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Land Use and CEQA Litigation Update

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Land Use Update

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LAND USE UPDATE

Cox v. City of Oakland (2025) 17 Cal.5th 362

Takeaway: Where lots were separately described in a conveyance (e.g., by lot number or metes and bounds description), but conveyed together and without formal action to subdivide, the lots have not been legally subdivided into separate legal parcels—including by conveyances that predate March 4, 1972 amendments to the Subdivision Map Act that imposed parcel map requirements to divide land into fewer than five parcels.

Facts: Three adjacent lots—lots 16, 17, and 18—were described in legal descriptions on deeds conveying land prior to March 4, 1972. The lots were never formally subdivided from each other or a larger parcel under state or local law. Lot 16 was conveyed separately from lots 17 and 18, but lots 17 and 18 were always conveyed together.

The owner of lots 17 and 18 claimed that the two were separate legal parcels because they were separately described in the documents conveying them. The City of Oakland claimed that lots 17 and 18 constitute one legal parcel because they were never separately conveyed and were never otherwise subdivided.

The Superior Court agreed with the City of Oakland; the Court of Appeal agreed with the owner; the California Supreme Court agreed with the City of Oakland.

Analysis & Holdings:

1. Subdivision Map Act (“SMA”) basics:
 - a. SMA requires local governmental approval before a property owner can subdivide real property.
 - b. The SMA prohibits the sale, lease, or financing of a parcel until an approved subdivision map is recorded.
 - c. Prior to March 4, 1972, “[t]he filing of such a map was formerly only required when dividing land into five or more parcels during a one-year period.”
 - d. Since March 4, 1972, the SMA requires the filing of a “parcel map” to divide land into fewer than five parcels.
 - e. However, Government Code section 66412.6(a) allows the “creation” of a parcel to be satisfied by conveyances from a grantor to a grantee at common law, prior to March 4, 1972, if there was no local ordinance in effect that regulated divisions of land creating fewer than five parcels.
2. Previously, the Supreme Court held that an antiquated subdivision map, recorded prior to March 4, 1972 (there, in 1865), did not constitute a legal

subdivision under the SMA, irrespective of accuracy, unless the owner had separately conveyed a lot described on the antiquated map. (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990.)

3. In *Cox*, the Court clarified and confirmed that pre-March 4, 1972 documents referencing separate lots—whether by lot number or metes and bounds—do not create separate legal parcels unless the lot was conveyed separately from adjacent lots prior to March 4, 1972, and there was no local ordinance in effect that regulated divisions of land creating fewer than five parcels.

***Carmichael v. Cafe Sevilla of Riverside, Inc.* (2025) 108 Cal.App.5th 292**

Takeaway: A Conditional Use Permit is not a statute, ordinance, or regulation.

Facts: A nightclub hosted a rap concert featuring performers from rival gangs. Violence broke out during the show, and multiple people were shot. Plaintiffs asserted the nightclub owners were negligent per se by failing to comply with their Conditional Use Permit.

The terms of the Conditional Use Permit required the nightclub to take steps to avoid becoming “detrimental to the public health, welfare or materially injurious to public safety, property or improvements in the vicinity,” and to prevent the property from being “operated or maintained so as to constitute a public nuisance.”

Plaintiffs asserted that by hosting the rap concert, the nightclub violated the terms of its Conditional Use Permit and thereby acted negligently per se. The trial court entered judgment for the nightclub defendants as a matter of law, ruling that “Plaintiffs have failed to establish that a conditional use permit is a statute, ordinance or regulation, which is one of the elements of a negligence per se cause of action.” The Court of Appeal affirmed.

Analysis & Holdings: Hosting the rap concert did not constitute negligence per se because the Conditional Use Permit was not a statute, ordinance or regulation, and was intended to protect the surrounding communities, not the permittee’s patrons.

1. Negligence per se requires violation of a statute, ordinance, or regulation. Plaintiffs argued that the term “statute, ordinance, or regulation [. . .] is interpreted broadly” and should include conditional use permits. The Court ruled that a conditional use permit is not a statute, ordinance, or regulation. Thus, a violation of the conditional use permit did not satisfy a required element of negligence per se.
2. Negligence per se requires that the injuries were “of the precise nature the [statute that was violated] was designed to prevent.” Here, the terms of the Conditional Use Permit were designed to prevent the club from becoming a public nuisance, meaning detrimental to the public health and wellbeing of neighbors and the surrounding community. The purpose of the terms of the

Conditional Use Permit was not to protect nightclub attendees. Thus, plaintiffs could not satisfy a second required element of negligence per se.

Meinhardt v. City of Sunnyvale (2024) 16 Cal.5th 643

Takeaway: The Court established a bright line rule that the filing of a formal judgment is required to trigger the deadline to appeal a decision in an administrative mandate proceeding, and that the filing of a dispositive order on the merits does not start the clock.

Facts: The superior court filed and served a dispositive order denying the petition for writ of administrative mandate. The court subsequently executed and entered the parties' proposed judgment. Petitioner appealed within the statutory time limit if measured from service of notice of entry judgment, but not if measured from the service of notice of the dispositive order on the merits.

The question for the court was whether a document other than the document titled "judgment" can constitute a judgment for the purposes of calculating the statutory deadline to appeal.

Analysis & Holdings: The notice of entry of the judgment triggered the deadline to appeal, not the notice of entry of the order, notwithstanding that the order was a final, dispositive decision on the merits of the case.

1. Previously, the Supreme Court ruled that a dispositive decision on a writ of mandate claim is not appealable if there are other pending causes of action pending in the case. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 732.) After that decision, the courts of appeal were split about whether a dispositive decision on a writ of mandate claim was itself an appealable judgment where there were no other causes of action pending, or whether a formal judgment is required to start the clock.
2. *Meinhardt* creates a bright line rule that a formal judgment is required to trigger the deadline to appeal.

Thomas v. County of Humboldt (9th Cir. 2024) 124 F.4th 1179

Takeaway: Imposing very high fines for zoning code violations may violate the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution.

Facts: The Humboldt County Code authorized daily fines of \$6,000 to \$10,000 for violations of local planning and zoning laws that involve the illegal cultivation of cannabis. If the County determined that a violation had occurred, the County would issue a notice of violation ("NOV") with a "description of the specific acts or omissions that gave rise to the violation." For cannabis-related violations, fines began accruing on the date of service of the NOV, and the deadline to appeal the NOV was only 10 days. Even during an appeal, fines continued to accrue, up to a maximum of 90 days.

Plaintiffs alleged that Humboldt County was issuing NOVs based on (1) imprecise images taken from satellites or drones without reasonable suspicion or any further investigation, and (2) the conduct of previous owners, which ceased before Plaintiffs purchased their respective properties. Plaintiffs also alleged that the County's penalty scheme created "immediate costs and immense pressure to settle due to the County's issuance of ruinous fines unsupported by any legitimate governmental interest, its refusal to drop baseless charges, its undue delay in providing hearings, its denial of permits while abatements are pending, and the cost the County imposes to prove one's innocence," all in violation of the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution.

The case worked its way to the Ninth Circuit after various lower court rulings on procedural matters that avoided addressing the case on the merits.

Analysis & Holdings: Plaintiffs alleged a plausible claim for relief under the Excessive Fines Clause.

1. The government cannot overstep its authority and impose fines on its citizens without paying heed to the limits posed by the Eighth Amendment.
2. The protections of the Excessive Fines Clause apply to local penalties, fines, and fees. "To determine whether a fine is grossly disproportional to the underlying offense, four factors are considered: (1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense."
3. A two-year statute of limitations applies to Section 1983 claims alleged against California government defendants.
4. Because Plaintiffs timely alleged a plausible claim pursuant to the four-factor test, the Ninth Circuit reversed the District Court's dismissal of Plaintiffs' Eighth Amendment claim and remanded for further proceedings.

California Resources Production Corporation v. City of Antioch (2024) 107 Cal.App.5th 481

Takeaway: It is not a violation of a franchisee's civil rights or the Franchise Act of 1937 for a municipality to decline to extend the term of a franchise agreement by which the franchisee has installed oil, gas, electric, or water pipeline utilities within the city's public right-of-way. In the unpublished portion of the decision, the Court also held that it is not a taking to decline to extend a franchise, unlawful extraterritorial action, or preempted.

Facts: Petitioner owned and operated a pipeline through which it transported natural gas from four gas fields to a transfer station in Contra Costa County. An 8.5-mile segment of the pipeline was located within the City of Antioch's public right-of-way.

In January 1991, the City Council approved an ordinance granting a 25-year franchise for the 8.5-mile segment of the pipeline until February 2016. In February 2016, Petitioner applied for and received a five-year extension, through February 2021. In February 2021, Petitioner applied for a 10-year extension, through February 2031. In September 2021, however, following a public hearing, the City Council voted not to extend the franchise.

Petitioners alleged various cases of action, including a regulatory taking claim, an equal protection claim, a preemption claim, and a claim that the City violated its ministerial duties under the Franchise Act of 1937. In the published portion of the decision, the Court of Appeal affirmed the Superior Court's decisions as to the equal protection and writ of mandate claims. In the unpublished portion of the decision, the Court of Appeal affirmed the Superior Court's decision on the taking, extraterritorial action, and preemption claims.

Analysis & Holdings:

1. A franchise is a privilege conferred to a third party for use of the government's property. Under the Franchise Act of 1937 (Pub. Util. Code §6201 et seq.), a municipality's legislative body may grant a franchise permitting a third party to install oil, gas, electric, or water utilities in the public rights-of-way.
2. Petitioner Failed to Plead an Equal Protection Violation:
 - a. Standard: A plaintiff who seeks to plead a "class of one" equal protection claim must make a prima facie showing that it is identical to similarly situated persons in all relevant respects, without distinguishing or mitigating circumstances that would render comparisons inutile. The plaintiff must also show that the government intentionally singled out the plaintiff on an irrational basis.
 - b. The equal protection claim failed because Petitioner failed to plead facts showing not the existence of a similarly situated franchisee who was similar to Petitioner in all relevant respects.
3. Petitioner Failed to Plead a Franchise Act Violation:
 - a. A city council's decision on whether to grant or extend a franchise is legislative, which is subject to review by petition for traditional mandate under Code of Civil Procedure section 1085.
 - b. Section 1985 does not require a public agency to make findings to support its legislative or quasi-legislative decision.
 - c. The motivations and thought processes of individual councilmembers are irrelevant to the legality of a legislative or quasi-legislative decision.

- d. The Franchise Act required the City Council to “hear and pass upon” public comment, but does not require it to make findings regarding those public comments. “Absent factual allegations to the contrary, the City Council is entitled to a presumption that it determined the merits of the protests before denying the application.” Nor did the Franchise Act require the City Council’s decision to explain its rationale with specificity, so as to show it properly exercised its discretion.
- e. Petitioner failed to plead facts to show the City violated a ministerial duty by not making findings or that it acted arbitrarily and irrationally by denying the extension such that it abused its discretion.

4. Unpublished Portion of the Opinion:

- a. The regulatory taking claim failed because there was no property right to be taken. Had the City rescinded the franchise before it expired, the City might have inversely condemned a Petitioner’s property rights. But the franchise had expired, so there was no property right to be taken.
- b. The extraterritoriality claim failed because the City’s denial of the franchise was not a regulation on activities in extraterritorial jurisdictions, but an “incidental impact” of the City’s valid contracting powers.
- c. The preemption claim failed because the City did not take any regulatory action that could be preempted; the denial of the franchise application did not regulate or attempt to regulate natural gas usage or pipeline safety in any manner.

Santa Clarita Organization for Planning v. County of Los Angeles (2024) 105 Cal.App.5th 1143

Takeaway: The 90-day statute of limitations of the Subdivision Map Act (“SMA”) applies to claims that could be brought under the SMA, including some CEQA-related claims, but not to claims that are exclusively CEQA-related.

Facts: Los Angeles County approved a conditional use permit, an oak tree permit, and a vesting tentative tract map for a proposed residential housing development in an unincorporated area of the Santa Clarita Valley. Petitioner filed a suit challenging the approvals on grounds that the approvals violated the SMA and CEQA. Petitioner filed but did not serve the County within 90 days.

The County claimed that the entire suit was barred by the statute of limitations contained in the SMA. Petitioners claimed that their CEQA claims were not subject to the SMA’s statute of limitations, and timely commenced under CEQA’s statute of limitations.

Analysis & Holdings:

1. The SMA's statute of limitations requires a plaintiff to file *and* serve a complaint and summons within 90 days. (Gov. Code § 66499.37.) "The SMA limitations period applies to any action that arises from or involves a controversy under the SMA or challenges a condition imposed as part of an approval of a subdivision or tentative or final map under the SMA, regardless of the form of the action" (e.g., whether petition for writ of mandate or inverse condemnation claim). Thus, to the extent that Petitioners' challenged the reasonableness of conditions of approval that attached to the subdivision map approval, including conditions to mitigate environmental impacts, the claim was barred by Petitioners' failure to serve within 90 days.
2. However, the SMA's statute of limitations does not bar CEQA claims to the extent a petition alleges violations of CEQA that are unique to CEQA and cannot be brought under the SMA, such as procedural violations of CEQA and failure to adequately analyze environmental impacts.

Yes In My Back Yard v. City of Culver City (2023) 96 Cal.App.5th 1103

Takeaway: A reduction in the allowable square footage for new homes in single-family residential zones violates the Housing Crisis Act of 2019 (SB 330) (Gov. Code § 66300 et seq.).

Facts: In July 2020, the City of Culver City adopted an ordinance reducing the allowable floor area ratio (FAR) for primary residences in single-family residential zones. The City passed the ordinance in an effort to prevent "mansionization" in residential neighborhoods, for the explicit purpose of reducing the overall square footage of new residences.

Petitioner sought a writ of mandate commanding the City to repeal the ordinance. Petitioner claimed that the ordinance conflicted with provisions of the Housing Crisis Act of 2019 (SB 330) that restrict the authority of most cities to re-designate or rezone parcels to a "less intensive use" or reduce "the intensity of land use" that has been allowed since January 1, 2018, within an existing land use designation or zoning district.

Analysis & Holdings:

1. The Housing Crisis Act of 2019 (SB 330) unambiguously prohibits cities from reducing the allowed FAR for new residences in single-family residential zones. (Gov. Code § 66300.)
 - a. The prohibition on "reducing the intensity of land use" expressly includes "reductions to height, density, or floor area ratio."
 - b. The legislative history is consistent with the Court's interpretation of the express language of the statute.
2. The ordinance was not exempt from the Housing Crisis Act.

- a. Subdivision (j) of Section 66300 exempts “a development policy, standard, or condition that is intended to preserve or facilitate the production of housing for lower[-]income households ... or housing types that traditionally serve lower[-]income households, including mobilehome parks, single-room occupancy units, or units subject to any form of rent or price control through a public entity's valid exercise of its police power.”
- b. The Court rejected the City’s contention that reduction in the maximum FAR was exempt from the Housing Crisis Act based on the City’s theory that it would facilitate development of more affordable housing and/or accessory dwelling units.

Casa Mira Homeowners Assn. v. California Coastal Commission (2024) 107 Cal.App.5th 370

Takeaway: The term "existing structures" in the context of the California Coastal Act refers to structures that existed before the Act's effective date of January 1, 1977, not structures existing at the time of submission of a coastal development permit.

Facts: Petitioner applied for a coastal development permit to construct a 257-foot seawall to protect a condominium complex, sewer line, apartment building, and a segment of the Coastal Trail in Half Moon Bay from erosion. The California Coastal Commission (“CCC”) denied the permit for the condominiums and sewer line, built in 1984, but approved a 50-foot seawall for the apartment building, built in 1972, but denied a permit to extend the seawall to protect the Coastal Trail, in part based on its determination that moving the Coastal Trail inland was a feasible alternative to armoring.

The San Mateo County Superior Court granted Petitioner’s petition for a writ of mandate, concluding that the term "existing structures" in the Coastal Act referred to structures existing at the time of the seawall application, thus entitling the condominiums and sewer line to protection. The Court also found that the CCC lacked substantial evidence to support its decision not to allow the extension of the seawall to protect the Coastal Trail.

The CCC appealed and argued that “existing structures” means structures that existed before the effective date of the Coastal Act. The Court of Appeal agreed, reversing the Superior Court and upholding the CCC’s denial of a permit for a seawall to protect structures built after 1976. The CCC also argued that substantial evidence supported its decision not to permit the seawall extension to protect the Coastal Trail. The Court of Appeal disagreed, affirming the Superior Court on this issue.

Analysis & Holdings:

1. "Existing structures" in the context of the Coastal Act refers to structures that existed before the Act's effective date of January 1, 1977. Thus, Petitioner was

not entitled to a permit to construct a seawall to protect structures built after 1977, e.g., condominiums and a sewer line.

2. However, substantial evidence did not support the CCC's determination that armoring was not permitted to protect the Coastal Trial.

Humboldt Alliance for Responsible Planning v. California Coastal Commission (2024) 107 Cal.App.5th 704

Takeaway: The California Coastal Commission has a degree of regulatory authority over certain Indian Tribe projects in the Coastal Zone.

Facts: The Cher-Ae Heights Indian Community of Trinidad Rancheria ("Tribe") owns approximately 46.5 acres of land east of the City of Trinidad. The Bureau of Indian Affairs ("BIA") holds the land in trust for the Tribe. The Tribe wanted to build a five-story hotel on the land, next to its existing casino.

In February 2019, the BIA submitted a consistency determination letter to the California Coastal Commission ("CCC"). The BIA determined that the proposed project was consistent with the California Coastal Act and requested that the CCC concur with its determination. After much back and forth, the CCC conditionally concurred with the consistency determination, with the condition that the BIA provide evidence of an adequate water supply before starting construction.

Petitioner filed an administrative mandamus petition challenging the CCC's conditional concurrence. Petitioner argued that the conditional concurrence must be set aside because (1) the CCC used the wrong legal standard in approving the visual aspects of the proposed hotel; (2) the CCC failed to state in sufficient detail the basis for its rejection of its staff's recommendation regarding the hotel's visual impacts; (3) the CCC improperly relied on the environmental justice policy and the doctrine of tribal sovereignty; (4) the CCC misapplied the law in granting a conditional concurrence; and (5) substantial evidence did not support a finding that the hotel will have adequate fire protection services.

Analysis & Holdings: The CCC did not abuse its discretion in issuing a conditional concurrence (except, in the unpublished portion of the opinion, that there was not sufficient evidence in the record to support a finding of adequate fire protection services for the hotel as required by the Coastal Act).

Ohio House, LLC v. City of Costa Mesa (9th Cir., Apr. 24, 2025) __ F.4th __, 2024 WL 5668044 (amended opinion issued on denial of rehearing)

Takeaway: A city does not violate the federal Fair Housing Act or the state Fair Employment and Housing Act by adopting zoning regulations that except sober-living homes from ban on group homes, but impose location and separation requirements.

Facts: The City of Costa Mesa adopted a zoning ordinance that generally prohibited group living arrangements (e.g., boarding houses) within the City. However, the ordinance contains an exception for group homes serving the disabled and sober-living homes serving recovering addicts (a protected disability under federal and state law). The exception allows small homes (serving six or fewer residents) to operate upon approval of a ministerial special use permit and large homes (serving seven or more residents) upon approval of a conditional use permit. The ordinance requires that sober-living homes be located at least 650 feet apart.

Plaintiff, an operator of sober-living homes, was denied a conditional use permit because it could not satisfy the separation requirement. Plaintiff claimed the zoning ordinance violates the federal Fair Housing Act (“FHA”) and the California Fair Employment and Housing Act (“FEHA”) by impermissibly discriminating against people with disabilities.

Analysis & Holdings:

1. Where a plaintiff makes a prima facie showing of disparate treatment under the FHA or FEHA, the burden shifts to the government to show the differential treatment benefits the protected class.
2. Plaintiff made prima facie showing of disparate treatment.
3. But the City met its burden to show that the zoning regulations *benefitted* disabled persons.
 - a. The City provides better opportunities for group and sober-living homes (for the disabled) than for boarding houses generally. Small and large boarding houses are prohibited in residential zones, but small homes serving the disabled may operate in those zones with a special use permit.
 - b. Extra benefits can have strings attached, like separation and CUP or other permit requirements, if, on the whole, it works as a net benefit to disabled individuals.

CEQA Litigation Update Spring 2025

Cases Reported from September 1, 2024, through March 15, 2025

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A. CEQA Compliance Issues

1. Analysis of Wildfire Risk

People ex rel. Bonta v. County of Lake
(2024) 105 Cal.App.5th 1222 (certified for partial publication)

Nutshell

Environmental Impact Report for a luxury resort development in an isolated unincorporated area found invalid for not adequately analyzing wildfire risks, and the county's belated errata that partially acknowledged the problem only served as evidence the court pointed to as to the EIR's insufficiencies.

Holding

The County's FEIR was defective because substantial evidence did not support the conclusion that less than significant impacts existed regarding the community's ability to evacuate during a wildfire and regarding the increased wildfire ignition risk.

Practice/Litigation Tips

- If the Attorney General's office is bothered enough to challenge the adequacy of your EIR, don't expect the court to show the same level of deference you might normally expect (though in this case, notably, the court rejected the vast majority of petitioners' claims).
- Be wary of relying on the use of an "errata" to an EIR that is released *after* the Final EIR is circulated. While such an errata should be okay to address minor issues, it cannot serve as a cure for a draft EIR's failure to adequately address environmental impacts.
- With respect to wildfire risk, do not try to argue that the development proposal is "self-mitigating." Carefully identify what provisions of the development plan are "mitigation measures" and make sure they are documented as such in the mitigation monitoring and reporting plan.

Summary

In a case with a lengthy factual and procedural background, three petitioners – the Center for Biological Diversity ("CBD"), the California Native Plant Society ("CNPS"), and the Attorney General ("AG") – argued that the Final EIR ("FEIR") issued for a large mixed use development on a 16,000 acre site was defective on numerous grounds, including failures to analyze wildfire impacts, GHG emissions, water usage, and project alternatives, among other reasons. The trial court agreed, but only on the basis that the FEIR failed to consider the project's impact on the community's ability to evacuate from wildfire.

The court of appeal reversed the judgment in part, affirmed the judgment in part, and remanded to the trial court to issue a new writ that vacates the County's certification of the FEIR and

approval of the project. The Court found the FEIR deficient for the same reason as the trial court, but also for an additional reason – the FEIR failed to adequately disclose and analyze the wildfire ignition risk. The published portion of the opinion discusses the FEIR’s analysis of wildfire ignition risk, the FEIR’s analysis regarding carbon credits, and the FEIR’s analysis regarding off-site water wells.

The Court further took issue with the County’s use of an errata to analyze the project’s potential to increase wildfire risks. The Court stated that the errata’s information came too late in the CEQA process – the information should have been included in the draft EIR. However, the Court also took issue with the substance of the errata’s wildfire analysis, such as failing to reasonably describe the additional wildfire risk factors of bring 4,000 new residents to an undeveloped project site compared to existing conditions. The Court expressed frustration that the errata did not quantify the increased wildfire risk:

“For example, given the general decline in human-caused wildfires, how many such ignitions occur per 1,000 people in a wildland-urban interface, and how much has that rate reduced as wildfire safety and education has increased? And how many wildfires ignite per 1,000,000 miles driven by vehicles with and by vehicles without catalytic converters, and how has the mix of vehicles on public roads affected those statistics over time?” (See *Id.* at 1234; see also fn. 8.)

Regarding the FEIR’s analysis relating to carbon credits, the Court found petitioners’ contentions meritless because the carbon credit program, although too uncertain to be feasible, was not relied upon by the County to eliminate the project’s significant and unavoidable climate impact. In other words, the County is not prohibited from considering potentially beneficial measures that could, but are unlikely to, significantly mitigate the project. Finally, the Court upheld the adequacy of the project’s water supply analysis, even though the County did not quantify the amount of groundwater offsite, because the offsite well would only be used “if necessary,” and because it could not reasonably forecast such water use and demand.

2. Tribal Consultation

Koi Nation of Northern California v. City of Clearlake
(2025) 2025 WL 814759

Nutshell

Court overturns city’s approval of a 4-story hotel development for its failure to adequately consult with a tribe, when it initially invited the tribe’s input, but then did not meaningfully respond to the tribe’s comments, despite repeated requests from the tribe for further explanation.

Holding

Following an initial consultation meeting with a tribe, the city improperly determined that it had concluded the initial consultation process, and failed to meaningfully respond to the tribe’s subsequent comments on the adequacy of the city’s mitigated negative declaration. The city’s failure to further engage in discussion with the tribe did not adequately comply with the statutory

requirement of a “process seeking, discussing and considering carefully the views of others” and “where feasible, seeking agreement.” (Gov. Code § 65352.4.) Rather, under Public Resources Code section 21080.3.2, consultation may only be concluded either when the parties agree to mitigation measures, or when, “acting in good faith and after reasonable effort, [the agency] concludes that mutual agreement cannot be reached.”

Practice/Litigation Tips:

Even if the local agency determines that there are no impacted tribal resources, it should continue to engage in discussions with any interested tribe and fully respond to all questions and comments from an interested tribe, including offering to meet with tribal representatives to discuss any areas of disagreement.

Summary:

This case deals with a project to construct a 4-story hotel. The project’s consultant initiated discussions with the representative of the Koi Nation, Robert Geary, who had informed the consultant that a Koi Nation ancestor had held property near the project site (approximately 0.2 miles away). On February 16, 2022, the City sent the Koi Nation formal notification as required by CEQA (Pub. Res. Code § 21080.3.1) to Geary. On February 23, 2022, Geary responded to the letter and requested formal consultation with the City. On March 9, 2022, the City met with the Koi Nation, during which the Koi Nation had requested the City to undertake certain mitigation measures. There was no further communication between the parties until the City circulated its notice to adopt an MND. Koi Nation objected to the approval of the MND, which the City disagreed (except it modified a mitigation measure to include a requirement to coordinate with the tribe expert if subsurface remains are uncovered) because the City determined that there was no evidence of tribal cultural resources on the project site and the mitigation measures would ensure a less than significant impact. The trial court upheld the City’s approval of the MND because nothing in the administrative record constituted a written request from Koi Nation to invoke the right to consultation on the project under CEQA.

The court of appeal reversed, holding that the February 23, 2022, letter sent to the City supported its assertion that they timely responded, in writing, to the City requesting consultation. The court further found that the March 9, 2022, meeting did not constitute meaningful consultation because the City took the tribe’s requests under submission but never engaged in any further discussion (even after Geary sent follow-up emails), the City did not disclose its reasons for granting one mitigation measure and denying the other two, and the City failed to consider the value and significance of resources to Koi Nation, as required by CEQA. Thus, because there was no discussion about the City’s reasoning or conclusions, there was no real opportunity for Koi Nation and the City to seek mutual agreement as CEQA contemplates.

B. CEQA Exemptions

1. The Ever-Popular “Infill” Exemption

Working Families of Monterey County v. King City Planning Commission
(2024) 106 Cal.App.5th 833

Nutshell

Court upholds city’s finding that a proposed Grocery Outlet store qualifies for CEQA’s Class 32 in-fill exemption, rejecting arguments that this exemption cannot be used in rural communities that are not “urban.”

Holding

Substantial evidence supported city’s determination that the project site was “substantially surrounded by urban uses,” notwithstanding petitioner’s argument that King City was too “rural” to be considered “urban.”

Practice/Litigation Tips

CEQA’s Class 32 in-fill development exemption for “in-fill development projects” (applicable to sites of less than five acres substantially surrounded by urban uses, where the development is consistent with applicable general plan and zoning designations) continues to be an attractive option for complying with CEQA.

Summary

At issue in this case is a CEQA challenge to a Grocery Outlet store, which the King City City Council determined to be subject to the Class 32 categorical exemption outlined in CEQA Guideline Section 15332. CEQA Guideline Section 15332 states that “Class 32 consists of projects characterized as *in-fill development* meeting the conditions described in this section ... [including] (b) [t]he proposed development occurs within city limits on a project site of no more than five acres *substantially surrounded by urban uses.*” Plaintiffs argued that the Class 32 exemption did not apply to the project because, among other reasons, the terms “in-fill development” and “substantially surrounded by urban uses” are undefined, and thus those terms must be interpreted by CEQA definitions of “in-fill site,” “urbanized area,” and “qualified urban uses,” as those terms are defined by Public Resources Code sections 21061.3, 21071, and 21072. Thus, according to plaintiffs, because King City is not an “urbanized area” within the meaning of the statute because its population is too small, it cannot be an “in-fill site.”

The Court rejected plaintiff’s arguments. To the extent that the terms in CEQA Guideline Section 15332 are ambiguous, the Court first looked at the intent of the Natural Resources Agency in issuing CEQA Guideline Section 15332, which it discerned was to encourage urban development and prevent sprawl. The Court could not find an intent to limit the Class 32 exemption to just large cities or to install a population requirement. The Court also noted that

“‘[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.’” The Court thus concluded that the project met the requirements for the exemption.

West Adams Heritage Association v. City of Los Angeles
(2024) 106 Cal.App.5th 395 (certified for partial publication)

Nutshell

Court reverses city’s reliance on the Class 32 in-fill exemption for a 102-unit university housing project for failing to make an express finding that the project is consistent with the city’s redevelopment plan, while also rejecting petitioners’ arguments that it was not so consistent, based on a recently adopted city ordinance mandating that the redevelopment plan supersede the local zoning.

Holding

The court held that the Class 32 in-fill exemption is not inapplicable simply because the project would generate residential noise, but remanded the case to the city to expressly determine if the project is consistent with the redevelopment plan, a finding the court holds must be made before concluding that the Class 32 exemption applies (without addressing extensive contrary caselaw holding that such supporting findings are not required).

Practice/Litigation Tips

- When relying upon the Class 32 in-fill exemption, make sure to adopt express findings as to each of its criteria (even though the CEQA Guidelines do not appear to explicitly require such supporting findings and there are several published decisions—ignored by this court—that hold that such findings are not required).
- Perhaps some appellate courts simply do not like being reversed by the Supreme Court. This court appears to strain to come up with a rather absurd reason to still reverse the city’s project approval, after the Supreme Court remanded the case back to it for reconsideration.

Summary

At issue in this case is a 2.8-acre housing development close to the USC campus. The project involves seven different residential buildings that collectively would contain 102 apartment units and include such amenities as outdoor lounges and cooking areas. The Zoning Administrator approved the project, finding that the Class 32 exemption applied, and granted a CUP and zoning bonus, but denied the site plan review because the project as proposed was not compatible with surrounding uses. The Planning Commission ultimately approved the project after revised site plans were submitted that addressed the Zoning Administrator’s concerns, and the City Council denied the project opponents’ appeal. The project opponents then filed the lawsuit, alleging that

the Class 32 exemption was improper because the project would generate residential substantial noise and result in significant effects relating to noise.

The trial court denied the writ petition, but the court of appeal reversed, holding that the Zoning Administrator's noise findings prevented the use of the Class 32 exemption. The California Supreme Court then granted review, vacated the decision, and asked the court of appeal to reconsider the case in light of AB 1307 and its decision in *Make UC a Good Neighbor v. Regents of University of California* (2024) 16 Cal.5th 43 (*Make UC II*). AB 1307 enacted Public Resources Code Section 21085, which explicitly states that when evaluating "residential projects" under CEQA, "the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment." And the *Make UC II* decision applied Public Resources Code Section 21085 to hold that an EIR for a student housing project was not deficient for its failure to consider the environmental impact of noise generated by residents.

Upon review in this case, the court of appeal concluded that residential noise could not form a basis for finding the Class 32 exemption inapplicable. The project opponents attempted to distinguish *Make UC II* on the basis that that decision concerned "social noise" (noise generated by human voices during social interactions) whereas the case at hand involved "amplified" noise from music devices. The court rejected this argument, reasoning that the legislature intended AB 1307 to apply to devices "playing music" and not just to noise generated from social noise, that the legislative history shows that they considered but rejected such an approach, and that such a holding would undercut one of the main purposes of the bill. However, the court remanded the case to the City to determine whether the project is consistent with the redevelopment plan, a finding that the court held it must make before it may grant the Class 32 exemption.

2. Other Exemptions

Sunflower Alliance v. Department of Conservation
(2024) 105 Cal.App.5th 771
review granted by California Supreme Court

Nutshell

The conversion of an oil well (which pumped oil and water out of the aquifer) into an injection well (which will pump wastewater from adjacent wells back into the same aquifer) qualifies for CEQA's "Class 1" categorical exemption involving "negligible or no expansion of existing or former use" of an "existing facility."

Holding

- The Class 1 categorical CEQA exemption applicable to "existing structures" may be applied even if the project proposes to make a materially different use of those structure (here, injection of water rather than pumping out of water), so long as the lead agency finds (based on substantial evidence) that the environmental risks are negligible.

Practice/Litigation Tips

- Courts may be willing to accept a “practical” view of the scope of categorical exemptions, and more specifically, may be willing to allow the “existing facilities” exemption to be invoked for projects that propose materially different uses of existing structures, so long as the resulting environmental impact is minimal.
- But stay tuned, as the Supreme Court has accepted review of this case, specifically as to whether “the term ‘negligible’ in [CEQA’s] Class 1 existing facilities exemption ... pertain to a negligible change in use or to a change that presents a negligible risk of environmental harm.”

Summary

The California Department of Conservation’s Division of Geologic Energy Management (“CalGEM”) regulates California’s underground injection program, a program that injects polluted water used in the oil extraction process back into the aquifer from which it came. Federal and state law requires that water can only be injected back into aquifers that will never be used as a drinking water source.

Here, Reabold (the real party) applied to CalGEM to convert a former oil well into a Class II injection well. This oil well was located more than 4,000 feet deep into the surface and converting it into an injection well would require minimal work and present no concern of contaminating drinking water (since the wastewater from adjacent pumping operations would be injected back into the same aquifer from which it was extracted). Additionally, the injection well would save at least 10 vehicle trips per week that are currently used to dispose of polluted water. CalGEM reviewed the application and approved it as CEQA exempt pursuant to the Class 1 categorical exemption of the CEQA Guidelines. The Plaintiff filed suit challenging the use of the categorical exemption, and the trial court granted the writ petition because injection is a “significantly different use” than oil extraction.

On appeal, the court reversed. The court agreed with CalGEM that the change in use regarding well conversion was minor (transforming the use from oil extraction to water injection). While the court noted that no cases were directly on point, the court focused on CEQA Guideline Section 15301 regarding Class 1 categorical exemptions, which exempts a negligible expansion of use. The court reasoned that “when a modified project is put to a new use, the change in use is unimportant, as far as CEQA goes, if the risk of environmental harm from the new use is negligible.” (*Id.* at 784.) The court thus concluded that the term “negligible” referred to a minor/inconsequential risk of environmental harm, even if the project results in a change of use. The court went on to conclude that the project at issue only involved minor modifications – it involved no changes to existing roads, or surrounding vegetation, and it did not involve significant modifications of the well. Additionally, the court concluded that the change in use is negligible because the water will be geologically confined to the aquifer. Finally, the court concluded that the evidence in the record supported CalGEM’s determination.

Save Our Capitol! v. Department of General Services
(2024) 105 Cal.App.5th 828

Nutshell

After losing a series of earlier battles in court over the adequacy of its CEQA compliance for major renovations to the California State Capitol, the State ultimately won the war by legislatively adopting a special statutory CEQA exemption for itself.

Holding

The Capital Renovation Project was exempted by the Legislature passing AB 174 (2024) and thus CEQA no longer applied. This change in the law compelled the court to reject the challenges to the legal adequacy of the EIR previously certified by the state agency.

Practice/Litigation Tips

- If you don't like the law, change it!
 - Fine print caveat: This practice tip may only be used by the State Legislature :/
- The case may be helpful authority as to how courts in mandamus proceedings must apply the current statutory law as it exists at the time of the decision. When facing circumstances in litigation where there is new, helpful statutory law, try to frame the issue in this manner. I have seen courts try to disregard recent statutory amendments as not controlling as to how it wants to interpret the law as it existed when the challenged decision was made.

Summary:

This is the third published CEQA decision involving the Capitol Renovation project. In the first case, the court of appeal reversed in part the trial court judgment rejected challenges to the EIR regarding the Capitol Renovation Project because it found the EIR flawed regarding the project description, analysis of impacts to historical resources and aesthetics, and because its alternatives analysis was deficient. (See *Save Our Capitol! v. Department of General Services* (2023) 87 Cal.App.5th 655.) In the second decision, the court of appeal found that the trial court needed to find the revised EIR consistent with the first decision before discharging the writ. (*Save the Capitol, Save the Trees v. Department of General Services* (2024) 101 Cal.App.5th 1237.)

The Court here found that SB 174, which specifically exempted the Capitol Renovation Project from CEQA, mooted the CEQA issue. SB 174 states that all work associated with the Capitol Annex Project “shall be exempt from” CEQA’s requirements and that SB 174 “shall take effect immediately.” (*Id.* at 833.) Even though SB 174 became effective after the appeal was filed, the court held that SB 174 was the current law and applied to this case.

C. CEQA Litigation Procedural Issues

Yolo Land and Water Defense v. County of Yolo
(2024) 105 Cal.App.5th 710 (certified for partial publication)

Nutshell

Court awarded a respondent agency a minor amount of costs (less than \$4,000) it incurred in assembling documents to provide to the petitioners who had elected to prepare the administrative record, rejecting arguments that petitioners' election barred recovery of any record preparation costs.

Holding

Even when a CEQA petitioner elects to prepare the administrative record, the respondent agency may still be able to recover reasonable costs it incurs in producing documents to petitioner for preparation of the record, including staff, secretarial, and consultant time. These costs may be in excess of costs others authorized under the Public Records Act.

Practice/Litigation Tips

- Petitioners who elect to prepare the administrative record in a CEQA action may serve the respondent agency with a Public Records Act request to obtain the necessary documents. While the PRA does not authorize charges for staff time, the agency might nonetheless be able to recover such additional costs if it ultimately prevails in the litigation. So it may be a good practice to keep track of such costs to better enable the agency to recover them later.

Summary:

Petitioners challenged the County's EIR for a mining project, claiming that the EIR was inadequate for several reasons. In the unpublished portion of the opinion, the court affirmed the trial court's denial of the writ petition on the merits, concluding that the EIR was proper.

In the published portion of the opinion, the court concludes that it was proper for the County to be awarded the modest amount of costs it incurred (\$3,813.45) in assembling documents for petitioners to use in preparing the administrative record. Petitioners argued that the County could not recover costs because they had elected to prepare the record pursuant to Public Resources Code Section 21167.6(b)(2).

Public Resources Code Section 21167.6(b)(2) authorizes a writ petitioner to elect to prepare the administrative record instead of asking the public agency to prepare it. However, Petitioners asked the County to produce documents, which it did (the final administrative record was 29,745 pages). And the public agency must certify the accuracy of the administrative record within the time period described by Section 21167.6(b)(1). "That appellants elected to prepare the record under section 21167.6, subdivision (b)(2) did not mean the County had no costs associated with

preparation of the administrative record, and it did not preclude an award of record preparation costs to the County.” (*Id.* at 715.) And because Section 21167.6 does not provide that a public agency prevailing in a CEQA action may not recover reasonable costs associated with the preparation of the administrative record that were actually incurred, the court concluded that Plaintiffs must pay the County’s reasonable costs.

Santa Clarita Organization for Planning the Environment v. County of Los Angeles
(2024) 105 Cal.App.5th 1143

Nutshell

A petitioner filing a CEQA action to challenge the approval of a subdivision map does not need to comply with the Subdivision Map Act’s special requirement to serve a summons within 90 days of the challenged decision, to the extent that it is alleging CEQA claims that are independent of the SMA, *and* that are not actually incorporated into conditions of approval that are reflected in the map itself.

Holding

The Court reversed and remanded the trial court judgment granting a motion for judgment on the pleadings, holding that the Subdivision Map Act’s 90-day limitations period under Government Code Section 66499.37 for actually serving a summons does not apply to all actions concerning a subdivision, but only actions that could have been brought under the SMA.

Litigation/Practice Tips

Normally, a summons is not required in a mandamus proceeding (unless the mandamus claim is joined with a complaint for declaratory, injunctive, or other relief). But the Subdivision Map Act has a special requirement (probably the result of a legislative drafting error made decades ago) to serve a summons, which can be a trap for an unwary petitioner. Even if they file a CEQA challenge within the applicable short 30-day limitations period, and even if they actually serve the petition itself shortly thereafter, they may overlook the need to serve a “summons.” So, if your agency has been served with such a CEQA lawsuit challenging a subdivision map approval, but not a summons, consider not making any “appearances” until after the 90 days is up (since, if you “appear,” it might argue that the need for summons has been waived). But, even if the summons is not timely served, this decision still allows certain types of CEQA challenges to be asserted.

Summary

This case deals with the intersection of the Subdivision Map Act (“SMA”) and CEQA. A challenge was brought for a Project involving a subdivision of land for single family homes, public facilities, and open spaces. County staff determined that an MND was the proper document, as the mitigation measures would ensure that the Project would not have a significant effect on the environment. The Santa Clarita Organization for Planning the Environment (“SCOPE”) filed a petition for writ of mandate, alleging that the County failed to

analyze/disclose/mitigate many of the Project’s significant environmental impacts, as well as five procedural CEQA violations. However, the project applicant filed a motion for judgment on the pleadings because SCOPE failed to serve a summons within 90 days of the County’s approval of the vesting tentative tract map as mandated by Government Code Section 66499.37 (hereafter, “Section 66499.37”). The trial court granted the motion for judgment on the pleadings, without leave to amend. The court of appeals reversed and remanded the case to the trial court as to the CEQA cause of action.

Section 66499.37 provides:

“Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations. The proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings.” (emphasis added.)

The court concluded that Section 66499.37 applies to claims that either (1) arise from or involve a controversy under the SMA; (2) ***could have been brought under the SMA***; or (3) overlap with an SMA claim. According to the court, SCOPE’s action is not barred by Section 66499.37 because some of their CEQA claims (like lack of adequate notice of an MND, failure to adequately analyze/disclose project impacts, etc.) ***could not have been brought under the SMA***, as those claims are unique to CEQA.

The Court reasoned that the legislative history of Section 66499.37 reflects an intent to apply the 90-day limitations period to actions brought ***under the SMA***, not to all actions concerning a subdivision. The court then discussed the relevant caselaw, concluding that these cases (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, *Friends of Riverside’s Hills v. City of Riverside* (2008) 168 Cal.App.4th 743, and *Legacy Group v. City of Wasco* (2003) 106 Cal.App.4th 1305) support the holding that a CEQA claim is barred under Section 66499.37 if it could have been brought under the SMA. The court also distinguished the *AIDS Healthcare Foundation v. City of Los Angeles* (2022) 86 Cal.App.5th 322 decision, which analyzes the analogous 90-day limitations period in Government Code Section 65009, because that case was not a CEQA case.

D. Cases Involving “Abusive CEQA Litigation” (i.e. CEQA claims being asserted for economic or other “non-environmental” reasons)

Relevant Group, LLC v. Nourmand
(9th Cir. 2024) 116 F.4th 917

Nutshell

Court rejects RICO claim by a hotel developer claiming that a competing hotel owner was unlawfully trying to extort funds from it by filing a series of CEQA lawsuits against its various projects.

Holding

- Hotel owner had a First Amendment right (under the *Noerr-Pennington* doctrine) to file a series of CEQA actions against a developer of multiple hotels and could not be sued for alleged RICO violations regardless of evidence of improper motive.

Practice/Litigation Tips

- Sorry Charlie, the answer is still no, you almost never can counter-sue a CEQA petitioner, unless you can demonstrate that the CEQA action is completely baseless.
- It would be slightly easier to prevail in a state court “malicious prosecution” action to challenge a frivolous CEQA lawsuit. (See *Jenkins v. Brandt-Hawley* (2022) 86 Cal.App.5th 1357)

Summary:

“You know the drill. It will take a check to make this go away.”

