General Municipal Litigation Update

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<u>General Municipal Litigation Update 2024</u>

I. *City of Grants Pass, Oregon v. Johnson* (2024) 144 S.Ct. 2202

Holding: Ordinances criminalizing sleeping or camping in public do not constitute cruel and unusual punishment, overturning *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584.

Facts/Background: In *Martin*, the Ninth Circuit held it violates the Eighth Amendment to criminalize public camping whenever the number of homeless individuals in a jurisdiction exceeds the number of "practically available" shelter beds. The Ninth Circuit reasoned that, unless adequate shelter is available, such ordinances criminalize the status of being homeless. A flood of challenges followed, and the new standard proved largely unworkable for cities trying to enforce camping ordinances.

The City of Grants Pass prohibited camping on public property or parking overnight in the city's parks, and imposed increasing sanctions including fines, stay-away orders, and a maximum penalty of 30 days' jail. Plaintiffs filed a class-action lawsuit, and the district court entered an injunction prohibiting Grants Pass from enforcing its camping ordinances against homeless individuals in the city. The court concluded that the unsheltered homeless population in Grants Pass was "involuntarily homeless" because the total homeless population outnumbered the number of available shelter beds. Many shelter beds were discounted from this calculation because they were run by religious charities with strict rules, such as requiring residents to abstain from smoking and to attend religious services.

A divided panel of the Ninth Circuit affirmed the injunction, and rehearing *en banc* was denied with significant dissent. The U.S. Supreme Court granted cert. Over two dozen cities supported the city's petition for certiorari, along with Cal Cities and its counterparts in other states.

Analysis: The United States Supreme Court reversed, holding that the Cruel and Unusual Punishment Clause of the Eighth Amendment did not prohibit statutes criminalizing camping in public.

The Court began by noting the complexities of the homelessness crisis in the western United States, and that most municipalities (including Grants Pass) employ a multipronged approach to addressing homelessness. It recognized homelessness has no single cause, and that diverse factors such as economic conditions, rising housing costs, natural disasters, substance abuse, and mental illness can all contribute. Individuals experiencing homelessness may camp in public for a multitude of reasons, ranging from necessity to access to drugs. The Court found local governments face significant obstacles from unregulated encampments, including increased crime, drug use, and lack of proper sanitation. These problems often persist or grow despite an increase in available shelter space. Given this backdrop, the Court noted that criminal statutes aimed at preventing camping are an important tool for local government.

The Court then summarized jurisprudence surrounding the cruel and unusual punishment clause of the Eighth Amendment, finding that it did not prohibit camping ordinances. The Court first explained that, historically, cruel and unusual punishment did not apply to what conduct gets criminalized, but how it was punished. Only punishments designed to add terror, pain, or disgrace to a conviction, or which had others fallen into disuse, generally counted as "cruel and unusual." Fines and a 30-day jail sentence did not meet these criteria.

The Court then distinguished *Robinson v. California* (1962) 370 U.S. 660, the case *Martin* relied on in concluding that camping ordinances violated the Eighth Amendment by criminalizing the status of being homeless. In *Robinson*, the Supreme Court struck down a California statute that made it unlawful to be addicted to narcotics, reasoning that even one day in jail would be cruel and unusual when punishing the "status" of being an addict. Although the majority in *Grants Pass* intimated *Robinson* was wrongly decided, it stopped short of overturing the decision. Instead, the Court emphasized that the holding in *Robinson* was narrow, expressly not extending it to volitional acts such as possessing and using narcotics. Similarly, the Court reasoned, Grants Pass did not criminalize the status of being homeless, only the act of sleeping in public.

Impact: Following the decision, cities may now impose criminal penalties for acts like public camping and public sleeping, even if there is insufficient shelter space within the jurisdiction for the unhoused population. As a result, public entities across California have started to again enforce their anti-camping ordinances and similar laws, including the State, which in July 2024 began removing encampments from state property. However, the potential for challenges remains on legal grounds such as the ADA, the state-created danger doctrine, and others.

