



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 **November 16, 2021 to February 11, 2022**. 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

- The California Supreme Court granted review of an unfavorable appellate court case – [Chevron v. County of Monterey](#) – in which the Court of Appeal called into question local governments' longstanding "police power" authority to regulate where oil and gas drilling can take place within their jurisdictions. Cal Cities filed a joint [letter](#) with the California State Association of Counties (CSAC) asking the Court to review the case. Now that the Court has agreed to review it, there is a chance the Court will reverse and ultimately uphold the local authority to regulate. **Cal Cities thanks letter writer Sean Hecht with the Frank G. Wells Environmental Law Clinic at the UCLA School of Law.**
- The California Court of Appeal for the Third District issued a favorable opinion in [Old East Davis Neighborhood Association v. City of Davis](#) – a case in which Cal Cities, along with CSAC and the Sacramento Area Council of Governments, filed a friend-of-the-court [brief](#). As urged in the brief, the Court deferred to the city's interpretation of its general and specific plans and held that the city acted within its discretion when approving a mixed-use development project. The opinion was originally ordered not to be published, but upon [request](#) by Cal Cities, the Court published the opinion so it may be used as precedent in future cases. **Cal Cities thanks brief and letter writer Adam Hofmann with Hanson Bridgett LLP.**

- The California Court of Appeal for the Second District issued a favorable opinion in [Wheeler v. Appellate Division](#), finding that the City of Los Angeles' ordinance providing criminal penalties for property owners that rent or lease their property to unpermitted commercial cannabis operations was not preempted by state law. The Court's holding is consistent with arguments made in a joint friend-of-the-court [brief](#) filed by Cal Cities and CSAC, which argued that local governments have inherent police powers to determine – for purposes of public health, safety, and welfare – the appropriate use of land within its borders, and general state laws do not preempt such local regulations. **Cal Cities thanks brief writer Jeff Dunn with Best Best & Krieger LLP.**
- The Ninth Circuit Court of Appeals issued a favorable opinion in [Ballinger v. City of Oakland](#). The Court held, in part, that an ordinance requiring landlords to pay tenants a relocation fee when terminating a tenancy was not an unconstitutional physical taking of property nor was it an unconstitutional exaction on their preferred use of their property. This result was consistent with arguments made by Cal Cities in its friend-of-the-court [brief](#). **Cal Cities thanks brief writer Brendan Darrow with the City of Berkeley.**
- The California Court of Appeal for the Second District issued an unfavorable opinion in [Lejins v. City of Long Beach](#), finding that the City's voter-approved utility user tax (UUT), which was embedded into the water and sewer rates of customers of the City's Water Department and used to fund transfers to the City's general fund, violated article XIII D of the California Constitution (added by Proposition 218). As explained in Cal Cities' friend-of-the-court [brief](#), the Court's decision conflicts with rulings in similar cases and misinterprets Proposition 218 in a way that could threaten the voter-approved UUTs of dozens of cities and counties. The City has filed a petition for review by the California Supreme Court, and Cal Cities filed a [letter](#) in support of the petition. **Cal Cities thanks brief and letter writer Matthew Slentz with Colantuono, Highsmith & Whatley, PC.**
- The California Court of Appeal for the Second District issued an unfavorable opinion in [City of Oxnard v. County of Ventura](#), finding that the City forfeited its rights to provide ambulance services under Health and Safety Code section 1797.201 (commonly referred to as 201 rights) by contracting for ambulance services through a Joint Powers Agreement (JPA), rather than contracting directly. The court's decision is contrary to the result urged by Cal Cities in its friend-of-the-court [brief](#). The City has filed a petition for review by the California Supreme Court, and Cal Cities filed a [letter](#) in support of the petition. **Cal Cities thanks brief writer Laura McKinney with Meyers Nave and letter writer Lindsay Moore with Kingsley Bogard.**
- The California Supreme Court let stand an unfavorable opinion of the California Court of Appeal for the Third District in [Sierra Watch v. Placer County](#), despite a [request](#) by Cal Cities that the Court depublish the case. The opinion holds that posting materials online does not satisfy the requirement under the Brown Act that writings distributed less than 72 hours before a meeting be distributed to the public and the legislative body at the same time. Rather, local governments must place copies of the document in a designated office open to the public. **Cal Cities thanks letter writers Michael Colantuono and Merete Rietveld with Colantuono, Highsmith & Whatley.**