The owner of the Hollywood Athletic Club objected to a series of four hotel projects that were being processed by the City of Los Angeles, and filed CEQA lawsuits against three of them. Each hotel had been owned by plaintiff Relevant Group, LLC (or one of its subsidiaries). Two of the lawsuits were ultimately settled, while one resulted in an adverse judgment that overturned the City’s approval and required more CEQA compliance.

Frustrated with what it perceived as extortion, the developer filed a RICO (Racketeer Influenced and Corrupt Organizations Act) action in federal court. Initially, the action survived two dismissal motions and a motion for summary judgment, but then was re-assigned to a different federal judge, who reconsidered summary judgment and eventually ordered the case dismissed. While acknowledging that a judge generally should not overrule a prior decision of another judge in the same case, the judge was “firmly convinced that the prior order is erroneous and, if upheld, would endanger core constitutional rights.” (This might be more challenging to do in state court.)

The Ninth Circuit affirmed, applying the *Noerr-Pennington* doctrine, which “is a rule of statutory construction that requires courts to construe statutes to avoid burdening conduct that implicates the protections of the Petition Clause of the First Amendment.” (*United States v. Koziol* (9th Cir. 2021) 993 F.3d 1160, 1171.) Under this doctrine, “those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. (*Sosa v. DIRECTTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 929.) The exception to this doctrine is if the lawsuit is a “sham” that is “objectively meritless,” and if the defendant’s motive in bringing it is unlawful.

Here, the 9th Circuit found that the defendant’s CEQA lawsuits were not objectively meritless (especially since petitioner prevailed in one of them), and thus did not need to reach the question of whether petitioner’s motive in bringing them was improper. The court noted (unhelpfully) that if a plaintiff “is concerned about the CEQA process being abused (as many persons and entities have claimed has occurred since its enactment), its recourse is to bring this to the attention of the state legislator and the governor, not to try to squash the process altogether in federal court.”

Gooden v. County of Los Angeles
(2024) 106 Cal.App.5th 1 (certified for partial publication)

Nutshell

Court upheld a Los Angeles County’s decision to ban new vineyards as part of its area plan for the Santa Monica Mountains, despite that proposed ban not being disclosed in the draft EIR, which originally contemplated allowing such uses subject to heavy regulation.

Holding:

The court upheld the trial court’s judgment affirming the county’s certification of a FEIR that banned new vineyard development, a change that was not discussed in the FEIR, because such a change did not make the project description unstable.

Practice/Litigation Tips:

- This case is a helpful example of courts rejecting CEQA challenges by industry groups whose goals are contrary to CEQA’s core objectives of protecting the environment.
- The decision articulates a refined test for determining when a modified project requires recirculation or requires CEQA review to start from scratch: does the deviation between the project description and the ultimately approved project “alter the ‘nature of the project’ or any of its ‘main features’”?

Summary

This case involved an update to the North Area Plan and the Community Standards District in Los Angeles County, comprising of the Santa Monica Mountains. The Board of Supervisors

approved a project, described as an update “to provide greater protection of biological habitats, align [North Area] Plan and [Community Standards District] policies and standards with the [Local Coastal Program], support the rural and semi-rural character of the [North Area], and bring the land use policies for the North Area into compliance with the General Plan.” The project would replace zoning provisions in the County Code and rezone hundreds of parcels but would not lead to any physical development. The DEIR addressed, among other things, viticulture by reducing the threshold for grape growing to qualify as a “vineyard” subject to the 2015 vineyard ordinance stringent development requirements and added standards for integrated pest control management. While public comments argued that the County should ban new vineyards, neither the DEIR nor the FEIR addressed a proposed ban on new vineyards. The Board then certified the FEIR but made one change – it approved a ban on all new vineyards.

The Malibu Coast Vintners and Grape Growers Alliance filed a petition for writ of mandate, arguing, among other things, that the ban on new vineyards violated CEQA’s requirements that the project have an accurate and stable project description and that the report be recirculated when significant new information was added. The trial court denied the writ petition, and the court of appeal affirmed its judgment.

The Court discussed settled CEQA principles that, on one hand, support that project descriptions must be accurate, stable, and finite and discuss the nature of the project and its main features, while also acknowledging that public agencies may change projects in response to feedback and should not be required to recirculate an EIR after every such change, which could “freeze” projects and “handcuff decisionmakers.” “In threading the needle between ensuring that a project’s description is accurate, stable and finite while also not robbing public agencies of the flexibility needed to tailor projects in response to feedback” (*id.* at 17), the court then described three scenarios where a project description may be inadequate:

- 1) When the environmental impact report does not actually describe the “project” at all.
- 2) When the environmental impact report’s description of the nature of the project or its main elements is too amorphous.
- 3) When the environmental impact report’s description of the nature of the project or its main elements is self-contradictory or inconsistent with later articulations.

Summarizing these scenarios and the cases underlying them, the court concluded that the instability of a project description can arise “(1) from inadequacies in the environmental impact reports” or “(2) from subsequent action by the public agency that deviates sufficiently from the project described in the reports that the deviation retroactively renders those reports’ description(s) uncertain and hence unstable[.]” (*Id.* at 19.) The court then discusses the requirements for recirculation before announcing / describing a “three-tiered system” when adopting a modified project:

“First, the modification can be so fundamentally significant that it calls into question—and hence destabilizes—the description of the project itself, thereby warranting a reboot of the CEQA review process. Second, the modification can be not so significant as to destabilize the project’s description, but significant enough to constitute ‘significant new information,’ thereby warranting recirculation for

further public comment on the new information. Third and lastly, the modification can be insignificant, in which case no further action need be taken.” (*Id.* at 22-23.)

Because Gooden abandoned their argument that the Board’s action warrants recirculation, the question before the court was whether the County’s action rendered the project description unstable. The Court held that it was not, in part because agriculture was a small component of the project, and the switch from heavily regulating vineyards to banning all new vineyards does not “alter the ‘nature of the project’ or any of its ‘main features.’” (*Id.* at 23.) Although the change is significant to those who want to start new vineyards, it is not enough to destabilize a project description. The court warned that if such a change was “sufficient to destabilize a project’s description, then any and every deviation from a prior project description would be grounds for hitting the reset button under CEQA; as noted above, that is not the law.” (*Id.* at 24.)

California Natural Gas Vehicle Coalition v. State Air Resources Board
(2024) 105 Cal.App.5th 304

Nutshell

Challenge brought by pro-natural gas industry group to regulations by the State Air Resources Board designed to promote “zero-emission vehicles” (i.e. electric cars) without also allowing for natural gas vehicles. Court generally rejected arguments that the EIR was inadequate for not considering natural gas vehicles as an alternative.

Holdings

- CARB’s rejection of a “Low-NOx Alternative” as not meeting CARB’s project objectives supported by substantial evidence.
- CARB considered a reasonable range of alternatives, consisting of the “no project” alternative and two additional variants.
- CARB did err in not responding to public comments suggesting a Low-NOx credit as a mitigation measure, but this was harmless error because substantial evidence supported CARB’s determination that the Low-NOx credit was against the fundamental purpose of the project.

Practice/Litigation Tips

- This case is a good example of a court applying a very deferential standard of review to a challenge to an EIR’s discussion of alternatives. But that likely was the function of the quintessentially legislative actions being taken by CARB here (statewide rule-making). As a practical matter, courts will sometimes apply less deference to local agencies, especially when approving specific development projects (even though they claim to be applying the same standard of review across the board).
- This case can also be cited as an example of courts finding “harmless error,” here in the context of a failure to adequately respond to a public comment.

Summary

The California Air Resources Board (“CARB”) challenged regulation, as adopted in 2021, requires 2.5% of new vehicle sales to be zero-emission vehicles (“ZEVs”) by 2023 and 15% of vehicles to be ZEVs by 2030. CARB rejected the use of low-NOx technologies (or a Low NOx vehicle carbon credit) as an alternative in its initial statement of reasons for the Regulation because it was already the subject of other regulations and allegedly would not achieve GHG or sufficient particulate matter (PM) reductions from exhaust and brake wear, and would not advance adoption of heavy-duty ZEV technologies.

The Coalition’s main argument was that CARB violated CEQA because CARB did not properly consider the Low-NOx credit as an alternative to the project or as a mitigation measure. The Coalition also argued that CARB failed to properly respond to comments discussing the Low-NOx credit as an option. However, the Court affirmed the trial court’s decision denying the Coalition’s writ petition.

First, the Court held that CARB’s decision to reject the Low-NOx credit as an alternative was supported by substantial evidence because the alternative did not meet, and actually contradicted, the Regulation’s fundamental purpose of moving toward ZEVs. For this reason, the Court held that CARB had considered a reasonable range of alternatives, even if it rejected the low-NOx option, because “[a]s a logical matter, an alternative that does not meet the fundamental purpose of the proposed project cannot attain most of that project’s basic objectives and therefore provides no relative indication that the actual alternatives considered were insufficient.” (*Id.* at 325.) The Court then held that the Board was not required to discuss the Low-NOx option as a mitigation measure because it was infeasible from a policy perspective, as it would disrupt the goal toward encouraging full move to ZEV. And while the court found that CARB violated CEQA by failing to respond to comments in the record identifying the low-NOx credit as a mitigation option, the court held that this was a harmless error because CARB’s “failure is most in line with the example of omitting information that was so patently irrelevant that no person could suppose the failure was prejudicial.” (*Id.* at 333.)

Western States Petroleum Association v. California Air Resources Board
(2025) 108 Cal.App.5th 938

Nutshell

Court rejects CEQA and other challenges brought by industry group seeking to challenge California Air Resources Board (CARB) regulations limiting toxic emissions from tankers and other vessels while at berth in California ports or terminals.

Holding

CARB’s environmental assessment of the future potential impacts resulting from possible actions that will be taken to comply with the regulation adequately disclosed, at a programmatic

level, the future safety and other impacts, and it did not need to include a “project-specific” level of analysis for future permittees.

Practice/Litigation Tips

This case is another example of the broad deference courts will show to regulatory bodies (especially at the state level) when they legislatively adopt rules intended to protect the environment.

Summary

This action challenges a California Air Resources Board (“CARB”) regulation, entitled “Control Measure for Ocean-Going Vessels At Berth” (the “Regulation”), which limits emissions from tankers and other ocean-going vessels while docked or anchored in California. Petitioners argued the Regulation violated CEQA because it failed to adequately analyze and mitigate (1) environmental impacts, specifically safety hazards, associated with the Regulation’s compliance methods, and (2) the cumulative impacts of the Regulation on the environment.

The Court disagreed, holding that the Regulation did not violate CEQA. The Court reasoned that CARB’s tiered approach to the environmental analysis undertaken for the Regulation was appropriate under CEQA. CARB understood that the Regulation contemplated and relied on three different tiers of environmental analysis: the environmental analysis for the 2016 State Implementation Plan (“SIP EA”), the environmental analysis (“EA”) for the Regulation, and the future, site-specific, environmental analysis to meet the Regulation’s standards. Because the Regulation EA was “programmatic”, CARB correctly determined that a general level of detail was appropriate, as the decisions by the regulated entities (in this case, the Ports) regarding compliance options and other variables are unknown. Thus, in holding that the Regulation EA adequately analyzed and addressed concerns regarding environmental impacts, safety hazards, and mitigation, the Court reasoned that CARB understood it lacked the specificity for site-specific impacts, it appropriately flagged certain issues at a programmatic level, and deferred specific analysis to a future project review under CEQA.

Further, the Court held that CARB conducted sufficient cumulative impact analysis in the Regulation EA. CARB properly relied on the summary of projects from the SIP EA, incorporating by reference that document’s cumulative impact analysis into the Regulation EA. Further, it rejected Petitioners challenge to the “summary of projections” methodology, holding that substantial evidence in the record supports CARB’s reliance on this approach. And the Court held that CARB had no obligation to break down the possible cumulative impacts of specific measures at specific ports because, among other reasons, the legislature specifically determined that no “project-level analysis” was required for this specific category of environmental projects that qualified for expedited review. (Citing Pub. Res. Code § 21159(d) and CEQA Guidelines § 15187(e).) Finally, the court determined that the cumulative impact analysis was not deficient for failing to address the fact that the Regulation accelerated the timelines for the emissions standards because Petitioners failed to prove that CARB’s determination lacked substantial evidence.



Strategies for Successfully Resolving CEQA and Land Use Disputes

Wednesday, May 7, 2025

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Strategies for Successfully Resolving CEQA and Land Use Disputes

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California needs to build abundantly for its green economy and to achieve the sustainable, equitable future we all imagine. Our housing demands require an estimated 120,000 new units each year. An enormous quantity of public infrastructure projects are planned to meet the State's decarbonization goals – grid upgrades, battery and water storage, transportation mobility projects and electric vehicle charging. In 2028, the Olympics come to Southern California, which will still be recovering from wildfire impacts.

This paper suggests strategies to resolve the permitting and litigation disputes that agency clients confront in considering and approving these types of projects. This paper is divided into three sections. Section I provides guidance for agency decisionmaking in California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and land use matters, including shaping the project, working with counsel and experts, and preparing for public hearings. Section II identifies ten tips to follow to obtain successful outcomes in CEQA and land use litigation. Section III discusses settlement strategies and negotiation tips to resolve these disputes.

I. SHAPING THE PROJECT AND PREPARING FOR PUBLIC HEARINGS: EARLY ENGAGEMENT WITH LEGAL COUNSEL FACILITATES SUCCESSFUL CEQA REVIEW¹

Helping public agency clients solve problems and facilitate reasonable outcomes are prime goals of most government lawyers. These goals can be easily frustrated when assisting a public agency with shepherding projects through the environmental review process required by CEQA.

Fortunately, CEQA's procedures, often derided as onerous, provide ample opportunities for public agencies and their counsel to collaborate proactively to shape public agency projects, create stakeholders to advocate for projects, and build administrative records that can withstand legal challenges to projects. This paper provides recommendations for early engagement between legal counsel and public agency clients that can help facilitate successful CEQA review and legal defense of CIP projects.

Don't Wait Until It's Too Late

CEQA contains multiple procedures and requirements that must be scrupulously followed to avoid challenges to, or even reversal of, CEQA decisions regarding CIPs. Legal counsel can assist staff with drafting checklists, reviewing draft documents, and planning timelines and deadlines that can make CEQA's procedures manageable and create an administrative record to buttress the project against legal challenges.

A common problem with many agencies is the failure to engage legal counsel early in the CEQA process. CEQA's requirements can be triggered by agencies taking actions or making decisions that definitively commit the agency to a project, but agencies may

¹ Authored by Johanna Canlas and Davin Widgerow, Burke, Williams & Sorensen, LLP.

violate CEQA by doing so without first performing environmental review of the project's potential environmental impacts. Legal counsel will have far fewer options available to defend the project from legal challenge if the agency has already committed resources, funding, and stakeholders to a project, but nevertheless failed to perform CEQA's required environmental review.

Counsel can avoid being consulted too late in the process by establishing regular meetings or lines of communication with agency staff. Staff often have preliminary ideas that can quickly develop into major projects without legal input. Good discussions for legal counsel to have with agency staff include assessing the likelihood of a proposal evolving into a project, the timeline for planning and implementing the project, and whether funding is available for contracts, consultants, potential legal challenges. More focused discussions should include whether a prior environmental analysis was performed that would encompass some or all of the project activities; whether or not the project is an emergency project that would qualify for expedited CEQA review; if the project is likely to impact sensitive natural resources or is located very close to residences, medical facilities, or schools; and if the project is likely to be controversial and engender significant public debate. Having these discussions *before* a project is already underway can help inform CEQA strategies, consideration of alternatives, preparation for public engagement, and building a good record for any decision to adopt the project.

Embrace Scrupulousness With The CEQA Document

Lawyers are trained to sit down for long periods of time, with long documents, and edit them, improve them, criticize them, and engage with them. CEQA documents and materials are no different. Effective agency counsel will be scrupulous in reviewing and editing CEQA documents to ensure that no questions are unanswered, no pitfalls exist, no regrettable statements are made, and all conclusions are justified with substantial evidence. Agency staff should embrace the same scrupulousness—an early and exhaustive review by a trusted advisor far outweighs a draining CEQA challenge after the project is adopted. If agency staff do not have annoying redlines from their legal counsel, they are not fully prepared—embrace scrupulousness!

Agency counsel should approach review of a CEQA document with the mindset of a potential challenger to the project: What are the weak points? Where is the conclusion on shaky grounds? Is there obvious information missing from the draft document that is critical to understanding the project? Is the evidence for a conclusion significant, or could the evidence be supplemented? This requires a very unforgiving analysis of the document by agency counsel, but the effort is more than worthwhile. The deference provided by courts to agency factual conclusions provides opportunities for meticulous counsel to help the agency build a defensible record before the CEQA documents are final—the more evidence and substantiation for the agency's conclusions, the fewer grounds any court will have to reverse those decisions. It is worth building that record from the very start of a project, so that the agency can feel confident it has thoroughly examined and documented the project, even if litigation is filed.

Encourage Consultant-Counsel Collaboration

Multiple firms provide consulting services specializing in both the procedural and substantive aspects of the CEQA environmental review process. For instance, consulting firms can help prepare checklists and background reports, conduct technical modeling, perform surveys and studies, and draft and finalize official CEQA documents.

CEQA consultants and legal counsel both have a common skill—they can “speak CEQA.” Legal counsel should consider offering to establish regular meetings where staff, counsel, and consultants can check in and discuss projects’ progression from initial feasibility studies all the way to public hearings. Establishing connections between legal counsel and CEQA consultants can streamline review by allowing consultants to focus on meeting procedural milestones and conducting technical studies, while legal counsel focuses on ensuring that the CEQA process and analyses meet all substantive legal requirements. A productive partnership between counsel and consultants can ensure that controversial and complex problems can be resolved strategically, early in the process, and without exposing the agency to liability.

Furthermore, encouraging counsel and consultants to collaborate frees agency staff to focus on the big-picture implementation of the project: Are agency decisionmakers informed? Is the agency prepared for public outreach and response? Are non-CEQA prerequisites or preliminary messaging required before the project is adopted? Allowing counsel and consultants to collaborate early in the CIP’s CEQA process will allow agency staff to devote time and energy to these issues.

Inevitably, some tension may arise between legal counsel and consultants during preparation of the CEQA analysis. As noted above, legal counsel’s review of the draft CEQA documents should be performed with the mindset of a rigorous challenger. The consultants who assembled the draft CEQA document may bristle at this level of inspection, but both parties should endeavor to accommodate each other’s needs: ultimately, legal counsel is reviewing the document in detail to improve and strengthen the document in anticipation of judicial review, not to undermine the consultant. Care should be given to help consultants understand that there are collaborators with counsel, not adversaries, in assisting the common agency client.

Be Flexible and Adaptive In Project Design And CEQA Evaluation

Perhaps you expected your project would be exempt from CEQA, but now learn it will need an environmental impact report (EIR)? Perhaps your high-profile project is eligible for streamlined CEQA procedures, but you are concerned about public backlash if the project is approved without open hearings? Perhaps you expected to perform a full EIR, but now learn there is a prior analysis you can incorporate into your environmental review to dramatically reduce time and expenses?

Legal counsel can assist staff early in the CEQA process by helping to evaluate all options and strategies, explore new alternatives, assess liability risks, and otherwise help to ensure that the agency is protected from legal exposure as much as possible for

whatever decisions it makes. Agency staff should be prepared to be flexible with the CEQA evaluation and procedures for their project, and be willing to adapt if necessary to ensure the project is successfully approved.

Legal counsel should encourage agency staff to be flexible if the CEQA process does not develop as originally planned, particularly if initial analyses show that the project will have additional or more severe environmental impacts than anticipated. If the agency was committed to an exemption or an addendum, but the preliminary analyses show the project could actually cause new or more severe impacts, or includes activities that would nullify an exemption, legal counsel should explain the costs and risks of proceeding, while being sensitive to concerns that performing additional analysis or changing the CEQA strategy adds time and expense to the project. After all, the potential liability and expenses of proceeding with a risky project should be compared to the costs of a challenge to the project, rather than the agency's initial financial and timeline projections for the project.

II. TEN STEPS FOR SUCCESSFUL RESOLUTION OF CEQA LITIGATION²

Notwithstanding best efforts in project design and CEQA evaluation, and early engagement of experts and counsel, your agency may still be served with a petition for writ of mandate alleging violations of CEQA

This paper provides a 10 step overview of statutory requirements and best practices to help make CEQA litigation go as smoothly and painlessly as possible. This guidance is intended as a high-level discussion of what may happen in a typical CEQA case; it does not, nor could it, discuss every conceivable twist and turn that may arise.

1. Think About the Administrative Record Early and Often

CEQA lawsuits are won (or lost) on the administrative record of the agency's proceedings. The administrative record includes "...pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development." (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 8.)

Except in rare circumstances, the items in the administrative record are the only evidence the court may consider. Consequently, it is critical to ensure relevant documents and studies are prepared, and maintained in the City's records *before* the City takes final action on a proposed project. Once the project is approved, there is little chance of augmenting the record with any post-approval documents or other evidence.

When served with a CEQA lawsuit, public agency counsel should consider both the content of the record and the process by which the record will be prepared. Public Resources Code section 21167.6 governs the timing, process, and content of the administrative record. Read it carefully.

² Authored by Nicole Hoeksma Gordon, Principal, Meyers Nave.

A few items to keep in mind:

- Pursuant to 2023 legislation (SB 149), lead agencies now have five (5) business days from receipt of a CEQA petitioner's election to prepare the record to reject the election. (Pub. Resources Code, § 21167.6, subd. (b)(3).) Rejecting a petitioner's election to prepare may enhance the speed and efficiency of record preparation. Importantly, however, exercising this option means waiving the right to recover record preparation costs that would otherwise be recoverable as a prevailing party.
- Be on the lookout for California Public Record Act ("CPRA") requests. Petitioners often use such requests to obtain documents to prepare the administrative record. While the CPRA does not require agencies to organize or explain the context for documents produced, it may be beneficial to do so, since the ultimate responsibility to certify an organized record in CEQA litigation lies with the lead agency.
- Check the local court rules for any provisions relevant to CEQA and administrative records.
- Collection, review, and production of email records can take a long time. E-discovery platforms can help. Seek out the advice of paralegals and e-discovery specialists.
- Consider reducing the scope of the record. The parties may stipulate to a "partial record of proceedings" that does not contain all the documents listed in Public Resources Code section 21167.6, subdivision (e), if approved by the court. (Pub. Resources Code, § 21167.6, subd. (b)(1)(B).) But make sure the record includes all the evidence needed to support and defend the City's conclusions.
- The record "shall not" include communications that are of a logistical nature, such as meeting invitations and scheduling communications, nor shall it include any material that is subject to privileges contained in the Evidence Code or exemptions contained in the CPRA. (Pub. Resources Code, § 21167.6, subd. (e)(10).)
- The record must be prepared and certified by the respondent agency within 60 days after service of a request for preparation. This deadline can be, and often is, extended by stipulation of the parties. Extensions over 60 days require court approval.

2. Communicate Early with Opposing Counsel

As described below, several deadlines come up very quickly in CEQA litigation. Acquainting yourself with opposing counsel early in the process, and establishing a civil

relationship, can help these deadlines go smoothly and set the stage for a more productive settlement discussion.

For example, it is helpful to communicate at the outset regarding:

- a date for the early settlement meeting;
- the deadline for the answer or other responsive pleading; and
- the scope of the record.

3. Serve the Notice of Responsible Agencies

The respondent agency must provide the petitioner with a list of responsible agencies and agencies having jurisdiction over a natural resource affected by the project, not later than 10 business days following service on the Agency. (Pub. Resources Code, § 21167.6.5, subd. (b).) Petitioner then has 15 days to notify the responsible agencies of the pending litigation and serve them with a copy of the Petition. (*Id.*, subd. (c).) This can be in letter or pleading form and need not be filed with the court.

4. File Notice of Mandatory Settlement Meeting

The respondent agency must serve a “Notice of Settlement Meeting” within 20 days after service of the petition. The settlement meeting itself must occur within 45 days of service of the petition. (Pub. Resources Code, § 21167.8.)

In many instances, 20 days may not be enough time to have confirmed a workable settlement meeting date with opposing counsel. In that case, it is acceptable to notice a settlement meeting date and time that works for you and your client and update it later if needed.

CEQA settlement meetings are relatively informal and do not typically take place in the courtroom (except where local rules require it, see, e.g., San Francisco Local Rule 6.11(f)).

Note that some counties, e.g., Los Angeles, Alameda, Fresno, have local rules observing that an early settlement meeting may be premature and recommending a second meeting be held after the administrative record is certified. In section 3 this paper, we discuss best practices and tips for making the early settlement meeting as productive as possible – including in-person participation by the parties and use of a neutral mediator.

5. Evaluate Merits of the Case and Settlement Options

Take a hard look at the case. If you are already familiar with the record, it may be easy to assess its strengths and weaknesses right away. In other cases, you may need time to review the record before determining the likelihood of prevailing.

In connection with this evaluation, consider settlement options, including mediation. If the parties are truly interested in resolving the case, a mediator can help enormously in getting the parties to the table and identifying a path to resolution. Research shows the benefits of early mediation to save costs and try to resolve disputes before parties are dug in. If the other parties are willing to sit at the table early in the case – consider taking that opportunity. The final section of this paper on dispute resolution strategies explores negotiation and settlement strategies in greater detail.

6. Consider Responsive Pleading and Defenses

A CEQA petition that fails to allege facts sufficient to state a claim may be attacked by a general demurrer. (See Cal. Code Civ. Proc., § 430.10 et seq.) Common grounds for demurrer include failure to exhaust administrative remedies, failure to file the petition within the applicable statute of limitations period, and mootness.

Before demurring, consider whether a demurrer will completely dispose of the case or a cause of action, or whether it may simply give the petitioner an opportunity to amend the petition with additional facts and allegations. In many cases, arguing affirmative defenses during briefing on the merits, with the benefit of the administrative record, may prove to be a better strategy.

Regarding timing, whereas the answer or other responsive pleading in civil litigation is typically due within 30 days of service of the complaint, because CEQA claims almost always involve an administrative record, they are governed by Code of Civil Procedure, section 1089.5. That section provides that the respondent and real parties in interest must file a responsive pleading within 30 days after receipt of a copy of the record. Where a lawsuit involves both CEQA and non-CEQA causes of action, it is a good idea to get confirmation from opposing counsel on the response date. If opposing counsel will not agree, it may be necessary to seek a court order to establish the date for filing a responsive pleading.

Be sure to calendar 90 days from the filing of the petition for petitioner to request a hearing. If a request for hearing is not filed within 90 days, respondents can file a motion to dismiss the case, or the court may dismiss it on its own motion. (Pub. Resources Code, § 21167.4; CEQA Guidelines, § 15232.)

7. Certification of the Administrative Record, Prepare for Briefing

Typically, once the respondent agency certifies the administrative record, the court will set a trial date and a briefing schedule. In some cases, court will permit parties to submit a proposed briefing schedule and propose page limits. Generally, the most important thing to the court is that the judge receive the briefs and the record with sufficient time to prepare for the hearing on the merits.

It is common practice to stipulate that the briefs on the merits will satisfy CEQA's requirement to file a separate "statement of issues." (See Pub. Resources Code, § 21167.8, subd. (f).) Sometimes, however, respondents may want to receive a statement

of issues in hopes of limiting the issues to be briefed and raised at the hearing. Note that CEQA does not prohibit parties from briefing or raising issues not mentioned in the statement of issues.

Once the briefing schedule has been established, counsel should continue to evaluate the merits of the case. If the case has weaknesses, it is not too late to revisit settlement. In deciding whether to reopen settlement discussions, counsel should weigh the downside of signaling potential doubts about the case against the upside of potentially settling the case before more attorneys' fees are spent. We analyze settlement strategies in greater detail in the final section of this paper.

Assuming the case proceeds to briefing on the merits, be sure to write a clear, concise brief. Adhere to any ordered page limits, but consider going into court *ex parte* if there is good cause to request more pages, e.g., the need to brief an affirmative defense. The brief should respond to all arguments raised, provide clear citations to the administrative record, and raise any applicable affirmative defenses. Some courts appreciate briefs that include hyperlinks to cited pages of the record and legal authority. It is worth inquiring with the court whether this is something the judge would prefer. If the court welcomes it, a hyperlinked brief can greatly facilitate judicial review.

8. Preparing for The CEQA Trial

A CEQA trial typically consists of a hearing before the judge on the merits of the case. Hearings typically last between half a day to three days. Many judges require the parties to file a joint appendix of administrative record pages cited in the parties' briefs. Even if the court does not require it, filing a joint appendix may be a good idea to ensure the judge sees and touches the relevant evidence.

Before trial, refamiliarize yourself with the administrative record. Have the complete record available electronically in case opposing counsel, or the judge, raises something unanticipated. Consider bringing hard copies of any critical documents to trial. This can be especially helpful if the case turns on interpretation of a map or other figure that may require explanation. Be sure any pages you wish to submit on the day of the hearing come directly from the certified administrative record, and bring copies for all counsel.

In some cases, the court will issue a tentative decision prior to the hearing on the merits. In that case, counsel should carefully study the tentative and direct their argument to any factual or legal issues that require clarification. With or without a tentative ruling, counsel should be prepared to discuss any and all legal and factual issues argued in the parties' briefs.

Following the hearing on the merits, the court will issue a final ruling.

9. Judgment for Respondent

If the court denies the petition, the respondent agency will typically be ordered to prepare a proposed judgment. The judgment should also include the court's decision on the matter of costs, or include a blank space for costs to be entered at a later date.

Often, the court or the local rules will require the draft judgment to be sent to opposing counsel for approval as to form. Following a reasonable period for such approval (e.g., five days), the proposed judgment should be submitted to the court. Once the court approves and enters the judgment, the respondent agency should file a Notice of Entry of Judgment.

If the court does not award the petitioner any relief, the respondent and any real parties are considered the prevailing parties and are entitled to costs as a matter of right. (*Chaparral Greens v. City of Chula Vista* (1996) 50 CA4th 1134, 1152.) A prevailing respondent may file a memorandum of recoverable costs within 15 days (plus 2 court days for service by electronic means) of service of the notice of entry of judgment or a file-endorsed copy of the judgment. (Cal. Rule of Court, 3.1700(a)(1); Code Civ. Proc., § 1010.6(a)(3)(B).)

The parties have 60 days from service of the Notice of Entry of Judgment to appeal the trial court's decision. (Cal. Rule of Court, 8.104(a).) If an appeal is filed, the rules governing appeals in civil actions generally apply to appeals in CEQA cases.

10. Judgment for Petitioner

If the court grants the petition, in whole or in part, the petitioner will typically be ordered to prepare a proposed judgment. The judgment will order issuance of a peremptory writ of mandate, which is also typically drafted by the petitioner. A peremptory writ of mandate orders the respondent agency to perform the act that was the subject of the lawsuit. A peremptory writ of mandate will also order the respondent agency to file a return to the writ describing the action it has taken to comply with the writ and a date by which the return must be filed. (Pub. Resources Code, § 21168.9, subd. (b).)

Where a court finds the public agency has not complied with CEQA, Public Resources Code section 21168.9, subdivision (a) limits the remedies a court may order to one or more of the following mandates:

- That the agency void its determination, finding, or decision, in whole or in part;
- That the agency and any real parties in interest suspend all or part of the activities under the agency's determination, finding, or decision, that could result in an adverse change to the physical environment, until the agency has brought its determination, finding, or decision into compliance with CEQA; and/or
- That the agency take specific action that may be necessary to bring its determination, finding, or decision into compliance with CEQA.

Code of Civil Procedure section 1021.5, also known as the "private attorney general statute," provides for recovery of attorneys' fees by a successful party in public interest litigation that might otherwise be infeasible to pursue. Within 15 days of service of the

notice of entry of judgment or file-endorsed copy of the judgment, an unsuccessful respondent agency should expect to receive a motion for attorneys' fees.

As stated above, the parties have 60 days from service of the Notice of Entry of Judgment to appeal the trial court's decision. (Cal. Rule of Court, 8.104(a).) If an appeal is filed, the rules governing appeals in civil actions generally apply to appeals in CEQA cases.

The Ten Tips "In a Nutshell"

The steps above provide a useful guide for steering a CEQA case from the initial challenge through trial court judgment. Ultimately, successful resolution of a CEQA case requires:

- Familiarity with the substance of the law
- Considering the content of the administrative record before litigation is filed
- Familiarity with CEQA's procedural requirements
- Attention to the trial court's local rules and requirements
- Objective evaluation of the case's strengths and weaknesses
- Objective evaluation of potential settlement options
- Distillation of complex concepts into clear legal arguments

III. SETTLING CEQA CASES: NEGOTIATION TIPS AND MEDIATION STRATEGIES³

Fostering A Culture of CEQA and Land Use Dispute Resolution

Recognizing the need to expeditiously resolve CEQA and land use disputes, the legislature has adopted a host of reforms to speed housing and infrastructure permitting and CEQA litigation. Examples are the SB 7 Environmental Leadership Project law for gubernatorial streamlining of priority California infrastructure projects and the SB 149 and AB 205 energy, water and transportation infrastructure packages. As we seek to resolve disputes around infrastructure permitting and CEQA, mediation is an arrow that should not be left in the quiver. Land use, environmental and related public policy disputes can be complicated and often fraught with emotion. It is precisely for these reasons that mediation can help build understanding and trust among the parties.

³ Authored by Gideon Kracov Esq., Mediator, ADR Services, Inc.

Mediation is extremely common and well-accepted in all types of real estate cases, with proven results.

Take the CEQA Settlement Meeting More Seriously

One existing, underutilized tool is the CEQA early settlement meeting process in Public Resources Code section 21167.8. As mentioned above, it requires that the parties meet and attempt to settle the litigation within 45 days of service of the CEQA petition. However, this mandatory early settlement meeting is often *pro forma*, *too informal*, abbreviated, and does not meaningfully assist in resolving the dispute. The CEQA early settlement meeting can be taken more seriously. Consider an in-person meeting including the litigants with a neutral mediator who “speaks CEQA.”

Use The Planning and Zoning Law Mediation Provisions

Thirty years ago, California lawmakers recognized that ADR, and specifically mediation, would aid in resolving land use, environmental and related public policy litigation – but this option is rarely used. The Planning and Zoning Law in Government Code section 66030 *et seq.* authorizes permissive mediation in ten specified types of litigation matters including general plan decisions, mitigation fees, zoning matters, and an expansive catch-all for “*the approval or denial by a public agency of any development project.*”

Yet today, these decades-old Government Code mediation are rarely invoked, largely because the provisions are permissive. Many attorneys and government agencies do not know they even exist even though land use, environmental, and related public policy cases are particularly suited to incorporate the culture of ADR and mediation. Consider invoking these provisions in appropriate cases.

Mediation Fosters Reciprocity Among the Parties

Mediation – especially with a trained neutral who “speaks CEQA” – bring the parties with authority to settle to the table – no small feat. By having the clients personally attend the mediation session, they focus on key interests and are forced to engage. Zoom and remote meetings are becoming the norm for reasons of convenience, and are good platforms for agreement, but there also are advantages to convening in-person. Time, travel and personal presence make for a more meaningful investment in reaching a deal – even on small reciprocal things like sharing an elevator or holding the door open on the way in.

Mediators De-Escalate and Reduce The Parties’ Reactivity To Eachother

A skilled mediator will maximize the chance to settle by utilizing facilitation skills that promote better understanding and trust. They will de-escalate tension and actively listen to all parties. The facilitator or mediator will have time to separately call or zoom counsel or the parties beforehand to distill the key issues. A mediator performs “shuttle

diplomacy” between the parties and the expansive mediation confidentiality enable parties to speak candidly to tell the mediator things they would never tell each other. A trusted mediator motivates parties to reveal their core interests and demands – among even the most reluctant participants. If emotions are high and repairing the parties’ relationship will help settle the dispute (for example if the litigants are neighbors), joint sessions can be considered with a mediator trained in facilitation.

Settlement Gets The Parties To Focus On Interests Not Positions

Once the mediator has established rapport, and the parties are de-escalated to be less reactive to the other side’s arguments, the mediator is able to discuss choices and alternatives. The mediator can review the parties’ BATNA – the best alternative to a negotiated outcome. Or the WATNA – the worst alternative to a negotiated outcome. For example, if a CEQA petitioner insists on complete victory or drawn-out trial, a mediator with subject-matter expertise can perform some “shock treatment” – and discuss the complex and increasingly contested remedy provisions of Public Resources Code section 21168.9 and identify a range of logical outcomes. A skilled and knowledgeable mediator will help petitioner understand it is not going to be able to “kill” the project or re-open all the approvals, and instead focus on mitigation measures that meet its interests.

Mediation Looks “Below the Iceberg”

Mediators use the analogy of an iceberg. We see the iceberg. It’s the lawsuit and the parties’ litigation positions or money demands. But what is “below the iceberg” – the parties’ motivations and interests? ADR and mediation are particularly valuable in land use, environmental and related public policy disputes that have lasting implications beyond just distributive bargaining over money. These cases may involve mitigation conditions important to petitioners including construction design features, air and water quality, traffic impacts, community benefits agreements, or conservation matters such as tree and open space protection. Mediation allows for creative brainstorming of the non-monetary terms.

Embrace Scrupulousness For Mediations and Settlement Talks Too

Prepare your clients and experts before your CEQA mediation. Study the underlying zoning approvals and identify technical constraints. Know what may be possible so you can be best prepared to make a deal. Like everything else, you get from the mediation process what you put into it. One good tip for this is to prepare a draft term sheet before you engage in settlement talks or mediation. Put the work in to identify the key components of a deal. Even if this just for internal use and internal decisionmakers. This will give you a potential roadmap of where you may end up and give counsel the authority to make a deal.

Settling Attorneys' Fees

Attorneys' fees can be a key element of CEQA cases pursuant to Code of Civil Procedure section 1021.5. There are techniques the mediator can use with attorneys' fees disputes to help get cases settled. For example, the desire for fees can be used at the end of a long day of mediation to close the deal – to leverage global resolution of the case on favorable injunctive terms. In some cases the substantive terms are resolved but the fees demand become the sole barrier to a deal. In these situations, experienced mediators can help creatively get cases settled.

Best Practices For Post-Mediation

The parties want the deal to be durable. However, they cannot always anticipate what can happen in the future. For future disputes, consider adding a meet and confer or dispute resolution process – mediation or arbitration. Also, not every case settles at mediation. In these situations, the mediator can ensure the parties agree to next steps with a timeline. The tenacious, flexible mediator does not give up, extending “shuttle diplomacy” for days, weeks, months after the mediation session – sometimes re-engaging with the petitioners and relying on the rapport created during the mediation – to try to get to “yes.”



Tricks and Traps in Reviewing Housing Projects: How to Protect Your City

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Tricks and Traps in Reviewing Housing Projects:

How to Protect Your City

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Introduction

Over 250 bills have been enacted since 2017 to “solve” California’s extraordinarily high housing prices. The majority of these have been aimed at local government processing of housing projects. This avalanche of bills, with their myriad details and strict timelines, has been nearly impossible for overworked planners to understand or to incorporate into their procedures. As a consequence, there are frequent mistakes made, with projects being “deemed complete” or “deemed consistent,” even when the applications are neither complete nor consistent. Even when mistakes are not made, cities and their attorneys must respond to novel claims from newly aggressive developers and their state allies, the Department of Housing and Community Development (HCD) and the Attorney General, and new causes of action contained in prolix and poorly drafted bills. Even those cities that are most supportive of and welcome housing development may encounter these claims.

This paper discusses the most frequent traps encountered by cities in reviewing housing developments and will suggest strategies to protect cities from both litigation and mistakes, especially in light of new housing laws effective in 2025. The paper first discusses issues with processing applications; then discusses the “specific, adverse impact” finding needed to deny housing projects; and then suggests strategies for working with HCD, the Attorney General, and developers in attempting to reach consensus.

PROCESSING HOUSING APPLICATIONS

I. Preliminary Applications (Gov’t Code § 65941.1)¹

A project proponent can submit a preliminary application prior to submitting a development application, which must include the information enumerated in Section 65941.1(a). A preliminary application “freezes” most zoning and development standards at the time of the preliminary application is submitted, with some exceptions listed in Section 65589.5(o). The applicant has 180 days to submit a full development application and must complete the application within 90 days of “receiving the agency’s written identification of the necessary information.” The interpretation of the 90-day limit is the subject of current litigation, as discussed below.

The agency has no obligation to review the preliminary application to ensure that it contains the required enumerated information; the burden is entirely on the applicant. If the preliminary information does not contain the required information, it is not effective. Nonetheless, some cities do review the preliminary application and advise applicants how to complete it. Whether or not to do this depends on the city’s policies and practice.

¹ All further references are to the Government Code unless otherwise stated.

II. Incompleteness Letters. (Permit Streamlining Act Gov't Code §§ 65940 et seq., 65941 and 65943)

- Agency must compile lists of what is required from any applicant for a development project, and make the list available on its website; any changes must be updated to the website within 30 days. §§ 65940, 65940.1.
- Agency has 30 days from submittal to determine incompleteness and provide comprehensive list – if not provided, deemed complete. Applicant has another 30 days for resubmittal. After second resubmittal, city **must** provide an appeal right, although a city may elect to provide an appeal right after each submittal. § 65943.
- For projects initiated through a preliminary application: If the public agency determines that the application for the development project is not complete pursuant to Section 65943, the development proponent shall submit the specific information needed to complete the application within 90 days of receiving the agency's written identification of the necessary information. If the development proponent does not submit this information within the 90-day period, then the preliminary application shall expire and have no further force or effect. § 65914.1(e)(2).
 - HCD has interpreted this provision to provide applicants with as many 90 day periods as they need to complete their application, based on two Los Angeles County Superior Court decisions by the same trial court.² This remains an issue in other current litigation.

A. **Per Gov't Code § 65589.5(h)(6)(F), an incompleteness determination under Gov't Code § 65943 may be a disapproval if:**

- The agency makes a determination or subsequent determination that the application is incomplete and includes an item in its determination that is not required on the agency's submittal requirement checklist; or, in a subsequent determination, asks for an item that was not on the first determination of incompleteness. The agency has the burden to prove the item is on the checklist.
- The agency makes a determination that the application is incomplete and a reasonable person would determine that the applicant has submitted all the items on the checklist, and the agency upholds its determination in an appeal pursuant to Section 65943(c).

² *Jha v. City of Los Angeles*, LACSC Case No. 23STCP03499; *YIMBY v. City of Los Angeles*, LACSC Case No. Case No. 21STCP03883; *Town of Los Gatos v. Arya Properties, LLC*.

- If the agency determines an application is incomplete after 2 resubmittals, the agency has the burden to show the determination is not a disapproval. [Note also the requirement to provide an appeal.]

If these administrative decisions are considered to be a disapproval, an applicant may immediately file suit, arguing that the city did not make the findings required under Sections 65589.5(f), and the city will be responsible for the applicant's attorneys' fees if the applicant is successful. To enable the city to correct any mistakes, we recommend that cities provide an appeal process for all incompleteness decisions and include the ability to request an appeal in incompleteness letters. Note that a decision on an appeal of an incompleteness letter must be made within 60 days (§ 65943(c)), which may require that the appeal go directly to the City Council.

III. Schedule of fees must be provided.

A project proponent who has submitted a preliminary application can request an estimated schedule of fees applicable to the proposed development, and the city must provide it within 30 business days. The applicant can also request the same information from other public agencies, which must provide this information "without delay." The estimate is provided for "informational purposes only" and does not bind the city. § 65941.1(b).

Within 30 business days of final approval, city **must** provide an itemized list and a good faith estimate of all fees and exactions. Final approval means that "the housing development project has received all necessary approvals to be eligible to apply for, and obtain, a building permit or permits." § 65943.1.