II. *Sheetz v. County of El Dorado, California* (2024) 601 U.S. 267

Holding: Legislatively approved permit fees are subject to the *Nollan/Dolan* test for determining whether a fee imposed as a condition for a land-use permit constitutes an unconstitutional taking under the Fifth Amendment.

Facts/Background: The Takings Clause of the Fifth Amendment forbids the government from taking private property without just compensation. Courts recognize that the coercive power governments wield in the land-use context can lead to an unconstitutional exaction when governments demand concessions from developers unrelated to the burdens created by the project. Thus, a permit condition becomes an unconstitutional taking under *Nollan v. California Coastal Comm'n, 483* U.S. 825 and *Dolan v. City of Tigard*, 512 U.S. 374, when it lacks either an "essential nexus" to the government's land-use interest or "rough proportionality" to the development's impact. In California, this restriction was interpreted to apply only to "ad hoc" exactions applied as conditions to a particular development, but not to legislatively enacted fees.

To address traffic congestion along Highway 50, El Dorado County requires developers to pay a traffic-impact fee as a condition of receiving a building permit. The fee amount is determined by a legislatively set rate schedule, which accounts for the type of development and its location. The opinion notes, "[t]he amount is not based on 'the cost specifically attributable to the particular project on which the fee is imposed.'"

Sheetz owned a residentially zoned property and applied for a permit to build a prefabricated home. As a condition of receiving the permit, the County required Sheetz to pay a traffic-impact fee of $23,420, as dictated by the rate schedule. Sheetz paid under protest, then sought judicial relief for the allegedly unlawful exaction. California courts ruled against Sheetz, based on then-controlling California precedent.

Analysis: The United States Supreme Court reversed, holding that the Takings Clause applies to all permit conditions, whether passed legislatively or imposed on an ad hoc basis. The Court first emphasized that imposing permit conditions remains a legitimate use of the police power, and that requiring developers to compensate the public for the increased impacts of development is "a hallmark of responsible land-use policy."

However, government may not withhold or condition a permit for reasons unrelated to its land-use interests, as the landowner is likely to acquiesce to extortionate demands because of the value of the permit. Thus, the constitution imposes the requirements for an "essential nexus" and "rough proportionality." These criteria apply both to land dedications and monetary exactions.

The Court held that the California Court of Appeal erred in refusing to assess the County's traffic-impact fees for an essential nexus and rough proportionality. It noted that the text and history of the Takings Clause did not exclude takings by the legislative branches, and that historically most takings were accomplished by statute. The Court has consistently applied the Takings Clause to legislative acts in other contexts, such as statutes that result in the physical taking of property for public use or that deny an owner practically all economic value from their property.

Impact: Going forward, cities should take care to prepare a study, when imposing development impact fees or other legislative land use exactions, that specifically addresses the "essential nexus" and "rough proportionality" requirements. However, in many cases this will not place any additional burden on government, as similar requirements already exist under the Mitigation Fee Act.

III. *Legislature of the State of California v. Weber* (2024) 16 Cal.5th 237

Holding: Ballot measure that would subject all government revenues to voter approval was a constitutional revision and could not be accomplished by initiative.

Facts/Background: Article XVIII of the California Constitution reserves to the People the right to "amend" the Constitution by initiative; however, a "revision" to the Constitution requires popular approval after either a constitutional convention or a supermajority vote by the Legislature. A constitutional revision cannot be achieved by initiative. The difference between an amendment and a revision is one of degree. An initiative impermissibly seeks to revise the Constitution when it would substantially alter the state's basic governmental framework.

In 2022, the California Business Roundtable secured sufficient signatures to place the so-called "Taxpayer Protection and Government Accountability Act" ("TPA") on the November 2024 ballot. Section 3 of the TPA stated its purpose was to require voter approval of "any new or higher tax" and to require legislative, not administrative, action on "all fees or other charges." Among the changes it proposed were mandating that all revenue measures require action by the local legislative body (subject to referendum) and that all tax increases receive voter approval. The net effect was that all government levies, at every level and however justified, were subject to voter approval.