- The California Court of Appeal for the Fourth Appellate District published an opinion in [Bankers Hill 150 v. City of San Diego](#) that may have an unfavorable impact on local governments. Although the City prevailed in the case, the Court of Appeal made a sweeping statement about density bonus law that some are relying on to argue that once a project qualifies for a density bonus, no development standards apply except the maximum density. Cal Cities filed a [letter](#) opposing publication of the case, but the Court unfortunately ordered the case published.

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 case:

- ***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, 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.

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:

Coastal Act and Zoning

- ***Coastal Act Protectors v. City of Los Angeles***
Second District Court of Appeal, Case No. B308306

Issue: Whether a city without a certified Local Coastal Program, and with only a small part of the city in the coastal zone, may enact a city-wide ordinance regulating short-term vacation rentals (STVRs) without obtaining a coastal development permit (CDP).

For many years, the City of Los Angeles prohibited STVRs. In 2018, the City adopted an ordinance allowing STVRs subject to certain conditions. Owners and managers of STVRs within the coastal part of the City who failed to meet the conditions filed a lawsuit arguing that the ordinance constituted a "development" within the meaning of the Coastal Act because it changed and reduced the intensity and density of land use or access to the coast, and therefore, the City was required to obtain a CDP. The Plaintiffs argued that since a CDP was not obtained, they were deprived of any opportunity to appeal the ordinance to the Coastal Commission.

The trial court rejected plaintiffs' challenge because: (1) it was untimely and barred by a 90-day statute of limitations for challenges to zoning ordinances; (2) the Coastal Commission only has authority to review a local government's zoning ordinance as part of a Local Coastal Plan (LCP) or LCP amendment, and (3) development requiring a CDP is a site-specific activity performed by a landowner on its property, not a general zoning ordinance. The plaintiffs appealed.

Cal Cities filed a friend-of-the-court [brief](#) in support of the City, arguing that the trial court got it right on reasons (2) and (3) and if the Court of Appeal were to overturn the trial court, it would impermissibly confer to an executive branch agency (the Coastal Commission) the constitutional police powers vested in local governments.

Significance to cities: A finding that the Coastal Act requires Coastal Commission approval of STVR ordinances such as the one at issue would expand the definition of development under the Coastal Act and erode local land use control.

Cal Cities thanks brief writers Trevor Rusin and Christi Hogin with Best Best & Krieger LLP.

Contracts

- ***Mitracos v. City of Tracy***

Third District Court of Appeal, Case No. C093383

Issue: Whether a City properly amended a developer agreement to allow new property to be added to the agreement by ordinance; and whether it was proper for a court to rule an entire development agreement was unlawful, when only a portion of the agreement was at issue.

The City adopted an ordinance amending a development agreement to allow the developer to request, for the City's consideration, whether the developer could allocate certain growth allotments not used in a previous agreement to another real property. A citizen sued the City, arguing this violated Government Code by adding subsequently acquired unknown property to an original developer agreement. The City argued it did not add any unknown property to the developer agreement, but rather provided a process by which the developer could apply to add property to the development agreement by ordinance. The trial court was unpersuaded and found in favor of the citizen. The City appealed.

Cal Cities filed a friend-of-the-court [brief](#) in support of the City, arguing that: 1) the City may amend a development agreement to add property if it follows the process outlined in Government Code section 65864; and (2) the court erred in invalidating the entire development agreement instead of just the provision at issue.