IV. Determination of consistency with zoning code and development standards. (Gov't Code § 65589.5(j)(2)(A).)

A determination that a proposed housing project is "inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision must be provided within 30 days of receipt of a completed application for project of up to 150 units, and within 60 days for projected of more than 150 units. Failure to meet these timelines results in the project to be "deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision."

The written determination must include documentation that identifies "the provision or provisions, and an explanation of the reason or reasons [the city] considers the housing development to be inconsistent, not in compliance, or not in conformity."

Although this provision has been in effect since 2018, some planning departments still do not seem to be aware of this provision and do not regularly provide consistency letters.

Note that once the consistency letter has been provided, or the deadline has passed to provide the letter, neither the Planning Commission nor the City Council (nor the public) has the ability to determine that the project is inconsistent with a provision that either the staff found consistent, or that was “deemed consistent” because the staff failed to find it inconsistent. Hence it is critical that the staff have an established procedure and method for determining inconsistency. Some cities now include in their application forms a list of standards and request applicants to show how the project is consistent with those standards.

V. Post entitlement permit approvals (Gov’t Code §§ 65589.5, 65913.3, and 65913.3.5)

City must provide a detailed list of information that will be required from any applicant for a post-entitlement phase permit, and post a complete, approved application as a sample, on the city’s website.

“Post-entitlement phase permit” includes all nondiscretionary permits and reviews filed after the entitlement process has been completed that are required or issued by the local agency to begin construction of a development that is intended to be at least two-thirds residential, excluding discretionary and ministerial planning permits, entitlements, and other permits and reviews that are covered under Chapter 4.5 (commencing with Section 65920). A post-entitlement phase permit includes, but is not limited to, all of the following:

(i) Building permits, and all inter-departmental review required for the issuance of a building permit.

(ii) Permits for minor or standard off-site improvements.

(iii) Permits for demolition.

(iv) Permits for minor or standard excavation and grading.

(B) A local agency may identify by ordinance a threshold for determining whether a permit constitutes a “minor” or “standard” permit for the purposes of this paragraph, which shall be supported by written findings adopted by the jurisdiction.

(C) A post-entitlement phase permit does not include a permit required and issued by the California Coastal Commission, a special district, a utility that is not owned and operated by a local agency, or any other entity that is not a city, county, or city and county. § 65913.3(j)(3)(A).

City must make a completeness determination within 15 business days of application submittal. Incompleteness letter can only include items on the posted list. If the city does not provide an incompleteness letter, the application is deemed complete.

For housing development projects with 25 units or fewer, the city must, within 30 business days of a complete application, “complete the review and either return in writing a full set of comments to the applicant with a comprehensive request for revisions or return the approved permit application on each post-entitlement phase permit requested,” and immediately notify the applicant by email and if applicable by posting on the city’s website. For projects of 26 units or more, the city’s review must be completed and immediately transmitted within 60 business days of a complete application. § 65913.3(c).

The timeline does not apply if the city makes a finding, supported by a preponderance of the evidence, of a specific adverse impact, i.e., “a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.”

If the post-entitlement permit requires approval by an outside agency, the timeline is tolled for the amount of time it takes for the outside agency to issue the permit. This does not provide the City with any additional time. The code has procedural requirements for how to notify the applicant.

If the city determines that the application is noncompliant the city must provide the applicant with “a list of items that are noncompliant and a description of how the application can be remedied by the applicant within the time limits specified above. The applicant must be permitted to rectify the application, and the same timelines apply to resubmittals.

An applicant provided an incompleteness letter or denial must be provided with an appeal right. For projects up to 25 units, the city issues ma written decision within 60 business days after the appeal is submitted, and for projects of 26 or more units, the decision must issue within 90 days. Failure to meet these timelines is a violation of the Housing Accountability Act (HAA), § 65589.5.

For SB 35 projects (Gov’t Code § 65913.4), the timelines in that section shall apply for post-entitlement permits.

Digital Post-entitlement Permits (§65913.3.5):

Cities are required to provide an option for post-entitlement permits to be applied for, completed, and retrieved via an internet website by the dates shown below. In the interim, applications for post-entitlement permits must be accepted by email.

A city located in a county with a population of 1,100,000 or greater, or a local agency with a population of 75,000 or greater in any county, as determined by the 2020 census, was required to comply with subdivision (b) on January 1, 2024. (This deadline could be extended by 2 years based on certain findings.)

Local agencies with a population of fewer than 75,000 in a county with a population of fewer than 1,100,000, and counties with populations of fewer than 75,000 in unincorporated areas, must comply by January 1, 2028, and can get a 5-year extension based on certain findings.

VI. ADUs/JADUs (Gov't Code §§ 66310 et seq., § 66317(a))

If there is an existing single-family or multifamily dwelling on the lot, city must approve or deny an application for an ADU or JADU within 60 days of receipt of a completed application, and if not acted upon within that timeline application is deemed approved. If the application is incomplete, the city must respond within 30 days, as described previously.

For ADU/JADU applications for proposed single family or multifamily dwellings, a city may delay approving or denying the permit application until the city approves or denies the permit application to create the new single-family or multifamily dwelling. The ADU/JADU application must be considered ministerially.

Note that, Gov't Code § 65852.27 provides that cities must have a program for preapproval of ADU plans, and these plans must be approved within 30 days of receiving a completed application.

VII. Two-unit developments and urban lot splits (Gov't Code §§ 65852.21, 66411.7 (SB 9))

City must approve or deny within 60 days of receipt of a completed application, and if not acted upon within that timeline applications are deemed approved. Any decision to disapprove a 2-unit development or urban lot split must be accompanied by a full set of written comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant. Completeness determinations must be made within 30 days.

VIII. Small housing developments/subdivisions of 10 or fewer units (Gov't Code §§ 65852.28, 66499.41, and 65913.4.5 (SB 684))

City must approve or deny ministerially within 60 days after receipt of a completed application, and if not acted upon within that timeline applications are deemed approved. Any decision to disapprove the development/subdivision must be accompanied by a full set of comments to the applicant in writing with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant. Completeness determinations must be made within 30 days

IX. Affordable housing developments in commercial zones and mixed-income housing developments along commercial corridors. (Gov’t Code § 65912.110 et seq., § 65912.120 et seq. (AB 2011))

A city must first determine whether a development submitted under this article is complete. But regardless of whether the application is complete or not, the city shall determine, in writing, whether the development is consistent or inconsistent with the objective planning standards specified in the Government Code within the following timeframes:

(A) Within 60 days after a project proposal is submitted if the project has 150 units or less.

(B) 90 days if the project contains more than 150 units.

(C) 30 days to review a resubmittal in response to the local agency’s findings that a project does not meet objective planning standards.

City cannot request information that was not requested in the initial consistency letter.

If the application was incomplete, the city may indicate that it cannot determine consistency based on the plans submitted. Once the local government determines that a development submitted pursuant to this article is consistent with the objective planning standards specified in this article, it shall approve the development within the following timeframes:

(A) Within 60 days of the date that the development is determined to be consistent with the objective planning standards specified in this article, if the development contains 150 or fewer housing units.

(B) Within 90 days of the date that the development is determined to be consistent with the objective planning standards specified in this article, if the development contains more than 150 housing units.

X. Multifamily housing developments of 2 or more units (Gov’t Code § 65913.4 (SB 35))

A. Tribal scoping consultation

Subdivision (b) requires a developer who intends to build an SB 35 project to submit to the city a notice of intent to build an affordable housing project in the form of a preliminary application (§ 65941.1). Within 30 days of receipt of the notice, the city must begin a scoping consultation “with any California Native American tribe that is traditionally and culturally affiliated with the geographic area.”

Timeline: City must provide formal notice of the developer’s intent to submit an SB 35 application “to each California Native American tribe that is traditionally and culturally

affiliated with the geographic area of the proposed development within 30 days of receiving that notice of intent.”

Any Native American tribe that wishes to engage has 30 days to accept the invitation. The city must then begin the consultation within 30 days of receipt of the tribe’s response.

The language of the statute suggests that the deadlines are directory rather than mandatory, as the statute provides for no consequences if the deadlines are missed. However, given the courts’ proclivity for ruling in favor of developers, the recommendation is to abide by the timelines as strictly as possible, at least on the city side.

It should be noted that in the updated HAA, § 65589.5(h)(6)(D), project disapproval includes failure to “cease a course of conduct undertaken for an improper purpose, such as ... to cause unnecessary delay ..., that effectively disapproves the proposed housing development without taking final administrative action...,” so unnecessarily delaying the tribal consultation period to stall a project may lead to a determination that the city violated the HAA.

However, once the city meets its timelines and engages with the tribe, the dates for meetings and the success of the consultation are entirely within the control of the tribe. If no agreement can be reached with the tribe, or if the applicant refuses to do studies demanded by the tribe, the consultation will fail, and the applicant cannot use the streamlined, ministerial provisions of SB 35 for the project.

B. Projects in certain opportunity zones (§ 65913.4(q))

The City Council (Planning Commission in city with population of greater than 250,000) must hold a public meeting within 45 days after a project proponent submits a notice of intent, but before the project proponent submits a development application, for a development proposed in a census tract that is designated either as a moderate resource area, low resource area, or an area of high segregation and poverty on the most recent “CTCAC/HCD Opportunity Map” published by the California Tax Credit Allocation Committee and the Department of Housing and Community Development. If the city fails to provide the hearing, the project proponent must hold a public meeting on the proposed development before submitting a development application.

The proponent must attest in writing that it attended the meeting and reviewed the testimony and written comments. However, there is no requirement that the proponent respond to any of the comments made.

C. Completeness and consistency determinations (§ 65913.4(c))

The city must first determine if the application is complete, as described above. However, as with AB 2011, regardless of whether the application is complete or not, if the city determines that “a development submitted pursuant to this section is in conflict with any of

the objective planning standards” provided in subdivision (a) of Section 65913.4, the city must “provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards, as follows:

(A) Within 60 days of submittal of the development to the local government pursuant to this section if the development contains 150 or fewer housing units.

(B) Within 90 days of submittal of the development to the local government pursuant to this section if the development contains more than 150 housing units.

(C) Within 30 days of submittal of any development proposal that was resubmitted to address written feedback provided by the local government pursuant to this paragraph.”

Failure to meet the above timelines results in the projects being deemed to meet the standards. If the application was incomplete, the city may indicate that it cannot determine consistency based on the plans submitted. If the city finds that the project complies with the criteria and standards of SB 35, the city must issue the permit. The Planning Director’s decision regarding consistency is determinative, and, effectively, cannot be appealed or overruled.

D. Design Review (§ 65913.4(d))

Design review by planning commission “or any equivalent board or commission” responsible for design review. Any design review shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction. Design review shall be completed, and if the development is consistent with all objective standards, the local government shall approve the development as follows and shall not in any way inhibit, chill, or preclude the ministerial approval provided by this section or its effect, as applicable:

(A) Within 90 days of submittal of the development to the local government pursuant to this section if the development contains 150 or fewer housing units.

(B) Within 180 days of submittal of the development to the local government pursuant to this section if the development contains more than 150 housing units.

Given the limits on design review, many cities have made the entire SB 35 process entirely ministerial and completed at the staff level. Possibly conditions could be added regarding design details, but the authority to do that is not clear. HCD’s Guidelines advise that only standard conditions can be applied to SB 35 projects.

E. Construction and entitlements (§ 65913.4(g))

If an approved project includes public investment in housing affordability and at least 50% of the units are affordable, entitlements do not expire.

Otherwise, approvals remain valid for 3 years. Approvals remain valid during construction, provided construction is in progress, as defined.

F. Modifications (§ 65913.4(h))

A development proponent can request a project modification prior to issuance of a building permit. The modification must be approved as long as the project remains in compliance with the requirements of Section 65913.4(a).

The city must analyze the modification “for consistency with the objective planning standards using the same assumptions and analytical methodology that the [city] originally used to assess consistency for the development that was approved for streamlined, ministerial approval....”

Consistency must be determined within “60 days after submission of the modification, or within 90 days if design review is required.”

“SPECIFIC, ADVERSE IMPACT” FINDINGS

Housing Accountability Act (Gov’t Code § 65589.5) – Applicable to All Housing Development Projects. The Housing Accountability Act requires that, *if a project complies with all objective standards*, then, to deny or reduce the density of an application for a housing development project, a city must provide written findings supported by a preponderance of the evidence that both of the following exist:

“(A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a “specific, adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

“(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.” § 65589.5(j)(1).

Most housing development projects with an affordability component (with the exception of those with four units or less, which are not eligible for a density bonus, § 65915(i)) must be found to be consistent with all objective standards – even if they request major variations from local development standards. That is because state density bonus law (§§ 65915

et seq.) allows unlimited waivers from local development standards, plus from one to seven “concessions,” for senior housing and for any housing project with at least 5 percent very low-income units. The receipt of waivers and concessions “shall not constitute a valid basis on which to find a proposed housing development project is inconsistent...with an applicable plan, program, policy, ordinance” etc.

As a result, all housing projects that are entitled to waivers and concessions must be found to be consistent with local standards, and the “specific health and safety” finding listed above must be made if the city desires to deny the project or reduce the density.

The “specific health and safety impact” finding includes three components:

- The city must have adopted an objective, written public health or safety standard that was in effect on the date that the application was “deemed complete” (the date that either a complete preliminary application was submitted, or the date that a project application was found complete if a complete preliminary application was not submitted. (§ 65589.5(h)(5).)

Often project opponents will provide information regarding possible safety impacts, such as the project’s effect on evacuation times during fires. However, unless the city has adopted, objective standards regarding evacuation times, this information cannot be used to deny or reduce the density of a project.

Additionally, if cities are considering adopting health and safety standards, applicants may seek to avoid them by filing preliminary applications, so that the project is “deemed complete” before the safety standard can go into effect.

- Violation of the health or safety standard must have a “significant, quantifiable, direct, and unavoidable impact.” While an environmental impact report (EIR) may find a “significant and unavoidable impact,” unless the impact is based on an objective and adopted health or safety standard, that impact cannot be used to deny or reduce the density of the project, although it may be used to impose mitigation measures.
- There can be no feasible way to mitigate the impact except by denying the project or reducing the density. One way to mitigate the impact is simply to require that the standard be met. However, if this is not feasible, then the project may conceivably be denied or the density reduced.

All of these findings must be supported by a preponderance of the evidence, rather than substantial evidence.

Trial Court Cases. There are at least three recent trial court cases where cities denied housing projects based, at least in part, on the “specific health & safety” finding. In all three cases, the trial court ruled against the city.

In two of the cases, *California Renters Legal Advocacy and Education Fund (CaRLA) v. City of Huntington Beach*³ and *TNHC Canyon Oaks LLC v. City of Calabasas*,⁴ the courts concluded that the cities failed to identify an objective, written public health or safety standard on which their finding was based. In *CaRLA*, the city found that there would be a negative impact on health and safety due to unsafe ingress/egress conditions, but the Court found that this was not based on any objective standard. In *TNHC Canyon Oaks*, the city cited increased fire evacuation time but the Court held that there was no city standard. Many of the city's other health and safety findings contradicted statements in the EIR prepared for the project, so the Court concluded that the city's findings were not supported by the preponderance of the evidence. The courts also held that both cities failed to make a finding that there was no feasible method to mitigate or avoid the asserted impact and stated that, in fact, the record showed that there were feasible methods to mitigate the asserted impacts.

In the third case, *Justin Mi v. City of San Marino*,⁵ the City based its denial on the project's asserted lack of compliance with the Fire Code. However, the Court disagreed with the Fire Chief's interpretation of the relevant Fire Code provisions and so concluded that the project was not inconsistent with the Fire Code. The City had also found that the project did not provide sufficient hydrants because the plans weren't complete enough; the Court held that that problem could have been easily mitigated by requiring more detailed plans. In relation to one asserted violation, the Court held that the record did not have any evidence from a knowledgeable person, such as the Fire Chief, stating that the asserted violation would cause a specific, adverse impact.

So here are the lessons from these three cases:

1. There must be an objective health and safety standard that was in effect when the project was "deemed complete," and the standard must clearly apply to the project.
2. There must be evidence that failing to comply with the standard would have a "significant, quantifiable, direct, and unavoidable impact." This evidence could be provided by an EIR, by a consultant's written findings, or by a memo drafted by a knowledgeable staff person, such as the Fire Chief, Public Works Director, or City Engineer.
3. The city must clearly explain why the asserted impact cannot be feasibly mitigated. If it is feasible to mitigate the impact by imposing the standard or adopting other conditions, the city must take that action rather than denying the project.

Most efforts to use the "specific, adverse impact" finding fail because no relevant objective health and safety finding was in effect when the project was "deemed complete."

³ Case No. 30-2020-01140855, Orange County Superior Court (October 4, 2021).

⁴ Case No. 21STCP01819, Los Angeles County Superior Court (November 27, 2023).

⁵ Case No. 21STCP01830, Los Angeles County Superior Court (January 17, 2023).

HOUSING LAWS ENFORCEMENT: WORKING WITH HCD AND THE ATTORNEY GENERAL'S OFFICE

1. Powerful Enforcement, Potent Remedies

Recent legislation substantially strengthens the role of HCD and of the Attorney General's office in enforcing housing laws. Notably, Government Code section 65585, in addition to requiring the submittal of housing elements to HCD for review and a determination whether the element substantially complies with state law, also requires that HCD review any local agency's "action or failure to act" that HCD has determined is inconsistent with an adopted housing element, or with the Housing Element Law itself. (§ 65585(i)(1)(A).) The review extends to any alleged failure to implement any program actions included in the housing element. (*Id.*) The section requires that HCD issue written findings to the agency regarding whether the act or failure to act in question substantially complies with the Housing Element Law; the jurisdiction then has no longer than 30 days to respond to the finding, prior to HCD and/or the Attorney General (AG) taking further enforcement action. (*Id.*)

If HCD finds that the action or failure to act does not substantially comply with the Housing Element Law, then it has the power to revoke a previous finding that the agency's Housing Element substantially complies with state law. (§ 65585 (i)(1)(C).) If HCD revokes a finding of compliance, then the agency is potentially exposed to the Builder's Remedy. Further, and crucially, if the question of the validity of the act or failure to act is litigated, an amendment effective January 1, 2025 creates a rebuttable presumption of the invalidity of the local agency action in the lawsuit, if HCD has found that the action did not comply either with the adopted housing element, or with state law. (§ 65585(i)(1)(B).)

Section 65585 also gives HCD the power to notify the AG's office that an agency has violated the law, if HCD has found that a housing element is not substantially compliant or that the agency has committed an act or has failed to act in a manner that complies with the adopted element or with the Housing Element Law. (§ 65585 (j).) HCD may also notify the AG if HCD has determined that an agency has violated any one of a number of housing statutes, including but not limited to the Housing Accountability Act (HAA) (§ 65589.5), the Housing Crisis Act of 2019 (SB 330) (§§ 65941.1, 65943 and 66300), SB 35 (§ 65913.4), and many others. (§ 65595(j).) The AG has standing to bring an enforcement action either on its own, or with HCD. (§ 65585(n).)

Further, SB 1037, effective January 1, 2025, creates new remedies and penalties in actions brought by the AG or HCD. SB 1037 adds Section 65009.1, which authorizes serious penalties in actions brought by the AG or HCD to (1) enforce adoption of housing element updates under the schedule in Section 65588(e); or (2) enforce any state law requiring a city, county, or local agency to ministerially approve an application for a housing development project. (§ 65009.1(a).) These remedies include: (1) a penalty for each violation of at least \$10,000, but no more than \$50,000, per month, accruing from the violation date until the

violation is cured; (2) all costs of investigating and prosecuting the action, including expert fees, reasonable attorneys' fees, and costs, whenever the AG or HCD prevails in a civil action to enforce state laws under this statute; and (3) other equitable or injunctive relief, including temporary or permanent injunctions. (§ 65009.1(a)(1)-(3).)

Moreover, any penalties imposed under Section 65009.1 may not be paid out of funds already dedicated to affordable housing. (§ 65009.1(c)(2).) Failure to pay penalties can result in the Controller intercepting available state and local funds. (§ 65009.1(c)(3).) Civil penalties are paid to the state's Building Homes and Jobs Trust Fund, to support affordable housing in the particular community.⁶ Additional penalties may be imposed to enforce timely adoption of housing element revisions if—despite a court order—cities or counties fail to meet the deadlines in Section 65754, which requires in part: (1) bringing the housing element into compliance within 120 days of the court's order; and (2) submitting to HCD for its review a draft of the revised housing element at least 45 days before adoption.

Failure to meet these deadlines requires the court to impose the following additional penalties: (A) if not already imposed, the court must modify its prior order to impose the *maximum* penalty of \$50,000 per month for each month until the agency has substantially complied with Section 65754; and (B) if not already imposed, the court must impose *all* of the remedial provisions in Section 65755(a) until substantial compliance is achieved, including:

1. Suspending authority to issue building permits and all other related permits, with limited exceptions;
2. Suspending authority to grant zoning changes, variances;
3. Suspending the authority to grant subdivision map approvals;
4. Mandating approval of all applications for building permits and related construction permits for housing projects with an approved final subdivision map, parcel map, or plot plan, subject to some exceptions;
5. Mandating approval of final subdivision maps for housing projects that conform to an approved tentative map;
6. Mandating approval of any tentative subdivision map for a housing project that meets certain requirements.

⁶ If the state does not spend the money placed in the Trust Fund after five years, the funds may be used anywhere in the state. (§§ 65009.1(c)(1),(4).)

(§§ 65009.1(d)(2)(B), 65755.)⁷

The new remedies apply *in addition* to any others already available, and apply to all cities, including charter cities. (§§ 65009.1(d)(1), 65009.1(e)(1), 65885(j)(1)-(26).) Attorneys' fees under Code of Civil Procedure section 1021.5, which a court may award to a successful party in any action resulting in the enforcement of an important right affecting the public interest, remain available, in addition to the remedies set forth in this new section. (§ 65009.1(e)(1).)

2. Responding to HCD Letters

Many cities have received HCD Letters of Technical Assistance and Notices of Violation, relating to the city's interpretation of the Housing Element Law, the Permit Streamlining Act, the HAA, density bonus law (§§ 65915 *et seq.*), and other housing statutes. HCD has also frequently issued letters in connection with pending housing development applications, urging the city to approve the housing, and/or disagreeing with the city's interpretation of a pertinent provision of the housing laws. The city's response to HCD presents an opportunity to add information and arguments that the court will eventually view as part of the administrative record in any resulting litigation. If HCD has issued a letter, it will almost certainly be in the administrative record; likewise, the city's response will be included.

If the city disagrees with HCD as to the meaning and effect of a particular statute addressed in either a Letter of Technical Assistance or Notice of Violation, it is helpful if the city's response include a thorough analysis of the statute in question, demonstrating the strength of the city's position, and that the city's interpretation is made in good faith. Consider attaching relevant sections of legislative history, and trial court or appellate decisions in which courts have agreed with the city's interpretation, not HCD's. It is rarely the case that HCD will become convinced due to the power of the city's arguments, but the strength of the city's response can assist in the defense of the litigation, as well as protect against a bad faith finding. However, litigation or possibly a threat to "de-certify" the city's housing element are likely if the city does not ultimately comply with HCD's finding.

The city's response to HCD also affords an opportunity to inform HCD about relevant facts regarding the underlying housing application, timeline, etc.—in other words, a chance for HCD to hear the city's side of the story, not just the version told to HCD by the developer and/or the housing advocates. Further, lawsuits by developers and housing advocates invariably include attempts by the plaintiffs to "poison the well" by portraying the city as a bad housing actor with a history of shirking housing duties. This picture is often misleading and inaccurate; many cities have strong records of multiple approvals, with many projects in the pipeline, and substantial progress towards meeting RHNA. Consider including helpful

⁷ Certain housing projects must be exempted from the prohibition on further approvals. (§ 65009.1(d)(2)(C)(i)-(iv).) In other words, cities, counties, and local agencies are still required to issue certain approvals for housing development projects even if their land use approval authority has otherwise been suspended.

facts about the city's pro-housing actions in the response to HCD. These facts, if in the record, can be useful in convincing a judge that the city is not the bad actor portrayed by the plaintiff.

3. Potential Resolution

The Legislature has significantly strengthened the state's enforcement powers, and created presumptions in HCD's favor that weaken the ability of cities to defend against either a state enforcement action or a developer or housing advocate's lawsuit for a supposed violation of the housing laws. Housing litigation is expensive and presents the risk of significant downsides, financial and otherwise. City Councilmembers often face pressure from constituents to litigate a denial of a housing project. There can also, however, be an interest in confidentially discussing potential resolution of the dispute, to avoid the expense and risk of litigation.

Notably, Government Code Sections 66030 et seq. establish a mediation process for any use disputes, including the approval or denial of a development project. (Section 66031(a)(1).) Section 66032 provides that time limits with respect to the action shall be tolled while the mediator conducts the mediation. Section 66034 states that if mediation is unsuccessful, the court in its discretion may schedule a judicial settlement conference.

When HCD and/or the AG has threatened a lawsuit, consider scheduling a confidential settlement meeting. Indeed, prior to the AG bringing any suit for alleged housing element noncompliance, the AG is required to offer the local agency two meetings in person or remotely to discuss the violation. (§ 65585 (k).) The meet and confer obligation, however, does not apply to any suits brought for alleged violations of the HAA, SB 330, SB 35, and several other housing statutes, nor does it apply to a decision by HCD to "de-certify" a housing element and subject a city to the Builder's Remedy. (*Id.*) And notably, the meet and confer duty applies only to a suit brought by the AG, not by a developer or housing advocacy group. If engaged in a meet and confer with the AG, it is helpful for the city to present as strong a position as possible, with factual and legal support. This can help dissuade the AG from taking on the risk of an adverse decision in an enforcement action.

Settlement discussions with developers can also be productive, since there is frequently an interest in compromising on elements of a proposed project in order to avoid the delay and expense of litigation. As part of a settlement the city can consider offering expedited processing and other benefits. In order to protect the confidentiality of those discussions, it is helpful to have all parties sign a confidentiality agreement. Evidence of settlement discussions is arguably inadmissible anyway under Evidence Code section 1152, but a written confidentiality agreement reminds all parties that confidentiality is a material term. Disputes under the housing laws can also be mediated, although it can be challenging to find a mediator with sufficient land use experience. If there is a mediation, Evidence Code section 1119 strongly protects the confidentiality of mediation-related discussions.

In our experience, the AG and HCD have in some cases expressed support for resolution and agreed to refrain from either intervening in the developer lawsuit or commencing an enforcement action, if the developer and the city can resolve the dispute. Of course, any potential revised project, housing element amendment or other legislative action that results from settlement discussions must be subject to a public hearing. The city cannot pre-commit to either a project approval or a legislative amendment in a settlement agreement. (See, e.g., *108 Holdings, Ltd. v. City of Rohnert Park* (2006) 136 Cal.App.4th 186, 194 (“a municipality may not contract away its legislative and governmental functions.”)) The settlement agreement can be drafted to provide that the litigation is stayed pending a public hearing on a revised project. The agreement can state that if a revised project is approved, then the city is released and the action is dismissed with prejudice. Alternatively, if the revised project is denied, or approved with conditions unacceptable to the plaintiff, then the stay will be lifted and the parties will continue to litigate.



Sidewalk Vending Regulation and Enforcement

Wednesday, May 7, 2025

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California Sidewalk Vendors Regulation & Enforcement

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California Sidewalk Vendors Regulation & Enforcement

I. Introduction

In 2018, California passed Senate Bill (“SB”) 946, also known as the Safe Sidewalk Vending Act, decriminalizing and forcing local agencies to allow sidewalk vending operations.¹ SB 946 expressly makes sidewalk vending a protected health, safety, and welfare activity, such that any local regulations against it require overwhelming health, safety, and welfare justifications that are limited to minimum time, place, and manner restrictions.² SB 946 expressly makes sidewalk vending an important public activity for promoting “safe and dynamic public spaces,” “economic development,” “entrepreneurship,” “access to desired goods,” and access to “culturally significant food and merchandise.”³

SB 946 also expressly protects the low-income and immigrants, including undocumented immigrants by prohibiting a requirement for sidewalk vendors to have social security numbers and prohibiting cooperation with federal law enforcement without a federal court order.⁴ The law aims to provide economic opportunities for small vendors while reducing punitive measures that disproportionately impact marginalized communities.⁵

While SB 946’s intentions were good, it has led to the proliferation of unlawful sidewalk vending activities under color of law.⁶ These unlawful sidewalk vending activities have presented significant enforcement challenges for cities and counties across the State.⁷ Given that outright bans on sidewalk vending are impermissible, municipalities must navigate complex legal and political circumstances to regulate and enforce sidewalk vending laws effectively.

The complexity of the SB 946 sidewalk vending situation was complicated by the addition of SB 972 in 2022, adding more protections and regulations to sidewalk food vending.⁸ SB 972

¹ SB 946 (2018) is codified in Government Code sections 51036 through 51039.

² The text of SB 946 (2018) can be found on the California Legislative Information website at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB972.

³ See Section 1 of SB 946 (2018).

⁴ See SB 946 (2018), §§ 1–3; Gov. Code, § 51038(c)(4).

⁵ See SB 946 (2018), § 1.

⁶ See COUNTY OF SANTA BARBARA, *The Unintended Consequences of Illicit Roadside Food Vending*, <https://www.edhat.com/news/the-unintended-consequences-of-illicit-roadside-food-vending> (September 18, 2024); Hosam Elattar & Brandon Pho, *More OC City Officials Look to Crack Down on Street Vendors*, VOICE OF OC, <https://voiceofoc.org/2023/03/more-oc-city-officials-look-to-crack-down-on-street-vendors> (March 30, 2023).

⁷ See COUNTY OF SANTA BARBARA, *The Unintended Consequences of Illicit Roadside Food Vending*, <https://www.edhat.com/news/the-unintended-consequences-of-illicit-roadside-food-vending> (September 18, 2024); Hosam Elattar & Brandon Pho, *More OC City Officials Look to Crack Down on Street Vendors*, VOICE OF OC, <https://voiceofoc.org/2023/03/more-oc-city-officials-look-to-crack-down-on-street-vendors> (March 30, 2023).

⁸ SB 972 (2022) is codified in Health and Safety Code sections 113818, 113831, 113868, and 114368 through 114368.8.

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created another classification of retail food operations known as the “compact mobile food operation” (“CMFO”), which is effectively synonymous with “sidewalk vending” for food.⁹

The situation is further complicated by another pending bill—SB 635.¹⁰ SB 635 aims to further limit local enforcement authority and effectiveness. Most significantly, SB 635 would prohibit cities and counties from contracting to “enforce sidewalk vending rules or regulations”, to “impound sidewalk vending equipment”, or to “cite, fine, or prosecute a sidewalk vendor for a violation of any sidewalk vending rules or regulations.”¹¹ These enforcement prohibitions would apply both to sidewalk vending under SB 946, as well as CMFO operations under SB 972.¹² SB 635 would also add further prohibitions about inquiring into immigration and citizenship status, including a requirement to destroy records relating to previous inquiries, and a prohibition against cooperating with federal immigration authorities without a subpoena or warrant.¹³ Even more significantly, SB 635 prohibits screening for criminal histories (including violent crimes, gang crimes, and crimes against children), meaning that cities and counties would be required to allow convicted violent criminals to operate on public rights-of-way throughout their jurisdiction, including potentially near schools and around other areas with children.¹⁴

This whitepaper will explore the legal landscape of sidewalk vending, the enforcement challenges posed by SB 946, the effect of SB 972, and practical approaches to mitigating unlawful sidewalk vending. This paper will provide guidance for cities and counties on crafting regulatory strategies that comply with State law while ensuring public health, safety, and welfare, and fair business practices.

II. SB 946 (2018)—The Safe Sidewalk Vending Act

SB 946 was enacted to decriminalize sidewalk vending and promote economic opportunity, particularly for immigrants and low-income individuals.¹⁵ SB 946 established sidewalk vending as a matter of statewide concern, overriding conflicting municipal regulations even in charter cities and counties.¹⁶ SB 946 purports to promote health, safety, and economic development while enhancing the cultural and commercial vibrancy of public spaces.¹⁷

⁹ See Health & Saf. Code, § 113831(c); Gov. Code, § 51036(a).

¹⁰ See SB 635 (2024–25), available at

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202520260SB635.

¹¹ SB 635 (2024–25), § 5.

¹² SB 635 (2024–25), §§ 5–6.

¹³ SB 635 (2024–35), §§ 2–8.

¹⁴ See SB 635 (2024–25), §§ 4, 8.

¹⁵ See SB 946 (2018), § 1; Gov. Code, § 51039.

¹⁶ See SB 946 (2018), § 1.

¹⁷ See SB 946 (2018), § 1.

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Under SB 946, a sidewalk vendor is defined as an individual selling food or merchandise from a nonmotorized conveyance on public sidewalks or pedestrian paths.¹⁸ However, SB 946 often uses similar, but not synonymous, terms to define permissible public sidewalk vending areas, such as “public right-of-way”, “public sidewalk”, “pedestrian path,” public “park”, “neighborhood”, “residential” zone, and “street”.¹⁹ These inconsistencies lead to some of the confusion about how to effectively enforce against unlawful sidewalk vending activities.

SB 946 categorizes sidewalk vendors as either stationary (operating from a fixed location) or roaming (continuously moving and only stopping for transactions).²⁰ SB 946 then regulates sidewalk vending by identifying specific locations where sidewalk vending is permitted or prohibited based on whether the vendor is stationary or roaming.²¹ In public parks, stationary vending may be restricted if an exclusive concession agreement is in place, but roaming vending cannot be banned.²² In residential zones, cities may also prohibit stationary vending, but also must allow roaming vending.²³

SB 946 identifies areas that are presumptively permissive for sidewalk vending, but may be prohibited by a compliant local ordinance.²⁴ Prohibitable areas include stationary vending in residential zones, stationary vending in public parks with exclusive concession agreements, and locations near farmers’ markets, swap meets, or temporary permitted events.²⁵ Prohibiting sidewalk vending in these areas requires limited time, place, and manner restrictions based upon legitimate health, safety, and welfare concerns.²⁶

The law sets limits on municipal regulation authority, preventing cities and counties from imposing regulations based on community animus or economic competition.²⁷ Additionally, non-governmental entities cannot be given the power to approve vendors.²⁸ Local governments cannot impose outright bans on sidewalk vending in public rights-of-way nor non-residential neighborhoods.²⁹ Roaming vending cannot be banned in parks or residential areas.³⁰

Despite SB 946’s protections, cities and counties may regulate sidewalk vending by requiring business licenses and permits, passing well justified health, safety, and welfare

¹⁸ Gov. Code, § 51036(a).

¹⁹ See Gov. Code, §§ 51036(a), 51038.

²⁰ Gov. Code, § 51036.

²¹ See Gov. Code, § 51038.

²² Gov. Code, § 51038(b)(2).

²³ Gov. Code, § 51038(b)(4)(B).

²⁴ Gov. Code, §§ 51037, 51038.

²⁵ Gov. Code, § 51038.

²⁶ Gov. Code, § 51038.

²⁷ Gov. Code, § 51037, 51038(e).

²⁸ Gov. Code, § 51038(b)(3).

²⁹ Gov. Code, §§ 51037, 51038.

³⁰ Gov. Code, § 51038(b).

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regulations, and imposing minimum reasonable time, place, and manner restrictions.³¹ Sidewalk vendors must also comply with food safety standards, accessibility laws under the American with Disabilities Act (“ADA”), and generally applicable law restrictions.³² While operational hours may be restricted, they must be consistent with those imposed on other businesses.³³

III. SB 972 (2022)—Sidewalk Food Vending Regulations

In 2022, SB 972 introduced additional regulations for sidewalk food vending by establishing the CMFO (Compact Mobile Food Operation) category.³⁴ While SB 972 is codified in the Health and Safety Code, the CMFO is effectively the same definition of SB 946’s sidewalk vending definition in the Government Code.³⁵ SB 972 defines CMFO operations to include one’s person, pushcarts, stands, displays, pedal-driven carts, wagons, showcases, racks, and nonmotorized conveyances, just like SB 947 defines “sidewalk vendors”.³⁶

SB 972 is a bit technically complicated in its application, but it helps define what food related activities sidewalk vendors are allowed to engage upon.³⁷ It does so in the context of regulating CMFO operations and the CMFO’s relationship with support facilities.³⁸ Under SB 972, support facilities include food support facilities as well as auxiliary conveyance support.³⁹ Depending on the type of food operations involved, CMFO’s must have access to these support facilities to some extent.⁴⁰

Food support facilities include permanent food facilities, cottage food operations, microenterprise home kitchens, and private homes.⁴¹ These food support facilities may be used to provide food preparation, food products, storage, cleaning, and decontamination.⁴² Auxiliary conveyance support services include on-site operational support, such as food preparation and support facilities, restrooms, handwashing facilities, warewashing facilities, potable water supply, and refuse collection.⁴³

³¹ Gov. Code, §§ 51038, 51039.

³² See SB 972 (2022); Gov. Code, §§ 51037(b), 51038(c).

³³ Gov. Code, § 51038(c)(1).

³⁴ SB 972 (2022) is codified in Health and Safety Code sections 113818, 113831, 113868, and 114368 through 114368.8.

³⁵ See Health & Saf. Code, § 113831(c); Gov. Code, § 51036(a).

³⁶ Health & Saf. Code, § 113831(c); Gov. Code, § 51036(a).

³⁷ See Health & Saf. Code, §§ 113818, 114368.2–114368.4.

³⁸ See Health & Saf. Code, §§ 113818, 113831(c), 114368–114368.4.

³⁹ See Health & Saf. Code, §§ 114368.2–114368.4.

⁴⁰ See Health & Safe. Code, §§ 114368–114368.7.

⁴¹ See Health & Saf. Code, §§ 113818, 114368.2–114368.4.

⁴² See Health & Saf. Code, §§ 113818, 114368–114368.4.

⁴³ See Health & Saf. Code, § 114368.4.

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Food preparation under SB 972 is more regulated than under SB 947. CMFO's (sidewalk food vendors) may only engage in limited food preparation, with more restrictions the more potentially hazardous the food involved.⁴⁴ Specifically allowed activities, based on the relevant risks and conditions involved, may include: cooking, frying, baking, roasting, steaming, boiling, popping, blending, juicing, temperature control, heating, reheating, cooling, portioning, slicing, chopping, shaving, assembling, seasoning, dispensing, or serving.⁴⁵ CMFO's may sell non-hazardous prepackaged food, whole uncooked produce, and certain items that require minimal preparation without much regulation.⁴⁶ However, potentially hazardous foods, including raw meat, poultry, and fish, cannot be prepared or stored without more rigorous approved facilities.⁴⁷ Certain activities are outright prohibited, such as cooling, thawing, grinding, use of milk products, and food washing.⁴⁸

IV. Sidewalk Vendor Enforcement

1. Decriminalization

Under both SB 946 and SB 972, sidewalk vending and CMFO violations are no longer subject to criminal penalties.⁴⁹ SB 946 expressly found that it advances the safety and welfare of the general public by decriminalizing sidewalk vending.⁵⁰ Even preexisting criminal cases had to be dismissed and expunged.⁵¹

2. Administrative Fines

The sole form of enforcement allowed by SB 946 and SB 972 are administrative fines and business license revocations.⁵² Even then, fines have to be reduced by 80% if the violator establishes an inability to pay, which would make a \$100 first offense violation only \$20.⁵³ And the right to demand an adjudication of the inability to pay may be made at any time in perpetuity until paid, even after the administrative fine is final and payment is delinquent.⁵⁴ Even then, if the violator doesn't pay, there can be no additional penalties for the refusal to pay.⁵⁵

⁴⁴ See Health & Saf. Code, §§ 113818, 114368–114368.4.

⁴⁵ See Health & Saf. Code, § 113818(a).

⁴⁶ See

⁴⁷ See Health & Saf. Code, § 113818(b), 114368.4.

⁴⁸ Health & Saf. Code, § 113818(b).

⁴⁹ SB 946 (2018), §§ 1–2; SB 972 (2022), § 4; Gov. Code, § 51039; Health & Saf. Code, § 14368.8.

⁵⁰ SB 946 (2018), § 1.

⁵¹ Gov. Code, § 51039.

⁵² Gov. Code, § 51039; Health & Saf. Code, § 14368.8.

⁵³ See Gov. Code, §§ 51039(f), 68632; Health & Saf. Code, § 14368.8(e).

⁵⁴ See Gov. Code, §§ 51039(f), 68632; Health & Saf. Code, § 14368.8(e).

⁵⁵ Gov. Code, § 51039(c); Health & Saf. Code, § 14368.8(d).

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SB 946 sidewalk vendors with permits face administrative fines of \$100 for a first offense, \$200 for a second offense within one year, and \$500 for each additional violation within one year, with the possibility of business license revocation after the fourth offense.⁵⁶ Unpermitted sidewalk vendors are subject to fines of \$250 for a first offense, \$500 for a second offense within one year, and \$1,000 for each additional violation within one year.⁵⁷ However, these elevated fines for unpermitted operations must be reduced to the permitted limits if the unpermitted sidewalk vendor subsequently obtains a permit.⁵⁸

To make things even more confusing, under SB 972, CMFOs (which are sidewalk food vendors) have a different administrative fine schedule than SB 946 sidewalk vendors.⁵⁹ Pursuant to SB 972, CMFO sidewalk vendors are only subject to a notice of violation for a first offense, \$100 for a second offense within one year, \$200 for a third violation within one year, and \$500 for each additional violation within one year.⁶⁰ There is no business license or permit revocation authorized by SB 972.⁶¹ If the violator is unpermitted, then the jurisdiction may issue an administrative fine up to three times the cost of the permit instead of a set elevated fine scheduled like under SB 946.⁶²

Finally, both SB 946 and SB 92 encourage alternative dispositions, such as community service, instead of monetary fines.⁶³

3. Other Remedies

Experience has shown that these small and largely unenforceable administrative fines are not sufficiently deterring unlawful sidewalk vending violations.⁶⁴ The violators are often part of, or victims of, organized crime (including human trafficking), unidentifiable, and insolvent.⁶⁵ Depending on the circumstances, unlawful sidewalk vending activities can be extremely dangerous

⁵⁶ Gov. Code, § 51039(a).

⁵⁷ Gov. Code, § 51039(a)(3).

⁵⁸ Gov. Code, § 51039(a)(3)(b).

⁵⁹ See Gov. Code, §§ 51036(a), 51039(a); Health & Saf. Code, §§ 113831(c), 114368.8(c).

⁶⁰ Health & Saf. Code, § 114368.8(c).

⁶¹ See Health & Saf. Code, § 114368.8.

⁶² Health & Saf. Code, § 114368.8(d); Gov. Code, § 51039(a).

⁶³ See Gov. Code, § 51039(f)(3); Health & Saf. Code, § 114368.8(e)(3).

⁶⁴ See COUNTY OF SANTA BARBARA, *The Unintended Consequences of Illicit Roadside Food Vending*, <https://www.edhat.com/news/the-unintended-consequences-of-illicit-roadside-food-vending> (September 18, 2024); Hosam Elattar & Brandon Pho, *More OC City Officials Look to Crack Down on Street Vendors*, VOICE OF OC, <https://voiceofoc.org/2023/03/more-oc-city-officials-look-to-crack-down-on-street-vendors> (March 30, 2023).

⁶⁵ See COUNTY OF SANTA BARBARA, *The Unintended Consequences of Illicit Roadside Food Vending*, <https://www.edhat.com/news/the-unintended-consequences-of-illicit-roadside-food-vending> (September 18, 2024); Hosam Elattar & Brandon Pho, *More OC City Officials Look to Crack Down on Street Vendors*, VOICE OF OC, <https://voiceofoc.org/2023/03/more-oc-city-officials-look-to-crack-down-on-street-vendors> (March 30, 2023).