The California Legislature and Governor Gavin Newsom filed a petition with the California Supreme Court seeking a writ prohibiting the Secretary of State from placing the initiative on the November 2024 ballot. Petitioners argued the TPA was an invalid revision of the California Constitution via citizen initiative, and "would seriously impair essential government functions." The Supreme Court found that Petitioners had made a sufficient *prima facie* showing and set the petition for oral argument.

Analysis: The Court first determined that preelection review of the initiative was appropriate. Generally, substantive challenges to initiatives are reviewed after an election to avoid disrupting the electoral process. However, preelection review is proper where, as here, the challenge is based on a claim that the initiative may not be submitted to the voters because it amounts to a constitutional revision. The Court also noted that pre-election review was particularly appropriate because the TPA's rollback provision applied to any revenue measure adopted after January 1, 2022, already creating significant uncertainty and a chilling effect on government finances.

The Court then identified three major changes the TPA would make to California's form of government, which taken together amounted to a revision of the Constitution. First, it would require voter approval for all tax increases by state or local government entities. The Court noted that, "[f]rom the state's founding, the Legislature has had broad authority to levy taxes," and that the power to tax was a power reserved to the legislature, not granted to it. While initiatives over the last 50 years have limited "the Legislature's and local governments' tax authority," the TPA would have prevented the Legislature from levying any new tax without voter approval, significantly interfering with the Legislature's fiscal powers and stripping it of authority to promptly raise revenues when necessary.

Second, the TPA would have mandated any change in state law resulting in a taxpayer paying a new or higher charge be passed by legislative act. Not only would this be a huge burden on state and local government, it would subject all revenue measures to referendum, "including fees for trash collection and water service, sewer connections, permits and licenses, cemeteries, and parks and recreation." The Court agreed this would "significantly rework the current balance between legislative and executive functions at the state and local level" and create an ongoing threat of fiscal disruption.

Third, the initiative would have transferred all local fee-setting to local legislatures, forbidding administrative fee setting. Thus, for example, a local utility could not adjust rates without the legislative body passing an ordinance, and fines for overdue library books and expired parking meters would become taxes subject to voter approval. Such far-reaching changes amounted to a qualitative revision of the Constitution.

Impact: For cities, the major impact of this case is to remove the uncertainty that had been hanging over local finances since the measure qualified for the ballot. Useful for local initiative challenges, the Court noted severance of the offending portions of the measure was not appropriate in a pre-election challenge. The voters who signed the initiative did so to put the entire measure before the electorate, and modifying the initiative before the election would frustrate that intent. Similar arguments can be made when local government challenges the constitutionality of local initiatives pre-election.

IV. *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785

Holding: In a challenge to a water agency's tiered-rate structure under the proportionality requirement of Prop. 218, the independent-judgment standard of review applied, and the agency's determination was not entitled to deference. Damages in the form of a refund for overcharged rates may be awarded in such a challenge.

Facts/Background: Proposition 218, section 6(b)(3), states that the amount of any fee or charge imposed as an incident of property ownership "shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., art. XIII D, § 6, subd. (b)(3).) This is known as Prop. 218's "proportionality requirement," in that it requires that any fees charged for a service to a particular property be proportional to the cost to provide the service to that property.

Based on this requirement, a resident brought a class-action lawsuit against the Otay Water District ("District"), challenging the District's imposition of "tiered" water rates on single-family residential customers. Under a tiered-rate structure, as the amount of water used by a customer increases, the customer enters a higher "tier," where a higher rate is charged for the same unit of water. Typically, such structures are adopted primarily to encourage water conservation.

The plaintiff alleged that the District's tiered-rate structure violated Prop. 218's proportionality requirement because the cost to the District for supplying each unit of water remained the same regardless of the volume used, making it unlawful to charge higher rates for higher usage. The plaintiff brought claims for injunctive and declaratory relief, restitution of the allegedly excessive water rates, and a writ of mandate under Code of Civil Procedure section 1085.

The case was tried on an administrative record consisting of the evidence before the District when it adopted the rates, the primary components of which were two rate studies performed by third-party consultants. In addition, the trial court took extra-record evidence in the form of expert testimony from both sides, which analyzed the rate studies.