Significance to Cities: Cities regularly amend development agreements. If the Court of Appeal were to affirm the ruling of the trial court, it would call into question many city agreements and actions. Additionally, it is important for courts to narrowly tailor legal remedies, so that they don't undo entire agreements if only a portion is found to be invalid or unlawful.

Cal Cities thanks brief writer Rick Jarvis with Jarvis, Fay & Gibson.

California Public Records Act

- ***Kinney v. Kern County Superior Court***
Fifth District Court of Appeal, Case No. F082845

Issue: Is the disclosure of arrest records under the California Public Records Act (CPRA) limited to contemporaneous records?

Plaintiff submitted a CPRA request to the County for the names of all persons arrested for driving under the influence from March to April 2020. The County denied the request, noting that section 6254(f)(1) of the CPRA only mandates disclosure of contemporaneous arrest information, not criminal history information. The County also noted that the Penal Code section 13300 prohibits the County from publishing non-contemporaneous criminal history information.

Kinney sued the County. After the trial court ruled in favor of the County, Kinney appealed. The Court of Appeal asked for briefing on the following issues: (1) Can Government Code section 6254(f)(1) be harmonized with Penal Code section 13300? What type of arrest record information do each of these statutory schemes govern?; (2) Do arrestees have a privacy right in their arrest records under the California Constitution? If so, how does that right apply here?

Cal Cities and CSAC filed a joint friend-of-the-court [brief](#) arguing that the two statutes can be harmonized by reading a contemporaneous requirement into section 6254(f)(1), as local law enforcement agencies commonly do, and noting that limiting disclosure to such contemporaneous information protects the privacy of arrestees.

Significance to Cities: A ruling limiting disclosure to contemporaneous arrest records would be consistent with the common practices of law enforcement agencies throughout the state. If the court were to reach a contrary ruling, it would upend those practices.

Cal Cities thanks brief writer Jennifer Bacon Henning with CSAC.

Police Powers

- **California Restaurant Association v. City of Berkeley**
Ninth Circuit Court of Appeals, Case No. 21-16278

Issue: Whether the federal Energy Policy and Conservation Act (EPCA) preempts a City ordinance prohibiting natural gas hook-ups to newly-constructed buildings.

In 2019, the City enacted an ordinance prohibiting natural gas infrastructure (such as gas hookups) in any new building applying for permits after January 1, 2020. The California Restaurant Association (CRA) sued on behalf of its members interested in opening a new restaurant or relocating to a new building in the City. CRA argued, in part, that the EPCA preempted the ordinance.

The EPCA sets energy conservation standards for appliances, and preempts state and local standards more stringent than the federal baseline. The City argued there was no conflict with its ordinance and the EPCA, because its ordinance pertains to the distribution of natural gas within the community, and the provision of gas to buildings – it does not address conservation standards for appliances. The district court agreed with the City and concluded that the EPCA does not require local governments to provide or continue to maintain natural gas connections. CRA appealed.

Cal Cities joined with CSAC and the National League of Cities in filing a [brief](#) arguing that the ordinance is a straightforward exercise of the City's constitutional police power, which authorizes it to protect public health, safety, and general welfare.

Significance to Cities: If the Ninth Circuit were to agree with CRA that the ordinance is preempted, it would put at risk countless other ordinances that in some way relate to appliances but were adopted by local governments to protect their residents' welfare.

Cal Cities thanks brief writers Michael Burger, Jennifer Dunis, and Amy Turner with the Sabin Center for Climate Change Law.

AMICUS LETTERS FILED

Letters Requesting Depublication of an Appellate Court Opinion

California courts accept letter briefs on various issues. For example, the California Supreme Court accepts letters briefs on the issue of whether the Court should depublish an appellate opinion, so that the opinion is no longer precedential. Within the time period covered by this report, Cal Cities filed two letters requesting that the California Supreme Court depublish an appellate court's opinion. The first one pertaining to the case of *Sierra Watch v. Placer County* as noted above, unfortunately did not persuade the Court to depublish the opinion. The second one pertains to the following case:

- **Getz v. County of El Dorado**

California Supreme Court, Case No. TBD

Third District Court of Appeal, Case No. C091337

Issue: Whether the CPRA requires cities to make a showing that a request calls for exempt or privileged material in order to establish that the request is overly broad and unduly burdensome, or whether it is sufficient to show that it would be unduly burdensome to make that determination in the first instance.