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due to risk of foodborne illness, support for organized crime and human trafficking, violence, attractive nuisance to children, blocked ADA access, diverted pedestrian traffic, and incursions into vehicular traffic, amongst other dangers.⁶⁶ In addition, unlawful sidewalk vending detracts from legitimate businesses, decreases sales tax revenues, decreases community aesthetics, attracts criminal behavior, decreases community investment, decreases property values, decreases property tax revenues, and detracts from the public's use and enjoyment of public spaces, amongst other issues.⁶⁷

Accordingly, many jurisdictions are exploring creative options to address unlawful sidewalk vending beyond mere administrative citations.⁶⁸ These options may include: confiscating potentially dangerous food; confiscating potentially dangerous equipment; impounding equipment; declaring unpermitted food, merchandise, and equipment forfeit; disposing of, or destroying, hazardous or abandoned food, merchandise, and equipment; charging impound fees; etcetera. However, it is unclear whether these creative options are strictly allowed in light of the language in SB 946 and SB 972 that expressly provide that these sidewalk vending violations are “punishable only by an administrative fine.”⁶⁹

To be effective, it is important that jurisdictions are able to differentiate between sidewalk vending violations and violations of other generally applicable laws. While sidewalk vending violations may be limited to administrative fines, cities and counties retain their full power to enforce against other violations.⁷⁰ Just because a violation of other applicable laws is used in furtherance of sidewalk vending operations, does not make that violation a sidewalk vending violation. If that violation is citable to any provision other than the sidewalk vending statutes and ordinances, then that violation is not a sidewalk vending violation and the jurisdiction may utilize its other enforcement options. Those options may include remedies such as civil penalties, to forfeitures, to arrest and criminal prosecution, to cost recovery and judgment liens.

⁶⁶ See COUNTY OF SANTA BARBARA, *The Unintended Consequences of Illicit Roadside Food Vending*, <https://www.edhat.com/news/the-unintended-consequences-of-illicit-roadside-food-vending> (September 18, 2024); Hosam Elattar & Brandon Pho, *More OC City Officials Look to Crack Down on Street Vendors*, VOICE OF OC, <https://voiceofoc.org/2023/03/more-oc-city-officials-look-to-crack-down-on-street-vendors> (March 30, 2023).

⁶⁷ See COUNTY OF SANTA BARBARA, *The Unintended Consequences of Illicit Roadside Food Vending*, <https://www.edhat.com/news/the-unintended-consequences-of-illicit-roadside-food-vending> (September 18, 2024); Hosam Elattar & Brandon Pho, *More OC City Officials Look to Crack Down on Street Vendors*, VOICE OF OC, <https://voiceofoc.org/2023/03/more-oc-city-officials-look-to-crack-down-on-street-vendors> (March 30, 2023).

⁶⁸ See, e.g., Hosam Elattar & Brandon Pho, *More OC City Officials Look to Crack Down on Street Vendors*, VOICE OF OC, <https://voiceofoc.org/2023/03/more-oc-city-officials-look-to-crack-down-on-street-vendors> (March 30, 2023).

⁶⁹ Health & Saf. Code, § 114368.8(a); see Gov. Code, § 51039.

⁷⁰ See Gov. Code, §§ 51037(b), 51038(c)(7), 51039(a); Health & Saf. Code, §§ 114368, 114368.1, 114368.4.

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V. Conclusion

The regulation and enforcement of sidewalk vending remains a complex issue due to the protections and restrictions imposed by SB 946 and SB 972 (with potentially even more restrictions if SB 635 is passed). While cities and counties cannot impose outright bans, they retain authority to regulate vending activities in a manner that protects public health, safety, and welfare. More importantly, jurisdictions retain full power to use all available enforcement tools against all other violations of generally applicable laws that are violated in the commission of sidewalk vending. By adopting innovative enforcement strategies, fostering community collaboration, focusing on non-sidewalk-vending violation enforcement, and advocating for legislative refinements, municipalities can develop effective solutions tailored to their unique challenges.



Politically astute, but not political . . . Politics and the Role of the City Attorney

Wednesday, May 7, 2025

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POLITICALLY ASTUTE, BUT NOT POLITICAL . . .
POLITICS AND THE ROLE OF THE CITY ATTORNEY

Essential Skills Subcommittee
Attorney Development and Succession Committee
May 7, 2025

I. ETHICAL PRINCIPLES

The City Attorneys Department of the League of California Cities has adopted Ethical Principles for City Attorneys to:

- Serve as an aspirational guide to city attorneys in making decisions in difficult situations,
- Provide guidance to clients and the public on the ethical standards to which city attorneys aspire, and
- Promote integrity of the city and city attorney office.

See: <https://www.cacities.org/UploadedFiles/LeagueInternet/d6/d60445e6-7918-459b-9780-00a714616297.pdf>

Principal number 3 is titled “No Politicization”:

The city attorney should provide legal advice in a manner that avoids the appearance that the advice is based on political alignment or partisanship, which can undermine client trust.

Explanation. The city attorney and the city attorney’s advice needs to be trusted as impartial by the entire council, staff and community.

Examples

1. The city attorney should provide consistent advice with the city’s overall legal interests in mind to all members of the city team regardless of their individual views on the issue.

2. Each city council member, irrespective of political affiliation, should have equal access to legal advice from the city attorney, while legal work on a matter consuming significant legal resources should require direction from a council majority.

3. The city attorney or persons seeking to become city attorney should not make campaign contributions to or participate in the campaigns of that city’s officials, including candidates running for that city’s offices or city officers running for other offices. For private law firms serving as city attorney or seeking to become city attorney, this restriction should apply to the law firm’s attorneys.

4. When considering whether to become involved in policy advocacy on an issue that may potentially come before the city, the city attorney should evaluate

whether such involvement might compromise the attorney's ability to give unbiased advice or create the appearance of bias.

For a discussion on how these Ethical Principles relate to the State Bar's Rules of Professional Conduct see: Ethical Principles for City Attorneys, 2019 City Attorney's Department Spring Conference: <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring-Montes-Ethical-Principles-for-City>; and Practicing Ethics Revised Third Edition 2020: <https://www.calcities.org/resource/practicing-ethics>

Additional Resources

Counsel and Council: A Guide to Building a Productive City Attorney-City Council Relationship: https://www.calcities.org/docs/default-source/city-attorneys/cc-counsel-council-2022-ver4.pdf?sfvrsn=ffd5aa65_3 ([A City Attorney] is not naïve about politics but doesn't "count the votes" prior to making a recommendation; can be counted on to provide his/her best professional advice on all legal issues; is politically astute, but not political.)

II. POLITICS AND LOCAL ELECTIONS

A. Election Laws

- Ballot Designations – Elections Code, sections 13106-13107.5, contain the requirements for ballot designations for candidates for local offices.
- Candidates' Statements - When running for office, candidates may prepare statements to convey information to voters about their qualifications (See Elections Code, section 13307.)

See: Ballot Arguments and Candidates' Statements: a Primer for Local Governments (2008): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2008/2-2008-Cont-Ed-Issues-Arising-from-Candidate-State>

Practice Tip – It is important for city attorneys to familiarize themselves with these requirements to be able to closely work with your Elections Official about any issues in this area that may arise.

War Story - Early in my career, there was an issue regarding the ballot designation of a sitting council member running for mayor. The city clerk conveyed the issue and I had a

follow-up conversation with the councilmember, with whom I believed I had a good relationship. It seemed like a clear issue under the statutory law at that time. At the end of the conversation, the councilmember indicated that he understood. I naively thought that the issue was resolved.

What I didn't appreciate was that the councilmember's "political advisors" would apparently see things differently and the matter was not resolved at all. I ended up getting an outside legal opinion (from an election/political law firm with a similar political leaning as this council member). I told outside counsel that I didn't care what the outcome was, but just wanted an expert to opine. Outside counsel reached the same conclusion as I did, and a new ballot designation was eventually submitted. Don't forget that elections for sitting council members are incredibly personal (e.g. purpose, social standing, financial) in a way that policy decisions of that sitting council member may not be.

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) Chapter 3 (Elections) - See also §3.42 (Ballot Designations) and §3.51(Candidates' Statements)

Municipal Elections: From Start to Finish (2018): [https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Winter-Webinar,-Municipal-Elections-\(2018\)/Municipal-Elections-From-Start-to-Finish-Written-M](https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Winter-Webinar,-Municipal-Elections-(2018)/Municipal-Elections-From-Start-to-Finish-Written-M)

B. Campaign Laws

City attorneys play an important role in educating staff, candidates, and officials on campaign related laws. These laws include the following:

- Soliciting Political Contributions – Government Code, section 3205, prohibits officers and employees of a local agency from soliciting political contributions from an officer or employee of the agency.
- Participating in Political Activities While in Uniform – Government Code, section 3206, prohibits officers and employees of a local agency from participating in political activities while in uniform.

- Using Public Resources for Campaign Activities – Government Code, section 8314, prohibits local officers and employees from using public resources for campaign activities
- Electioneering Near Polling Places and Ballot Drop Off Locations – If city facilities are used as a polling places or ballot drop off locations, Elections Code, section 18370, contains prohibitions on electioneering within 100 feet of such locations.

Practice Tip – Well before an election, it is helpful to distribute a brief memo to staff and city council reminding them of these campaign related laws. Preparing a one-page checklist in simple language of what is permitted and what is prohibited can be very helpful. (See Attachment A)

Additional Resources

Municipal Elections: From Start to Finish (2018): [https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Winter-Webinar.-Municipal-Elections-\(2018\)/Municipal-Elections-From-Start-to-Finish-Written-M](https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/Winter-Webinar.-Municipal-Elections-(2018)/Municipal-Elections-From-Start-to-Finish-Written-M)

C. Initiatives, Referenda, and Local Ballot Measures

The Elections Code mandates a role for the City Attorney in initiatives, referenda and local ballot measures.

- Ballot Title & Summary for Initiative – Elections Code, section 9203, requires that within 15 days after notice of intention to circulate an initiative petition is filed, the City Attorney must prepare a non-argumentative ballot title and summary of 500 or fewer words describing the purpose of the initiative measure. The ballot title and summary must not be misleading or biased.

See: Drafting Titles, Summaries and Impartial Analyses (2008):

<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2008/2-2008-Cont-Ed-Election-Seminar-Holly-Whatley-Sand>

- City Attorney Impartial Analysis of a Local Ballot Measure – Elections Code, section 9280, authorizes the City Council to direct the City Attorney to prepare an impartial analysis of a local ballot measure showing the effect of the measure on the existing law

and the operation of the measure. The impartial analysis must be 500 words or less. The impartial analysis has the same deadline as the ballot arguments.

See: Impartial Analysis (2015): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/2015-Spring-Conference/5-2015-Spring-Michael-Jenkins-Impartial-Analysis>

- Impartial Summary of Referendum Against an Ordinance – If referendum proponents prepare an impartial summary of the referendum, Elections Code, section 9238, authorizes the City Attorney to edit the impartial summary. All edits made to the summary must be true and impartial and shall not contain argument or any matter likely to cause prejudice for or against the referendum. If the city attorney fails to issue an approved summary within 10 business days of submission by the referendum proponents, the proposed summary submitted by the proponents shall be considered approved.

Practice Tip—Don’t procrastinate. The City Attorney only has approximately 10-15 days, depending on the task, to complete this work.

Practice Tip—Check your City Charter to see if there are different rules applicable to election timelines.

Practice Tip – Having a non-attorney person you trust review your summaries and impartial analysis and give a “person on the street” perspective was incredibly helpful to avoid jargon and legalese. Despite some legal background, a legal secretary or legal assistant in the office may be a good choice if a spouse/partner is not. It is best to find a person in your office or firm rather than an outside party. This avoids early drafts becoming public records and any appearance of not being impartial.

- Defending a Challenge. The City Attorney is usually tasked with defending a challenge to the City Attorney’s Ballot Title & Summary, Impartial Analysis, or Impartial Summary. In addition, the City Attorney is usually tasked with defending challenges to actions of the Elections Official (often, the City Clerk). The Elections Code requires courts to expedite hearings on elections-related challenges, and oftentimes a challenger will initially appear *ex parte*.

Practice Tip—Closely communicate with your Elections Official about any rumors of a challenge so you can be prepared to quickly send an attorney to court to represent the Elections Official or the City Attorney.

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) §§3.80 - 3.125 (Initiatives and Referenda) - See also 3.222 - 3.226 (Drafting Ballot Measures and Analyzing City Ballot Measures)

Initiatives/Referendums (2015): https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/2015-Spring-Conference/5-2015-Spring-Craig-Steele-Initiatives_Referendums

D. Speech

1. Elections-related activities

- Government entities are authorized to express opinions on ballot measures, but not expressly advocate for one side in the election. (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 36.)
- Campaign materials and campaign activities may not be paid for by using public funds, but it is acceptable to produce, develop, and/or disseminate informational materials, and conduct informational activities. (*Vargas, supra*, 46 Cal.4th 1; Gov. Code § 54964.)

Practice tip—It can be challenging to determine whether materials or activities are informational-related or constitute impermissible campaign conduct. In *Stanson v. Mott*, the California Supreme Court provided that commissioning materials such as bumper stickers, posters, advertising floats or television and radio spots are improper campaign-related conduct. ((1976) 17 Cal.3d 206, 221.)

Practice tip—During election season, cities often receive requests to opine on the veracity of election materials. While city officials may respond to requests for information utilizing city resources under *Vargas*, the ability of public entities to serve as roving factcheckers has First Amendment implications because false information is afforded constitutional protections. (*U.S. v. Alvarez* (2012) 567 U.S. 709, 717.)

Practice Tip – Election consultants can be quite aggressive in pushing cities closer (if not over) the line between information and advocacy. Familiarize yourself with the FPCC’s enforcement actions in this area so you can more definitively point to why an approach may be problematic as opposed to just giving a “gut reaction.” Also, like most legal advice, some suggested alternatives versus just a “no” will be better received.

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) Chapter 3 (Elections) - §3.313 - 3.218 (City Participation in Ballot Measures)

Ballot Measures and Public Agencies: https://www.ca-ilg.org/sites/main/files/file-attachments/ballot_measures_and_public_agencies_faq_final.pdf?1652940596

Cities on the Ballot: What, When & How of Speech (2019): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Annual-Conference/10-2019-AC;-Cameron-Perlmutter-Cities-on-the-Ballo>

2. Signs

War story - Handling violations of sign ordinances for campaign signs can be a difficult, particularly for cities that rely on complaint-based enforcement, like our city does. Our city regularly received complaints from one candidate regarding an opposing candidate's signs, resulting in the removal of the opposing candidate's signs. Code enforcement personnel removed the signs in accordance with the city's procedures. After a few weeks of this happening, it was brought to the attention of the city attorney's office that it appeared as if the city was enforcing its sign regulations disproportionately against one candidate.

Practice tip - Make a plan with the city's public information officer to inform the community about the jurisdiction's regulations, and the city's practices for enforcement, and ensure this information is shared with all candidates. If your jurisdiction has a complaint-based system, that fact should be referenced in those informational materials. In the event your jurisdiction has a proactive enforcement practice in addition to a complaint-based one, work with staff to ensure that the proactive enforcement plan is methodical, including by planning ahead for which streets or neighborhoods are slated to receive an inspection.

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) §9.151 (Political Signs)

The Challenge of Content Neutrality (2016): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/2016-Spring/5-2016-Spring-The-Challenge-of-Content-Neutrality>

Sign Regulation in the Wake of *Reed v. Town of Gilbert* (2015):

<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2016/Sign-Regulation-in-the-Wake-of-Reed-v-Town-of-Gil>

3. Members of the Public

- The Brown Act provides in relevant part that “[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public . . . that is within the subject matter jurisdiction of the legislative body. (Government Code, section 54954.3(a).) It is unclear whether this section allows members of the public to engage in purely political speech during this time.

See: Open & Public VI: A Guide to the Ralph M. Brown Act:

https://www.calcities.org/docs/default-source/advocacy/open-public-vi-revised-2024.pdf?sfvrsn=2f412f0d_3:

Q. During the public comment period of a regular meeting of the legislative body, a resident urges the public to support and vote for a candidate vying for election to the body. May the presiding officer gavel the speaker out of order for engaging in political campaign speech?

A. There is no case law on this subject. Some would argue that purely campaign issues are outside the subject matter jurisdiction of the body within the meaning of Section 54954.3(a). Others take the view that the speech must be allowed under paragraph (c) of that section where relevant to the governing of the agency and an implicit criticism of the incumbents’ performance of city business.

4. Social Media

- Pursuant to Government Code section 8314, the use of public resources, including City-operated or maintained social media accounts administered by City personnel, must be limited to official City business. These platforms may not be utilized in any manner that constitutes—or could reasonably be interpreted as—advertising or promoting a specific elected official, as such use may violate restrictions on the personal or political use of public resources. This does not apply to informational or educational expenditures. (*DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236.)

War Story - In one California city, a councilmember running for re-election started posting campaign messages on their personal social media page using the official City logo in their posts and graphics.

Even though the account was personal, the use of the City's official logo made it seem like the City was endorsing the councilmember's campaign. City Attorney had to step in to explain that the City logo should not be used for personal post. A memo was sent out to staff and council members pointing to Government Code section 8314, which says public resources can't be used for personal or political purposes.

In this case, the City Attorney reminded everyone that official City resources—like logos and staff-run accounts—must stay neutral and can't be used to promote any candidate or initiative.

Practice Tip - Even unintentional use of City branding in campaign posts can cause confusion and may violate the law. It's always best to keep personal and campaign content separate from anything that looks "official."

Practice Tip - To avoid the appearance of City endorsing any campaign-related content, you can send a memo to department directors and City Councilmembers before the election cycle. The memo should: (1) remind officials and staff that City-owned or maintained social media accounts are considered public resources; (2) reinforce that City logos, seals, and other branding may not be used in campaign materials or personal social media posts related to elections; (3) clarify the requirements under Government Code Section 8314, which prohibits the use of public resources for personal or political purposes; and (4) inform staff and officials to consult with legal before posting anything that references their campaign on official or staff-managed platforms.

Additional Resources

Case Law Update: *Lindke v. Freed* – When a Public Official's Social Media is Subject to the First Amendment (2024) - San Diego City Attorney's Office (See Attachment B)

Social Media and Public Agencies: Legal Issues (2010): https://www.ca-ilg.org/sites/main/files/file-attachments/3_-_social_media_paper_110813_0.pdf

E. Campaign Contributions

1. The Levine Act

- Government Code section 84308 (“Levine Act”) generally prohibits a party seeking a contract (other than competitively bid), license, permit, or other entitlement for use from making a contribution of more than \$500 to an official of the agency. Section 84308 also prohibits certain officials, including local elected officials, from taking part in an entitlement for use proceeding if the official has received a contribution exceeding \$500 from a party or participant in the proceeding within the preceding 12 months. An official is also prohibited from accepting, soliciting, or directing a contribution exceeding \$500 from a party or participant in the proceeding for 12 months after a final decision is rendered in such a proceeding.

Statutes such as section 84308 aim to maintain the integrity and public perception of government bodies and to prevent a culture in which bidders or applicants believe it is necessary to make political contributions to receive government contracts or permits.

See: FPPC - Pay-to-Play Limits and Prohibitions (Section 84308):

<https://www.fppc.ca.gov/learn/pay-to-play-limits-and-prohibitions.html>

Practice tips - To implement the provisions of the Levine Act, consider the following:

- Create a checklist for city staff that can be used to track Levine Act items, for example:

A check or "Y" in the checklist below indicates that the action being considered falls under a Levine Act category or exemption:

SUBJECT TO THE LEVINE ACT

___ Land development entitlements

___ Other permit, license, or entitlement for use

___ Contract or franchise

EXEMPT FROM THE LEVINE ACT

___ Competitively bid contract

- Add a reference to staff reports indicating that the item is subject to the Levine Act. This could be as simple as “This item is subject to the Levine Act (Govt. Code § 84308).” Alternatively, some cities offer a more detailed explanation:

This item is subject to the Levine Act. City elected and appointed officials, including candidates for City elected office, (City Officers) who have received a contribution of more than \$500 within 12 months prior from a party, participant, or their representatives involved in this proceeding may do either of the following: (1) disclose the contribution on the record and recuse themselves from this proceeding; OR (2) return the portion of the contribution that exceeds \$500 within 30 days from the time the elected official knew or should have known about the contribution and participate in the proceeding.

All parties, participants, and their representatives must disclose on the record of this proceeding any contribution of more than \$500 made to the City Officers, such as the Mayor and/or Councilmembers, within 12 months prior to the date of the proceeding. City Officers are prohibited from accepting, soliciting, or directing a contribution of more than \$500 from a party, participant, or their representatives during a proceeding and for 12 months following the date a final decision is rendered.

- Add a provision to agreements subject to the Levine Act, such as:

Campaign Contribution Disclosure. Consultant has complied with the campaign contribution disclosure provisions of the California Levine Act (Govt. Code § 84308) and has completed the Levine Act Disclosure Statement, attached.

- Create Levine Act disclosure statement form for items subject to the Act (See Attachment C)

2. Campaign Finance Ordinances

- Many cities have campaign finance ordinances that contain campaign expenditure and contribution limits. For a list of local ordinances see: <https://www.fppc.ca.gov/the-law/local-ordinances.html>
- In some campaign finance ordinances, the City Attorney has the duty to investigate and prosecute any violations. It is a best practice for such ordinances to include exceptions to enforcement by the City Attorney in instances where the City Attorney also is an elected official, and for instances where the City Attorney believes outside counsel is warranted.

As an alternative, upon mutual agreement between the FPPC and the city, the FPPC may assume primary responsibility for the enforcement of local campaign finance ordinances. See: See Cal. Gov't Code § 83123.6 [Enforcement of Local Government Campaign and Ethics Ordinance].

- Finally, Assembly Bill 571 (Stats. 2019, Ch. 556, AB 571 Mullin), effective January 1, 2021, applies a default campaign contribution limit to city candidates when the city has not already enacted a contribution limit. See: FPPC - Contribution Limits: City and County Candidates <https://www.fppc.ca.gov/learn/Contribution-Limits-City-and-County-Candidates.html>

Additional Resources

The California Municipal Law Handbook (Cal. CEB 2024) - §3.205 (Political Reform Act Contribution Limits); and §§3.210 - 3.211 (Local Regulations)

Pay to Play No More? Levine Act (SB 1439) (2023): https://www.calcities.org/docs/default-source/advocacy/9.2023-annual-fabela-freeman-moon---pay-to-play-no-more-levine-act-sb-1439.pdf?sfvrsn=6091b39e_3

Developments in Campaign Finance: How to Update Your City's CFRO (2018): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/2018-Spring-Conference/5-2018-Spring;-Getman-Vidra-Developments-in-Campai>

A Primer on Local Campaign Finance Reform Ordinances (2008): <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2008/2-2008-Local-Campaign-Finance-Reform-Prasanna-Rasi>

III. INTERGOVERNMENTAL CONFLICTS

A. Some Examples of Intergovernmental Conflicts

- City/County disagree on whether County is subject to City's zoning or other regulations.
 - See: The California Municipal Law Handbook (Cal. CEB 2024) § 1.106 (Immunity from Zoning and Building Code Regulations)

- Government Code §§ 53090-91 (definition of “local agency” subject to applicable building ordinances and zoning ordinances of the county or city in which the local agency is situated does not include, e.g., counties)
- *Lawler v. City of Redding* (1992) 7 Cal.App.4th 778, 783 (construing §§ 53090-91)
- *Regents of the University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 138
- 68 Ops.Cal.Atty.Gen. 114 (1985) (governmental agency may not transfer its “section 53090 immunity” to lessee for purely private purposes)
- City and the state Department of Housing and Community Development (HCD) disagree on their respective jurisdictions, e.g., mobilehome parks.
 - Health & Safety Code § 18300(g)(1) provides that state law does not prevent local authorities from “establishing . . . certain zones for manufactured homes, mobilehomes, and mobilehome parks within the city . . . or establishing types of uses and locations.”
 - *County of Santa Cruz v. Waterhouse* (2005) 127 Cal.App.4th 1483 (construing § 18300(g)(1))
 - *Lagrutta v. City Council* (1970) 9 Cal.App.3d 890, 893
- Neighboring cities disagree on impacts to one city from development in another.
 - For example, a neighboring city may be impacted by traffic from a new residential or commercial development which it believes that the host city has not adequately studied or mitigated.
- City and Coastal Commission
 - The city has worked extensively with Coastal Commission staff to arrive at a positive recommendation from the Coastal Commission staff to the Commission. Unfortunately, the Coastal Commission staff is adamant that the proposed sites are not appropriate. The city staff believes that the full Commission will look at the proposed affordable housing sites favorably. At that point it may be necessary to insist upon going before the Commission with a negative staff report from the Coastal Commission staff.

B. What is the role of the city attorney when interfacing with state agencies and counties?

Practice Tips –

- Know what role you are supposed to play before any meeting. Sometimes, your city council might want you to take a stand against another agency even if the law is not on your side. Since policy issues are involved consider whether you should bring other city officials (e.g., City Manager) to support your advocacy and explain the policy reasons for the City's position.
- It's usually a good idea to prepare an agenda ahead of time – ideally shared with everyone who will attend, but if not, then at least as “talking points” for yourself. There might be a more detailed agenda for your city clients outlining who is going to handle what parts of the discussion or field questions with a more general agenda shared with the other agency.
- This can be a great opportunity to develop relationships with attorneys in different agencies. If you are aware of a thorny issue that is likely to come up at a meeting, give a “heads up” to the opposing agency's attorney and share what you can. It is helpful to develop credibility and a trusting relationship with the agency's attorney.
- Body language (including where attendees decide to position themselves in the meeting room) can say a lot; be aware of what is said out loud and what is not.
- Intergovernmental meetings have the potential to make news; make sure you and other city representatives observe appropriate decorum.
- Sometimes it may be appropriate for staff, not the city attorney, to be the primary city representative at intergovernmental meetings, especially standing meetings (for instance, with HCD), so consider recommending this to your City Manager. This can be a good way to build rapport and understanding between agencies so that future conflicts may be avoided or minimized.

Nonetheless, it may make sense for the city attorney (or a deputy) to attend at least some of these meetings, depending on the subject matter. Under these circumstances, you may want to set parameters ahead of time for your participation, i.e., when is it best to just listen and when is it appropriate to speak?

C. Sometimes the public does not understand that state law may preclude local government discretion. What is the City Attorney's role in explaining that to the public? What are some strategies for doing that in a public, contentious setting, such as a city council meeting?

Practice Tips –

- Explain that as the city's attorney you do not advance or oppose policies. Rather, you are nonpartisan legal advice. You can play the role of unbiased, plain-language "educator" on the applicable legal issues/standards.

This often works better as part of the staff presentation before public comments so the city attorney is less likely to find themselves responding to a public comment which can appear like the city attorney is arguing with the member of public.

- Try to provide clear, concise explanations of the law in a non-defensive manner. Remind the governing body (in particular, the board or commission chair or mayor), and the public, of the applicable legal standard prior to or at the meeting. Preparing a script or talking points in advance can help. The city attorney will sometimes need to take "flak" for the Council; ideally you will know in advance when you need to play this role.
- It may also be advisable to establish flexible procedures or protocols covering how and when the city attorney will participate (or not) in community meetings, and your availability to meet with community representatives. Then make sure to explain those protocols and take care to treat all groups and similarly situated community members equally.
- Sometimes it may be more appropriate for the city attorney to refrain from interjecting, and for staff or city officials to convey information to the public instead. Particularly when facing a hearing on a potentially controversial project, seek to prepare staff and the board or commission chair or mayor on how to deal with acrimonious public comments, so they are better equipped to maintain objectivity/non-bias.
- Depending on the subject matter, you may need to provide advice in private versus a public setting. In that case, provide confidential analysis to staff and/or officials before the meeting (e.g., at the same time as the public staff report, or one-on-one briefings if necessary), regarding applicable legal standards and factual findings to be established relating to consideration of the project. You may have to explain that those standards will not allow them to take the action they want (e.g., deny a particular housing project), and in certain cases, that it could be against the city's interest even to ask certain questions of the city attorney, where

their responses could become part of the record. And provide legal options and analysis of potential risks if the project decision conflicts with any legal standard and/or requirement.

D. How would you try to resolve intergovernmental conflicts before litigation?

Practice Tips –

- If neighbor city(ies) are facing a similar conflict with the same agency, it can help to form a “united front” with other cities. Monthly or semi-annual luncheons with other city attorneys, and/or county counsel, in your area can be a great way to share information and identify allies.
 - For example, in Alameda County, the city attorneys coordinated to oppose the position of the County related to tenant protections.
 - In Contra Costa County, the cities came together to discuss the handling of Pitchess/Brady matters with the District Attorney instead of a more ad-hoc approach by individual cities. There was also a concerted effort by the city attorneys in dealing with County stormwater issues. Different city attorneys would take the lead with different issues with the county, which also had the benefit of spreading the workload of being the point person with the county, which is especially helpful for smaller cities. These efforts would have been harder to organize if there wasn’t already the practice of monthly lunches/MCLE/roundtables among the city attorneys in the county.
- Litigation should usually be the option of last resort; the public (as a whole) generally dislikes seeing public agencies “wasting” taxpayer dollars on litigating.

E. What do you think is the appropriate role for the city attorney when communicating with the press on issues of intergovernmental conflict?

Practice Tips –

- It may be desirable or necessary for the city attorney and/or the Public Information Officer (PIO) to prepare talking points that will effectively communicate the city’s position on the intergovernmental issue, as well as identify issues and areas of concern that should be avoided if at all possible. For cities that do not have a PIO, it may fall to the city attorney, who is often viewed as a de facto PIO.
- Except when it is a personnel matter, it is usually better to say something in response to a media inquiry, rather than “no comment.” Consider attempting a joint statement with the other agency(ies) that explains and frames the legal issues.

- Have “off the record” conversations only when appropriate; some attorneys advise never having “off the record” conversations, on the theory that no conversation with the media is truly off limits for publication.
- Following up with the reporter with a written summary of the points you made can be helpful to ensure that your comments are accurately stated in the article. The follow up summary also can include some key facts you may have omitted in the oral conversation.

Additional Resources

Difficult Conversations: Complaints Against a Councilmember (2025):

https://www.calcities.org/docs/default-source/city-attorneys-spring-conference/ethics-complaints-against-a-council-member.pdf?sfvrsn=d6b8a3a5_3

"...And Other Duties As Required": Talking to Non-Clients (2023):

https://www.calcities.org/docs/default-source/city-attorneys/5.2023-spring-adsc-and-other-duties-as-required.pdf?sfvrsn=fba78e63_3

Ethics of Speaking One’s Mind (2008): <https://www.westerncity.com/article/ethics-speaking-ones-mind>

Dealing with Emotional Audiences (2009): https://www.ca-ilg.org/sites/main/files/file-attachments/everyday_ethics_emotional_audiences7-2013.pdf?1442364939

Dealing with Deeply Held Concerns and other Challenges to Public Engagement Processes: https://www.ca-ilg.org/sites/main/files/file-attachments/deeply_held_concerns.pdf?1497552740

Beyond the Usuals Ideas to Encourage Broader Public Engagement in Community Decision Making: https://www.ca-ilg.org/sites/main/files/file-attachments/beyond_the_usuals_8_15.pdf?1477947600

A Local Official’s Guide to Intergovernmental Conflict Resolution:

https://www.ca-ilg.org/sites/main/files/file-attachments/2008_-_conflict_resolution_guide.pdf

**CITY OF SAN PABLO
CITY ATTORNEY'S OFFICE**

TO: All City Employees
FROM: Lynn Tracy Nerland, City Attorney
DATE: July 7, 2020

SUBJECT: City Employees and Political Activities



With the upcoming November 2020 election, I want to remind you of State law restrictions on political activities, in addition to your ongoing compliance with the City's personnel rules.

Fundamentally, a person does not give up the Constitutional right to participate in political activities by being a City employee. However, State law restricts certain political activities of employees of general law cities, such as the City of San Pablo. (Cal. Gov't Code sections 3201 *et seq.*) ***State law prohibits City employees from using City resources for political activities. Accordingly, it is inappropriate for an employee to engage in political activities during work hours or at the work place.*** Therefore:

- DO NOT use work time or City resources to gather information for candidates (outside of a formal Public Records Act request);
- DO NOT use work time or City resources to campaign for candidates or ballot measures;
- DO NOT use work time or City resources to hand out flyers for candidates or ballot measures;
- DO NOT participate in any political activity while in uniform even if off-duty;
- DO NOT solicit political contributions from other City employees or use the City email or address or other City resources to solicit political contributions; and
- DO NOT wear campaign buttons while on City business.

The City may need to compile information if there is a ballot measure (not advocacy), but the City Manager or City Attorney will direct that effort to avoid legal issues.

State law also prohibits candidates for elective offices from using City resources for campaign activities (including office space, equipment, supplies, vehicles, staff time) or City communication channels to distribute campaign materials (including the City's internal mail systems, fax machines, bulletin boards or email systems). In addition, the City cannot give preference to campaign-related requests to use agency facilities.

Elected officials and candidates cannot seek campaign contributions from City staff. This law is not intended to prohibit general solicitations, so long as City employees are not targeted and City resources are not used.

If you have questions about any of these matters or are concerned about possible violations, please contact your Department/Division Head, City Manager or me immediately.

cc: Mayor and Members of the City Council; City Clerk; City Treasurer

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: May 14, 2024

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Case Law Update: *Lindke v. Freed* – When a Public Official’s Social Media is Subject to the First Amendment

INTRODUCTION

In less than 20 years, social media websites like Facebook and Twitter (now known as X) have become for many the principal sources for information on current events, news, and the like, and are “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Public officials’ use of social media has given rise to a key legal question – under the First Amendment, may public officials delete unwelcome comments to their social media posts or block individuals from viewing or interacting with their social media accounts entirely?

In 2021, this Office issued a memorandum explaining the laws relating to the use of social media by elected officials. *See, e.g., City Att’y MS 2021-8* (Apr. 9, 2021) (MS-2021-8), attached. In March, the United States Supreme Court, in a unanimous decision, addressed the use of social media by public officials in *Lindke v. Freed*, 601 U.S. 187 (2024), establishing a two-part test to determine whether a public official’s use of social media is the act of a private citizen or represents official public communications subject to the First Amendment. This memorandum supplements our prior advice to address this recent ruling.

ANALYSIS

1. First Amendment – Free Speech And Social Media

The First Amendment of the United States Constitution holds, in part, that Congress shall make no law “abridging the freedom of speech, or of the press.” These protections apply to the States under the Fourteenth Amendment’s Due Process Clause.¹ As a general matter, the right to free speech means that the government has “no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Nat’l Inst. of Family & Life Advocates v. Becerra*,

¹ Local governments are subdivisions of the State, and their officials are subject to the First Amendment. *See Monell v. Dep’t of Social Services*, 436 U.S. 658, 690 (1978).

585 U.S. 755, 766 (2018) (citation omitted). These protections, however, are not absolute, and, in a public forum, the government may impose reasonable time, place, or manner restrictions that are narrowly tailored to serve a significant governmental interest.

Historically, public fora (i.e., places traditionally open to political speech and debate) were limited to government buildings, public parks, streets, and sidewalks. *See Packingham*, 582 U.S. at 104 (“[a] basic rule . . . is that a street or park is a quintessential forum for the exercise of First Amendment rights”). With the introduction of the Internet and social media in particular, the concept of public fora has evolved beyond physical locations and now encompasses cyberspace.² *Id.*

Unsurprisingly, recent court decisions throughout the country have found that certain governmental officials’ social media accounts were public fora subject to the First Amendment and any attempt to limit public engagement is subject to reasonable time, place, or manner restriction standards. *See Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019); *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), *vacated as moot sub. nom. Biden v. Knight First Amend. Inst. at Columbia Univ.*, — U.S. —, 141 S. Ct. 1220 (2021) (President intentionally opened a Twitter account and repeatedly used the account as an official vehicle of governance and made its interactive features accessible to the public without limitation); *Garnier v. O’Connor-Ratcliff*, 41 F.4th 1158, 1178-79 (9th Cir. 2022), *vacated*, 601 U.S. 205 (2024) (a designated public forum is created when the government has made the forum available for public use and has no policy or practice of regulating posted content).

These cases have been brought under 42 U.S.C. section 1983 (Section 1983), which allows an injured party to pursue a cause of action against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State” deprives someone of a federal constitutional or statutory right. To be held liable under Section 1983, a defendant must be acting in an official governmental capacity.³ *See West v. Atkins*, 487 U.S. 42, 47-48 (1988). Conversely, a private citizen who is not acting on the government’s behalf or performing a governmental function cannot be held liable under Section 1983. *See Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 812 (2019) (“when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor”). When a government official uses social media, they may be acting in a private, personal capacity, in an official capacity under authorization granted to them, or a mix of both.

² *See* City Att’y MS 2020-30 (Dec. 14, 2020) (discussing California Government Code section 54952.2 which excludes certain government officials’ communications over social media from the Brown Act).

³ Known as the “state-action” requirement, a plaintiff must show that the defendant “exercised power ‘possessed by virtue of state law’” to establish liability. *West*, 487 U.S. at 49 (citation omitted).

A. *Garnier v. O'Connor-Ratcliff*

As discussed in MS-2021-8, Christopher and Kimberly Garnier sued two members of the Poway Unified School District's Board of Trustees in federal court after the Trustees blocked the Garniers from their Facebook and Twitter accounts due to repetitive comments and complaints. The Garniers alleged that the Trustees' social media pages constitute public fora and that, by blocking them, the Trustees violated the Garniers' First Amendment rights. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision in 2022, finding that, under the circumstances presented, "the Trustees have acted under color of state law by using their social media pages as public fora in carrying out their official duties." *Garnier*, 41 F.4th at 1163. Recognizing that it is not always easy to determine if an official is acting in an official capacity on social media, the Ninth Circuit used what is known as the governmental "nexus test" which examines if there is "such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Id.* at 1169 (citation omitted). The Ninth Circuit found that the Trustees' use of their social media accounts was directly connected to, although not required by, their official positions and the Trustees' blocking of the Garniers from their social accounts constituted state action under Section 1983 and violated the Garniers' First Amendment rights.

B. *Lindke v. Freed*

On similar facts, the United States Court of Appeals for the Sixth Circuit reached the opposite conclusion in finding the actions of the Port Huron city manager in blocking an individual on Facebook did not constitute state-action under Section 1983. *See Lindke v. Freed*, 37 F.4th 1199, 1204 (6th Cir. 2022), *vacated*, 601 U.S. 187 (2024).

In this case, James Freed created a private Facebook account before he was appointed city manager for Port Huron and used it for years like many average citizens. When the account outgrew Facebook's 5,000-friend limit, Freed converted his account to a public page with unlimited followers instead of friends. In 2014, Freed was appointed city manager for Port Huron, Michigan, and updated his page to reflect his new title. During the COVID-19 pandemic, Freed's posts caught the attention of Kevin Lindke, who did not approve of how Freed was handling the pandemic and began posting criticism to Freed's Facebook account. Freed did not appreciate the comments, so he deleted them. Freed eventually blocked Lindke from the page.

Lindke sued Freed in federal court alleging that Freed violated his First Amendment rights. As Lindke saw it, he had a right to comment on Freed's Facebook page as a public forum and Freed had engaged in impermissible viewpoint discrimination by deleting Lindke's comments and blocking him.

Recognizing that Section 1983 distinguishes actions taken in an official capacity from those taken in a personal one, the Sixth Circuit concluded that Freed maintained his Facebook page in his personal capacity and his conduct in deleting social media posts and blocking a user did not constitute a state-action under Section 1983. *Lindke*, 37 F.4th at 1202, 1204. The Sixth Circuit

used what it calls the “state-official test,” which “asks whether the official is ‘performing an actual or apparent duty of his office,’ or if he could not have behaved as he did ‘without the authority of his office.’” *Id.* at 1202 (citation omitted).

The Sixth Circuit acknowledged that its analysis differs with how other Circuit courts approached the question of state-action involving public official’s social media usage.⁴ Instead of examining whether a social media account’s appearance and content looks official like the Ninth Circuit, the Sixth Circuit focused on the official’s duties and whether government resources or employees were used to maintain the social media account.

II. Supreme Court Establishes New Test For Determining Whether A Public Official Engaged In State-Action When Deleting Or Blocking Comments On Social Media

Recognizing a split in the Circuit courts, the Supreme Court in *Lindke* established a two-part test to determine whether a public official’s social media posts and activities constitute state-action subject to the First Amendment. Under this two-part test, a public official’s social media activity can only be characterized as state-action if the official “(1) possesses actual authority to speak on behalf of the government regarding a particular matter or topic, and (2) purports to exercise that authority when speaking on social media.” *Lindke*, 601 U.S. at 198.

According to the Court, an analysis of these two factors will determine if a government official engaged in state-action or functioned as a private citizen on social media.⁵ Purely personal accounts are not subject to the First Amendment’s protections and the account owner may delete third-party comments and block their authors.

A. Plaintiff Must Demonstrate the Public Official Possessed Specific Authority to Speak on the Government’s Behalf to Establish Liability under Section 1983

The test’s first prong is based on the principle under Section 1983 that the conduct allegedly causing the constitutional violation must be “fairly attributable to the State.” *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). The alleged conduct, therefore, must be traceable to the official’s power or authority to speak for the public agency, which can be found either in the agency’s statutes, ordinances, or regulations, or may be derived from well-established customs or usage.⁶ The Supreme Court cautioned that “[p]rivate action – no

⁴ The Second Circuit adopted a similar approach to the state-action question as the Ninth Circuit. See *Knight First Amend. Inst. at Columbia Univ.*, 928 F.3d at 236.

⁵ The Supreme Court identified the nature of the technology involved as an additional factor to consider in making the state-action analysis. *Lindke*, 601 U.S. at 204. For example, in matters involving the deletion of comments, the only relevant social media posts are those from which comments were removed. “Blocking, however, is a different story,” and requires that a court consider whether the public official engaged in state-action with respect to any post in the account. *Id.* “If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.” *Id.*

⁶ “Custom” and “usage” encompasses “‘persistent practices of state officials’ that are ‘so permanent and well settled’ that they carry ‘the force of law.’” *Lindke*, 601 U.S. at 200 (citation omitted).

matter how ‘official’ it looks – lacks the necessary lineage” to hold the State “responsible for the specific conduct of which the plaintiff complains.” *Lindke*, 601 U.S. at 198-199. A plaintiff must show more than simply that the public officials had some authority to communicate on behalf of the public agency. It is insufficient to merely allege that “making official announcements *could* fit within [an official’s] job description.” *Lindke*, 601 U.S. at 201 (emphasis in original). Rather, a plaintiff must show that “making official announcements is *actually* part of the job that the State has entrusted the official to do.” *Id.* (emphasis in original).⁷

If this threshold showing of authority cannot be met, there is no state-action and, thus, no liability under Section 1983 for blocking individuals or removing comments.

