief](#) in the case, urging the court to overturn the ruling due to its lack of clarity and potential to subject cities and counties to legal challenges. In its decision to overturn the ruling, the Court of Appeal affirmed that the Governor's executive orders were consistent with the authority granted under the California Emergency Services Act and did not violate the Constitution.
- In [*Oakland Police Officers Association v. City of Oakland*](#), a California Court of Appeal held that there was no mandatory obligation under the Public Safety Officers Bill of Rights for the City to disclose reports and complaints to a police officer under investigation prior to a second interrogation. The court also held that cities may designate and de-designate records as confidential in order to maintain the integrity of any internal misconduct investigations. The ruling, however, created a split amongst appellate courts in California regarding whether and under what circumstances officers are entitled to reports and complaints prior to a second interrogation. Cal Cities filed a [friend-of-the-court brief](#) in the case supporting the City.

PENDING CAL CITIES LITIGATION

When authorized by the Board, Cal Cities may initiate or affirmatively participate as a party in litigation to advance cities' collective interests. Cal Cities is currently participating in the following cases:

- ***League of California Cities v. Federal Communications Commission (FCC)***

Ninth Circuit Court of Appeals, Case No. 20-71765

The Middle Class Tax Relief and Job Creation Act requires local governments to approve certain modifications to existing wireless facilities that do not substantially change the physical dimensions of the site. FCC implementing rules address what constitutes a substantial change. In 2019, the FCC adopted a Declaratory Ruling to “clarify” and change the rules to allow a significant increase in the height of additional antenna permitted to be added to existing towers and to undo protections used by local governments to preserve concealment elements or enforce prior conditions of approval.

With approval of the LAC and the Cal Cities Board of Directors, Cal Cities joined a coalition of cities, counties, and other municipal leagues in challenging the Ruling in the Ninth Circuit Court of Appeals. The coalition filed their opening briefs in January 2021.

Significance to Cities: If the Ruling takes effect, it will limit local control over modifications to existing telecommunications facilities.

- ***City of Portland, et al. v. United States***

Ninth Circuit Court of Appeals, Case No. 18-72886

United States Supreme Court, Case No. 20-1354

In 2018, to accelerate the deployment of 5G wireless technology, the FCC adopted a Declaratory Ruling and Order. The Ruling and Order: (1) limits city authority over the public right of way with respect to deploying 5G equipment; (2) limits the fees and ongoing rent that can be charged for the use of the public right of way; and (3) shortens the “shot clock” for cities to consider applications filed by telecommunications providers.

With approval of the LAC and Cal Cities' Board of Directors, Cal Cities joined a coalition of cities, counties, and other municipal leagues in challenging the Ruling and Order in the Ninth Circuit Court of Appeals. On August 12, 2020, the Court issued a decision. In a victory for local governments, the Court struck down some of the Ruling and Order's limits on aesthetic regulations, thereby restoring significant local discretion over design standards. However, the Court upheld all other aspects of the Ruling and Order.

Cal Cities and other petitioners asked the Ninth Circuit to rehear the case en banc, in hopes of convincing the Court to overturn other aspects of the Ruling and Order. The Court denied the petition. On March 22, 2021, a coalition of local governments filed a petition seeking review by the United States Supreme Court. The petition was scheduled to be considered by the Court on June 24, 2021.

Significance to Cities: The facilities necessary to deploy 5G service are often built in the public right of way. The Ninth Circuit's August 12 decision largely restores local control over

aesthetics but leaves cities with lower revenues and higher costs. If the Supreme Court agrees to hear the case, it will have an opportunity to restore greater fiscal control for cities.

AMICUS BRIEFS FILED

An amicus curiae brief is a “friend-of-the-court” brief filed by a non-party in a lawsuit who nonetheless may be affected by the outcome. With approval of the LAC and Cal Cities’ Executive Director, Cal Cities filed amicus briefs in the following cases:

California Voting Rights Act

- ***Pico Neighborhood Association, et al. v. City of Santa Monica***
California Supreme Court, Case No. S263972

Issue: What must a plaintiff prove to establish vote dilution under the California Voting Rights Act (CVRA), such that a city can be compelled to convert from at-large to district-based elections?

Cal Cities filed a joint amicus brief with the California Special Districts Association that indicated support for the underlying goals of the CVRA (such as remedying structural discrimination in voting and accomplishing fair representation), but noted that many cities have switched to district elections solely out of fear of threatened litigation and not based on any showing or finding that unlawful racially polarized voting or vote dilution was occurring in their community. The brief further educated the court on the valid reasons a city may prefer either system, and underscored the need for clarity to allow cities to choose the equitable elections system that best fits their community without fear of unjustified legal action. The brief also highlighted the practical impacts on cities – especially small cities – if the Court were to adopt the plaintiffs’ desired standard for determining vote dilution and noted that smaller jurisdictions may have difficulty attracting candidates and achieving competitive races.