The plaintiff sought various records from the County pertaining to a planned development. He submitted a records request under the CPRA, and the County produced all non-exempt responsive records. The plaintiff, believing he did not obtain all of the records available, made another request for additional emails over a five-year period. The County responded that over 40,000 emails were identified as potentially responsive and asked him to narrow his request to allow for a more focused search and to reduce the burden on the County of reviewing so many records. The plaintiff asked the County to provide an index of the emails (as they had previously done for another, less voluminous, request). The County did so, but the Plaintiff refused to narrow his request, and instead insisted he needed copies of all of the records in the index. The County did not respond further and did not produce the records.

Getz then sued to obtain the records. In a 2-1 [opinion](#), the Court of Appeal held the County was obligated by the CPRA to produce the records. The Court rejected the County's argument that the request was overly burdensome because it would require hundreds of hours of County staff time to review the records to determine if they are exempt from disclosure. The Court noted that the County merely speculated – but presented no evidence – that some of the records might be purely personal in nature or privileged.

Cal Cities joined with CSAC and the California Special Districts Association in filing a [letter](#) requesting depublishation of the Court's opinion. The letter argued that the Court reached incorrect conclusions on significant points of law and was written too broadly in a way that presents a high potential for the opinion to be misused as a precedent.

Significance to Cities: If the opinion is not depublished, it may be misused as a precedent to argue that cities must comply with unduly broad and overly burdensome public records requests, contrary to the plain language of the CPRA.

Cal Cities thanks letter writer Kane Thuyen with Burke Williams & Sorensen, LLP.

Letters Supporting a Petition for Review of an Appellate Court Opinion

The California Supreme Court accepts letter briefs from non-parties on the issue of whether they should grant review of an appellate case. As noted above, within the time period covered by this report, Cal Cities filed three letters supporting petitions for review in the cases of *Chevron v. County of Monterey*, *Lejins v. City of Long Beach*, and *City of Oxnard v. County of Ventura*. The Supreme Court granted review of *Chevron v. County of Monterey*, but has not yet ruled on the petitions in the other two cases.

ATTORNEY GENERAL OPINION LETTER FILED

As the chief law officer of the state, the California Attorney General provides legal opinions upon request to designated state and local public officials and government agencies on issues arising in the course of their duties. The formal legal opinions of the Attorney General have been accorded "great respect" and "great weight" by the courts.

Prior to issuing an opinion, the Attorney General accepts letter briefs from interested parties with comments on the opinion request. Cal Cities filed a comment letter on the following opinion request:

- **Attorney General Request No. 21-1001.** The Attorney General received a request from Robert H. Pittman, County Counsel of Sonoma County, for an opinion on the following questions:
 1. May a county adopt policies to address the environmental impacts of pesticides in a Local Coastal Program without violating Food and Agriculture section 11501.1?
 2. May a county adopt ordinances to regulate pesticides in the coastal zone to implement Local Coastal Program requirements?

Cal Cities filed a [comment letter](#) arguing that the answer to these questions must be no because (a) express statutory preemption applies to regulation of pesticides and exceptions to that preemption requires legislative action to amend the law; (b) the Coastal Act does not expand the authority of local governments to adopt policies that conflict with state law; and (c) these are matters of concern for both coastal and inland areas of the State.

Significance to Cities: If the Attorney General were to conclude that the Coastal Act expands the authority of local governments to adopt policies that conflict with state law in the coastal zone, the Coastal Commission may use that rationale to argue that their authority under the Coastal Act is expanded as well (which could be used to the detriment of cities).