B. The Speech is Purportedly Made on the Government’s Behalf

The second prong looks to whether the public official was using their official authority in the disputed social media posts. Recognizing that government officials have a choice about the capacity in which they choose to speak to the public, the Supreme Court held that it is generally accepted that a public official “purports to speak on behalf of the State while speaking ‘in his official capacity or’ when he uses his speech to fulfill ‘his responsibilities pursuant to state law.’” *Id.* (citation omitted). If the public official is not speaking in furtherance of their official responsibilities, they are speaking in their own voice and cannot be held liable under Section 1983 for alleged violations of the First Amendment.⁸ *Id.*

The factors to consider in determining whether a specific social media post purports to speak on the government’s behalf include whether the account belongs to a governmental office or is passed down to whoever occupies a particular office. Another consideration is whether the official uses government staff to maintain the account or make a particular post. In these situations, the context can make it clear that the social media account speaks for the government. *Id.* at 202. Conversely, if the account carries a label (e.g., “this is the personal page of”) or disclaimer (e.g., “the views expressed are strictly my own”), the account will be entitled to “a heavy (though not irrebuttable) presumption” that all the posts contained therein are personal. *Id.*

For ambiguous or hard-to-classify accounts, “a fact-specific undertaking” is required which examines a specific post’s “content and function.” *Id.* at 203. The Court cautioned that there must be an awareness that an official does not necessarily purport to exercise their authority

⁷ The Supreme Court states that “[t]he alleged censorship must be connected to speech on a matter within [the public official’s] bailiwick.” *Lindke*, 601 U.S. at 200. The Court explained that if Freed, as city manager, had posted a list of local restaurants with health code violations and subsequently deleted snarky comments made by other social media users, state-action could not be established unless it is shown that public health is within the city manager’s portfolio of responsibilities. *Id.*

⁸ The Supreme Court outlined a hypothetical situation to explain this distinction. In the hypothetical, a school board president announces at a school board meeting that the board has lifted COVID-19 restrictions at public schools. The next day, at a backyard barbecue with friends whose children attend public schools, the president shares that the board has lifted the restrictions. Although the substance of the announcements is the same, the Supreme Court states that only the former is state-action taken by the school board president in their official capacity while the latter is a private action taken in a personal capacity as a friend and neighbor. *Id.* at 201-02.

simply by posting about a matter within it. The Court recognized that a public official may post job-related information on social media for any number of personal reasons, including a desire to raise public awareness or to promote the official's reelection prospects. *Id.*

In sum, because public officials have the right to speak about public affairs in their personal capacities, a plaintiff must show the official is intentionally exercising their state authority in the specific, complained-of social media posts for there to be state-action.

C. Cases Remanded to Respective Circuit Courts

The Supreme Court remanded both *Lindke* and *O'Connor-Ratcliff* to their respective lower courts for review under the newly announced two-part test.

RECOMMENDATIONS

The two-part test announced in *Lindke* highlights several important issues for public officials, the agencies that employ them, and their interactions on social media. Key among them is the importance of clarifying whether the public official is speaking as an authorized representative on the agency's behalf or in a personal capacity.⁹ Additionally, there are other actions that can be taken to lessen any confusion and avoid potential liability when public officials use social media:

- Public officials should label their social media accounts to identify whether they are personal accounts or official ones. Social media accounts labeled as personal are entitled to a strong presumption that their posts are personal.
- If an account is labeled as public, the public officials should make sure they have authority to post on the agency's behalf. It may be appropriate to include a disclaimer if authority does not exist.
- Public officials should not post personal news to their official accounts and vice versa.
- If public information is posted on a personal account, the public official should include links or re-posts to the location where the information is officially released so it is clearly shown that the information is publicly available elsewhere.

⁹ As stated above, Section 1983 liability is contingent on a plaintiff establishing that the complained of action or conduct can be fairly attributable to the State. The Supreme Court's test focuses on whether making public announcements is an actual, specifically enumerated part of an official's job function and not merely an incidental (i.e., "could") one. If no express authority exists, the official's conduct is likely personal in nature and not subject to Section 1983.

Honorable Mayor and Councilmembers
May 14, 2024
Page 7

Questions about whether a public official may delete comments or block individuals on social media must be analyzed on their specific facts. This Office is available to assist and answer any questions as they arise.

MARA W. ELLIOTT, City Attorney

By /s/ David J. Karlin
David J. Karlin
Senior Deputy City Attorney

DJK:cm
MS-2024-2
Attachment: City Attorney Miscellaneous Memorandum MS-2021-8 (Apr. 9, 2021)
Doc. No. 3652734

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: April 9, 2021

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Case Law Update on Elected Officials' Use of Social Media: *Garnier v. O'Connor-Ratcliff*

In December 2020, this Office issued a legal memorandum discussing amendments to the Ralph M. Brown Act clarifying that members of a legislative body may communicate with the public on social media platforms. City Att'y MS 2020-30 (Dec. 14, 2020). As this type of activity grows more common, courts are being asked to determine whether activities like blocking individuals from posting on elected officials' social media accounts violate the First Amendment. This memorandum discusses a recent local federal court case evaluating these issues. *Garnier v. O'Connor-Ratcliff*, No. 3:17-cv-02215-BEN-JLB, 2021 WL 129823 (S.D. Cal. Jan. 14, 2021). Although the outcome is currently being appealed and subject to change, the case merits consideration by elected officials in their use of social media.¹

I. FACTS

In *Garnier*, two members (Board Members) of the Poway Unified School District (PUSD) Board of Trustees blocked a husband and wife (Plaintiffs) from their public Facebook pages after Plaintiffs posted numerous repetitive comments. The Facebook accounts were established before the Board Member were elected to the PUSD Board to promote their campaigns and political activities. The Board Members updated their Facebook pages after their election to reflect their new positions and provide information about PUSD and their participation in PUSD activities. PUSD did not regulate or control the pages or spend money maintaining these accounts. Also, the Board Members did not have in place social media rules of etiquette or decorum.

Plaintiffs' children were enrolled in public schools within PUSD, and Plaintiffs regularly attended Board meetings to voice concerns on PUSD issues. Plaintiffs began posting comments to the Board Members' social media accounts when they believed the Board Members were not responding to their emails and other communication efforts.²

¹ Although this Office can only advise on social media accounts used to discuss official City business, the issues discussed in *Garnier* are equally applicable to private campaign and personal social media accounts.

² Evidence shows Plaintiffs emailed one of the Board Members at her PUSD email address 780 times, and Plaintiffs testified that email messages sent to the Board Members either went unanswered or the recipient refused to talk or meet. *Garnier*, 2021 WL 129823, at *3.

None of Plaintiffs' comments used profanity or threatened physical harm, and almost all related to PUSD. Plaintiffs' comments were often repetitive, however. For example, one of the Plaintiffs posted the same comment to 42 Facebook posts made by one of the Board Members and posted the same reply on Twitter to 226 separate tweets made by that Board Member in a 10-minute period. *Garnier*, 2021 WL 129823, at *6.

The Board Members testified they blocked Plaintiffs due to the disruptive and repetitive nature of their comments and not due to the content of the comments.³

II. LEGAL CLAIMS AND RULING

On October 30, 2017, Plaintiffs filed suit in the United States District Court for the Southern District of California against the Board Members in their individual capacities. Plaintiffs alleged the Board Members violated their First Amendment rights by blocking them from their public social media pages. Plaintiffs also named PUSD in the lawsuit but voluntarily dismissed the District in January 2018.⁴

Plaintiffs' federal claim arises out of 42 U.S.C. section 1983 (1996), pursuant to which "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983 (1996). To state a claim under Section 1983, a plaintiff must allege: (1) the violation of a right secured by the Constitution and laws of the United States; and (2) that the alleged deprivation was committed by a person acting under color of state law. Plaintiffs allege that the Board Members violated section 1983 by restraining their ability to participate in a public forum (Facebook).

Under the First Amendment, the government may regulate speech in a public forum by imposing reasonable time, place, or manner restrictions, "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Here, the District Court found the Board Members were acting in their official capacity as PUSD board members in blocking Plaintiffs. *Garnier*, 2021 WL 129823, at *10. Because the Board Members "could not have used their social media pages in the way they did but for their

³ One of the Board Members blocked Plaintiffs after contacting Facebook. The other Board Member implemented a 2,000-word filter preventing all Facebook users from commenting on his posts. Although this Board Member may not have intentionally blocked Plaintiffs, the District Court found the result of the Board Member's actions was that he prevented Plaintiffs from commenting on any of his posts, which is consistent with what a blocked user would experience. *Garnier*, 2021 WL 129823, at *7.

⁴ PUSD is defending the Board Members in this action. This is consistent with California Government Code section 995, which requires a public entity to defend public officials or employees if the civil action is being brought on account of an act or omission within the scope of employment. Here, Plaintiffs alleged the Board Members used their private social media accounts as a tool for governance and thus were acting in "under the color of law" in blocking Plaintiffs.

positions on PUSD's Board," the Court found their blocking of Plaintiffs "satisfies the state-action requirement for a section 1983 claim." *Id.* The Court's ruling is consistent with other recent cases which found legislators acted in their official governmental capacity in making blocking decisions on social media. *See, e.g., Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019) (county board chair); *Campbell v. Reisch*, 367 F. Supp. 3d 987, 994 (W.D. Mo. 2019) (state representative); and *Felts v. Reed*, No. 20-cv-821-JAR, 2020 WL 7041809, at *6 (E.D. Mo. Dec. 1, 2020) (municipal alderman).

The District Court recognized that whether Plaintiffs' repetitive comments and replies disrupted the Board Members' original posts, making the Board Members' blocking of Plaintiffs a reasonable time, place, or manner restriction on Plaintiffs' speech was an issue of first impression. *Garnier*, 2021 WL 129823, at *11. The Court found that the blocking of Plaintiffs' repetitive posts was content-neutral and "promoted the legitimate interest in facilitating discussion on the[] social media pages and did not burden substantially more speech than necessary because it *immediately responded to high frequency posting during a short period of time.*" *Id.* at *13 (emphasis added).⁵ The Court expressed a need to intervene because the 3-year length of blocking "applies a regulation on speech substantially more broadly than necessary to achieve the government interest." *Id.* at *14.

The District Court suggested the Board Members "could adopt content-neutral rules of decorum for their pages to further the substantial government interest of promoting online interaction with constituents through social media." *Garnier*, 2021 WL 129823, at *14. Those rules "could contain reasonable restrictions prohibiting the repeated posting of comments and include sanctions such as blocking for a limited period of time." *Id.* Although the Court stated that it "cannot decide a precise time limit that might be reasonable," it did suggest that "blocking for one month may pass muster given the ease at which a page administrator can block and unblock a user from a particular page" while "[b]locking for three years, on the other hand, cannot." *Id.*

III. RECOMMENDATIONS

As demonstrated by *Garnier*, elected officials should use caution when blocking individuals from their public-facing social media accounts. The first step in making a blocking decision, as suggested by the District Court, is the adoption of content-neutral guidelines or rules of decorum. Regularly monitoring and reviewing comments with the potential for removing comments or users (also known as "moderating" comments) should be performed without consideration of the viewpoint expressed by the user. The rules should expressly state that prohibited activity will lead to user-generated posts being rejected or removed, or the user being temporarily blocked from the account. For example, the rejection or removal of an offending post, or temporary blocking of a user, could be warranted against users who on multiple occasions posts a comment that:

⁵ The Court commented that it was "undeniable that Defendants, by creating and maintaining public Facebook pages and Twitter accounts, serve a substantial government interest," by "leverag[ing] technology to provide new ways for their constituents to gain awareness of their activities and initiatives as elected officials." *Garnier*, 2021 WL 129823, at *14. According to the Court, the Board Members' social media accounts facilitate "transparency in government" which "is one of the most 'significant government interests' the Court could imagine." *Id.*

- a. contains sexually explicit, profane, or obscene language or content;
- b. would be threatening, abusive, or harassing to a reasonable person;
- c. incites or promotes violence or illegal activities;
- d. contains information that reasonably could compromise individual or public safety;
- e. contains or links to malicious or harmful software;
- f. violates the copyright, trademark or other intellectual property rights of any person or entity; or
- g. violates a local, state, or federal regulation or law, including privacy laws.

Detailed documentation on any blocking decision should be meticulously maintained and include the reason for the blocking. Decisions cannot be based on the content of the speech.

Elected officials may also consider adding a disclaimer as applicable. If, for instance, the elected official maintains a personal Facebook page, the official may wish to post on the page that the page is maintained for personal purposes and is not affiliated with official government business. The elected official should refrain from using the forum for anything other than personal business.

In addition, if social media is used for government business, the elected official may wish to note on social media that the site is not regularly checked or maintained, if that is the case, and refer the public to an alternative mode of communication that may be more responsive to the public, such as an office phone number, website, or even the Get It Done app.

The City's Communications Department maintains social media standards for City department use in developing and maintaining social media pages that may prove helpful when addressing issues that arise on City officials' private social media accounts. We are also available to address specific questions related to official City websites and social media.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ **David J. Karlin**

David J. Karlin
Senior Deputy City Attorney

CITY OF SAN JOSE
California Levine Act Disclosure Statement
[Cal. Govt. Code § 84308](#)

The Levine Act requires a Party in a proceeding pending before the City of San José that involves any action related to their contract, license, permit, or use entitlement to disclose any campaign contributions to City elected or appointed officials totaling more than \$500 within the twelve (12) months prior to the City decision. A Participant in a proceeding may voluntarily report a campaign contribution on this form.

1. Have you or your company/organization, or any agent on behalf of you or your company/organization, made any political contributions of more than \$500 to any San José City Council Member or San José City Quasi-Judicial Body Member in the 12 months preceding the anticipated date of any Council or Quasi-Judicial Body action related to this license, permit, or other use entitlement?

☐ YES ☐ NO

2. If yes to 1, please identify:

- a. City Council or specific Quasi-Judicial Body:
- b. Meeting Date:
- c. Agenda item number:
- d. Brief Agenda Description (e.g., contract, license, permit, use entitlement):

3. If yes to 1, please identify the Council Member(s) or Quasi-Judicial Body Member(s)

Answering yes to question #1 does not preclude the San José City Council or San José City Quasi-Judicial Body from taking action on the license, permit, or other use entitlement. It does, however, preclude the identified Council Member(s) or Quasi-Judicial Body Member(s) from participating in the actions.

Verification

I have used all reasonable diligence in preparing this Disclosure Statement. I have reviewed this Disclosure Statement and to the best of my knowledge the information contained in this statement is true and complete. I declare under penalty under the laws of the State of California that the foregoing is true and correct.

Signature of Authorized Individual

Date

Name of Authorized Individual:

Name of Company/Organization:

CITY OF SAN JOSE
California Levine Act Disclosure Statement
Cal. Govt. Code § 84308

INSTRUCTIONS AND DEFINITIONS

Effective January 1, 2025, [California Government Code Section 84308](#), commonly referred to as the "Levine Act," prohibits a local elected official or quasi-judicial appointed official from participating in any action related to a contributor's contract, license, permit, or other use entitlement if the official receives any campaign contributions totaling more than \$500 within the twelve (12) months prior to the City decision, and for twelve (12) months following the date a final decision has been made, from the party, participants, or agents in the proceeding. The Levine Act also requires a member of the San José City Council or San José City Quasi-Judicial Body who has received such a contribution to disclose the contribution on the record of the proceeding and recuse themselves before the proceeding unless the violation has been properly cured.

"License, permit, or other use entitlement" means all business, professional, trade, and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises.¹ The FPCC interprets "competitively bid" contracts to apply only when the bidders submit fixed amounts in their bids and the City is required to select the lowest qualified bidder with no discretion in awarding the contract. "License, permit, or other use entitlement" excludes: 1) Contracts a) valued under \$50,000, b) where no party receives financial compensation, or c) between two or more government agencies, and 2) competitively bid contracts with material modifications/amendments less than 10% of the contract value or \$50,000, whichever is less.

Members of the San José City Council can be found at <https://www.sanjooseca.gov/your-government/departments-offices/mayor-and-city-council>

San José City Quasi-Judicial Bodies can be found at <https://www.sanjooseca.gov/your-government/appointees/city-clerk/boards-commissions>

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Parties,² Participants³ or Agents for a proceeding involving a license, permit, or other use entitlement pending before the City Council or a City Quasi-Judicial Body are responsible for accessing the above links to review the names prior to answering the following questions, and must complete this form prior to their proceeding.

¹ Cal. Govt. Code § 84308(a)(5).

² "Party" means any person who files an application for, or is the subject of, a proceeding involving a license, permit, or other entitlement for use. Cal. Govt. Code § 84308(a)(1).

³ "Participant" means any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision. A person actively supports or opposes a particular decision in a proceeding if that person lobbies in person the officers or employees of the City of San José, testifies in person before the City, or otherwise acts to influence officers of the City. Cal. Govt. Code § 84308(a)(2).



Water Rates, Prop. 218 and 26 Litigation, and Other Developments in the Law of Municipal Revenues

Thursday, May 8, 2025

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Current Developments in the Law of Municipal Revenues

League of California Cities
City Attorneys Conference
Burlingame, CA
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by

Michael G. Colantuono, Esq.

I. Introduction

Municipal finance is not getting any simpler and recent months have produced new developments in the Legislature and the courts involving a broad range of municipal revenues. We focus on just four here — transactions and use (“sales”) taxes, utility users taxes, water rates, and sewer rates.

II. Transactions and Use (“Sales”) Taxes

Revenue and Taxations Code sections 7285.9 et seq. authorize California cities, with voter approval, to supplement the 1 percent Bradley-Burns Uniform Local Sales and Use Tax with “transactions and use taxes” in increments of one-eighth percent of taxable transactions. Section 7251.1 of that law, however, caps all city and county transaction and use taxes at 2 percent. A number of questions about that cap are unanswered, like what happens if two taxes are approved at the same election that, together, take a community over the cap? Does one or the other prevail? Are they prorated? Los Angeles County

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recently collected less than all of its voter-approved park and recreation tax in some communities to respect the limited “headroom” under the 2 percent cap in those communities. Long Beach is now litigating whether its tax automatically returned to its full amount when voters reduced a Los Angeles County housing tax. (*Long Beach Reform Coalition v. City of Long Beach*, Los Angeles Superior Court No. 25 STCP 00471, filed Feb. 6, 2025.) These unanswered questions will eventually require legislative answers but, for now, the affected local governments seem to be finding negotiated solutions, mostly avoiding litigation.

A. Exceptions to the 2 Percent Cap on Local Taxes

Many Los Angeles County and Bay Area communities are at or near the 2 percent cap, leading the Legislature to make exceptions. Many of these justify their application to one or a few communities despite our Constitution’s preference for general legislation by referencing “unique fiscal pressures” on the benefited communities. Article IV, section 16 of the California Constitution¹ states:

- (a) All laws of a general nature have uniform operation.
- (b) A local or special statute is invalid in any case if a general statute can be made applicable.

Some of the recent bills allowing exceptions include 2024’s AB 1256 (Humboldt County transportation programs); SB 335 (Santa Clara County general tax, Ventura County transportation tax); and, SB 862 (Santa Cruz County transportation tax). Such statutes have been litigated, questioning whether special legislation can be justified and whether the taxes which relied on them actually come within their terms.

¹ Unspecified references to “articles” are to the California Constitution.

Alameda County Taxpayers Association v. County of Alameda (2025) 108 Cal.App.5th 524, review pending, rejected a challenge to a general transactions and use tax, concluding ballot materials' references to homeless services were not sufficient to make this a special tax; the ballot materials were not so false and misleading as to violate due process, empowering the court to invalidate the tax; the tax did not violate the 2 percent cap given a statutory exception; and, that exception was not invalid special legislation. The last point is of most interest given that it is also raised in *Silicon Valley Taxpayers Association v. City of Campbell*, Santa Clara Superior Court Case No. 25 CV 455853 (filed Jan 6, 2025) and *Lester v. Cooper*, Contra Costa Superior Court Case No. MSN 20-1173 (filed Aug. 17, 2020).

Alameda County Taxpayers rejected the special legislation claim in broad language that will support a demurrer in the Campbell and Contra Costa County cases:

In both bills, the Legislature found “unique fiscal pressures” in the specified localities warranted the exemptions from the state sales tax cap. Authorizing additional taxes for certain localities is rationally related to the purpose of alleviating unique fiscal pressures in those localities. That the Legislature did not identify the specific fiscal pressures, as the Association complains, is of no moment: the relevant analysis is whether “any state of facts can reasonably be conceived which would sustain a statutory classification.” (*Watson, supra*, 63 Cal.2d at p. 833, 48 Cal.Rptr. 481, 409 P.2d 481.) The Association also argues the fact that the bills identify more than one locality means the localities cannot be unique. The Legislature could reasonably determine that certain localities face fiscal pressures not faced by the state’s remaining localities. The Association provides no authority for its contentions that a bill exempting an existing tax is reviewed with

greater scrutiny than one exempting a future tax, or that the absence of sunset provisions renders the bills unconstitutional.

“Here, the Legislature identified a reasonable and rational basis for the need to enact legislation directed only to [the County and certain other localities]... . The Legislature has the authority to determine the best method for resolving state fiscal issues, and it is not for the court to second-guess its determination.” (*White, supra*, 88 Cal.App.4th at p. 307, 105 Cal.Rptr.2d 714.)

(*Alameda County Taxpayers, supra*, 108 Cal.App.5th at p. 517, abridgements by court.)

The petitioner unsuccessfully sought publication and rehearing before the Court of Appeal. It petitioned for Supreme Court on March 13, 2025 and the County is preparing to answer that petition as this paper is written. Review is unlikely because the law in this area is settled. Petitioner effectively seeks error correction, which is rarely a persuasive basis for review in the California Supreme Court.

B. Tax-Rebate Agreements

Some communities have entered into agreements with retailers, especially internet vendors, to rebate a substantial fraction of the Bradley-Burns 1-percent tax in exchange for the vendor’s agreement to report all sales as having occurred in the contracting community. This can create a very large windfall for the contracting government, a big tax break for the vendor, and a loss of revenues to the communities that had previously benefited from taxes on those transactions. Such agreements are controversial and have generated litigation. (E.g., *City of Fontana v. California Department of Tax and Fee Administration* (2017) 17 Ca.App.5th 899 [rejecting challenge by Fontana, Lathrop and San

Bernardino to Ontario agreement affecting taxes on sales of medical supplies from warehouses located in those three cities].)

The controversy has led to legislative attention, most recently 2024's AB 2854, which adopted Revenue & Taxation Code section 7213 to require any local agency which benefits from such an agreement to post to its website information about the agreement including: the parties, the amount rebated since its execution, the execution date, any sunset date, the rebate percentage and any commission paid to a third party. The posting is due annually by April 30th. Every city and county which does not have such a rebate agreement must report that fact to the California Department of Tax and Fee Administration (CDTFA) by April 30th of each year, too. CDTFA is then required to compile and post the data to its website. Failure to report to CDTFA (even of the non-existence of such an agreement) or to post the required information is punishable by a fine of \$1,000 per day for the first 180 days of non-reporting and \$4,000 per day for the balance of the reporting year.

The statute is intended to daylight these agreements and allow State policymakers to understand their consequences for California's sales tax revenues. It is also intended as a precursor to more substantive legislation to rein in such agreements and especially commissions to those who brokered such deals, but that is complicated by the fact that some small cities are very heavily dependent on these agreements.

III. Utility Users Taxes

Utility users taxes have generated litigation lately, too, testing two questions:

- can voters approve a transfer from utility rate proceeds to a city's general fund as a general tax notwithstanding Proposition 218's prohibition on the

use of utility rate proceeds for non-utility purposes? (Cal. Cost., art. XIII D, § 6, subd. (b)(2); and,

- can voters approve a general tax on water, sewer and trash services, or are such UUTs limited to special taxes by article XIII D, § 3's closed list of permissible impositions on property or "as an incident of property ownership"?

The general fund transfer question has been answered differently by three published cases to date. *Wyatt v. Sacramento* (2021) 60 Cal.App.5th 373, 383 upheld Sacramento's voter-approved general fund transfer from its utilities as "at least akin to a tax," which voters might approve under article XIII C, section 2. Shortly thereafter, *Lejins v. City of Long Beach* (2021) 72 Cal.App.5th 303 reached the opposite result. *Lejins* purported to distinguish *Wyatt*, but seems to disagree with it:

In this regard, the matter before us is distinguishable from *Wyatt v. City of Sacramento* (2021) 60 Cal.App.5th 373, 274 Cal.Rptr.3d 710, a recent Third District Court of Appeal case on which the City relies in support of its contention a city's voter-approved general tax on utility services, to fund transfers to the city's general fund, does not violate article XIII D. In *Wyatt*, Sacramento argued—and the Court of Appeal concluded Sacramento proved—a voter-approved mandatory 11 percent tax Sacramento imposed on utilities' revenues was a cost of providing services that the utilities could pass on to ratepayers without violating article XIII D, section 6, subdivision (b). (*Wyatt*, at pp. 378, 380, 383, 274 Cal.Rptr.3d 710.) We express no opinion on whether *Wyatt* was correctly decided. We note only that *Wyatt*'s analysis is inapplicable to the case before us because the City

here never argued, and there is nothing in the record indicating, the Measure M transfers and/or surcharge were in any way related to the costs of providing water and sewer services.

(*Lejins, supra*, 72 Cal.App.5th at p. 323–324.) Sacramento did not argue in *Wyatt* that its general fund transfer represented costs of utility service either, of course, only that once voters approved the tax, the utility was obliged to pay it and it was a “cost” of service allowable under Proposition 218 for that reason — just as Bradley-Burns sales taxes borne by utilities are.

Most recent in this series is *Palmer v. City of Anaheim* (2023) 90 Cal.App.5th 718, which concluded that a voter-approved transfer from Anaheim’s power utility did not violate Proposition 26. Proposition 218 does not apply to electric rates by virtue of article XIII D, section 3, subdivision (b). Its reasoning was simple — Proposition 26 defines “taxes” which require voter approval and voters had approved the charter provision authorizing the general fund transfer in *Palmer* as a tax. This question recurs in a suit Riverside is defending that may soon reach the Court of Appeal. (*Simpson v. City of Riverside*, Riverside Superior Court Case No. RIC 1906168 (filed Dec. 19, 2019).)

Beck v. City of Canyon Lake, 4th District Court of Appeal case number D083322 (unpublished decision filed Mar. 20, 2025) affirmed a judgment invalidating that city’s general UUT on water and sewer services as violating Proposition 218’s article XIII D, section 3, subdivision (a), which states:

Property Taxes, Assessments, Fees and Charges Limited. (a) No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except:

- (1) The ad valorem property tax imposed pursuant to Article XIII and Article XIII A.
- (2) Any special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A.
- (3) Assessments as provided by this article.
- (4) Fees or charges for property related services as provided by this article.

The Court also adopted *Lejins'* "distinction" of *Wyatt*.

Petitioners persuaded the trial court that, because water and sewer service charges are fees for a property-related service, a tax on those charges violates this provision of the Constitution unless approved by two-thirds of voters as a special tax under Proposition 13. But Proposition 218's ballot arguments and impartial analysis assured voters that utility taxes on water would continue post-Proposition 218 so long as voters approved them. A petition for review is due April 29, 2025. The ruling is unpublished, but its logic would invalidate the taxes of four counties and nearly 100 cities raising hundreds of millions of dollars. Absent review, copycat litigation is likely.

IV. Ratemaking

Ever since the Supreme Court made clear that retail water rates are property-related fees subject to Proposition 218, they have been often litigated, typically by plaintiffs' contingency counsel suing for refunds (and attorney fees) on behalf of a class of all rate payers. Such cases call for independent judgment review of legislative ratemaking. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 450 [independent judgment review of assessment under Prop. 218]; *Hill RHF Housing Partners, L.P. v. City of Los Angeles* (2021) 12 Cal.5th 458, 482 [assessment levy is legislation].) This makes outcomes unpredictable. And, if refunds are available,

and fees for class counsel, too, there will be many such suits — especially against the State’s largest municipal utilities with the potential for multi-million-dollar payouts. Predictably, litigation abounds. We review some of the more recent decisions to aid ratemakers’ counsel in containing risk.

Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493 invalidated that City’s tiered water rates, i.e., rates which increase with the amount of water used to encourage conservation, because the record on which rates were made did not plainly show that the amount charged in each tier recovered only the cost to serve water in that tier. As the decision occurred in the midst of historic drought, it garnered worldwide attention and a wave of litigation followed.

Coziahr v. Otay Water District (2024) 103 Cal.App.5th 785, review denied, is the most recent of these. This was a class-action challenge to tiered water rates imposed by a district which serves territory along the international border south and east of San Diego. At one level, *Coziahr* is just an application of *Capistrano*’s “show your math” rule — decided against the District because its tiered rates were not sufficiently justified by its ratemaking record. On another, though, it is very troubling. It rejected the approach to tiered rates recommended by the American Water Works Association’s M-1 Manual — the most-cited authority on ratemaking — that looks to so-called “peaking factors” (ratios of the volume of water a customer or customer class uses in a peak hour, day, or month as compared to that customer’s or class’s average use). Although ratemaking is necessarily based on reasonable estimates of future expenses, this Court demanded “actual data” regarding costs the District incurred to provide water in each tier of use. It stated that reasonable estimates will not suffice. That standard will invite litigation and may discourage use of tiered rates even though the Legislature has passed laws in

each of the last two years (discussed below) encouraging such rates because conservation is a necessity in our desert state. The Court of Appeal upheld an award of \$18 million in refunds against Otay (remanding for its recalculation), rejecting argument that money awards are not authorized under Proposition 218.

Howard Jarvis Taxpayers Association v. Coachella Valley Water District (2025) 108 Cal.App.5th 485, review pending, was a class-action challenge to rates this agency charges to deliver raw water for irrigation via its canal system. It distinguishes urban irrigators (e.g., golf courses and homeowners' associations) from farmers and charges only the former the very high cost of supplemental water supplies under the Quantification Settlement Agreements which settled rights to Colorado river water among California agencies. Its rationales for doing so were farmers' historical use of and payment for the water (rejected in the trial court and not reasserted on appeal, although the decision states otherwise) and that urban development is driving the need for new supplies, while agricultural use is declining slowly as farmland is developed.

The trial court invalidated the rates despite evidence the District uses tax proceeds to subsidize rates below cost for all payors. It allowed standing even though the domestic ratepayers for which HJTA sued did not pay the raw-water rates — they bore some of their economic incidence via rates for domestic water service which benefit from groundwater replenishment with canal supplies. It concluded the duty to pay under protest imposed by Health & Safety Code section 5472 did not apply because the statute references cities and counties, but not special districts like CVWD. It awarded \$17 million in refunds and \$4 million of that in fees to petitioner's counsel and enjoined the District to comply with Proposition 218 as to future ratemaking, threatening to turn future disputes into contempt proceedings in that case rather than new suits.

The Court of Appeal affirmed on every point but the last. Like *Otay*, it can be viewed as merely a record case and not precedent for rates made on other records. It refused to apply Government Code section 54958.5's new prohibition on refunds without much explanation, stating only that this statute effective January 1, 2025 was "not before" the Court. But its holdings on standing, the duty to pay under protest, and the availability of refund remedies may not be so easily dismissed. CVWD's petition for review is pending as this paper is written and raises these questions for review:

- Does *Zolly v. City of Oakland* (2022) 13 Cal.5th 780 authorize challenge under Propositions 218 or 26 to a use of the proceeds of domestic water rates without showing that the use causes rates to exceed the reasonable cost of service, notwithstanding *Webb v. City of Riverside* (2018) 23 Cal.App.5th 244 and *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1?
- May a customer challenge under Proposition 26 a water rate that is less than the cost of service, due to subsidies from discretionary revenues, because other customers pay even less? Put differently, does Proposition 26 empower courts to independently review an agency's application of discretionary revenues to rate subsidies?
- Are refunds available under Propositions 218 and 26 by implication or common law development, despite California Constitution, article XIII, section 32's requirement of statutory authority for refunds of government revenues?
- Does federal due process require a monetary refund in rate challenges under Propositions 218 and 26?

The Supreme Court’s decision to grant or deny review is due May 9, 2025 unless the Court extends that time, as it commonly does.

Patz v. City of San Diego, 4th DCA Case No. E083543 (tentative opinion issued Mar. 12, 2025). This was originally filed under one pleading with *Coziahr*, but the cases were bifurcated. San Diego had no more success than Otay, and the trial court entered a judgment invalidating its tiered rates and awarding almost \$80 million in refunds, plus attorney fees. In a tentative ruling issued on March 12, 2024, a Riverside panel of the Court of Appeal affirmed the trial court’s conclusion that the city’s tiered rates were not supported by its record, but applied Government Code section 53759.1, subdivision (b) to overturn the refund award, remanding to the trial court to allow the remedy the statute calls for — a credit to the single-family residential class in a subsequent ratemaking. This same Division of the Fourth District refused to apply that statute to the *HJTA v. Coachella Valley Water District* case discussed above. Argument is set for May 6, 2025 and, of course, the Court is not bound to follow its tentative.

V. Water and Sewer Ratemaking

A. Tiered Water Rates

The 2015 decision in *Capistrano* discouraged water agencies from using tiered water rates. Environmental advocates and others favor such rates because they encourage conservation. This led Assemblywoman Papan (D-San Mateo), recently a Millbrae Councilmember, to introduce two bills in successive years to encourage such rates. First is 2023’s AB 755, which adopts Water Code sections 390 and 390.1 to require a cost-of-service analyses (COSAs) for water rates prepared after January 1, 2024 to identify the top 10 percent of customers by demand and identify any costs associated with serving

them. Identifying a cost caused by a customer class and not isolating that cost to that class in rate design implies an improper cross-subsidy of rates — i.e., cost-shifting from those customers to others. However, the statute refers to the top 10 percent of all **customers**, not the top 10 percent of any **customer class**. In many agencies, the largest users will be non-residential and a COSA can easily explain that costs associated with serving those users are not best allocated to them, but to customer classes such as commercial, industrial, single-family, etc. — as is industry-standard practice. Thus, the bill requires a little thought about these issues when preparing a COSA and adopting new rates, but may not unduly control rate design.

2024's AB 1827 seeks to facilitate tiered water rates by stating that a COSA can consider any or all of higher water demand, maximum potential water use, and projected peak water use in allocating costs to customers who use more water than others. It responds to trial court rulings in *Patz* and particularly *Coziahr* which adopted the plaintiffs' draft statement of decision declaring that tiered rates and use of peaking factors more generally (i.e., measures of the extent to which a water user class's peak use exceeds its average use) are necessarily unreasonable and violate Proposition 218 (Cal. Const., art. XIII D, § 6, subd. (b)(3)) unless the agency has time-of-use data. That reasoning is absurd: water ratemakers have been using peaking factors for decades and time-of-use data is a novelty available only to the largest and best-funded utilities. Thus, if time-of-use data is required, nearly all agencies must abandon a decades-old ratemaking practice and many adopted rates are inadequately supported. But nothing in Proposition 218 suggests votes intended that maintaining long-standing, industry-standard ratemaking practices would be deemed unreasonable. The bill adopts Government Code section 53750.6 and states that it is declaratory of existing law. *HJTA v. Coachella* found the statute inapplicable and no other court has yet applied it.

B. Exhaustion of Remedies; Litigation on the Record

Last year's AB 2257 (Wilson, D-Suisun City), sponsored by the Association of California Water Agencies (ACWA), makes two helpful changes to the Proposition 218 Omnibus Implementation Act. First, it authorizes agencies to require those who challenge new or increased fees, charges, or assessments for water or sewer services to exhaust administrative remedies before suit. That requires litigants to inform an agency, in writing, of the legal theories of suit along with a protest under Proposition 218's procedures for property-related fees or assessments. If they do not, they cannot sue. If they do, they can sue only on the issues they (or, perhaps, another objector) raised.

The requirements for the local remedy (best clarified by ordinance or resolution) are many, but most restate existing law. New requirements are that an agency must state in hearing notices that an exhaustion requirement applies and must respond in writing to every substantive comment made in objection to a proposed rate, charge, or assessment. This will require some work and last-minute comments (common in CEQA disputes) will slow down ratemaking, but adopting a local policy to clarify and maximize the exhaustion requirement ought to be a priority for every local water or sewer provider.

AB 2257 also provides that Prop. 218 challenges to water and sewer charges, fees, and assessments are litigated on the agency's record of its ratemaking — discovery is not permitted on the merits of such disputes. This is what many public lawyers understood to be the law, but we have been litigating the point and not always winning it. So, this is a helpful change. In addition, the statute defines the contents of a ratemaking record, ending disputes on that subject, too. These rules took effect in January 2025 without local action.

The statute adopts Government Code section 53759.1 (exhaustion) and 53759.2 (litigation on the record). To date, only the tentative ruling in *Patz v. San Diego* applies

them. The statute's uncodified findings state the "act establishes a 'clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties' (see *Plantier v. Ramona Municipal Water Dist.*, *supra*, 7 Cal.5th at p. 384, citing *Rosenfield v. Malcom* (1967) 65 Cal.2d 559, 566)."

C. Statutory Bar on Refunds in Proposition 218 Challenges

SB 1072 (Padilla, D-Chula Vista) states that refund remedies are not permitted in Proposition 218 challenges to property-related fees, including those for water, sewer and trash service. If a challenge to a fee determines that one class of customers or another, or all customers, have been overcharged, the necessary repayment is to be accomplished in the next ratemaking. This will prevent the multimillion-dollar refunds *Coziahr*, *Patz* and *HJTA v. Coachella* awarded, threatening the finances of providers of vital utility services. Such refunds wipe out agency reserves, which have to be refunded by rate increases, so this is all a very expensive way of shifting money from ratepayers' left pocket to their right – generating defense costs and large fee awards to plaintiffs' counsel, too. Orders that rates be corrected will be sufficient to protect ratepayers and to enforce Prop. 218. Indeed, this was how limits on revenue measures were enforced until the advent of class action claims in the last decade.

The statute adopts Government Code section 53758.5, the gist of which is:

If a court determines that a fee or charge for a property-related service, including water, sewer, and refuse collection, violates Section 6 of Article XIII D of the California Constitution [i.e., Proposition 218], then the local agency shall, in the next procedure to impose or increase the fee or charge, credit the amount of the fee or charge attributable to the violation against

the amount of the revenues required to provide the property-related service unless a refund is explicitly provided for by statute.

A statement the measure was declaratory of existing law was deleted in the Legislature, but the bill should apply to rates made previously in any event. Courts apply the law in effect when judgment is entered, unless doing so would “result in manifest injustice or there is statutory direction or legislative history to the contrary.” (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 931, citing *Bradley v. School Bd. of City of Richmond* (1974) 416 U.S. 696, 711.) And even if judgment has entered and a case is on appeal, the reviewing court “must dispose of the case under the law in force when its decision is rendered.” (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 831.)

“It is well established that a plaintiff has no vested property right in a particular measure of damages, and that the Legislature possesses broad authority to modify the scope and nature of such damages.” (*American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 368; see also *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 159; *Werner v. Southern California Associated Newspapers* (1950) 35 Cal.2d 121, 129.) “All statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time.” (*Callet v. Alioto* (1930) 210 Cal. 65, 67–68.)

Moreover, SB 1072 represents “a considered legislative judgment as to the appropriate reach of the constitutional provision.” (*Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 291.) It therefore “enjoys significant weight and deference by the courts.” (*Ibid.*, citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.) And, like a court, the Legislature interprets Propositions 218 and 26 as they were adopted in 1996 and 2010, respectively. Retroactivity is not an issue.

D. Stormwater and Sewer Fees

The cost of complying with Regional Water Quality Control Board mandates under the federal Clean Water Act's National Pollutant Discharge Elimination System (NPDES) has become unsustainably expensive. Proposition 218, as interpreted in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 requires majority property-owner approval, or two-thirds registered-voter approval, of fees for water quality and flood control programs. (Cal. Const., art. XIII D, § 6, subd. (c).) *Salinas* read Proposition 218's exception from that rule for fees for "sewer, water, and refuse collection services" (*ibid.*) to limit "sewer" to sanitary sewer fees.

Environmental advocates who persuaded the regional boards to impose the expensive water quality mandates have recognized the need to help local governments fund compliance. This led to 2017's SB 231 (Hertzberg, D-San Fernando Valley) which amended Government Code section 53750, subdivision (k) to define the "sewer" services fees which are partially exempt from Proposition 218 to include storm, as well as sanitary, sewers. It also adopted Government Code section 53751 to explain the Legislature's disagreement with *Salinas*. One trial court accepted that reasoning and refused to follow *Salinas*. (*Gluck v. City and County of San Francisco*, 1st DCA Case No. A170087.) The appeal has been fully briefed and awaiting argument since October 30, 2024, so argument is likely soon.

However, the Third District Court of Appeal, while noting that SB 231 postdated the dispute before it, nevertheless disagreed with it and provided a more intellectually rigorous justification for *Salinas'* interpretation of Proposition 218. (*Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535.) The decision concluded that, because of the voter-approval requirement, local governments do not have the power to adopt stormwater fees. Accordingly, many of the provisions of the 2007 NPDES permit

for the County of San Diego and the cities within it are unfunded state mandates requiring the Legislature to fund their costs or to suspend the mandate. Interestingly, the Court of Appeal noted that many stormwater permit programs amount to removing waste from waterways and might therefore be funded by a fee for “refuse collection services” exempt from Proposition 218’s election requirement, and subject only to its 45-day noticed majority-protest proceeding, with which we have become familiar.

In light of these developments, cities may rely on one or more of these options to fund stormwater mandates:

- use general funds;
- charge appropriate portions of the stormwater budget to other city programs which burden the system — like water, sewer and trash services;
- recover a portion of the stormwater budget from a fee for “refuse collection services” in the form of efforts to prevent trash from entering receiving waters or removing it from them;
- seek property-owner or voter approval of a stormwater fee under article XIII D, section 6, subdivision (c); or
- seek voter approval of a general or special tax under article XIII C, section 2.

Dessin, LLC v. City of Sacramento, 3rd DCA Case No. C100644 is a challenge to a fee for combined sewer and storm sewer services imposed after a property-owner election under Proposition 218’s article XIII D, section 6, subdivision (c). This reverse validation challenge argued that the measure should have failed because the margin of victory was provided by the city’s own properties and those of other government agencies, of which there are many in our capital city. The trial court ruled for City and the petitioners

appealed. The appeal is fully briefed and awaiting argument as of March 3, 2025. Argument is likely late this year.

VI. Conclusion

Further developments are, of course, inevitable. City Attorneys should monitor new developments in the courts, the Legislature, and in the communities we serve.

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Our File No. 99904.0114

Current Developments in the Law of Municipal Revenues:

Regulatory Fees After *Sutter's Place, Inc. v. City of San Jose*;

What's Bubbling with Soda Taxes; &

Development Impact Fee Update – Cases and Statutes

League of California Cities

City Attorneys Conference

Burlingame, CA

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by

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I. Regulatory Fees After *Sutter's Place, Inc. v. City of San Jose* (2024) 104 Cal. App. 5th 855

Holding: Regulatory fees under Proposition 26 cannot cover the full cost of a regulatory program. Instead, fees must be limited to specific activities enumerated in Cal. Const., art. XIII C, § 1, subd. (e)(3): “issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.”

The Sixth District also found San Jose properly divided its regulatory costs equally between two licensed cardrooms, since both could operate the same number of tables. The appellate court interpreted Proposition 26’s exceptions to the definition of a tax very narrowly—treating the measure as if it were a statute passed by the Legislature, rather than a voter initiative, which precedent requires to be interpreted more flexibly in light of voters’ apparent intent rather than in a strict way informed by the canons of statutory construction.

As a result, local governments may no longer be able to fund regulatory programs through regulatory fees alone. Any unrecoverable costs may need to be subsidized by other sources, like the general fund, which are often already overextended. Since the California Supreme Court declined to review or depublish the decision, this interpretation remains binding law—unless a future Court of Appeal is persuaded to issue a contrary decision and the Supreme Court elects to resolve the conflict.

Sutter's Place also reaffirms earlier case law that allows agencies flexibility in how they distribute regulatory costs among the entities they regulate, as long as the allocation is reasonable. An equal split was acceptable here even if one club or the other made greater demands on the City’s staff in a given year. Additionally, it confirms that if a court invalidates certain costs recovered through a Proposition 26 charge, the appropriate remedy is not a full refund. Instead, the refund should be the difference between what the fee payer paid and what they should have been charged in compliance with Proposition 26 to cover the agency’s valid costs.

Facts/Background: Sutter’s Place, Inc., operating as Bay 101 Casino, and M8trix are San Jose’s only two cardrooms. Each is licensed to operate 49 tables and is open 24 hours per

day, year-round. San Jose imposes three charges on each: a voter-approved special tax that varies with a cardroom's income; a licensing fee of about \$1,500 per year; and a regulatory fee, which varies annually based on the City's projected enforcement and regulation costs.