Following a bifurcated trial, the trial court found in favor of the plaintiff class, holding that the District failed to meet its burden of demonstrating that its tiered-rate structure complied with Prop. 218's proportionality requirement. On the issue of damages, the trial court awarded approximately $18 million in overcharged fees. The District appealed.

Analysis: Under Prop. 218, in any legal action under its provisions contesting the validity of a fee or charge, "the burden shall be on the agency to demonstrate compliance." (Cal. Const., art. XIII D, § 6, subd. (b)(5).) Thus, the District had the burden of showing that its tiered-rate structure satisfied Prop. 218's proportionality requirement.

According to the Court, "[t]o carry its burden, an agency must generally provide evidence identifying the data used, analyzing the cost of service, and demonstrating the proportionality of the rate." (P. 797.) In an effort to meet this burden, the District relied upon the two rate studies used by it in adopting the rates, and on extra-record testimony from an expert witness interpreting the studies. The plaintiff also relied upon expert testimony.

Based on existing authority—primarily, the California Supreme Court case of *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, and the case of *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493—the Court of Appeal held that the District's decision to adopt the tiered rates was subject to the independent-judgment standard, *not* the substantial-evidence standard, and that the District was not entitled to any deference on its rate-making. According to the Court, the language of Prop. 218 was specifically intended to "curtail" such deference on this issue. Thus, the District could not satisfy its burden simply by pointing to supporting evidence in the record; on the contrary, that evidence had to demonstrate compliance with the proportionality requirement under the reviewing court's independent judgment.

However, despite the applicability of the independent-judgment standard to the review of the District's decision to adopt the rates, the Court applied the substantial-evidence standard in evaluating *trial court's* factual findings. This meant the Court of Appeal did not perform a *de novo* review of the entire case, but instead upheld the trial court's findings if there was any substantial evidence in the trial court record to support them. This was important to the result, as many of the trial court's factual findings concerned the interpretation of the District's rate studies, as explained by the parties' competing experts. Based on the substantial evidence standard, the Court of Appeal simply deferred to the trial court's determinations on those issues.

Against this backdrop, the Court of Appeal upheld the trial court's determination that the District did not meet its burden, primarily because (1) the District's rate studies, its expert, and comments by its board at the time of adoption of the rates, all acknowledged that the tiered rates were at least partially, if not primarily, adopted for *conservation purposes* rather than cost-recovery purposes, (2) the District's rate studies did not contain evidence showing that the per-unit cost of providing water increased as usage increased (and the District's expert even admitted to the contrary), and (3) the difference in pricing between the District's tiers was based on percentages stated in an industry manual rather than on specific data relating to usage by the District's customers.

In addition, the court found the District's arguments in favor of so-called "peaking factors" to be unconvincing, upholding the trial court's determination that the District failed to show a link between these factors and an increase in the costs of providing service to a particular parcel. The court was particularly troubled by the fact that peaking factors appeared to be based on a "peak" time of demand, during which the strain on the District's facilities was the highest, and yet the District's meters did not collect time-of-use data that would allow the District to attribute that peak usage to particular parcels.

On the issue of damages, the Court held that they were available in a challenge under Prop. 218, at least where, as here, the plaintiff sought a writ of mandate under Section 1085 for restitution of the overcharged fees. (It was unclear from the Court's discussion whether other procedural vehicles would also allow for a claim for damages to be made.) In reaching this conclusion, the Court also held that the Government Claims Act ("Act") applies to such damages claims, meaning a timely tort claim must be filed (as it was here) with the agency before suing. Notably, the ability to obtain refund damages for a violation of Prop. 218 was an issue of first impression.

Impact: *Coziahr* makes clear the difficulties that cities and other public agencies will have in justifying tiered-rate structures for property-related fees or charges. The key battleground in any such case will be a factual debate over the expert reports relied upon by the agency at the time of adoption of the rates. To be successful, those reports must clearly show the link between the rates and the costs of providing services to particular parcels. *Coziahr* also clarifies the legal standards that will be applicable in such a challenge, and shows the hurdles agencies will face in relying on peaking factors.