Significance to Cities: In recent years, some attorneys have exploited the ambiguity in the CVRA to pressure cities to switch to district-based elections without any actual proof of inequity in the local elections system. As noted above, greater clarity from the Supreme Court will allow cities to choose the equitable elections system that best fits their community without fear of unjustified legal action.

Cal Cities thanks amicus brief writer Derek Cole with Cole Huber LLP.

Other – Homelessness

- ***LA Alliance for Human Rights et al v. City of Los Angeles et. al***
Ninth Circuit Court of Appeals, Case No. 21-55404

Issues: (1) Did the federal district court violate principles of federalism and separation of powers when it ordered the City of Los Angeles to take certain steps to address homelessness, including offering and providing housing to all homeless persons living on Skid Row, and holding \$1 billion in escrow for this purpose? (2) Did the federal district court correctly rule that the City should be held jointly liable with the County under a state statute that requires counties to provide aid and relief to indigent persons?

In this case, a group of downtown City residents and business owners (plaintiffs) sued both the City and the County of Los Angeles, alleging that they allowed the homeless population to grow uncontrollably within their jurisdiction while wasting tax dollars meant to address the issue. The plaintiffs alleged several different causes of action including negligence, violations of due process and equal protection, violations of the Americans with Disabilities Act, and violations of state law including Welfare & Institutions Code section 17000, which requires counties to provide aid and relief to indigent persons. The district court found that the plaintiffs were likely to succeed on these claims and issued sweeping equitable relief in favor of the plaintiffs. Specifically, the district court ordered the City and County to: (1) hold \$1 billion in escrow; (2) provide housing for every homeless individual on Skid Row within 90 – 180 days; (3) cease all sales and transfers of City properties pending a court-ordered report by the Controller on all land potentially available for homeless housing (but did not include “projects in process”); and (4) create many investigations, audits, and reports related to funds that had been utilized to address homelessness. The district court also concluded that the City was liable under Welfare & Institutions Code section 17000, even though California Supreme Court has previously ruled that section inapplicable to cities within counties. Cal Cities filed an amicus brief in support of the City. In addition to indicating support for the arguments made by a local government coalition that the court’s order violated federalism and separation of powers principles, Cal Cities also argued that the district court incorrectly concluded that the City could be held liable under Section 17000 simply because the City had undertaken to provide some of the aid and relief contemplated by that statute. The brief noted that subjecting cities to liability would disrupt the appropriate division of labor between cities and counties under California law for addressing homelessness.

Significance to Cities: Homelessness is an issue that many cities are facing and working collaboratively with counties and other government entities to alleviate. A Ninth Circuit Court of Appeals ruling in favor of the City would allow cities to continue to work collaboratively with other local government entities without fear of being subjected to expansive court orders or being held liable under Section 17000.

Cal Cities thanks amicus brief writer Elizabeth Atkins with the City of San Diego.

Public Records Act

- ***Austin v. City of Burbank***

California Court of Appeal, Second District, Case No. B307677

Issue: Do extraordinary circumstances exist to allow a California Public Records Act (CPRA) appeal to continue, even though the appellant did not follow proper appellate procedures?

The appellant in this case attempted to appeal a ruling that denied him access to records sought from the City via a CPRA request. However, he did not follow the appropriate procedure and the City is therefore seeking to dismiss his appeal. Cal Cities filed an amicus brief in support of the City and argued that no extraordinary circumstances exist in the case to justify the court exercising its discretion to allow the appeal to proceed. In support of this argument, the brief pointed out that the appellant appeared to be very familiar with CPRA procedure, considering the many CPRA requests he has submitted and lawsuits he has previously filed against cities throughout the state.

Significance to Cities: If the Court of Appeal finds in favor of the City, it will dissuade serial CPRA requestors from filing frivolous appeals to obtain unjustified monetary settlements from cities.

Cal Cities thanks amicus brief writers Andrew Faber and Thomas Murphy with Berliner Cohen.

Tort Liability

- **Essex v. City of Pasadena**
Second District Court of Appeal, Case No. B3004821

Issue: Is a city sidewalk with a 1.375 inch offset considered a trivial defect as a matter of law?

In this case, the plaintiff tripped over an offset in a City sidewalk and sustained injuries. Cal Cities filed a brief in support of the City asking the court to uphold the trial court's ruling and follow the holding of a prior case, *Huckey v. City of Temecula* (a case published as precedent after [Cal Cities requested publication](#)), in determining that the defect was trivial as a matter of law, and therefore, could not form the basis for liability.

Significance to Cities: Cities statewide are responsible for maintaining many thousands of miles of sidewalk. A ruling in favor of the City will allow cities to save money and resources by moving for summary judgment and arguing that, as a matter of law, such height differentials do not pose substantial risk of injury.

Cal Cities thanks amicus brief writer Daniel Barer with Pollack, Vida & Barer.