The regulatory fee is split evenly between the two cardrooms. Over the seven years at issue, each paid between \$826,871 and \$1,012,142 annually. In all but two of those years, the fee revenue fell short of the City's actual regulatory costs.

Sutter's Place sued, claiming the fee was an unconstitutional tax under Proposition 26 and violated due process. It also claimed the regulatory fee violated Proposition 26 in two ways: the fee included costs unrelated to regulatory functions and thus exceeded the City's actual or reasonable costs of administration; and that dividing the fee equally failed to reflect differences in regulatory burden between the two cardrooms, which forced Sutter's Place to bear an unreasonable share of the cost of the regulatory program.

Specifically, Sutter's Place disputed four types of costs that the City sought to recover through its regulatory fee: legislative activity, including work to amend the municipal code and travel to Sacramento to testify before the California Legislature (at card rooms' request); responding to California Public Records Act requests from card rooms and others; City attorney's office staff time spent on litigation (including this case); and tax-monitoring activities. Because these are not among the cost categories in Proposition 26's regulatory fee exception, Sutter's Place argued their inclusion made the fee into a tax requiring voter approval.

The trial court found for the City, stating there was no "specific test" for determining which costs could be included. Therefore, all costs reasonably related to regulation could be included. The trial court also found that the equal fee split between the two licensed clubs bore a fair and reasonable relationship to the respective burdens of each cardroom.

The Sixth District reversed. It held that Article XIII C, § 1(e)(3) of the California Constitution provides a specific test for valid regulatory fees: charges must be limited to the reasonable costs of licensing, inspections, investigations, audits, and related enforcement.

The City's regulatory fee was designed to recover both direct and indirect regulatory costs, including general government functions like CPRA compliance, tax monitoring, amending the municipal code, and litigation. The appellate court found these broader cost categories indirectly related to the regulation exceeded the narrow constitutional exception.

The Sixth District noted that there may be costs associated with operating the cardroom regulation program that cannot be recovered through a regulatory fee under the narrow constitutional exception. The government must show the costs comprising the fee are incurred only for permissible regulatory activities, not just peripherally related to the regulatory program.

The case was remanded for further proceedings. The trial court must determine whether the four disputed cost categories fall outside the permissible scope of Proposition 26. If the fee collected exceeded the City's allowable regulatory costs, *Sutter's Place* is entitled to a refund of the difference—but not a full refund. If actual allowable costs were higher than the fee charged (as the City contends), no refund is owed.

Analysis: The Sixth District took a narrow view of Proposition 26's regulatory fee exception, limiting recoverable costs to those directly tied to licensing, inspections, investigations, audits, and related enforcement. Based on that reading, the trial court may find that the four cost categories challenged in *Sutter's Place*—legislative activity, CPRA responses that would not be necessary but for the operation of regulated party, litigation, and tax monitoring—cannot be recovered from a regulatory fee.

This decision suggests that indirect costs related to regulation may not be recoverable by a regulatory fee. Those costs may now require support from general fund or other discretionary revenues. Based on the ballot arguments on Proposition 26, this is a shift from how most public lawyers interpreted Proposition 26. Most public lawyers understood that the fees could cover the full cost of regulatory programs, which necessarily require rulemaking, and Public Records Act compliance, and litigation because these are costs associated with licensing, permitting, investigations, and the like. That is certainly what voters were led to expect.

Historically, courts readily found that agencies could recover the full cost of a regulation, including indirect costs, as long as the agency could justify them. Courts have upheld

recovery of expenses such as utility impacts,¹ debt service,² sewer system management,³ and housing inspection programs⁴ when tied to the cost of service. Drafting and updating regulations had also been considered a legitimate, recoverable expense under the regulatory fee exception.

This decision means that trial courts now face conflicting precedents. Some may follow *Sutter's Place* for Proposition 26 fees, while limiting cases like *Griffith v. Pajaro Valley Water Management Agency*, which allowed indirect cost recovery under Prop. 218, to that measure.

Equal Division of Regulation Fee. Regarding the equal division of the regulation fee, the Sixth District agreed with the trial court, upholding the City's equal cost allocation between cardrooms. The Sixth District also found that substantial evidence supported the trial court's determination that equally allocating the cardroom regulation fee between the two cardrooms was fair and reasonable. It noted that local agencies need not show a precise cost-fee ratio, as Proposition 26 only requires a reasonable basis for cost allocation. The appellate court noted the two cardrooms had similar operations, the same number of licensed tables, and imposed equal burdens on the City's oversight over time, despite varying regulatory attention in a given year.

Refund Limited to Invalid Costs Only. Although *Sutter's Place* sought a full refund, the Sixth District held that only impermissible costs must be refunded, aligning with earlier Proposition 26 decisions.⁵ The court observed that "in all but two of the contested years, the cardroom regulation fee was lower than the defendants' total actual costs." If the trial court finds that the City's allowable costs exceeded the fee charged, no refund is owed. If some charged costs were impermissible, the refund is limited to the difference between what was charged and what could have been lawfully imposed under Proposition 26.

Due Process for Refunds of Regulatory Fees. The trial court rejected plaintiff's claim that its federal constitutional right to due process was violated by the imposition and

¹ See *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914, 927

² *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 598

³ *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 369

⁴ *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 987, 997

⁵ *Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1.

implementation of the cardroom regulation fee as an unconstitutional tax imposed without voter approval.

Citing *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida* (1990) 496 U.S. 18, 32, the Sixth District explained that a valid due process claim arises if a party is denied both the opportunity to challenge a fee and a meaningful remedy for any unlawful taxation. (*McKesson*, at p. 39). If the trial court finds any refund is owed, Sutter's Place is entitled to proceed to trial on its federal due process cause of action.

This reasoning represents a novel application of *McKesson*—a tax case—to regulatory fees. Under the court's logic, any dispute which can be monetized is a federal due process claim. Regulatory fees do not involve federally protected property interests unless the right to do business at all is at stake.

Takeaways: This case is bad news for local agencies, suggesting much more work to be done to impose defensible fees and much greater risk of litigation and large refund awards.

- Full cost recovery may be risky. A fee that includes full cost-recovery of all costs both directly and indirectly related to a regulatory program is now harder to defend. Some general fund support will allow a margin for error.
- To avoid risk, fees must clearly fall within Proposition 26's regulatory fee exception permitted categories. To minimize legal exposure, fees should be limited to the regulatory activities listed in Cal. Con., art. XIII C, § 1, subd. (e)(3):
 - Issuing licenses and permits
 - Performing investigations, inspections, and audits
 - Administrative enforcement and adjudication of those activities

For costs not plainly within these categories, make findings supported by evidence in the ratemaking record how they relate to the permitted categories and are necessary costs of providing the service for which the fee was adopted.

- If a general fund subsidy is required, document it in ratemaking record.

Agencies should comply with 2024's AB 2257's procedures to impose a duty to exhaust administrative remedies before suit to limit exposure to suit and give the agency a full opportunity to consider the asserted bases for challenge and make administrative corrections. (Gov. Code §§ 53759.1 and 53759.2). Although that statute applies only to Proposition 218 challenges to utility fees, cities' and counties' police power under California Constitution, article XI, section 7 will allow a broader local exhaustion requirement. Special districts also have such power under article XI, section 9 empowering them to provide utility services and, by implication, to impose fees and fee-making procedures to do so.

- Be clear and specific in your fee resolution. Use your fee-setting resolution as an opportunity to explain how fees support permissible activities instead of generally citing the need for regulation.
- Ensure support for allocation is fair and reasonable. Courts generally defer to how agencies allocate fees among payees, applying a standard similar to rational basis review. As long as an agency can show by a preponderance of the evidence that the allocation is fair and reasonable across all payees, it will likely hold.
- Follow legal developments. This area of the law is developing rapidly.

II. What's Bubbling with Soda Taxes

Over the past decade, soda taxes in California have sparked ongoing disputes—from the 2018 passage of Keep Groceries Affordable Act of 2018 ("Groceries Act"), a political compromise to block a harmful revenue initiative, to the recent legal challenge in *Cultiva La Salud v. State*, which invalidated a provision threatening charter cities' sales tax revenues if they enacted soda taxes.

Following that ruling, in the November 2024 election, the City Santa Cruz took on the beverage industry with its Measure Z "Sugar Sweetened Beverage Tax", which was adopted by its voters. While no lawsuit has been filed yet, threats of litigation continue to loom over Measure Z. If "Big Soda" does not challenge Santa Cruz's tax, other charter

cities will likely follow, both to raise money and to discourage consumption of what they perceive to be a health risk.

***Cultiva La Salud v. State of California* (2023) 89 Cal.App.5th 868**

Holding: The penalty provision in the Keep Groceries Affordable Act of 2018 (AB 1838), which threatened charter cities with losing sales and use tax revenue if they imposed taxes on sugar-sweetened beverages, is unconstitutional. The penalty provision improperly uses the threat of crippling penalties to deter charter cities from exercising their right to enact local taxes under the home-rule doctrine of the California Constitution.

Facts/Background: Between 2014 and 2016, Berkeley, San Francisco, Oakland, and Albany adopted 1-cent-per-fluid-ounce taxes on the distribution of sodas and other sugar-sweetened beverages, citing the dangers of too much sugar in children’s diets. Similar efforts were underway in Chicago and Seattle, as well as Cook County, IL.

To stop this trend, the beverage industry contributed generously to the California Business Roundtable’s proposed “Tax Fairness, Transparency, and Accountability Act of 2018.” This initiative was intended to amend the California Constitution to make nearly all State and local government revenues subject to a two-thirds voter approval and included other restrictive provisions, such as limiting regulatory fees to actual costs.⁶ It was a forerunner of a similar Business Roundtable measure excluded from the 2024 ballot by *Legislature of State of California v. Weber* (2024) 16 Cal.5th 237.

To avoid a costly fight to defeat that 2018 initiative, the Legislature passed the Groceries Act in exchange for the initiative proponents’ agreement to withdraw the measure. The Groceries Act imposed a 12-year moratorium on new or increased local taxes on carbonated and noncarbonated nonalcoholic beverages. In effect, the State agreed to restrict one type of local government taxing authority to prevent what it perceived as a much larger threat of loss of State and local revenue authority.

⁶ Tax Fairness, Transparency, and Accountability Act of 2018 initiative petition: <https://www.oag.ca.gov/system/files/initiatives/pdfs/17-0050%20%28Two-Thirds%20Vote%20Requirement%20V1%29.pdf>

Specifically, the California Legislature passed AB 1838, labelled the “Keep Groceries Affordable Act of 2018” (Rev. & Tax. Code §§ 7284.8–7284.16). The Groceries Act prohibits charter cities, counties, and other local governments from imposing taxes, fees, or assessments on listed grocery items, including sodas and other sugar-sweetened drinks.

The Act also includes a penalty requiring the California Department of Tax and Fee Administration (CDTFA) to terminate its contract with local agencies that impose taxes on groceries, causing the loss of all sales and use tax revenue (including Bradley-Burns 1 % taxes and any local add-on transactions and uses tax) for any charter city that enacted a tax on sugar-sweetened beverages to test the claim that the Groceries Act was not a matter of statewide concern that could be imposed on charter cities.

The Groceries Act caused several cities to abandon plans to pursue local taxes on sugar-sweetened drinks, including Santa Cruz and Stockton. After the City of Santa Cruz abandoned its pursuits of a soda tax, the nonprofit health group, Cultiva La Salud, along with Santa Cruz City Council Member Martine Watkins, sued the CDTFA, challenging the Groceries Act’s penalty provision as unconstitutional as it seeks to bypass charter cities’ legitimate authority by imposing a harsh penalty for properly exercising their rights under the home rule doctrine.

Under California’s familiar “home rule doctrine,”⁷ charter cities may make and enforce ordinances on municipal affairs free from preemption by general laws. A charter city’s law on a matter of local concern may only be preempted when it conflicts with a state law addressing a subject of statewide concern, the state law is reasonably related to resolution of that concern, and the state law is narrowly tailored to avoid unnecessary interference in local governance.⁸

Plaintiffs alleged the Legislature knew the home rule doctrine prevented the state from blocking charter cities’ right to impose taxes on sugar-sweetened drinks. Thus, instead of enacting an outright prohibition on charter city authority, the Legislature imposed a harsh penalty to deter cities from exercising this right, making it too risky for any charter city to enact a local soda tax. Plaintiffs sought a declaration that the Groceries Act’s

⁷ Cal. Const., art. XI, § 5

⁸ *State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555–556

penalty provision was unlawful, an injunction to prevent its enforcement, and a writ of mandate directing the Department not to implement it.

Amicus briefing described this as an example of what academics have called “punitive preemption,” by which legislatures not only preempt local legislation, but punish those cities which adopt it — a disheartening retreat from principles of home rule and pluralism.

The Department argued the case was not ripe, and should be decided only after a charter city has enacted a tax triggering the Act’s penalty. They also argued the provision penalizes a charter city only when its grocery tax “would **otherwise** be a valid exercise of a of the local government’s constitutional powers, **in the absence of the Groceries Act.**” Meaning, the penalty would only apply if the Groceries Act is the only reason for finding the tax is prohibited. The Department argued any offending language could be severed to save the rest of the provision.

Finding for Plaintiffs, the trial court found the case ripe for review due to plaintiffs’ facial challenge because their petition raised important legal questions that might otherwise remain unanswered, as charter cities may avoid enacting a soda tax fearing the financial risk posed by the penalty provision. Stockton and Santa Cruz did just that after the Groceries Act was adopted. The court found the penalty provision unlawful and deemed it unenforceable because it only penalizes charter cities that validly exercise their constitutional rights under the home rule doctrine. The Department appealed.

Analysis: The Third District affirmed.

Ripe for Review. The appellate court agreed with the trial court’s analysis, rejecting the claim that the case should not be reviewed until a local tax was imposed. The court explained that accepting this position would create a situation where laws with potentially unconstitutional provisions could escape judicial scrutiny, as the fear of penalties would prevent cities from challenging them. This approach, the court reasoned, would let the state impose unconstitutional laws with no recourse for affected parties.

The court found that the facts had sufficiently “congealed” to allow for a final ruling on the plaintiffs’ facial challenge to the Groceries Act’s penalty provision, citing *Vandermost v. Bowen* (2012) 53 Cal.4th 421. The court noted that deferring the case would result in

lingering legal uncertainty, particularly because the Groceries Act's penalties that required charter cities to risk loss of their sales and use tax revenues were so severe that no charter city would likely ever enact a soda tax under its terms.

Groceries Act's Penalty Provision Unconstitutional. On the merits, the appellate court rejected the CDTFA's argument that the penalty only applies if the Groceries Act is the only reason a charter city's tax is prohibited. To understand the Act and its penalty provision, the court looked to the Groceries Act's context – the Bradley-Burns Uniform Local Sales and Use Tax Law of 1955, particularly its 1996 amendment.

The appellate court observed that, like the 1996 amendment to the Bradley-Burns Act, section 7284.12 of the Groceries Act reflects the Legislature's concern about preempting charter city taxes. Both laws follow a similar structure: they first prohibit local governments from imposing certain taxes, and then, as a backup, threaten severe penalties if taxes are adopted nevertheless. The court concluded that both laws aim to prevent charter cities from enacting specific taxes, either directly or through the threat of severe penalties if the prohibition is ineffective.

Considering this purpose, the appellate court agreed with the trial court, that section 7284.12 improperly uses the threat of crippling penalties to chill charter cities from exercising their constitutional rights. As the California Supreme Court explained, "[i]f a law has no other purpose than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." (*In re King* (1970) 3 Cal.3d 226, 235-236).

Offending Penalty Provision Cannot Be Severed. The appellate court ruled it couldn't sever parts of the penalty provision, as the Department suggested, because doing so would have significantly changed the scope by creating penalties for counties and general law cities, where none were provided by the Legislature. Severance may be used by a court to remove offensive language when the language is grammatically, functionally, and volitionally separable; it is not a tool for creating new penalties the Legislature never intended.

Since the offending provision could not be stricken, the appellate court found the entire penalty provision unlawful and unenforceable. This outcome isn't surprising, given that the Groceries Act's penalty provision clearly targeted expressive activities – framing and

adopting local policy – and resort to courts to defend the home rule doctrine. Few courts will tolerate penalties on those who seek judicial assistance. (*San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124.)

Takeaway: The fight for soda taxes and home rule for charter cities is likely not over. In the November 2024 election, Santa Cruz’s voters adopted Measure Z. Known as the “Sugar Sweetened Beverage Tax,” Measure Z is the first soda tax passed in California since the Groceries Act was enacted in 2018 and after *Cultiva La Salud*.

Measure Z passed despite expensive opposition from the beverage industry lobby. The American Beverage Association has threatened a lawsuit will be filed to challenge Measure Z in the spring of 2025. If filed, the lawsuit would be the first case to challenge a charter city’s soda tax after the Groceries Act’s penalty provisions were held unconstitutional by the Third District. If Measure Z is not challenged by Big Soda, or it survives a challenge, other charter cities in California are expected to follow.

As of this paper, no challenge has been filed.

III. Development Impact Fee Update – Cases and Statutes

A development impact fee (DIF) is a charge by local governments on developers to cover public facility costs related to their projects (Gov. Code § 66000(b)) and is regulated under the Mitigation Fee Act.

The Mitigation Fee Act (Gov. Code §§ 66000-66025 or “AB 1600”) requires local agencies to adopt five-year findings to account for balances of development impact fee proceeds held for more than five years. The findings are to be included in the agency’s annual reports and must be filed within 180 days of the end of the fiscal year.

Fees governed by the Act, distinct from taxes or special assessments, must reflect service costs. Imposing a fee requires a nexus study, and annual or five-year reports to demonstrate proper and timely use of funds. If a fee exceeds service cost, it is a special tax, requiring two-thirds voter approval (Cal. Const., Art. XIII A, § 4).

Coming off a busy 2023–2024 Legislative session for development impact fees, these are new statutes and recent cases to be aware of.

County of El Dorado v. Superior Court (2019) 42 Cal.App.5th 620

Holding: Statute of limitations for refund claim under AB 1600 was one year, as the duty to refund fees is a penalty, triggering the statute of Code of Civil Procedure section 340, subdivision (a).

Facts/Background: Property owners, the Austins, sued to recover DIFs under the Mitigation Fee Act levied by the County and its special districts. The Austins alleged that the County did not make the necessary “nexus” findings to justify the continuing need to hold unexpended funds generated from 11 DIFs. The County contended that the statute of limitations barred the action and that the Austins needed to show “prejudice” to recover the fees.

The trial court rejected the County’s demurrer regarding the statute of limitations, but upheld the demurrer because the plaintiffs failed to include necessary parties. The County petitioned for writ of mandate.

Analysis: On interlocutory review, the County argued that a one-year statute of limitations for penalties and forfeitures applied, and that the plaintiffs did not show prejudice as Government Code section 65010 required. The Court of Appeal agreed, ruling that a one-year statute of limitations applied. Since the mandatory damages the plaintiffs sought were in addition to any actual harm they suffered, they were a penalty, subject to the one-year limitations period under Code of Civil Procedure section 340(a).

The appellate court rejected the County’s argument that the trial court’s action resulted in the invalidation of the county’s fees and therefore was not permissible under Government Code section 66022, imposing validation’s 60-day bar on such disputes. Instead, it was properly characterized as a refund action based on the County’s failure to make timely nexus findings justifying retention of fees. The claim could proceed—at least as to payments made within the statute of limitations—under the continuous accrual doctrine. The County’s demurrer was overruled, since the plaintiffs could recover fees for the one-year period preceding each breach. Each fee collected without proper findings constitutes a new breach, resetting the statute of limitations for that collection. While the statute of limitations did not completely bar the action, it limited the recovery.

The appellate court also ruled the requirement in Gov. Code section 65010's requirement of prejudicial error was not applicable to the Austins' AB 1600 claim. The appellate court denied the County's petition for writ of mandate.

Takeaway:

- Statute of limitations to challenge DIFs is one-year
- Suit can be filed to challenge the sufficiency of annual and five-year findings, so the statute limits remedy, but not litigation exposure
- AB 1600 findings are burdensome, but statutorily sufficient and compliant
annual and five-year findings are necessary to protect your agency

This case helpfully limits *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350 which had ordered refund of all fees collected since inception of a fee.

***Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528, review denied**

Holding: A fee a paid voluntarily in-lieu of providing all the parking a developer's project required was also subject to AB 1600. The court ordered the city to refund the fees because it had not spent them for the purposes for which they were collected in the allowed time and had not adopted adequate findings to support retention.

Facts/Background: In 2013, the Plaintiffs received entitlements for a mixed-use building, conditioned to provide 40 parking spaces. They opted to pay fees \$906,900 in lieu of constructing 16 spaces. The City Council certified an EIR for a parking garage to timely spend those funds, but members of the public and some Councilmembers questioned the need for more parking rather than parking demand management.

In January 2019, the City issued five-year findings required by AB 1600 for the period that included Plaintiff's 2013 in-lieu parking payment. However, because the City contended this in-lieu fee was not governed by AB 1600, those five-year findings did not cover the developer's fee.

The Developer asked for a refund, which the City denied in February 2020. The City adopted five-year findings related to the parking fund in May 2020.

Less than two weeks after the City issued its findings, the developer sued to recover the \$906,900 in unspent in-lieu parking fees, paid 7 years earlier. The developer argued that the City did not provide timely findings as mandated under the AB 1600. The City contended that (1) the in-lieu parking fees were not subject to AB 1600's reporting requirements; (2) the fees were not included in the City's 2019 report because they had not yet been held for five years; (3) the action was barred by the one-year statute of limitations; and (4) the May 2020 findings complied with the AB 1600 reporting requirements.

The trial court ruled for the City, concluding the case was not filed within one-year statute of limitations under *County of El Dorado v. Superior Court* (2019) 42 Cal.App.5th and AB 1600 did not apply because the fees were paid voluntarily, rather than "imposed" by the City. The developer appealed.

Analysis: The Court of Appeal reversed, concluding that the claim did not accrue until the City rejected the refund demand — without identifying a deadline for the refund demand. The appellate court also concluded AB 1600 applied because the fees were a condition of development (even though the developer paid them rather than provide on- or off-site parking), the City's belated five-year report did not satisfy the requirement to prepare it within 6 months of the end of a fiscal year, and that Government Code section 65010(b) did not require the developer to prove prejudice resulting from the delay in findings. The court directed the trial court to order the City to refund the unexpended fees.

In-lieu fees had not been understood to be subject to AB 1600, because they are a voluntary alternative to providing project improvements to meet zoning standards. Thus, local agencies have rarely made the AB 1600 one- and five-year findings as to in-lieu fees.

Before *Hamilton* these fees were analyzed under the regulatory takings standard of *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, which had upheld a fee in lieu of public art included in a project against a takings challenge. *Ehrlich* analysis requires much the same

justification as AB 1600 to **establish** a fee, but does not require the money to be spent by a deadline, nor does it require annual and five-year reports.

This is crucial because in-lieu fees rarely support -identified projects and are often held until an opportunity arises to use them effectively. Unless the Legislature enacts a statutory solution, cities may want to reconsider accepting fees instead of requiring developers to meet development standards, such as providing required parking or public art. While developers would lose some options in this scenario, cities would mitigate their risk. *Hamilton* also seems to criticize the holding of *El Dorado*, although it does not formally disagree with it.

Takeaway: In light of this decision, agencies are advised to:

- Require a recorded agreement, perhaps a development agreement, with a developer who chooses to pay a fee rather than meet zoning standards by which it expressly waives application of AB 1600 and any right to a refund of the fee.
- Adopt AB 1600 findings for in lieu fees, annually and every five years.
- Spend fee proceeds timely.
- Consider eliminating in-lieu fee ordinances in favor of enforcing zoning standards and rely on variances and development agreements to vary those standards if necessary.

This case is reason to renew focus on AB 1600 compliance, especially careful programming of funds and timely, well-drafted findings.

***Barajas v. City of Petaluma* First District Court of Appeal Case No. A1652 (unpublished)58, review denied (Nov. 13, 2024)**

Holding: A two-month delay in filing a required report on development impact fee balances did not entitle plaintiffs to a \$36 million refund. AB 1600 mandates that local agencies adopt five-year findings for unexpended development impact fees, but does not require new studies.

Facts/Background: As of June 30, 2018, the City had about \$32 million in unexpended impact fee funds for various City facilities and traffic improvements.

On February 25, 2019, City's Council adopted a resolution making its five-year findings using mitigation fee reports from 2003, 2008, and 2012 to support the use of the DIFs. The capital improvement program for fiscal year 2018–2019 identified City's five-year plan for capital improvement projects, including improvements funded with impact fees, as well as other sources.

Adrian Barajas sought declaratory relief for the City's failure to make required five-year findings under AB 1600, and filed a writ of mandate to stop the City from collecting impact fees and to refund all unused DIF as “invalid, void, and illegal.”

Barajas argued, *inter alia*, that the City had violated Gov. Code section 66001(d)(1) because its five-year findings for 2018 were based on studies conducted earlier. The trial court disagreed, ruling that section 66001(d)(1) required the City to make new findings, not conduct new studies, and that the City's findings were adequately supported by evidence. Barajas appealed.

Analysis: The First District affirmed the trial court's rulings, explaining that the purpose of the five-year findings was to show the reasonable relationship between fees and the continuing need for the intended public facilities, not to require new studies every five years. The court found that the City's use of past nexus studies from 2003, 2008, and 2012 met the Act's requirements, as they sufficiently identified the purpose and expected projects for which the fees were retained.

Takeaway:

- Make findings annually and every five-year findings, as required by section 66001(d)(1) establishing the continuation of the need for the capital projects for which the fees were collected
- New studies are not required if earlier studies provide adequate evidence of the nexus between fees and their intended purposes BUT nexus studies must be updated every 8 years (starting 1/1/22) per Gov. Code § 66016.5(a)(8).
- Agencies should be mindful of maintaining up-to-date records and consistently making required annual and five-year findings to avoid disputes.

Sheetz v. County of El Dorado (2024) 601 U.S. 267

Holding: Legislatively adopted fees on new development to mitigate its impacts are subject to the same analysis as similar, one-off or ad hoc permit conditions or exactions. This holding follows the familiar analysis established by *Nollan* and *Dolan*, which require any condition or mitigation measure imposed on development have a logical connection — or “nexus” — to the impact it seeks to address (i.e., a traffic fee should mitigate traffic impacts). Additionally, the condition must be at least “roughly proportionate” in scale to the development’s impacts.

AB 1600 already requires a nexus study to support new fees and annual and five-year reports to show the fees bear a reasonable relationship to the purpose for which they’re collected, and are properly collected, programmed and/or spent. So, this should be of lesser significance in California. Still the property-rights bar views the case as a significant win.

Facts/Background: George Sheetz proposed a modular home in unincorporated El Dorado County. The County conditioned the building permit on a \$23,420 traffic mitigation fee — a legislatively adopted development impact fee required by its general plan for all residential development. Sheetz sued, backed by the property-rights bar.

Sheetz argued the fee violated *Nollan / Dolan* because there was no showing that the application of the adopted fee to his modest project could be demonstrated to bear any reasonable relationship to its impacts; i.e., he argued there was no reasonable basis to support that his home could trigger a need for Countywide traffic improvements or that the amount of the fee was commensurate to the traffic demand his home would generate.

He lost in the trial and California appellate courts, which followed precedents holding that *Nollan / Dolan* apply only to one-off ad hoc permit conditions and exactions, and not to legislatively adopted, generally applicable, fee programs, like AB 1600 fees. The California Supreme Court denied review, but the U.S. Supreme Court granted certiorari.

The briefing in *Sheetz* raised the possibility the case might threaten impact fees and mitigation measures broadly, but oral argument made clear the Court was not headed there. El Dorado County conceded at argument the only point the Supreme Court would decide — that legislative fees and conditions on classes of developments are subject to

the same requirements of nexus and rough proportionality traditionally required under *Nollan / Dolan* review.

Analysis: The Fifth Amendment requires just compensation when government action results in a “taking” of private property. One form of taking occurs when a government conditions land-use approvals on fees or exactions (like a DIF) that lack a sufficient connection to the proposed development’s impacts. Under the *Nollan / Dolan* standard, there must be an essential nexus and rough proportionality between the amount of the fee and the project’s impacts. If a DIF meets both of those elements, it is not a “taking” under the Fifth Amendment.

The Supreme Court held that *Nollan / Dolan* applies not only to ad hoc fees imposed through discretionary approvals, but also to generally applicable, legislatively enacted DIFs. It reasoned that courts’ focus should be on the result of government action (i.e., requiring money from a developer in exchange for a building permit), not on whether the result is accomplished legislatively or otherwise.

However, the Court declined to decide whether legislative fees must meet the same level of scrutiny as individualized exactions. Justice Kavanaugh’s concurrence emphasized this unresolved issue.

Takeaway: While California law did not previously subject DIFs to the heightened scrutiny *Sheetz* now requires, the Mitigation Fee Act requires detailed nexus studies to support such fees.⁹ It also requires specific findings connecting each fee to the public facilities they will fund, as well as annual and five-year reports — which address the standards *Nollan* and *Dolan* impose.¹⁰

Developers also have a short 90-day period to protest the DIFs the City imposes, but only if the City provides notice of that deadline when it imposes the fees.¹¹ By failing to give this notice, the City waives its protection under this provision.

⁹ Gov. Code, § 66016.5(a)(1).

¹⁰ Gov. Code, §§ 66001(a), (d)(1).

¹¹ Gov. Code, § 66020(d).

The case returns to State court to decide these issues, but there is no further movement as of this writing.

AB 516 (Ramos, D-San Bernardino)

- **Effective** 1/1/24
- **Amends** Gov. Code §§ 66006, 66008, 66023
- **Summary of Changes**
 - Existing law requires annual reports, five-year reports, and auditing on request where DIFs are imposed.
 - AB 1600 now requires annual reports to explain the timeline to construct facilities. Requires agency to inform developer of right to request and receive a mailed notice of the agency's annual report review meeting
 - Also expanded the purpose of periodic auditing and requires the agency to inform developers of their right to request audits
- **Stated Reason for Change** - Enhances transparency and accountability regarding DIFs by increasing public access to information, including the reason for project delays and when construction is expected, and ensures applicants are aware of their rights to ask for an audit and to receive information.
- **Highlights**
 - Annual Report Requirements - Gov. Code § 66006(b)(1) - Additions shown by underline.
 - Annual reports must be made publicly available within 180 days after each fiscal year. Must be presented at the next regularly scheduled public meeting no less than 15 days after making it available. Annual reports must include:
 - Brief description of each type of DIF it imposes.
 - The amount/rate of each DIF.
 - The beginning and ending balance for each DIF fund.
 - Fees collected and the interest earned.
 - Each public improvement on which DIF revenues were expended, the total amount spent on each, and the percentage of that total DIF revenue funded.

- Any subsequent annual report must now note whether construction began by the date estimated in the previous report for these public improvements.
 - If construction did not begin, the subsequent annual report must explain the delay and estimated new construction date.
 - Expected start date for construction on improvements funded by fees that remain incomplete for which sufficient funds have been collected
 - Description for each transfer or loan from a DIF fund, the interest applied to the loaned amount, and the date on which the loan will be repaid
 - The amounts of any refunds to property owners, any allocations, and the number of people/entities identified to receive those funds
- Notice Required to Payors - Gov. Code § 66006(e) - Agency must tell an applicant/DIF payor of:
 - Their right to ask for an audit under Government Code section 66023
 - Their right to file a written request to receive a mailed notice of the agency's annual report review meeting
 - A link to the location on the agency's website, which includes fee account or fund information for public review
- Auditing Requirements - Gov. Code § 66023
 - Any person may ask for an audit of DIF funds.
 - Not required to conduct an audit if already performed one for the same DIF within last 12 months
 - Can be performed by an independent auditor
 - Can require the person asking for the audit to pay a deposit to fund it. If annual reports have not been complete for three consecutive years, agency must pay audit + for each year in which the annual report was not completed

- Audit must examine:
 - Whether the DIF exceeds the amount reasonably necessary to fund the public facilities it is designed to support.
 - When the agency is scheduled to spend the revenue generated by that DIF
 - When those public facilities are scheduled to be completed

AB 1820 (Schiavo, D-Santa Clarita)

- **Effective** 1/1/25
- **Amends** Gov. Code §§ 65940.1 & 65941.1; **Adds** Gov. Code § 65943.1
- **Summary of Changes**
 - Previously agencies required to:
 - Post on its website a current schedule of development fees, exactions, and affordability requirements
 - Accept a preliminary application for a housing development project
 - Request from developers the total fees and exactions associated with a project for which a certificate of occupancy is issued, post it on their websites, and update the website twice a year
 - AB 1820 allows development applicants to request estimate of DIFs to be provided within 30 business days. On project approval, agency must provide a detailed list of estimated fees
- **Stated Reason for Change** – Addresses lack of transparency in DIFs, aims to streamline the development process, and reduce financial risks for developers to allow for more housing.
- **Highlights**
 - Developers Right to Fee Estimates – Developers may ask for estimate of fees and exactions at preliminary application and at project approval:
 - Developer may request an estimate in preliminary application (Gov. Code § 65941.1)
 - Agency must provide within 30 business days of submission

- Applies only to those fees and exactions imposed by local agency, e.g., development impact fees, building permit fees, etc.
- Estimate is for informational purposes only and not legally binding
- On project approval, agency must provide detailed list of estimated fees and exactions that will apply to project within 30 business days. (Gov. Code § 65943.1)
 - If a cost recovery method is used to cover administrative costs, must give fee estimates based on the typical fees charged for comparable projects
 - Estimate is for informational purposes only and not legally binding
- Clear Statement Required — Cities and counties must request the total fees and exactions from developers at project completion (final inspection or certificate of occupancy), but the request must clearly state that developers are under no obligation to respond and will face no consequences for not responding or for the content of their response. Any information received must be posted online and updated at least twice a year. (Gov. Code § 65940.1)

SB 937 (Wiener, D-San Francisco)

- **Effective** 1/1/25
- **Amends** Gov. Code § 66007
- **Summary of Changes** — Prevents local agencies from requiring payment of impact fees for certain affordable housing projects until the certificate of occupancy or final inspection occurs. Developers must break ground on the project within five years to qualify. Local agencies may collect fees earlier in certain situations.

Developers may post a performance bond or letter of credit rather than pay cash, though failure to pay cash allows local agencies to place a lien on the land to secure unpaid fees which will likely complicate project financing.

SB 937 creates two rules for collecting development impact fees. Local agencies still cannot require payment of fees or charges on multifamily market-rate residential developments for public improvements until the final inspection or certificate of occupancy, whichever comes first, per Government Code section 66007.

Under SB 937, “designated residential development projects” — which means most affordable residential developments and all market-rate residential developments with 10 or fewer units — will be subject to the new procedure for collecting development impact fees. Fees may no longer be collected upon final building inspection. If the City does not issue a certificate of occupancy, then the final building inspection will serve as the certificate of occupancy.

- **Stated Reason for Change** – To reduce the negative effects of market fluctuations and high interest rates on housing production. It addresses issues such as entitlements expiring before developers can secure funding and the challenge of high development fees during economic hardship.
- **Highlights**
 - Collection of Fees and Charges for Public Facilities — “Designated Residential Development Projects”
 - Under existing law, local agencies may collect development impact fees to mitigate a development project’s impact on public infrastructure and facilities.
 - Can only collect on residential projects after a final building inspection or the issuance of the certificate of occupancy, whichever is later
 - Three exceptions – utility service fees, DIF for an established account and proposed construction plan before final inspection or issuance of the certificate of occupancy; or DIF for expenses incurred for public improvements/facilities related to the project
 - Adds “Designated Residential Development Projects,” which includes:

- projects with 100% of units affordable to lower income households,
- low barrier navigation centers,
- SB 4 projects (affordable housing projects on land owned by religious or higher education institutions),
- SB 35 projects (affordable housing projects in multi-family zones),
- AB 2011 projects (affordable housing projects in commercial zones),
- projects entitled to a density bonus, or
- projects that include 10 or fewer residential housing units.
- DIFs may be collected for designated residential development projects on issuance of whichever comes first — the first certificate of occupancy OR the first temporary certificate of occupancy
 - This prohibits collection of DIFs on final building inspections
 - If no certificate of occupancy is issued, final building inspection serves as certificate of occupancy
- Allows DIFs to be collected earlier. Does **not** apply to housing developments if 49% or more units are designated for lower-income households
 - for utility service connection fees (early collection of utility capacity charges is no longer an option);
 - when construction on the development does not begin within five years of building permit issuance;
 - for development impact fees to reimburse the local agency for expenses incurred for public improvements or facilities related to the designated residential development project; or
 - for water, sewer/wastewater, fire, public safety, emergency service, and certain other transportation-related development impact fees for which an account has been established and funds appropriated (e.g. through the adoption of a capital improvement plan).

- Contracts to Pay Outstanding Fees and Charges
 - Existing law allows local agencies to accommodate residential developers without sufficient funds to pay development impact fees by entering into a recorded contract that becomes a lien on the property.
 - SB 937 allows a public officer or employee to execute these contracts on behalf of the agency.
 - Must post a sample version of the contract on agency website if these agreements are made.

AB 2243 (Wicks, D-Oakland)

- **Effective** 1/1/25
- **Adds** Gov. Code § 65912.114(g)
- **Summary of Changes**
 - Part of a larger scheme to expand AB 2011 and SB 6, streamlining housing development in commercial zones and incentivizing retail-to-residential conversions, particularly on larger sites like regional malls.
- **Stated Reason for Change** — To further streamline and expand the Affordable Housing and High Road Jobs Act of 2022 (AB 2011) and the Middle Class Housing Act of 2022 (SB 6) by making it easier for developers to build housing on commercially zoned land, including underutilized malls, and by clarifying certain provisions that proved difficult to interpret.
- **Highlights**
 - If residential redevelopment in commercial zone demolishes or changes an existing use, DIFs must account for the demolition or change so that the fee amount reflects only to the development's incremental impact on public facilities or services.
 - "Changes an existing use" means no demolition is proposed, but a current office, commercial, or similar use changes to residential use.
 - Demolition credit against DIFs also applies to residential development in commercial corridors.

AB 2430 (Alvarez, D-San Diego)

- **Effective** 1/1/25
- **Adds** Gov. Code § 65915.3
- **Summary of Changes** — The Density Bonus Law requires local agencies to provide development bonuses to housing developers in exchange for projects that include deed-restricted affordable housing units at specified levels. Some agencies charge a monitoring fee to ensure that the affordable units are offered to and occupied by qualifying households. AB 2430 prohibits a local agency from charging a “monitoring fee” on a housing development which satisfies certain requirements. Does not apply to affordable housing projects funded by local governments.
- **Stated Reason for Change** — Eliminates duplicative local monitoring fees. AB 2430 prohibits local agencies from charging a monitoring fee on affordable housing developments built using State Density Bonus Law that are already subject to compliance monitoring by a State housing agency. This change is intended to lower affordable housing development costs by eliminating a duplicate cost. (Note – the level of state oversight leaves room for non-compliance if not overseen at the local level.)
- **Highlights:**
 - No Monitoring Fees On Certain Housing Developments - Gov. Code § 65915.3
 - Monitoring fees cannot be charged on housing developments that satisfy all these requirements:
 - Development satisfies all requirements of Density Bonus Law;
 - Development received a “density bonus”;
 - 100% of units are affordable;
 - Development is subject to a recorded regulatory agreement;
 - Applicant provides a copy of the recorded regulatory agreement and corresponding tax credit reservation letter;
 - Applicant provides a copy of the monitoring document; and,

- Existing housing developments subject to a monitoring fee that meet these requirements are no longer required to pay it.
- Monitoring Fees Can Still Be Charged Under Certain Circumstances - Gov. Code § 65915.3(d)
 - Monitoring fees may be charged when:
 - An applicant utilizes a local incentive program or accepts a local funding source that results in the development of units with different affordability than what State monitors; or
 - An applicant uses a local incentive program that results in the development of units affordable to and occupied by moderate-income households

AB 2663 (Grayson, D-Contra Costa County)

- **Effective** — 1/1/25 as to Gov. Code § 65906.6
- **Deadline** – Required to post by 1/1/26 every 5 years thereafter
- **Adds** — Gov. Code § 65906.6
- **Summary of Changes** - State law permits local agencies to adopt inclusionary housing ordinances to require a percentage of new residential development be affordable to lower or moderate-income households. Developers must be allowed to pay fees in lieu of providing affordable units. The Mitigation Fee Act requires agencies to post on their website information on how development-related fees are spent. Since housing in-lieu fees do not fall within the Mitigation Fee Act, AB 2663 requires agencies to also post how inclusionary in-lieu fees are spent.
- **Stated Reason for Change** – Per the Legislature, this statute aims to increase transparency in the collection and use of inclusionary housing in-lieu fees, responding to instances where local agencies used affordable housing funds for legal fees related to housing lawsuits. However, considering the decision in *Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528 and the court’s application of AB 1600 in-lieu fees, this bill aligns in-lieu fees with reporting requirements annually and every five years in AB 1600.
- **Highlights**
 - Applies only to local agencies that collect inclusionary housing in-lieu fees

- Starting 1/1/26, must post on its website:
 - Annually – the fees collected in the last year and whether those fees are intended to be used for a project.
 - Every 5 years – the fees collected in the past 5 years and the projects on the fees funded.
- **Practice Tip** – In light of the decision in *Hamilton* and the court’s application of AB 1600 to in-lieu fees, in-lieu fees must be spent as promptly as AB 1600 fees. We recommend agencies:
 - Require a recorded agreement, perhaps a development agreement, with a developer who chooses to pay a fee rather than comply with zoning standards by which it expressly waives application of AB 1600;
 - Comply with the finding requirements and spend funds promptly;
 - Return funds if the capital project for which fees were collected is no longer pursued; and
 - Consider eliminating in-lieu fee ordinances in favor of enforcing zoning standards and rely on variances and development agreements to vary those standards if necessary.

AB 2553 (Friedman, D-Glendale)

- **Effective** – 1/1/25
- **Amends Gov. Code § 66005.1 & Pub. Res. Code § 21064.3**
- **Summary of Changes** – Companion to AB 3177. Existing law requires local agencies to lower vehicular traffic mitigation fees in areas within a half mile of a “transit station.” This change significantly increases the areas in which transit-oriented developments can be developed.

AB 2553 also requires local agencies to lower traffic impact mitigation fees for “transit priority areas,” particularly when a proposed housing project will be in an area with a transit stop expected to be completed within one year of the project’s completion and occupancy. It expands the definition of a “major transit stop” to include bus routes with service intervals of up to 20 minutes instead of the 15 minutes which applied previously.

- **Stated Reason for Change** – Promotes development by simplifying development processes and promotes transit-oriented housing by broadening the geographic area eligible for incentives such as reduced traffic impact fees and CEQA exemptions, while also updating the definition of a “major transit stop.”
- **Highlights**
 - Lower Vehicular Transit Mitigation Fees - Gov. Code, § 66005.1(a)(1) — Agency required to lower these fees in “transit priority areas” if the area’s “major transit stop” is scheduled to be in service before or within one year of completing the affected housing development.
 - New Definition of Major Transit Stop — Pub. Res. Code § 21064.3(c) — Includes bus routes with service intervals of up to 20 minutes or less, instead of the -5 minute standard which previously applied.