In addition, a key issue that will have to be addressed in future cases is the extent to which the law established by *Coziahr* has been changed by recently passed legislation, including (1) SB 1072, which requires that any surplus funds collected from water and wastewater customers be used to reduce future fees; and (2) AB 1827, which confirms that meter charges and peak usage associated with higher costs of water service are appropriate components of water fees.

V. *AIDS Healthcare Foundation v. Bonta* (2024) 101 Cal.App.5th 73

Holding: State law did not preclude State Legislature from passing law that authorized local legislative bodies to supersede local housing density caps, even if those caps were adopted by voter initiative.

Facts/Background: To help combat California's housing crisis, in 2021, the State Legislature adopted Senate Bill 10 ("SB 10"), codified at Government Code section 65913.5. SB 10 authorizes local legislative bodies, including those of charter cities, to zone urban-infill parcels for 10 units of residential density, regardless of any local restrictions on density, whether adopted by ordinance or initiative. To override local restrictions, SB 10 requires only a simple majority vote of the local legislature to supersede a housing density cap enacted by local ordinance, but a supermajority two-thirds vote to supersede a cap adopted by local voter initiative.

The Petitioners brought a facial challenge against Senate Bill 10, claiming that it violated the California Constitution by allowing local legislative bodies to override the will of the voters as enacted by initiative. The trial court ruled in favor of the State, holding that SB was valid exercise of the State Legislature's power. The petitioners appealed.

Analysis: In holding SB 10 constitutional against the petitioners' facial challenge, the Court of Appeal made the following primary holdings:

First, even though issues of land use are typically considered matters of local concern, the power granted to local legislative bodies by SB 10 nevertheless applies equally to charter cities, because the housing crisis that the law seeks to address is a matter of statewide concern. In finding for the State on this issue, the Court did not merely accept the Legislature's declaration of a statewide concern, but made its own independent determination on that issue. Among other things, the Court stated that the housing crisis was best handled at the State level to avoid local NIMBY concerns.

Second, SB 10 preempts local laws that set residential density caps at less than 10 units per parcel because such laws purport to prohibit what the state law expressly authorizes. According to the Court, because local housing caps "tell the local legislative body, 'You cannot do X [where X is approving a project that exceeds the locally enacted housing density cap],' while Senate Bill 10 tells the local legislative body, 'You have the option of doing X [opting to exceed the cap] or doing Y [opting not to exceed the cap],'" such local laws are preempted.

Third, the State Legislature may preempt local laws adopted through the initiative power if there is a "clear showing" or a "definite indication" of legislative intent to do so. (Citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775-776, and *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1079.) In SB 10, the Legislature expressly manifested such an intent by giving the power to local legislative bodies to override all local housing density caps, including those adopted by initiative.

Fourth, the State Legislature may exercise its preemptive power by essentially delegating to local legislative bodies the discretion to exercise that power on a parcel-by-parcel basis. The Court's reasoning for this conclusion was that (1) the California Supreme Court approved a similar limited granting of local control in the preemption context in *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, involving development fees, and (2) granting local legislative bodies the discretion to supersede local housing density caps on a case-by-case basis is more protective of the local initiative power than a "wholesale invalidation of all local caps," and thus not "constitutionally offensive."

Impact: The key impact of this case is its determination that SB 10 is constitutional, and therefore can be relied upon by cities to override local housing density caps, even if those caps were enacted directly by the voters via initiative. In addition, the court recognizes (not surprisingly) the fact that laws enacted to combat the state housing crises represent matters of statewide concern. More broadly, the court describes the preemptive power of the state over local legislation very broadly, even stating that local laws will be preempted if they prohibit what state law expressly permits, and permitting the state to "delegate" that preemptive power to local legislative bodies.

VI. *Cohen v. Superior Court of Los Angeles County* (2024) 102 Cal.App.5th 706

Holding: Government Code section 36900(a), which grants a right to redress violations of municipal ordinances via either criminal prosecution or civil action, only authorizes actions by public agencies, not private citizens, overruling *Riley v. Hilton Hotels Corp.* (2002) 100 Cal.App.4th 599, which was from the same District and Division of the Court of Appeal (Second District, Division Four).