AB 3177 (Wendy Carrillo, D-Los Angeles)

- **Effective 1/1/25**
- **Amends Gov. Code § 66005.1**
- **Summary of Changes**
 - Companion bill to AB 2553
 - Existing law allows local agencies to impose an exaction on developers to make a land dedication to improve public facilities. AB 3177 prohibits agencies from imposing a land dedication requirement for widening roads to mitigate traffic, except under specified conditions
- **Stated Reason for Change** – Aimed at decreasing housing costs to increase housing supply. Costs of land dedication to increase roadways drives up the cost of housing and delays its completion. It also uses land for roads, which could be used for more housing units. Road widening has also been shown to increase traffic, not decrease it. Promoting development in transit-rich areas aims to reduce vehicle miles traveled and greenhouse gas emission. It also encourages people to use public transportation.
- **Highlights**

- “Transit Station” is now a “Transit Priority Area”) — Gov. Code, § 66005.1(a)
 - Existing law allows a local agency to impose a “vehicular traffic mitigation fee” on housing development projects.
 - One component of calculating the fee is the rate of automobile trip generation associated with a housing development project.
 - Previously, a lower rate of automobile trip generation was set for projects within a half mile of a “transit station,” as defined.
 - “Transit station” was replaced with “transit priority area”
 - “Transit priority area” means an area within one-half mile of an existing or planned “major transit stop,” when the stop is scheduled to be completed within one year of completing the housing development project.
 - Uses new definition of “major transit stop” in updated Pub. Res. Code § 21064.3, which includes:
 - An existing rail or bus rapid transit station;
 - A ferry terminal served by either a bus or rail transit service;
 - The intersection of two or more major bus routes with a frequency of service interval of 20 minutes or less during peak commute periods; or
 - Stops designated by the agency’s applicable regional transportation plan.
 - Note — “transit priority area” now includes that train stations or stops, such as Amtrak and commuter rail.
- Land Dedications — Gov. Code, § 66005.1(c)
 - Agencies prohibited from imposing a land dedication requirement on housing development projects to widen a roadway if the requirement should mitigate vehicular traffic impacts, achieve an adopted traffic level of service related to vehicular traffic, or achieve a desired roadway width.
 - May impose a land dedication requirement if:

- The affected housing development is not located in a transit priority area and has a linear street frontage of at least 500 feet;
- The agency makes a finding that the requirement is necessary to preserve the public health and safety, including pedestrians, cyclists, and children; or
- The requirement is imposed to construct public improvements, including sidewalk and sewer improvements.

AB 3012 (Grayson, D-Contra Costa)

- **Effective** — 1/1/25
- **Deadline** – Must post tool by 7/1/31 for cities of 500k+; 7/1/32 for smaller cities
- **Adds** Gov. Code § 65940.2 and Health & Safety Code § 50466.6
- **Summary of Changes** - Existing law requires every agency to make its current fee schedule for proposed housing development projects available on its website. AB 3012 goes one step further by requiring agencies to provide a fee estimate tool on their websites for proposed housing development projects. Also requires HCD to create a template for the tool by 7/1/28.
- **Stated Reason for Change** — To address concerns about impact fee transparency and to make information regarding housing impact fees more accessible to the public, requiring local jurisdictions to post relevant information online.
- **Highlights**
 - Fee Estimate Tool — Gov. Code, § 65940.2
 - Must create and post a “fee estimate tool” the public can use to estimate fees and exactions for proposed housing development projects on agency website
 - The tool must calculate:
 - a fee or charge described in the Mitigation Fee Act;
 - a construction excise tax;
 - a special tax levied on new housing units under the Mello-Roos Community Facilities Act of 1982;
 - in-lieu fees for affordability requirements;

- in-lieu fees for a requirement that project provide public art; and
 - in-lieu fees for dedications of parkland.
- Agencies not responsible for the accuracy of the estimate
- Deadlines to Implement Fee Estimate Tool
 - July 1, 2028 for HCD to create a template fee schedule tool
 - Before July 1, 2031 for agencies with a population of greater than 500,000
 - Before July 1, 2032 for agencies with a population of 500,000 or fewer
 - *Practice Tip* – Before developing your own fee estimate tool, check whether a template has been created by HCD.



The Next Streaming Wars: Local Taxation of Online Streaming Services

Thursday, May 8, 2025

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The Next Streaming Wars

Local Taxation of Online Streaming Services

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Introduction

Anyone who watches television on a regular basis knows that in recent years, there has been an upheaval in the market for subscription television services. Historically, most subscription television services were provided by cable television companies. In 2005, about 65 million households in the United States received television service from a cable provider.¹ By 2023, that number had dropped to 35 million.²

What happened?

Consumers, of course, have not stopped watching television. Instead, like so many other aspects of daily life, subscription television services have moved on to the internet, and are now provided by companies like Netflix, Hulu, Amazon Prime Video, Max, and others. Some of these companies offer multiple channels of linear video programming, replicating the service offered by cable companies. Some allow users to “rent” individual videos for a fee. Most give subscribers access to a library of videos that can be viewed “on demand.”³ But whatever format they use, these “online streaming services” have exploded in popularity. By 2024, consumers in the United States held more than 500 million active subscriptions to various online streaming services.⁴

The growth of online streaming services at the expense of cable television services has had several downstream effects on cities in

¹ Federal Communications Commission, *FCC Issues 12th Annual Report to Congress on Video Competition*, at 3, February 10, 2006, available at <https://docs.fcc.gov/public/attachments/DOC-263763A1.pdf> (viewed March 19, 2025).

² Federal Communications Commission, *2024 Communications Marketplace Report*, at 141 [¶ 204], December 31, 2024, available at <https://docs.fcc.gov/public/attachments/FCC-24-136A1.pdf> (last viewed March 19, 2025).

³ *Id.* at 150-55 [¶¶ 223-33].

⁴ *Id.* at 160-62 [¶¶ 243, 248].

California. One of those effects is being acutely felt by cities that rely, in part, on “utility user taxes” as a source of general fund revenue.

A utility user tax is a tax on the use of a particular service, such as electric service, gas service, or telephone service. It is levied on the person using the service and calculated as a percentage of the charge the user pays for the service. Rather than collect utility user taxes themselves, most cities require service suppliers to collect the taxes owed by their user (as part of their normal billing process) and then remit what they collect on a periodic basis – typically, every month.

Close to 100 cities impose utility user taxes on the use of cable television service.⁵ Because utility user taxes are calculated as a percentage of the charges paid by the user, when users switch from cable television to online streaming services, revenue from those utility user taxes will decrease. Ask folks in the finance department of cities that have such taxes will tell you – receipts are drying up.

To combat this loss of tax revenue, many cities have expanded their utility user taxes to cover “video services” that are comparable to cable television service. These cities have started to evaluate whether their expanded taxes on the use of video services apply to the use of online streaming services. And at least one city – Santa Barbara – has concluded that they do. This conclusion was recently upheld by the Santa Barbara Superior Court and is now being challenged by various online streaming companies in the Second District Court of Appeal: *Disney Platform Distribution Inc. v. City of Santa Barbara* (B342211).

Let’s be perfectly clear. Online streaming companies do not want to collect utility user taxes. Any city that hopes to follow in Santa Barbara’s footsteps and compel online streaming services to collect its utility user tax should expect – and be prepared for – a fight. But as Santa Barbara’s experience shows, in the right circumstances, cities can win the fight. The purpose of this paper is to show how.

To that end, below, you will find an overview of the following topics:

- 1. an explanation of how to determine if a utility user tax applies to the use of online streaming services;**

⁵ California City Finance.com, *The California Local Government Finance Almanac, Utility User Tax Facts*, January 2021, available at <https://californiacityfinance.com/UUTfacts21.pdf> (last viewed March 19, 2025).

2. **a list of arguments that online streaming companies have raised in their efforts to avoid collecting utility user taxes, and an evaluation of those arguments; and**
3. **a brief outline of the enforcement mechanisms that cities can utilize to compel online streaming services to comply with their tax collection obligations.**

Part 1: Application _____

Before any city attempts to compel online streaming companies to collect its utility user tax, it must first determine whether its utility user tax actually applies to the use of online streaming services.

It would be nice if utility user ordinances contained explicit language to that effect – language, for instance, that taxes the use of “video services” and defines “video services” to include “online streaming services,” the “provision of video programming to subscribers over the internet,” or something else along those lines. But things are not that simple. Utility user tax ordinances adopted before the explosion of online streaming services in recent years – as most ordinances were – tend not to reference internet-based video services explicitly.

Nevertheless, even when explicit language cannot be found in a utility user tax ordinance, taxing the use of online streaming services is still possible, if the ordinance in question contains language that can reasonably be construed to tax the use of online streaming services.

What does this language look like?

To state the obvious, language applying a utility user tax to the use of cable television service is not sufficient. Although there are similarities between cable television services and online streaming services, particularly from the user’s perspective, the two are generally understood by the public to be different, and courts are unlikely to allow cities to treat the latter as if they were, in essence, the former.

~~There is imposed a tax upon every person
in the City using cable television service.⁶~~

However, cities may reasonably rely on language that taxes a set of “video services” that is intended to be broader than cable television

⁶ See Santa Barbara Municipal Code § 4.24.070.

– and, in particular, language that defines the term “video services” to include the provision of video programming “using internet protocol.”

There is hereby imposed a tax upon every person in the City using video services.⁷

“Video Services.” Video programming and any and all services related to the providing, recording, delivering, use or enjoyment of “video programming” (including origination programming and programming using Internet Protocol, e.g., IP-TV and IP-Video) using one or more channels by a “video service supplier,” regardless of the technology used to deliver, store or provide such services, and regardless of the manner or basis on which such services are calculated or billed ⁸

Online streaming services fit comfortably within this definition, because: (i) they provide video programming; (ii) that video programming is delivered to subscribers over networks that use internet protocol; and (iii) tax applies to any service providing video programming, regardless of the technology used to deliver videos.⁹

Online streaming companies have contested this straightforward conclusion, claiming that utility user taxes only apply to “facilities-based” video services – services where the company offering video programming also operates the transmission facilities used to deliver videos to subscribers. Online streaming services are generally not considered facility-based services, because their videos are delivered over networks operated by third-party internet service providers.

Every utility user ordinance, of course, is a little bit different, so careful consideration of the text and legislative history of the ordinance at issue is necessary to rule out this argument. But if the ordinance

⁷ *Id.* § 4.26.050(A).

⁸ *Id.* § 4.26.020.

⁹ Internet protocol is a set of conventions for formatting data that is used to facilitate the transmission of packets of data over a network – including the internet (a network of networks). U.S. Department of Commerce, National Institute of Standards and Technology, *Information Technology Laboratory, Computer Security Resource Center, Glossary – Internet Protocol*, available at https://csrc.nist.gov/glossary/term/internet_protocol (last viewed March 21, 2025).

uses the definition of “video services” outlined above, that definition significantly undermines the online streaming companies’ position.

“Video Services.” Video programming and any and all services related to the providing, recording, delivering, use or enjoyment of “video programming”

The use of the word “or” indicates that a service related to any one of the listed functions – providing video programming, recording video programming, delivering video programming, using video programming, or enjoying video programming – qualifies as a “video service.”¹⁰ So, services that relate to “providing” (supplying) video programming are taxable, even if services that relate to “delivering” that video programming are provided, in part, by a different company.

Many utility user ordinances also define the types of service suppliers whose video services are taxed, using a definition like the following:

“Video Service Supplier.” Any person, company, or service which provides or sells one or more channels of video programming, or provides or sells the capability to receive one or more channels of video programming, including any telecommunications that are ancillary, necessary or common to the provision, use or enjoyment of the video programming, to or from a business or residential address in the City, where some fee is paid, whether directly or included in dues or rental charges for that service, whether or not public rights-of-way are utilized in the delivery of the video programming ¹¹

To operate a facilities-based video service, a video provider typically must have some transmission facilities located within public rights-of-way. And even where that isn’t the case, this definition of “video service supplier” covers companies that supply (i.e., “provide[] or sell[]”) video programming and companies that deliver (i.e., “provide[]

¹⁰ See, e.g., *In re E.A.* (2018) 24 Cal.App.5th 648, 661; *Dow v. Honey Lake Valley Resource Conservation District* (2021) 63 Cal.App.5th 901, 913-14.

¹¹ Santa Barbara Municipal Code § 4.26.020.

or sell[] the capability to receive”) video programming, and it states – again, by using the word “or” – that a company need not do both.

Online streaming companies also claim that the phrase “channels of video programming” refers to the transmission paths over which video programming is delivered to subscribers, and thus, that a company must operate the transmission path used to deliver videos to qualify as a video service supplier. This is a stretch. The ordinary meaning of the term “channel,” in the context of video programming, is a collection of video programs offered on a continuous basis by a “provider[] like NBC, CBS, or ESPN” – or today, Netflix, Hulu, etc.¹² And the ordinary meaning of a statutory term is typically the correct meaning.

One last point. Many cities impose utility user taxes on the use of “telecommunications services,” with the term “telecommunications services” defined as “[t]he transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, whatever the technology used”¹³ Just as utility user taxes on the use of video services were designed to supplement older utility user taxes on the use of cable television services, utility users taxes on the use of telecommunications services were designed to supplement older utility user taxes on the use of telephone service. Although some online streaming companies do utilize their own telecommunications facilities to push videos to the internet in a way that speeds up the delivery of those videos to subscribers, the primary service they offer is the provision of video programming – which is not, itself, a “telecommunications service.” So, taxes on the use of telecommunications services taxes offer a relatively weak basis for taxing the use of online streaming services.

Part 2: Enforceability _____

Once a city has determined that its utility user tax applies to the use of online streaming services, it must still evaluate whether some other law prevents it from enforcing that tax. If one were to believe the online streaming companies, there are many such laws. In the main, the online streaming companies are incorrect; the laws they invoke do not categorically prevent cities from taxing the use of online streaming

¹² *Massachusetts Department of Telecommunications and Cable v. Federal Communications Commission* (1st Cir. 2020) 983 F.3d 28, 33, 37-38. Many online streaming companies market their programming collections as “channels.”

¹³ Santa Barbara Municipal Code § 4.26.020.

services. But a few of those laws may impose modest limits on when, and against which companies, utility user taxes may be applied.

≥ **The Bradley-Burns Uniform Sales and Use Tax Law** _____

Some online streaming companies take the position that the State of California's Bradley-Burns Uniform Sales and Use Tax Law ("**Bradley-Burns Act**") prevents cities from imposing taxes on the use of online streaming services.¹⁴ The Bradley-Burns Act does not have this effect.

The State imposes a sales tax on retailers "[f]or the privilege of selling tangible personal property at retail"¹⁵ It also, in lieu of taxing the retailer, sometimes imposes a use tax on a purchaser of tangible personal property who stores, uses, or consumes that property.¹⁶ The Bradley-Burns Act allows cities to impose their own sales and use taxes, to be administered on their behalf by the California Department of Tax and Fee Administration, but these taxes must contain provisions that are identical to the provisions that govern the State's sales and use taxes.¹⁷ And cities may not impose sales and use taxes that diverge in any way from the Bradley-Burns Act's requirements.¹⁸

There is, however, a big exception to this last point. The Bradley-Burns Act does not prevent cities from imposing "any other substantially different tax"¹⁹ Taxes that do not apply to the sale or use of tangible personal property are "substantially different" taxes from Bradley-Burns taxes.²⁰ Because online streaming services are services, not tangible personal property, local taxes on the use of online streaming services are not preempted by the Bradley-Burns Act.²¹

Practice Tip: Although the Bradley-Burns Act *might* limit the application of a utility user tax to charges for equipment used to deliver videos, online streaming

¹⁴ Rev. & Tax. Code § 7200 et seq.

¹⁵ *Id.* §§ 6051-55.

¹⁶ *Id.* §§ 6201-6207, 6401; 18 Cal. Code Regs. § 1660(c)(1).

¹⁷ Rev. & Tax. Code § 7202(h)(1)-(4); Gov. Code §§ 15570.22, 15570.24(a).

¹⁸ Rev. & Tax. Code § 7203.5; Stats. 1968, ch. 1265, § 2.

¹⁹ Rev. & Tax. Code § 7203.5.

²⁰ *Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 136-38.

²¹ Rev. & Tax. Code § 6016; California Department of Tax and Fee Administration, Sales Tax Annotation 540.0332, available at <https://www.cdtfa.ca.gov/lawguides/annotations/540-0332.pdf> [last viewed March 20, 2025].

services generally do not impose equipment charges. Instead, they provide free software (apps and websites) that can be installed on equipment that users purchase from a third party (such as set-top boxes, smart TVs, etc.).

≥ **Proposition 218**

Most utility user taxes are “general taxes” whose revenue may be used for general governmental purposes.²² And Proposition 218 mandates that all general taxes must be approved by a majority vote of the local electorate before they may be imposed.²³ Accordingly, even if a city’s utility user tax applies to the use of online streaming services, that tax should not be enforced unless the relevant portion of the utility user tax ordinance was approved by voters or adopted prior to January 1, 1995 (for charter cities) or August 1, 1985 (for general law cities).²⁴

Some online streaming companies go further than this and claim that even when a utility user tax applies to the use of online streaming services and has been approved by voters, cities must obtain additional voter approval to enforce the tax if there has been a lengthy delay between the adoption of the utility user tax ordinance and the enforcement action. This is incorrect. Enforcing a tax after a period of non-enforcement does not trigger Proposition 218. Once voters have approved a tax, no new vote is needed so long as “the methodology for the maximum recovery of local taxes ... remain[s] constant ...”²⁵

Practice Tip: Even when city officials have previously issued formal guidance stating that the use of online streaming services is not taxable, many modern utility user tax ordinances include language, both in codified and uncoded provisions, that preserves their ability to alter formal guidance without voter approval.²⁶

²² *The California Local Government Finance Almanac, Utility User Tax Facts*, see *supra*, n. 5; Cal. Const. art. XIIIIC, § 1(a) [defining “general tax”].

²³ Cal. Const. art. XIIIIC, § 2(b), (d).

²⁴ See Cal. Const. art. XIIIIC, § 2(c); Gov. Code § 53727(b).

²⁵ *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 763-64. Some utility user tax ordinances also contain uncoded provisions stating explicitly that tax enforcement actions do not require voter approval.

²⁶ See, e.g., Santa Barbara Municipal Code § 4.26.130(B) [“[T]he City does not waive or abrogate its ability to impose the ... video users tax in full as a result of promulgating administrative rulings or entering into agreements.”].

≥ Public Utilities Code Section 799

Many online streaming companies take the position that they cannot be compelled to collect utility user taxes for a city unless the city imposing the tax has provided them with notices required by section 799 of the Public Utilities Code. Such notices are sometimes necessary. But only in specific, and relatively narrow, circumstances.

When cities enact a new tax or amend an existing utility user tax, they must send notices to companies that will be required to collect the tax and give those companies adequate time – either 90 days, for new taxes, or 60 days, for amended taxes – to implement or adjust their billing systems as needed.²⁷ Notices need only be sent to companies that have provided instructions for the delivery of notices.²⁸ Moreover, although the issue has not been settled, there is good reason to believe that the notice requirement is not perpetual. Cities must send notices to existing companies when they enact a change to a utility user tax ordinance, but notice is not required for companies that start doing business in the city after the new or amended ordinance is in effect.²⁹

Practice Tip: The notice requirements of section 799 have not been interpreted in a published appellate opinion, so it is important to confer with legal counsel before initiating enforcement actions against online streaming companies. This is particularly true when the company that is the subject of the enforcement action was already providing a taxable video service at the time that the city updated its utility user tax ordinance to apply to the use of online streaming services.

²⁷ Pub. Util. Code § 799(a)(5), (a)(6).

²⁸ Cities must provide notices under section 799 “in accordance with procedures established by” the company that is required to collect the tax. *Ibid.*

²⁹ This reading is supported by section 799’s text in two ways. First, notice is triggered by changes to a city’s tax ordinance, not by a company’s entrance into the market. *Ibid.* Second, section 799 gives companies 90 days after receiving a notice to implement a new tax but only 60 days after receiving a notice to implement an amended tax. *Ibid.* These different time frames make sense if section 799’s purpose is to provide notice to companies that are already doing business in a city; the Legislature could reasonably assume that it will take more time for existing companies to implement a new tax than it will take them to implement an adjustment to an existing tax. But when a company starts doing business in a city, from its perspective, there is only an existing ordinance to follow, and the different time frames set forth in section 799 serve no purpose.

≥ The Internet Tax Freedom Act

Some online streaming companies claim that the federal Internet Tax Freedom Act prevents cities from taxing the use of online streaming services unless the tax applies at the same rate to rentals of physical media (such as DVDs).³⁰ This question has never been addressed by the courts, so some caution is warranted. But there are good reasons to believe that the online streaming companies are wrong.

The Internet Tax Freedom Act provides that “[n]o State or political subdivision thereof may impose ... discriminatory taxes on electronic commerce.”³¹ The term “electronic commerce” means “any transaction conducted over the Internet or through Internet access, comprising the sale, lease, license, offer, or delivery of property, goods, services, or information” – a definition that easily encompasses online streaming services.³² A tax is “discriminatory” if it is imposed “on electronic commerce” and “is not generally imposed and legally collectible” at all, or at the same rate, “on transactions involving similar property, goods, services, or information accomplished through other means”³³

Most courts have required a strict “similarity” between online and offline services to trigger the Internet Tax Freedom Act. Two services will be found similar if “the only difference” between them is that one is sold over the internet, and the other is not.³⁴ To the extent that this is the appropriate rule, utility user tax ordinances will generally comply with it. Online streaming services offer television over the internet; subscribers receive access to on-demand video collections, live sports, first-run television series and movies, and sometimes even traditional TV channels like ABC, NBC, and CNN. This is a much different type of transaction than renting a DVD from a local store.

³⁰ Utility user taxes do not apply to rentals of physical media like DVDs. Instead, physical media rentals are subject to state and local taxes on the use of tangible personal property, discussed above. See *supra*, at 7; Rev. & Tax. Code §§ 6009, 6010(e)(7), 6011, 6201, 7202(h)(2); 18 Cal. Code Regs. § 1660(c).

³¹ Internet Tax Freedom Act, § 1101(a)(2). The Internet Tax Freedom Act is codified as a note to 47 U.S.C. § 151. See [\(https://uscode.house.gov/view.xhtml?req=\(title:47%20section:151%20edition:prelim\)\)](https://uscode.house.gov/view.xhtml?req=(title:47%20section:151%20edition:prelim)) (last viewed March 23, 2025)].

³² Internet Tax Freedom Act, § 1105(3).

³³ *Id.* § 1105(2)(A)(i)-(ii).

³⁴ *Labell v. City of Chicago* (Ill. App. 2019) 147 N.E.3d 732, 749; *ADP, LLC v. Arizona Department of Revenue* (Ariz. App. 2023) 524 P.3d 278, 286.

Practice Tip: A reasonable argument can be made that the Internet Tax Freedom Act requires cities to tax the use of other types of subscription television services in the same manner that it taxes the use of online streaming services. Although most broadly applicable utility user taxes on the use of video services treat all video services in the same manner, cities should be careful to not apply a different tax rate to the use of cable television services or direct broadcast satellite television services.³⁵

≥ The Commerce Clause

Some online streaming companies claim that applying utility user taxes to the use of online streaming services violates the Commerce Clause of the United States Constitution. It is possible for cities to run afoul of the Commerce Clause when enforcing their utility user taxes against online streaming services. It is also easy to avoid doing so.

The Commerce Clause prohibits certain state actions that burden the flow of commerce across state lines. However, a tax will not impose an impermissible burden of interstate commerce if it “is applied to an activity with a substantial nexus with the taxing [jurisdiction], is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the [jurisdiction].”³⁶ Applying utility user taxes to the use of online streaming services implicates the Commerce Clause in at least two possible ways.

First, online streaming companies contend that utility user taxes are not “fairly apportioned” because subscribers may use online streaming services on portable devices outside of a taxing city’s borders. This is incorrect. Taxes levied on purchasers of services may be applied to the entire purchase price of the service, at least when there is “partial performance” of the service within the taxing city.³⁷ If a utility user tax is only collected from users of an online streaming service that

³⁵ In 1996, Congress enacted a statute exempting providers of direct broadcast television service from any obligation to collect local taxes on the use of their services. 47 U.S.C. § 152 (note); Pub. L. 104-104, Title VI, § 602. However, so long as a utility user tax applies to the use of direct broadcast satellite television services and is “legally collectible” from users of those services, it will not trigger the Internet Tax Freedom Act – even if one mechanism for collecting the tax is foreclosed by federal law. Internet Tax Freedom Act, § 1105(2)(A).

³⁶ *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279; *Oklahoma Tax Commission v. Jefferson Lines, Inc.* (1995) 514 U.S. 175, 179-80.

³⁷ *Oklahoma Tax Commission, supra*, 514 U.S. 175, 189.

have a billing or service address within the city, as is typically true, this requirement will be satisfied in all but the most unusual of cases.

Practice Tip: In the unlikely event that a user of an online streaming service who has a billing or service address in a city never uses the service in that city, it may be appropriate to refund the tax that user has paid. Most utility user tax ordinances explicitly allow refunds in such situations.³⁸ The possibility that a few users might be entitled to refunds should not be used as an excuse for online streaming companies to refuse to collect a utility user tax.

Second, the “substantial nexus” requirement of the Commerce Clause will prevent a city from compelling an online streaming company to collect its utility user tax when the company has no physical presence within the city and does only a *de minimis* amount of business in the city. What amount of business qualifies as *de minimis* is not entirely clear, but it is safe to say that if an online streaming company completes more than 200 transactions in a city each year or receives more than \$100,000 in annual revenue from transactions within the city, it may be compelled to collect that city’s utility user tax.³⁹

Practice Tip: Most online streaming companies will easily pass these thresholds. However, it is possible that some companies may not pass the thresholds in smaller cities. To avoid this issue, smaller cities that wish to enforce their utility user taxes against online streaming companies should focus their efforts on larger companies.

≥ **The First Amendment**

Some online streaming companies insist that online streaming services must be exempt from taxation because they engage in speech that is protected by the First Amendment to the United States Constitution. The First Amendment, however, does not prevent the government from taxing speech. It prevents the government from taxing speech in a manner that is “directed at, or presents the danger of suppressing, particular ideas.”⁴⁰ So long as a tax is “content neutral” and part

³⁸ See, e.g., Santa Barbara Municipal Code § 4.26.150.

³⁹ *South Dakota v. Wayfair, Inc.* (2018) 585 U.S. 162, 188.

⁴⁰ *Leathers v. Medlock* (1991) 499 U.S. 439, 453.

of a broader tax scheme that does not target a small number of speakers, it should easily pass muster under the First Amendment.⁴¹

Most taxes on the use of online streaming services are part of an overall utility user tax scheme that applies a variety of other services. And many utility user tax ordinances explicitly state that the use of “video services” is taxable regardless of the content – *i.e.*, the topic, idea, or message – of the video programming offered.⁴² Because a law is “content based” only if it draws distinctions that turn on “the topic discussed or the idea or message expressed[,]” most generally applicable utility user taxes on video services – or even some subset of video services – will not run afoul of the First Amendment.⁴³

Practice Tip: Even content neutral taxes can be enforced in content-based ways. It should go without saying that enforcement efforts should not be focused on online streaming companies that engage in “disfavored” speech.

Part 3: Collection

After a city has run the gauntlet described above – after it has determined that its utility user tax applies to the use of online streaming services and is enforceable – it still must decide what actions it wants to take to ensure that the tax is properly collected.

Remember that a utility user tax is imposed on the service user, not the supplier of that service. Because it would be practically impossible for cities to collect the tax directly from every service user, most utility user tax ordinances require service suppliers to collect the tax from

⁴¹ *Id.* at 444-49; *Sacramento Cable Television v. City of Sacramento* (1991) 234 Cal.App.3d 232, 237-43. Some courts also ask whether any differential treatment that a tax imposes on different categories of speakers is rational – a test that duplicates the analysis that governs equal protections challenges to tax ordinances. *Sacramento Cable Television, supra*, 234 Cal.App.3d at 237-43; see *City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234, 247-28 [equal protection].

⁴² *City of Austin, Texas v. Reagan National Advertising of Austin, LLC* (2022) 596 U.S. 61, 69, citations omitted; *Arkansas Writers’ Project, Inc. v. Ragland* (1987) 481 U.S. 221, 224, 226-31 [finding that a tax on magazine sales that exempted religious, trade, professional, and sports magazines was content based]; see, e.g., Santa Barbara Mun. Code § 4.26.020 - Video Programming.

⁴³ *Leathers, supra*, 499 U.S. at 449-50 [holding that differential taxation of different media types is not categorically prohibited by the First Amendment].

their customers. Tax collection requirements of this type are ubiquitous and have been considered lawful for close to a century.⁴⁴

Many online streaming companies, intentionally or inadvertently, are not collecting utility user taxes imposed on their services, even when they are legally required to do so. What should cities do when they encounter one of these companies? There are two principal options:

- 1. bring litigation against the company and request a court order that compels it to collect the tax;**
- 2. hold the company liable for the uncollected amounts (and, if appropriate, interest and penalties).**

The first option is rarely utilized, in part because it is focused only on prospective relief, with no recovery available for past uncollected amounts, and in part because it raises complex questions about what judicial remedies are available to redress statutory violations committed by private parties. The second option is more common.

Cities are generally understood to have the power to impose liability on companies that fail to collect taxes they are legally required to collect.⁴⁵ It is a power they share with the State of California, which has, since the 1930s, required retailers to collect use taxes from purchasers of tangible personal property and held them liable when they fail to collect the full amount due.⁴⁶ Liability is not for the uncollected taxes, per se. Instead, companies may be found to owe a debt, or damages, in “an amount equivalent to [the tax]” they failed to collect, with liability established by an assessment that is issued after the city conducts an administrative hearing process.⁴⁷

⁴⁴ *Monomotor Oil Co. v. Johnson* (1934) 292 U.S. 86, 93-94; *Ainsworth v. Bryant* (1949) 34 Cal.2d 465, 477; see also, generally, *City and County of San Francisco v. Regents of the University of California* (2019) 7 Cal.5th 536, 551-52.

⁴⁵ *City of Glendale v. Crescenta Mutual Water Company* (1955) 135 Cal.App.2d 784, 796; cf. *City of Vacaville v. Pitamber* (2004) 124 Cal.App.4th 739, 747 [rejecting due process challenge to city’s effort to hold hotel operator liable for “transient occupancy” taxes that it failed to collect from its guests].)

⁴⁶ Rev. & Tax. Code § 6204; *Bank of America National Trust and Savings Association v. State Board of Equalization* (1962) 209 Cal.App.2d 780, 792-93.

⁴⁷ *Bank of America National Trust and Savings Association*, *supra*, 209 Cal.App.2d at 792-93; *First American Title Insurance Co. v. California Dep’t of Tax and Fee Administration* (2021) 71 Cal.App.5th 603, 613; see, e.g., Santa Barbara Municipal Code § 4.26.110, 4.26.170 [example of hearing process].

Most modern utility user tax ordinances establish some kind of administrative process for holding service suppliers liable when they fail to collect taxes. However, a few older utility user tax ordinances may limit liability to circumstances where companies collect taxes but then keep for themselves the amounts they collect. If a city has an ordinance of this type, seeking prospective relief from a noncompliant service supplier in court may be the only enforcement option available.

The process of issuing assessments can be expensive and time-consuming, so careful evaluation of a city's case is warranted. Depending on the circumstances, it may sometimes make sense to attempt informal negotiations with noncompliant companies, offering some relief from liability for prior uncollected amounts in exchange for an agreement that the company will collect the tax moving forward.

Conclusion

The discussion above provides a basic overview of the major issues that cities may face if they seek to enforce their utility users taxes against online streaming companies. The task may seem daunting, and navigating the enforcement process can be complicated. But several years of personal experience have led the author to believe that online streaming companies' challenges to the enforceability of properly worded utility user tax ordinances are ultimately unconvincing. For those cities whose utility user taxes apply to the use of online streaming services, enforcement is likely to be successful in most cases.

I hope that the following information will prove helpful. If you have questions about anything, please do not hesitate to contact me directly.



City Attorney's Guide to Navigating Cybersecurity and Lessons Learned

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Smart Cities Need Smart Procurement

The city attorney role in protecting your city from cybersecurity risks

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Introduction

You might not realize it, but you are in the cybersecurity business as a city attorney. Almost every public service your city provides has a backend that is made possible by substantial internet-connected resources, and your city's long term vision likely includes many more "internet of things" (IOT) devices compared to five years ago. In 2025 your residents probably interact more frequently with the virtual form of your city than they do the brick and mortar of city hall. Even your city's employees spend most of their time working in a primarily digital-first environment. On a daily basis, residents and employees alike move large troves of sensitive data through your city's critical infrastructure. It should come as no surprise then that the modern city has become an attractive target for cyber threat actors, and the home front for a new form of global conflict that most closely resembles a "warm war".^{1 2}

Cyber threat actors generally fall into two major categories: those who are financially motivated, and nation state actors who are motivated by the winds of global politics. Both types of actors increasingly employ more sophisticated methods, including "hack now, ransom later" style attacks, or even turning their operations into an up-market business by selling successful methods of cyberattack as a kit.³ Nation state actors have similarly become more sophisticated, finding new ways to silently enter, quietly gather data, and leverage common hardware en masse, or a "botnet" to devastating effect.⁴

¹ *China-Linked Hackers Breach U.S. Internet Providers in New "Salt Typhoon" Cyberattack*
<https://archive.today/20241007181947/https://www.wsj.com/politics/national-security/china-cyberattack-internet-providers-260bd835>

² *Volt Typhoon Targets US Critical Infrastructure With Living-off-the-Land Techniques*
<https://www.microsoft.com/en-us/security/blog/2023/05/24/volt-typhoon-targets-us-critical-infrastructure-with-living-off-the-land-techniques/>

³ <https://www.crowdstrike.com/en-us/cybersecurity-101/ransomware/ransomware-as-a-service-raas/>

⁴ <https://www.cybersecuritydive.com/news/86000-iot-compromised-eleven11-botnet/741507/>

Unfortunately, local public agencies, and especially cities, attract both types of attackers. A financially motivated attacker might want to breach your city's utility billing system to acquire personally identifiable information (PII) for resale, while a state-sponsored actor may want to breach your city's utility system to understand how to manipulate the chemical composition of the water supply.⁵

While it can be tempting to assume that managing all of these issues can be outsourced to your security vendor or chief information security officer (CISO), in reality there are many practical steps you can take as a city attorney to improve your organization's defensive posture to both reduce the odds of a cyber attack, and mitigate harm when one does occur. This paper will provide practical guidance to help your office better understand your city's needs, properly frame risks for operational departments, and negotiate better vendor contracts.

Part I: Knowing Your Client

As is true with any other client, the first step in protecting your client is getting to know their strengths and weaknesses. A large city that has the resources to staff a fulltime IT department with a CISO and experienced software buyers is going to have some advantages, but also a larger attack surface compared to a medium or small city.⁶ A large city is also likely to have far more legacy systems and bespoke solutions. A small city might have a small attack surface, but the unenviable task of delivering more robust security with the same budget as last year. A medium-sized city might be the luckiest of all: a fairly large attack surface, but with a limited budget.

This is where having a strong working relationship with your IT department is key. Your IT director probably has the best understanding of where the low-hanging fruit is for your city's cybersecurity defenses, what departments ask for the most, and what challenges they face when attempting to procure. You can use that information to help you effectively triage your city's procurement process into 3 groupings:

- 1) 90%-contracts that are on your paper, or cooperatively purchased/piggybacked.
- 2) 9%-contracts that are predominantly your terms, with minor redlines due to market conditions and extreme need.

⁵ <https://www.cybersecuritydive.com/news/federal-probe-vulnerabilities-us-water-systems/733331/>

⁶ The attack surface is the number of all possible points, or attack vectors, where an unauthorized user can access a system and extract data. The smaller the attack surface, the easier it is to protect.
<https://www.fortinet.com/resources/cyberglossary/attack-surface>

- 3) 1%-contracts that are exceptionally high profile or high risk, negotiated with extensive participation by all stakeholders

If you can effectively triage your technology contracts into these three categories, you can maximize your effectiveness by limiting time allotted to 90% of contracts and maximizing your impact on the 1% of contracts that might truly make or break your city.

Of course, that sounds simple in theory, but in practice, it can be difficult, if not impossible, to determine which contracts are 1% contracts in advance. The key to solving that problem is helping your operational departments understand their risk profile and needs *before* the procurement process begins.

Part II: Framing and Articulating Risk

Understanding What's at Stake

The first step in helping your operating departments frame risk is clarifying what is potentially at stake with the contract. Suppose, for example, that your parks department wants to purchase a web-based application that will allow residents to book recreational facilities such as tennis and pickleball courts. The vendor is offering a hosted system, so your IT department doesn't need to acquire new hardware.⁷ Your initial assessment might be that this presents no serious risk. After all, if the system is attacked and becomes unavailable for a period of time, idle tennis courts won't endanger your residents. Your parks department also doesn't want any of the application's payment features so no credit cards or banking information will be entered.

So far, you're optimistic. And then, you learn that your parks team plans to require names, dates of birth, home address, email, and contact phone number in order for residents to book; this is to prevent duplicate bookings, prevent bot-driven bookings, and ensure a legal adult is responsible for any minors planning to use recreational facilities. An anodyne booking system has now become a PII collection point, and you now have to help assess a risk for your client.

Your thought process probably immediately jumped to how you will contract for PII protections to shift liability away from your city and to the vendor, while also looking

⁷ Hosted services are applications, IT infrastructure components or functions that organizations access from external service providers, typically through an internet connection.
<https://www.techtarget.com/searchitchannel/definition/hosted-services>

out for insurance provisions that speak to the vendor's credibility in the market. That is certainly what you should do as an attorney, but your client needs a more digestible prompt in order to help bring actionable information to you in a timely manner. A simple ask is often the most effective:

"Briefly describe the worst thing that will happen if the product stops functioning without warning".

This appears deceptively simple, however, it can be very effective at encouraging your operational departments to look into the future beyond procurement. Departments are eager to solve a problem by purchasing a solution, but they often don't consider that a solution can sometimes fail and leave them in a worse position. By asking this simple question, you should receive a succinct answer that provides you with all of the following actionable information: 1) will health or safety be at risk?; 2) will critical infrastructure be at risk?; 3) will the city be exposed to a large financial liability?; 4) will the city face other material disruptions?

The next step is understanding how your operational department plans to actually use the product. Vendors can offer significant configurability, even for "out of the box" solutions and the exact configuration your city selects will greatly impact overall risk. For scheduling tennis courts, for example, the vendor might offer a solution that doesn't require PII entry but your parks department might still request that configuration for their needs. This leads to your next ask of the department:

"Will any personally identifiable information, such as names, dates of birth, social security numbers, home address, emails, or phone numbers, be entered into this system?"

"If yes, which types of personally identifiable information will be entered?"

"How will your department use this information, and if it is not collected, can you successfully operate this system?"

Note the prompt to consider avoiding PII collection altogether. Often operational departments continue past practices without considering their ongoing utility. This can be a very effective nudge that not only reduces your city's legal risks, but can also improve efficiency for operating departments.

Here again it can be important to pause and remember the value of your agency partners. Your city's risk manager and IT director probably have direct experience with the daily habits of your operational departments. If Post-It notes with passwords are

strewn on every monitor and those passwords are “1234”, your IT director and risk manager may want to calibrate risk management differently and offer their own thoughts; even veterans and professional vendors can sometimes fall prey to these oversights, as Silicon Valley cities recently learned through some hacked crosswalk signals.^{8 9}

Understanding Your Vendor

So far, you’ve taken steps to understand your city’s risk profile, but you haven’t yet factored in the risk profile of your vendor. Technology vendors come in many flavors, and unlike with other public contracts, you can’t lean on a surety or always find a peer city who has worked with the vendor. Nonetheless, you can build in some quality control measures to help round out the risk profile for your contract. Your risk manager will be able to offer standard cyber insurance clauses for the proposed scope of technology being purchased and intended uses. This is often the most efficient way to distinguish between good and bad actors.¹⁰ Cyber insurance carriers act as signals in the market for a vendor’s security readiness. They assess vendors before issuing any policy or increasing the limits on any policy, and conduct regular audits. While they can be notoriously difficult to collect from, their services as an auditor of best practices should not be overlooked. A vendor might offer many plausible reasons why they do not need insurance for your contract, but they will all distill into a simple fact: the vendor is unwilling or unable to meet the security demands of a qualified expert.

You can gather all of your city’s risk factors and the vendor’s factors into a simplified questionnaire shared by your office, IT, purchasing, and risk. By creating a one-stop-shop, you can reduce information silos and avoid creating resistance by operating departments. A sample has been incorporated at the end of this paper for your reference.

Finally, consider whether the vendor has appealed to your city using a lot of marketing jargon as opposed to concrete examples of performance. Many vendors, for example,

⁸ Crosswalks in Redwood City, Palo Alto, and Menlo Park were hacked to imitate Elon Musk and Mark Zuckerberg. <https://www.paloaltoonline.com/technology/2025/04/12/silicon-valley-crosswalk-buttons-apparently-hacked-to-imitate-musk-zuckerberg-voices/#:~:text=Crosswalk%20buttons%20along%20the%20mid%2DPeninsula%20were%20hacked,Mark%20Zuckerberg%20or%20Elon%20Musk%20began%20speaking.&text=Menlo%20Park%20spokesperson%20Kendra%20Calvert%20told%20this,and%20that%20city%2Dcontrolled%20crosswalks%20were%20not%20hacked.>

⁹ Subsequent investigation revealed that the vendor had not updated its default password, and had kept “1234” in place for the affected systems.

https://www.theregister.com/2025/04/19/us_crosswalk_button_hacking/

¹⁰ <https://www.fortinet.com/resources/cyberglossary/cyber-insurance>

are eager to advertise that their product “leverages artificial intelligence” without explaining how that confers a benefit to your city. This might be an indication that the vendor is more likely to seek opportunities to use your city as a test subject for new features or new pricing models. A vendor who is carefully trying to incorporate new technology will be transparent about how they plan to manage this process, and typically provide assurances that they will use government-grade products, usually Microsoft Azure.¹¹

Keep these factors in mind and work with your IT director and risk manager to assess the complete risk profile for the vendor. Low risk vendors working on low risk projects should easily fit into the 90% of contracts that can proceed along with minimal review time from your office. Contracts that have some mixed factors of vendor or project risk but can be easily contained should be part of the 9% that require some moderate effort.

Implementing this procurement approach will help you maximize your available time for the most challenging aspect of the procurement process: negotiation of the 1% contracts that are highest risk.

Part III: Negotiate Better Contracts

Negotiating new technology purchases has become increasingly difficult for cities of all sizes. The market is increasingly concentrated and vendors have become more brazen in suggesting they are replacing a professional service without offering the guarantees a typical professional would. Nonetheless you can still play a vital role at the negotiating table as part of your city’s team by keeping a few things in mind. If you were able to help your client frame risks and complete a questionnaire as described in **Part II**, they have probably selected a good faith vendor who will be easier to collaborate with on critical areas of law.

First, distinguish what is a legal question from what is not a legal question. Your city charter, state procurement laws, and federal law will all come into play when working with a new vendor. Your city and the vendor will be concerned with different compliance requirements; you might not appreciate their limitations regarding incident

¹¹ Microsoft’s Azure has become the gold standard for government technology vendors, including those offering artificial intelligence products. Its market position has become so robust it is now drawing anticompetitive concerns. <https://www.techradar.com/pro/microsoft-accused-of-creating-a-monopoly-on-us-government-systems-through-free-upgrades>

reporting, and they might not appreciate the scope of the California Public Records Act.¹²

Negotiating each party's ordinary compliance requirements is usually not fraught with difficulties. Most vendors will understand and accept that as local government agencies, we must seek certain common clauses such as requesting venue and jurisdiction in a city's home county, compliance with the California Consumer Privacy Act if a vendor interfaces directly with residents, and similar requests that are common across all California local agency customers. You will begin to encounter more challenges as you work with your operational department on the specifics of the work being delivered. For example, if your city is purchasing drones, your vendor is unlikely to be aware of AB 481 and the potential delays it might induce before the contract can be effectuated.