Facts/Background: Government Code section 36900(a) provides that "[v]iolation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction," and that "[t]he violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action." Prior law from the Second District Court of Appeal, Division Fourt (Los Angeles County) had held that this statute allowed private parties to bring civil actions for violations of municipal ordinance. (See *Riley v. Hilton Hotels Corp.* (2002) 100 Cal.App.4th 599.)

Based on this law, the plaintiff property owners brought a civil action against their neighbors, alleging claims for nuisance and declaratory relief, and for violations of provisions of the Los Angeles Municipal Code relating to landscaping height. The neighbors demurred, and the trial court sustained the demurrer as to the nuisance and declaratory relief claims, but, based on the *Riley* case, permitted the case to proceed with respect to the claims for violations of the Los Angeles Municipal Code. In response, the neighbors filed a petition for writ of mandate in the Court of Appeal, which took the case for review.

Analysis: The Court of Appeal first addressed the mootness and jurisdictional questions raised by the plaintiffs, who claimed that (1) the case was moot because they wished to dismiss the case and no longer proceed, (2) the court lacked jurisdiction to consider the overruling of a demurrer at this stage, and (3) the court lacked jurisdiction to overrule existing appellate authority.

With respect to mootness, the Court held that it was irrelevant that the plaintiffs "wished" to dismiss their case since they had not yet done so, and regardless, given that the case raised a significant issue of law that was likely to recur, the Court chose to exercise its discretion to address the issue at this stage. With respect to the alleged lack of jurisdiction to address an overruled demurrer, the Court held that it has the authority to do so in response to a petition for writ of mandate, so long as the case presents a significant issue of law and the remedy of appeal would be inadequate. The Court found both conditions to be satisfied here.

With respect to the Court's alleged lack of "jurisdiction" to overrule existing appellate authority, the Court rejected as inapposite the authorities holding that one district or division of the Court of Appeal my decline to follow a ruling from a different district or division. Irrespective of such authority, the Court held that the various divisions of the Court of Appeal "are empowered to reconsider—and in the appropriate case disapprove of or overrule—prior decisions of those courts." The Court did not specifically observe that the *Riley* decision is from the very same District and Division as the *Cohen* case, but that fact may have been pertinent to this conclusion.

On the issue of readdressing *Riley*, the Court held that, despite the importance of *stare decisis*, it was nevertheless appropriate to reexamine the case because (1) the court in *Riley* did not support its interpretation with any principles of statutory construction, and (2) it did not appear that the issue was heavily briefed in *Riley* or that court considered the legislative history. Moreover, the Court held that overturning *Riley* would not have a significant impact because it has "only been cited in 20 decisions," these decisions merely accepted *Riley*'s conclusion.

On the interpretation of Section 36900(a), the Court held that the language was ambiguous in referring to violations being redressable "by civil action," but held that the better interpretation was that it only gave such power to "city authorities" because of the mention of such authorities in the prior clause. On this issue, the Court also cited "principles of interpretation governing clauses written in the 'passive voice.'" According to the Court, "where the drafter of a sentence identifies the actor in the first clause, but uses the passive voice in the next clause, and therefore does not identify the actor to whom that clause applies, it is reasonable to infer that the undisclosed actor in the second clause is the same actor specified in the first." (P. 722, citing *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1525.) Furthermore, the Court held that this interpretation was supported by the legislative history, which had stated that Section 36900(a) was merely a reinstatement of prior law, which had only granted the power to sue over municipal violations to cities.

Finally, the Court held that its decision did not disturb existing authorities holding that a violation of a municipal ordinance could form an element of another cause of action (such as a nuisance claim), or that persons can sue for violations of a municipal ordinance that (1) was enacted for their benefit, and (2) causes a unique injury to them that is different from the kind of injuries suffered by the general public.

Impact: The primary impact of this case is that it overrules a 22-year-old precedent regarding the right of individuals to sue for violations of local ordinances. Under *Cohen*, the law is now clear that only cities have that right. On a broader note, the court relied on a seldom-used rule of statutory interpretation regarding a sentence that "identifies the actor in the first clause, but uses the passive voice in the next clause"—an interpretation tool that may be useful to litigators.