Your vendor might also commonly provide an uptime commitment and a series of credits if uptime doesn't meet contract minimums. Your operational departments will have to work with you to determine if this can create an unintended violation of state law. Similarly, there might be many aspects to the scope of work or performance of the technical delivery where an operating department or IT can verify a factual condition and address a legal requirement (think of this as a punch list). You can help your teams by flagging clauses that make it easy for them to know with certainty what they will be receiving and when.

Finally, go back to your questionnaire and review your operational department's assessment of what could go wrong if this vendor's product were to suddenly fail. Is life at risk? Is the city's ability to operate core functions at risk? Will the city be able to pivot away quickly in a crisis and terminate the contract? Consider these factors as you negotiate the most common pain points with technology vendors: 1) bankruptcy protections; 2) arbitration; and 3) damages caps.

Unlike many other vendors, technology vendors who file for bankruptcy protection can be especially disruptive for your city. Technology vendors provide specialized services for which a bankruptcy trustee may not be able to readily identify temporary talent to act as a manager of the firm or its assets as the company is reorganized or portions of its business sold off. From a security standpoint, much of the value a vendor offers at the time you enter into a contract is their reputation, much of which can be lost as a result of Chapter 11 reorganization.

¹² <https://www.sec.gov/newsroom/press-releases/2023-139>

A bankruptcy stay also prohibits your city from taking any adverse action against the vendor until the stay is lifted. This can put your operational department in a bind. To the greatest extent possible, attempt to characterize all or as many components of your contract as possible as 11 U.S.C. 365(n) contracts for the license of intellectual property.¹³ Also keep in mind that any part of your contract not deemed to be a 365(n) contract will receive liquidated damages, and you may want to carve out a distinct liquidated damages formula for bankruptcy, up to the limit of California law.¹⁴

Vendors will commonly request arbitration or other alternative dispute resolution. Vendors prize this clause because it allows them to contain costs and avoid jury verdicts. If your contract is not the type that is likely to be controversial or lead to substantial damages, and if your city is able to retain highly qualified arbitration counsel, this can be an attractive incentive to offer a vendor in exchange for more valuable clauses elsewhere.

You should also be prepared for a vendor request to aggressively limit contract damages. Most technology vendors will seek to limit their maximum exposure to the trailing twelve months of contract payments, and obtain waivers for all special and consequential damages. Your bargaining position might allow you to obtain some more favorable terms at the margins, however, be prepared for an uphill climb on this issue. Keep in mind that if your goal is to keep your city secure and able to function during a crisis, you may have to make tradeoffs in order to achieve an optimal outcome.

If All Else Fails, Observe the Business Judgment Rule

There are many technology contract negotiations that become difficult not because of the law, but because of the attorney's perceived wisdom of the purchase. It can be tempting to blend legal judgment with business judgment and quickly become "The Office of No" in your city. This often results in operating departments avoiding legal review or worse, forum shopping. City attorneys often do have to be "The Office of No", however, unlike traditional procurement, technology purchases that avoid the city

¹³ See *Mission Product Holdings Inc. v. Tempnology LLC* 587 U.S. __ (2019). Please note that while this emerged as best practice after the US Supreme Court decided *Mission Product*, in practical terms its impact has been gradually blunted by economic reality. If your vendor is in serious enough financial straits and your contract or product is not profitable to the surviving entity, even transfer to a bankruptcy-remote entity may not solve the real-world problems of planned obsolescence or end of support for the product. Nonetheless, it can give your city precious time to find alternatives without a disruption in service that might otherwise occur.

¹⁴ Civil Code Section 1671 quantifiability and reasonableness limits are not likely to be reached in most technology contracts that enter bankruptcy because your operational departments should be able to document the cost of onboarding a substitute vendor.

attorney's office can create more risk than an imperfect, but legally guard railed, agreement that you were able to negotiate.

When in doubt, borrow from the business judgment rule and ask yourself:

"Is this contract so one-sided in favor of the vendor that no government official of ordinary sound judgment would conclude that consideration is adequate?"

If the answer is "no", do your best to help your client with the agreement in front of you, and set them up for success for the next agreement. This will demonstrate that you intend to be a partner in their success, as opposed to an obstacle in their plan.

Conclusion

This brief summary to improve your city's technology procurement process should not neglect other preventative measures your office can take to help your city be prepared for a cyberattack. Work with your IT director to develop and regularly update your Cybersecurity Playbook. If you need help developing your playbook, or understanding vendor options for managing your security options, do not hesitate to contact me directly.



Municipal Tort and Civil Rights Litigation Update

Thursday, May 8, 2025

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I. CIVIL RIGHTS-LAW ENFORCEMENT LIABILITY

A. *Hart v. Redwood City*, 99 F.4th 543 (9th Cir. 2024)

- **Officer's use of deadly force against armed and non-responsive individual did not violate individual's Fourth Amendment rights**

Officers Gomez and Velez responded to a call involving a man attempting suicide with a knife in his backyard. When they arrived, they found the man's wife covered in blood and frantically pleading for help. The man had been actively cutting his arms and neck with the knife prior to the arrival of the officers. At her urging, the officers went to the backyard, where they found Hart holding a knife. They told him to drop the knife, but instead of doing so he began moving towards them while raising the knife. As Hart neared the officers, Officer Velez deployed her taser, but it was ineffective. With Hart approaching closely and wielding a knife, Officer Gomez took action to protect himself and his partner, shooting Hart. Medical assistance was called for Hart, but he ultimately passed away in the emergency room. Hart's family brought suit alleging that Gomez, Velez, and the City of Redwood City violated their and Hart's constitutional and state law rights. The parties filed cross-motions for summary judgment, and as relevant here, the district court found that Officer Gomez was not entitled to qualified immunity.

The district court found that facts were in dispute regarding whether the Officers' conduct was objectively unreasonable. "Hart had committed no offense, was suicidal, was not a flight risk, did not pose a threat to others, and a dispute exists regarding whether an adequate warning that force would be used by the officers was given."

Upon review, the appellate court examined whether Officer Gomez' conduct was objectively reasonable. To assess the reasonableness of a particular use of force, the court balances the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake. Use of deadly force is the ultimate intrusion, and the court thus would examine whether the state interest was sufficient to justify the use of force.

The Supreme Court has provided three factors for determining the strength of the government's interest: "[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Conner*, 490 U.S. at 386, 396 (1989). The "most important" of these factors is "whether the suspect posed an immediate threat to the safety of the officers or others." *Lal v. California*, 746 F.3d 1112, 1117 (9th Cir. 2014).

Here, the Court found that Hart posed an immediate threat to Officer Gomez. Although there were some disputed facts as to where exactly Hart was located in the yard at the time of the Officers' arrival and how he was holding the knife at that time, the Court found these disputes to be immaterial. The material facts were undisputed: Plaintiff was holding the

knife and advanced toward the Officers wielding the knife and refused to comply with commands to drop the knife.

Plaintiffs also argued that because Hart had already harmed himself when the officers arrived, he presented less of a threat. Plaintiffs cited *Tan Lam v. City of Los Banos* for the proposition that one who is wounded may no longer present an immediate threat. 976 F.3d 986, 999 (9th Cir. 2020). In *Tan Lam*, the individual stabbed an officer with scissors. *Id.* The officer then shot the individual. *Id.* This court found that first shot to be an objectively reasonable use of force. *Id.* But then, after the individual “was injured and was [no longer] approaching [the officer] with scissors,” the officer shot him again. *Id.* (emphasis added). At that point, the court determined that the individual was no longer an immediate threat. *Id.* Perhaps if Hart's injuries had made it so he could no longer approach the officers with the knife, then as in *Tan Lam*, Hart would not have been an immediate threat. But it was uncontroverted that Hart was able to approach at least at a brisk walk, while wielding the knife in front of him.

Regarding the Officers’ pre-shooting conduct, the Court noted that California state law does factor pre-shooting conduct into whether an officer acts “reasonably when using deadly force,” *Hayes v. County of San Diego*, 736 F. 3d 1223 (9th Cir. 2013), “[t]he Fourth Amendment is narrower and places less emphasis on pre[-]shooting conduct,” *Vos v. City of Newport Beach*, 892 F. 3d 1024, 1037 (9th Cir. 2018).

Finally, the Court held that Hart’s mental illness did not change the outcome. While “whether the suspect has exhibited signs of mental illness is one of the factors the court will consider,” this court has “refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.”

Ultimately, the Court held that there was no constitutional violation and even if there were, Officer Gomez would have been entitled to qualified immunity as he did not violate clearly established law.

Significance: The idea that subjects undergoing a mental health crisis should be treated differently when use of force is at issue has become relatively ubiquitous. This case is significant in establishing that a subject can and should be considered an immediate threat notwithstanding the appearance of mental illness.

B. *Scott v. Smith*, 109 F. 4th 1215 (9th Cir. 2024)

- **Officers were not entitled to qualified immunity when placing a bodyweight restraint on an unarmed and cooperative subject who lost consciousness and died as a result of the restraint**

On March 3, 2019, Roy Scott called the police for help claiming that assailants were trying to enter his home with a saw to harm him. Las Vegas Metropolitan Police Department Officers Kyle Smith and Theodore Huntsman came to the scene. Scott was unarmed and in mental distress. Though he complied with the officers' orders and was not suspected of a

crime, Smith and Huntsman initiated physical contact, forced Scott to the ground, and used bodyweight force to restrain him. Shortly after, Scott lost consciousness and he was later pronounced dead. Scott's daughter and a representative of Scott's estate sued the officers and the Department for violating their constitutional rights, including the Fourth Amendment right to be free from excessive force and the Fourteenth Amendment right to familial association. The trial court denied the Officers' motion for summary judgment on grounds of qualified immunity and the Officers appealed.

When the Officers arrived at Scott's apartment and Scott came to the door, he was holding a metal pipe. He was ordered to drop the pipe, which he did. The Officers ordered Scott to stand by a near by wall. Scott also complied with this order. He was asked if he had any other weapons, at which time he pulled a knife from his pocket and handed to the Officers. The Officers were shining a flashlight at Scott who asked them to turn off the light and acknowledged that he had paranoid schizophrenia.

The Officers grabbed Scott's arms and took him to the ground. Initially, Scott was on his back with his arms at his side. For over two minutes, Scott screamed and begged the Officers to leave him alone. The Officers turned Scott to his stomach with his hands restrained behind his back. Officer Huntsman then placed his body weight on Scott's back for one to two minutes. During this time, Scott became more incoherent and his breathing more labored. Scott was then handcuffed and rolled to his side. His face was bloodied from contact with the ground, and he then essentially stopped moving. He was pronounced dead shortly thereafter.

In reviewing the trial court's denial of the Officers' motion for summary judgment, the Court analyzed the reasonableness of the Officers' conduct. First, the body weight restraint was considered to be deadly force. In analyzing the second prong, the government's interest in the force used, the Court did consider Scott's apparent mental illness and the fact that he had not committed any crime. The Court suggested that further de-escalation should have been considered by the Officers. Scott was not an immediate threat as he had relinquished both the knife and the pipe on the command of the Officers.

As to the third prong, a balance between the gravity of the intrusion on the individual and the government's need for that intrusion, the Court found that deadly force was completely unnecessary under the circumstances. Thus, under the *Graham* reasonableness test, the force used was not reasonable and Scott's Fourth Amendment rights were violated by the Officers.

The Court then examined whether Scott's Fourth Amendment rights were clearly established. In determining that said rights were clearly established, the Court leaned heavily on the case of *Drummond ex rel. Drummond v. City of Anaheim*, 343 F. 3d 1052 (9th Cir. 2003). In *Drummond*, officers "pressed their weight against [an individual's] torso and neck, crushing him against the ground." They "maintained that pressure for a significant period of time" while the suspect was prone, handcuffed, "offered no resistance," and "repeatedly told the officers that he could not breathe and that they were choking him." The Court found that

Officers were not entitled to qualified immunity and that ruling clearly established the unconstitutionality of the of the Officers in this matter.

Next, the Court reviewed Scott's 14th Amendment claim. To show a violation of the right to familial association under the Fourteenth Amendment based on an officer's use of force, a plaintiff must establish that an officer's conduct "shocks the conscience."

Two tests govern whether an officer's conduct "shocks the conscience." *Ochoa v. City of Mesa*, 26 F.4th 1050, 1056 (9th Cir. 2022). "Which test applies turns on whether the officers had time to deliberate their conduct." *Id.* The "deliberate-indifference test" applies when a situation "evolve[s] in a time frame that permits the officer to deliberate before acting." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). The more demanding "purpose-to-harm test" applies when a situation " 'escalate[s] so quickly that the officer must make a snap judgment.' " Here, the Court found that the Officers had time to deliberate and that the deliberate indifference standard would apply. The Court found that the Officers violated Plaintiff's 14th Amendment rights.

However, the Court could not point to an analogous prior appellate case that would have clearly established this violation of Plaintiff's 14th Amendment rights. On those grounds, the Court reversed the trial court's denial of qualified immunity as to the 14th Amendment claim.

Significance: Be very wary of your department's use of body weight restraints on prone individuals, particularly to those subjects who are already restrained. Also, this case has clearly established a 14th Amendment violation regarding the Officers' conduct.

***C. Rosenbaum v. City of San Jose*, 107 F. 4th 919 (9th Cir. 2024)**

- **Officers not entitled to qualified immunity when a police K9 was deployed on Plaintiff and continued to bite him for nearly 20 seconds after surrendering and laying prone on his stomach**

On September 10, 2019, five SJPd Officers responded to a domestic violence call. One of the Officers was K9 handler with his police K9 "Kurt." When the officers arrived at the subject home, they observed Plaintiff standing on a landing on the second floor. For approximately six minutes, they engaged in a dialogue with Plaintiff wherein they repeatedly ordered him to come down the stairs. Plaintiff refused to comply and come down the stairs. An officer advised him that if he did not come down, the K9 would be deployed to apprehend him and that he would be bitten.

Approximately nine minutes after entering the home, Kurt was deployed up the stairs to apprehend Plaintiff. When the officers reached the second story, they found the unarmed Plaintiff seated with his back against a wall while Kurt was biting his right forearm. Plaintiff was offering no resistance. Kurt then dragged Plaintiff onto his stomach. One of the officers had his gun pointed at Plaintiff, another was standing on his legs, while another was pulling his left arm behind his back. At this time, Kurt was still biting Plaintiff's right arm. Body

camera footage captured the incident and confirmed that Kurt continued biting Plaintiff for approximately twenty seconds after he had clearly surrendered before Kurt was ordered to release his hold. Plaintiff sustained severe and permanent injuries to his right arm because of the incident.

In reviewing the trial court's denial of qualified immunity, the Court noted that it has been clearly established that when an officer allows a police dog to continue biting a suspect who has fully surrendered and is under officer control, it is a violation of Plaintiff's 4th Amendment rights. In some cases, such as this one, the conduct is so clearly a violation, that on-point appellate authority is not even necessary. This case was distinguishable from others where qualified immunity was granted but in those cases, the K9 was released as soon as it was determined that the subject was not armed. Here, it was clear that Plaintiff was unarmed and had surrendered, however, Kurt stayed on the bite for another twenty seconds before he was ordered to release.

The officers argued that it was not clear that Plaintiff had surrendered. However, the body camera footage supported Plaintiff's version of the events and whether surrender was clear is a factual issue to be decided by the jury.

Significance: This case exemplifies that the Court will occasionally find some conduct so egregious that the typical qualified immunity two-step analysis is rendered to be unnecessary.

D. Chinarian v. City of Los Angeles, 113 F.4th 888 (9th Cir. 2024)

- **It is clearly established that reasonable suspicion by police officers that a vehicle is stolen does not justify a high-risk, 24-minute traffic stop during which the plaintiff was asked to exit the car at gunpoint in front of her passenger and teenage daughter and asked to lay flat on her stomach on the ground**

Plaintiff was driving home from a family celebration with her teenage daughter and a friend when an LAPD police officer saw her and mistakenly suspected that she was driving a stolen vehicle. The mix-up was due to several unfortunate coincidences, including an error by the Department of Motor Vehicles, which had issued the wrong license plates. Although Plaintiff drove normally and in compliance with all traffic laws while being followed by a police car for more than ten minutes, officers from LAPD decided to conduct a "high-risk" felony stop involving about a dozen officers and a helicopter unit. The officers ordered Chinarian out of the vehicle at gunpoint and commanded her to lie prone on the street with her arms outstretched. The officers, again at gunpoint, ordered the passengers out of the vehicle with their hands in the air. All three were handcuffed and seated on the street while the officers investigated. After the officers determined the unfortunate mix-up and that Plaintiff's vehicle was lawfully registered to her husband, Plaintiff and her children were released from detainment. The duration of the entire encounter was approximately 24 minutes.

Plaintiff and her passengers sued the officers, the LAPD, and the City of Los Angeles for illegal seizures, excessive force, and a failure to properly train the officers. The district court granted partial summary judgment in favor of the officers, and a jury subsequently rejected plaintiffs' municipal liability claims against the LAPD and the City. Plaintiffs appealed the trial court's granting of summary judgment.

In review of Plaintiffs' Fourth Amendment claim, the Court recognized that the degree of intrusiveness was severe. Plaintiff was ordered out of the car at gunpoint, forced to prone herself on the ground, and was handcuffed. Although vehicle theft can be considered a "severe" crime, the officers had no articulable basis that Plaintiffs posed a threat to them or to anyone else. Plaintiffs were fully cooperative at all times. Furthermore, Plaintiff remained in handcuffs for a period of time even after the officers became aware of the error. The Court held that the officers' reasonable suspicion that plaintiffs had stolen the Suburban, standing alone, was not enough to justify such intrusive tactics.

The Court then examined the second prong of the QI analysis; whether it was clearly established that the officers' tactics violated plaintiffs' Fourth Amendment rights. The Court looked to the case of *Green v. City and County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014). Denise Green, a 47-year-old Black woman with no criminal record, was driving her car when an automated license plate reader misread her license plate number by one digit and erroneously identified the plate as belonging to a stolen vehicle. The officers with the reader were unable to respond, so "they radioed the hit to dispatch" for other officers to follow up. Dispatch determined that the license plate number belonged to a gray GMC truck, whereas Green was observed driving a burgundy Lexus sedan.

A nearby officer who had heard the radio traffic observed Green's vehicle pass him and did not realize that her license plate differed by one digit from the number reported to dispatch. The officer called for backup, and after three to five additional officers arrived, they made a high-risk stop of Green's vehicle. The officers ordered Green out of her car, drew and pointed their weapons at her, ordered her to her knees, and handcuffed her. "Green was wholly compliant and nonresistant for the entirety of the stop and ... there was no indication that she was armed." Officers searched Green's vehicle, performed a pat-down search of her person, and after a record check of her correct plate number revealed they had made a mistake, uncuffed her. The trial court granted the officers' QI motion for summary judgment but the 9th Circuit reversed holding that it was a question for the jury to determine if the tactics used were justified in light of the circumstances.

Relying on *Green*, the Court held that Plaintiff's Fourth Amendment rights were clearly established and the trial court's order granting qualified immunity was reversed.

Significance: Reasonable suspicion of vehicle theft alone is not enough to justify the intrusive tactics used by the officers in this case.

E. *Sanderlin v. Dwyer*, 2024 WL 4033065 (9th Cir. 2024)

- **Officer was denied qualified immunity when he struck Plaintiff in the groin with a deployed foam bullet at a George Floyd protest**

On May 29, 2020, at around 2:00 p.m., a protest started at San Jose City Hall. Police officers patrolling the scene initially reported that the crowd remained peaceful for the first hour or so. The crowd eventually marched from City Hall down Santa Clara Street onto Highway 101, temporarily blocking both northbound and southbound lanes. Additional officers were dispatched to assist in the response, as some members of the crowd began engaging in violent behavior, including smashing vehicles with rocks and throwing objects at officers from an overpass.

Officer Panighetti arrived on the scene at around 3:30 p.m., equipped with a 40mm launcher, capable of firing foam baton rounds. According to then-existing San Jose Police Department (SJPd) policy, SJPd officers had blanket authority to use 40mm foam baton rounds throughout the protests as defensive weapons against “specific individuals who posed a threat of serious injury to the officers or others.”

At about 4:30 p.m., officers issued dispersal orders to the crowd. The crowd then began to make its way back toward City Hall. Officer Panighetti was standing behind a skirmish line when protestors again began to throw objects at the officers. He noticed two subjects who were throwing objects at officers. He observed the subjects pick up what appeared to be paint cans and Officer Panighetti believed that they were preparing to throw the cans at officers. At that point, Plaintiff moved onto the sidewalk between Officer Panighetti and the two subjects holding a sign over his head. Panighetti ordered Plaintiff to move and warned him that he would “hit” him if he did not move. Plaintiff refused to move. Panighetti fired one foam bullet round at Plaintiff striking him in the groin. The injury was severe and required an emergency surgery.

Sanderlin filed suit against Panighetti under 42 U.S.C. § 1983, alleging that Panighetti had used excessive force against him because he was protesting the police and that Panighetti's acts therefore violated his rights under the First and Fourth Amendments of the United States Constitution. Defendants moved for summary judgment on grounds of qualified immunity which the trial court denied.

To establish a claim for retaliatory violation of the First Amendment, Sanderlin must show (1) that he was engaged in a constitutionally protected activity; (2) that Panighetti's actions would “chill a person of ordinary firmness from continuing to engage in the protected activity;” and (3) that “the protected activity was a substantial or motivating factor in [Panighetti's] conduct.” *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020).

Panighetti argued that Plaintiff was obstructing him from carrying out his duties, i.e., blocking him from the two subjects he was trying to apprehend, is not a constitutionally protected activity. However, the Court noted that this was a dispute of fact and therefore had

to be rendered in favor of Plaintiff. According to Sanderlin, he was merely standing peacefully on the sidewalk holding the sign. Resolving the disputed facts in Sanderlin's favor, he was engaged in protected First Amendment activity.

The third element turns on the same factual dispute. If a factfinder concludes that there was no legitimate justification for Panighetti's actions, they could reasonably infer that those actions were motivated by retaliatory animus. Thus, when all factual disputes are resolved and all reasonable inferences are drawn in Sanderlin's favor, Panighetti's acts violated clearly established law. It is clearly established that police officers may not use their authority to retaliate against individuals for protected speech.

As to Plaintiff's Fourth Amendment claim, the Court first had to determine whether Plaintiff was "seized" within the meaning of the Fourth Amendment. A Fourth Amendment seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied. The Court found that Panighetti effectuated a seizure of Plaintiff when he fired a foam bullet at him which knocked him to the ground restricting his movement.

Once it was deemed that a seizure of Plaintiff had occurred, the Court next examined if the seizure was unreasonable. The reasonableness of the force used by Panighetti would turn on "how the jury interprets the video footage, and whether the jury credits Panighetti's testimony that Sanderlin was blocking the police from targeting the two individuals." To the extent that the jury discredits Panighetti's account or believes that Panighetti failed to consider other less intrusive tactics, it could determine that the use of force was unreasonable which would be a violation of Plaintiff's rights under the Fourth Amendment.

Going to the second prong of the QI analysis, the Court evaluated whether the right was "clearly established." In stating that right was clearly established, the Court relied on the case of *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012). There, the police ordered a group of students at a large disturbance to disperse, and when the students failed to comply, the police fired pepperball projectiles at them. The Nelson court held that "the firing of a projectile that risked causing serious harm, in the direction of non-threatening individuals who had committed at most minor misdemeanors ... constitute[d] unreasonable force in violation of the Fourth Amendment." *Id.* at 886. Given the factual similarities between *Nelson* and this case, Panighetti was on notice that his use of force was excessive.

Significance: Chaos can occasionally result from protected protest activity. While police engage in tactics to control unruly crowds, they must still be cognizant of the constitutional rights of protestors.

F. *Black Lives Matter Los Angeles v. City of Los Angeles*, 113 F.4th 1249 (9th Cir. 2024)

- **Certification of a putative class requires commonality where issues can be resolved together.**

In the summer of 2020, protests related to the death of George Floyd occurred in Los Angeles for approximately ten consecutive days. Some of these protests were peaceful. Others were not. In response, the Los Angeles Police Department (LAPD) set curfews, declared demonstrations unlawful, used non-lethal force to control crowds, and arrested thousands of people.

About a week after the protests began, the plaintiffs filed this putative class action against the City and then-LAPD Chief Michel Moore, alleging that the LAPD used excessive force, arrested protestors without probable cause, and restricted their First Amendment rights. The trial court granted protestors' motion for certification of three classes seeking damages from city and fourth class seeking injunctive relief against department. City appealed.

FRCP 23 requires that the members of the class have the burden of proving by a preponderance of the evidence that they have common questions that can be resolved together, and these common questions predominate over individual ones. This kind of rigorous analysis is especially important in a case such as this, where classes bring fact-specific constitutional claims challenging a wide variety of LAPD's actions across Los Angeles. The question of whether reasonable force was used on the entire class depended on the facts of many different, individual situations. Thus, the plaintiffs did not adequately prove that they have raised a question which can be solved on a class-wide basis because the different claims arise in various different circumstances of alleged police brutality.

The court vacated and remanded to the trial court, finding that further analysis of commonality and predominance was required before these classes could be certified.

Significance: Protest cases can find “strength in numbers.” We have seen Protest Plaintiffs with very little or no damages attempt to coalesce in the formation of a class action or file with multiple Plaintiffs in a single lawsuit. It gives the appearance that the use of force was pervasive and indiscriminate. This case is helpful in requiring a true commonality of force used and injuries sustained.

II. CIVIL RIGHTS-HOMELESSNESS

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

- **The Eighth Amendment’s protections against cruel and unusual punishment does not prohibit local governments from passing or enforcing ordinances banning sleeping or camping on public property.**

In 2019, the Ninth Circuit issued a decision in *Martin v. City of Boise* holding that “the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.” The underlying reasoning was that the Supreme Court had previously ruled in *Robinson v. California* that it violated the Eighth Amendment’s Cruel and Unusual Punishment Clause to criminalize a person’s status, rather than their conduct (in Robinson, the statute criminalize

the status of being a drug addict, not using drugs). The Ninth Circuit concluded that broad prohibitions on sleeping or sitting essentially prohibited unhoused people from merely existing in public spaces (at least at certain hours) if there were no alternative shelters for people to go to, meaning it was their status of homelessness that was being criminalized.

The City of Grants Pass, Oregon, had a series of ordinances on the books that prohibited camping—which it defined as sleeping with any form of protection from the elements—in any public space. A violation of these ordinances resulted in a minimum \$295 fine. Multiple violations of the ordinance could lead to exclusion orders from parks or other public spaces, a violation of which could then result in a criminal trespass charge.

In the wake of *Martin*, several unhoused individuals in Grants Pass filed a class action lawsuit to prevent the City from enforcing these ordinances. At the time, the city’s unhoused population well exceeded the number of available shelter beds. A federal district court enjoined enforcement of these ordinances saying that, under *Martin*, these ordinances effectively criminalized the status of homelessness in violation of the Punishment Clause. The district court also ruled that the fines imposed on homeless people under these ordinances violated the Eighth Amendment’s Excessive Fines Clause.

The City appealed the District Court’s injunction on Punishment Clause grounds to the Ninth Circuit (without addressing the Excessive Clause findings). The Ninth Circuit affirmed the injunction, at which point the City appealed to the U.S. Supreme Court.

The USSC majority took the position that the ordinances at issue in *Grants Pass* were distinguishable from *Robinson* because they criminalized conduct (i.e., sleeping, camping, using a blanket) rather than status (i.e., being homeless). Instead, the majority looked to *Powell v. Texas*, in which the Court found that a law criminalizing public intoxication was not the same as criminalizing someone’s status as an alcoholic. As the *Powell* court reasoned, it was the act of being drunk in public, not the compulsion to drink, that was being criminalized.

In analyzing cases under the Cruel and Unusual Punishment Clause, the majority found that fining people for sleeping in public was neither cruel (because it did not cause “terror, pain, disgrace” or other “atrocious” punishments) nor unusual (in that punishing such behavior was commonplace around the country). Therefore, prohibiting sleeping or camping in public did not violate the Cruel and Unusual Punishment Clause.

The Court reversed the Ninth Circuit ruling on the Cruel and Unusual Punishment Clause and remanded it “for further proceedings consistent with the opinion.”

Significance: Although the case provides no panacea to the issue of homelessness, it does allow municipalities to take a more active approach in removing the unhoused from public spaces.

III. CIVIL RIGHTS-FIRST AMENDMENT

A. *Lindke v. Freed*, 601 U.S. 187 (2024)

- **A public official who prevents someone from commenting on the official's social-media page engages in state action under 42 U.S.C. § 1983 only if the official both (1) possessed actual authority to speak on the state's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.**

James Freed created a private Facebook profile that was originally intended to connect with family and friends. Eventually, he grew too popular for Facebook's 5,000-friend limit on profiles. So Freed converted his profile to a "page," which has unlimited "followers" instead of friends and is public so that anyone may "follow" it. Freed designated the page category as "public figure."

In 2014, Freed was appointed city manager for Port Huron, Michigan, so he updated his Facebook page to reflect that new title. On his page, he shared both personal updates about himself and his family and professional updates, including directives and policies he initiated in his official capacity.

Kevin Lindke came across Freed's page and did not approve of how Freed was handling the pandemic. He posted criticism of Freed in response to Freed's Facebook page, and Freed deleted the comments and ultimately "blocked" Lindke.

Lindke sued Freed under 42 U.S.C. § 1983 for violating his First Amendment rights by deleting his comments and blocking him. The district court granted summary judgment to Freed, and the U.S. Court of Appeals for the Sixth Circuit affirmed.

In a unanimous opinion, the Court held that for section 1983 to apply to a city manager, the state action doctrine required that the city manager both had actual authority to speak on the behalf of the state, and that he purported to exercise that authority.

"The distinction between private conduct and state action turns on substance, not labels: private parties can act with the authority of the state, and state officials have private lives and their own constitutional rights." *Lindke v. Freed*, 601 U.S. 187, 197 (2024). The fact that Freed's page has government information does not necessarily mean it is an official conduit of state authority. For the actions of a private person to be covered by section 1983, the state has to be responsible for the person's conduct. Because the Sixth Circuit did not apply this test, the Court vacated and remanded.

Significance: While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights, and by excluding from liability acts of officers in the ambit of their personal pursuits, the state-action requirement of § 1983 protects a robust sphere of individual liberty for those who serve as public officials or employees.

B. *Gonzalez v. Trevino*, 602 U.S. 653 (2024)

Sylvia Gonzalez, a resident of Castle Hills, Texas, was elected to the city council in 2019. During her campaign, she learned of widespread dissatisfaction with the current city

manager. After taking office, she organized a nonbinding petition calling for the manager's removal. The petition was presented at a contentious council meeting, after which Mayor Edward Trevino questioned Gonzalez about the petition's location, found in her binder. Two days later, Trevino initiated a criminal complaint against Gonzalez for allegedly stealing the petition. Despite an atypical legal process involving Police Chief John Siemens and special detective Alex Wright, Gonzalez was arrested and spent a night in jail. She is no longer on the council and has refrained from public political activity.

Gonzalez sued Trevino, Siemens, Wright, and the city (collectively, the Defendants) for violating her First and Fourteenth Amendment rights. She argued that the arrest was in retaliation for engaging in conduct protected by the First Amendment, but she conceded that there was probable cause for the arrest. In support of her retaliation claim, she cited a decade-long review of misdemeanor and felony data in Bexar County that showed no similar cases.

The Defendants moved to dismiss her lawsuit on grounds of the independent-intermediary doctrine and qualified immunity, but the district court allowed Gonzalez's claims to proceed. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed, finding that the outcome was controlled by the U.S. Supreme Court's decision in *Nieves v. Bartlett*, holding that, in general, the existence of probable cause will defeat a retaliatory arrest claim. The Fifth Circuit noted that Gonzalez's facts did not trigger the narrow exception recognized in *Nieves*, under which a plaintiff need not plead lack of probable cause "where officers have probable cause to make arrests, but typically exercise their discretion not to do so."

In its holding, the USSC stated that requiring petitioner Sylvia Gonzalez to provide specific comparator evidence to support her retaliatory arrest claim, the Fifth Circuit did not properly apply the principles of *Nieves v. Bartlett*, 587 U. S. 391 (2019). The only express limit the Court described in *Nieves* was that the evidence a plaintiff presents must be objective.

Justice Samuel Alito concurred with the Court's decision but wrote separately to provide additional guidance on the scope of the *Nieves* exception, emphasizing that it is a narrow exception to the no-probable-cause requirement for retaliatory arrest claims and that the rule applies to all such claims, not just those involving split-second decisions.

Justice Brett Kavanaugh concurred with the per curiam opinion but argued that Gonzalez's case does not actually involve the *Nieves* exception, as her claim is about probable cause regarding her mental state rather than a conduct-based comparison, making the Court's grant of certiorari misplaced.

Justice Ketanji Brown Jackson, joined by Justice Sonia Sotomayor, concurred with the per curiam opinion but emphasized that plaintiffs can use various types of objective evidence beyond surveys to satisfy the *Nieves* exception, including unusual arrest procedures or indications of retaliatory motives in arrest documents.

Justice Clarence Thomas authored a dissenting opinion, arguing that plaintiffs bringing First Amendment retaliatory-arrest claims under § 1983 should be required to prove a lack of probable cause. He asserted that the common-law torts most analogous to retaliatory-

arrest claims (false imprisonment, malicious arrest, and malicious prosecution) all required proving absence of probable cause. Thus he rejects the abuse-of-process analogy and criticized the Court for expanding the Nieves exception, asserting that there is no historical basis for this exception and that the Court should not craft § 1983 rules as a matter of policy.

Significance: The decision means that more plaintiffs may be able to bring a retaliatory arrest claim under the Nieves exception by utilizing any form of objective evidence.

IV. LAND USE

A. *Scheetz v. County of El Dorado*, 601 U.S. 267 (2024)

- **The Fifth Amendment’s takings clause does not distinguish between legislative and administrative land-use permit conditions.**

The County of El Dorado, California, has a Traffic Impact Mitigation (TIM) Fee Program that imposes a traffic-impact fee on any property owner applying for a building permit. The fee consists of two components: the “Highway 50 Component” and the “Local Road Component,” and is determined by the geographic zone in which the project is located and the type of construction proposed. The fee is mandatory regardless of the actual impact the project may have on existing or future roads. The TIM Fee Program stipulates that new developments bear the full cost of road construction and widening, even though these roads are used and benefitted from by existing residents and non-residents alike. In 2012, the County Board passed a resolution establishing new TIM Fee rates, which were subsequently applied to George Sheetz’s project.

Sheetz applied for a building permit in July 2016 to construct a 1,854-square-foot manufactured house for his family. The County required him to pay \$23,420 in traffic-mitigation fees based on the type and location of his project, even though no individualized assessment was made to correlate the fee with the project’s actual impact on local or state roads. Sheetz paid the fee under protest and later filed a legal action against the County, alleging the fee was an unconstitutional condition under the Nollan and Dolan standards and seeking a refund of the fee paid.

Under the unconstitutional-conditions doctrine, “the government may not deny a benefit to a person because he exercises a constitutional right.” The U.S. Supreme Court in *Nollan v. Cal. Coastal Comm’n* (1987) and *Dolan v. City of Tigard* (1994) recognized that land-use permit applicants “are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits.” Under those cases, the government may condition approval of a land-use permit on the owner’s dedication of property to public use if the government can prove that an “essential nexus” and “rough proportionality” exist between the demanded property and the impacts of the owner’s project.

The superior court ruled against Sheetz, concluding that legislative exactions are exempt from Nollan/Dolan review. The California Court of Appeal affirmed.

The Fifth Amendment's Takings Clause does not distinguish between legislative and administrative land-use permit conditions. Justice Amy Coney Barrett authored the opinion for a unanimous Court, holding that the California Court of Appeal erred in holding that the Nollan/Dolan test does not apply to permit conditions imposed by legislatures.

The Takings Clause requires the government to provide just compensation when it takes private property for public use, and this applies equally to all branches of government. Neither the text of the Constitution, the historical understanding of eminent domain (the power of the government to take private property for public use), nor the Court's own precedents support exempting legislatures from the requirements of the *Nollan/Dolan* test. This test, which is based on the unconstitutional conditions doctrine, requires that permit conditions have an "essential nexus" to a legitimate government interest and be "roughly proportional" to the impact of the proposed development. These principles apply consistently across physical takings, regulatory takings, and the unconstitutional conditions doctrine, regardless of whether the condition is imposed by a legislature or an administrative agency.

Justice Sonia Sotomayor authored a concurring opinion, in which Justice Ketanji Brown Jackson joined, pointing out an antecedent question that was not raised in this case: whether the permit condition would be a compensable taking if imposed outside the permitting context.

Justice Neil Gorsuch authored a concurring opinion to argue that the Nollan/Dolan test cannot operate differently when an alleged taking affects a "class of properties" rather than "a particular development."

Justice Brett Kavanaugh authored a concurring opinion, in which Justices Kagan and Jackson joined, clarifying that the Court has not previously decided—and in this case explicitly declined to decide—whether "a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development."

Significance: Legislatively imposed conditions on development are not exempt from scrutiny under the Takings Clause. Following *Sheetz*, it is now clear that legislatively imposed conditions on development must engage in some form of nexus and proportionality analysis under *Nollan* and *Dolan*.

B. Center for Biological Diversity et al. v. County of San Benito, et al. (2024) 104 Cal.App.5th 22

- **The limitations period to initiate a CEQA challenge does not begin until a final Notice of Determination has been issued**

The case involves the proposed development of the Betabel Project by the McDowell Trust, which includes a large commercial roadside attraction in San Benito County. The County's Board of Supervisors certified an Environmental Impact Report (EIR) and approved a conditional use permit for the project. The Center for Biological Diversity and the Amah

Mutsun Tribal Band opposed the project, arguing that the EIR violated the California Environmental Quality Act (CEQA) and that the project approval violated state planning and zoning laws. They filed a petition for a writ of mandate to challenge the project approval.

The San Benito County Planning Commission initially approved the project and filed a Notice of Determination (NOD) on October 14, 2022. The Center and the Amah Mutsun Tribal Band appealed this decision to the County Board of Supervisors, which denied the appeals and filed a second NOD on November 10, 2022. The trial court sustained the McDowell Trust's demurrer, agreeing that the CEQA causes of action were time-barred because the petitions were filed more than 30 days after the first NOD.

The California Court of Appeal, Sixth Appellate District, reviewed the case and concluded that the trial court erred. The appellate court determined that the 30-day limitations period for filing a CEQA challenge began with the second NOD filed on November 10, 2022, following the final decision by the Board of Supervisors. The court emphasized that the Planning Commission's decision was not final due to the timely appeals. Therefore, the writ petitions filed on December 9, 2022, were within the 30-day period. The appellate court reversed the judgments of dismissal and remanded the case to the trial court with directions to overrule the demurrer.

Significance: The limitations period for a CEQA challenge does not begin until a final decision is made by the Planning Commission.

V. UTILITIES

A. *City of Gridley v. Superior Court*

The City of Gridley operates an electric utility and approved reduced electric rates for residential users in September 2020. Plaintiffs, residential ratepayers, challenged these rates, alleging they resulted in charges exceeding the reasonable cost of providing electric service, thus constituting a tax without voter approval in violation of article XIII C of the California Constitution. They also claimed the rates violated the state and federal takings clauses under the unconstitutional conditions doctrine. Plaintiffs sought a writ of mandate and class action complaint, alleging the City set rates higher than necessary and transferred excess revenues to its general fund.

The Superior Court of Butte County denied the City's motion for summary judgment, finding triable issues of fact regarding whether the rates resulted in excessive charges and whether plaintiffs had a property interest in continued electric service. The court rejected the City's argument that article XIII C was inapplicable because the City did not impose, extend, or increase a tax when it approved reduced rates. The court also found that the unconstitutional conditions doctrine could apply to plaintiffs' takings claim.

The California Court of Appeal, Third Appellate District, reviewed the case and concluded that the City was entitled to relief. The court found article XIII C inapplicable

because the City did not impose, extend, or increase any tax by reducing its electric rates. The court also found the unconstitutional conditions doctrine inapplicable, as it applies only in the land-use permitting context, not to user fees like the electric rates in question. Consequently, the court directed the trial court to set aside its order denying the City's motion for summary judgment and to enter a new order granting the motion. The City's motion for summary judgment was granted, and the stay of proceedings in the trial court was vacated.

Significance: A reduction in utility rates do not require voter approval.

VI. EMINENT DOMAIN

A. City of Ontario v. We Buy Houses Any Condition, (2024) 103 Cal.App.5th 1212

- **Under Eminent Domain, a public entity must identify a specific project supporting the condemnation**

The City of Ontario filed an eminent domain action to acquire properties owned by We Buy Houses Any Condition, LLC, located near the Ontario International Airport. The City argued that the properties did not conform to land use requirements and suffered from airport-related impacts and blight. The City held a public hearing and adopted a resolution of necessity to commence eminent domain proceedings, citing the mitigation of airport impacts and elimination of blight as public uses. However, the resolution did not describe any specific proposed project.

The Superior Court of San Bernardino County granted summary judgment in favor of We Buy Houses, finding that the City had not articulated a proposed project as required to exercise its power of eminent domain. The court concluded that the City's resolution of necessity was insufficient because it did not describe a specific project, which is necessary to determine public interest, necessity, and compatibility with the greatest public good and least private injury. The court also granted We Buy Houses's request for attorney fees, making certain reductions to the requested amounts.

The Court of Appeal, Fourth Appellate District, Division One, reviewed the case and affirmed the lower court's decision. The appellate court held that the City failed to identify a proposed project with sufficient specificity in its resolution of necessity, as required by the Eminent Domain Law. The court found the City's arguments unpersuasive and concluded that the trial court properly rejected the City's effort to exercise eminent domain. Additionally, the appellate court found no abuse of discretion in the trial court's award of attorney fees to We Buy Houses, affirming the fee award.

Significance: A public entity must provide specific information as to what it intends to do with condemned property.

VII. MANDATORY DUTY

A. Danielson v. County of Humboldt (2024) 103 Cal.App.5th 1

- **County dog control ordinances did not create mandatory duty and the County and its officer were thereby immune from suit.**

The plaintiff, Candis Danielson, was seriously injured by dogs owned by Donald Mehrstens. She filed a lawsuit against several parties, including Mehrstens and the County of Humboldt. Danielson claimed that the County failed to discharge certain mandatory duties regarding dangerous and unvaccinated dogs under both state law and the Humboldt County Code, which she argued led to her injuries. The trial court sustained the County's demurrer without leave to amend, leading to Danielson's appeal.

The trial court found that the duties Danielson identified were not mandatory within the meaning of Government Code section 815.6, and therefore, the County was immune from liability as a matter of law. The court reasoned that even if the Humboldt County Code had created a mandatory duty to hold a potentially dangerous dog hearing, it was uncertain that the hearing would have resulted in the dog's destruction or quarantine. The court also concluded that the vaccination statutes created a mandatory duty to set up an impoundment system, but did not mandate the impound of any specific, unvaccinated animals.

The Court of Appeal of the State of California First Appellate District Division One affirmed the trial court's decision. The appellate court agreed that the duties identified by Danielson were not mandatory and that the County was immune from liability. The court also found that Danielson failed to identify any statute creating a mandatory duty which was breached by the County, and agreed with the trial court that her claim raised a serious question of causation.

Significance: Public entities are immune from liability for legislative action or discretionary law enforcement activity.



AI, HR, Policing, and Bias

Thursday, May 8, 2025

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The Legal Landscape of Artificial Intelligence in Modern Policing

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1 INTRODUCTION

Artificial intelligence (“AI”) focuses on creating machines capable of performing tasks that typically require human intelligence, such as learning, problem-solving, and decision-making. Ultimately, AI aims to develop machines that can reason, understand natural language, perceive their environment, and act autonomously to achieve defined goals. Introducing AI in policing can enhance efficiency and crime prevention but comes with the need to uphold constitutional rights and prevent discriminatory policies and practices.

Integrating AI into the operational framework of law enforcement agencies represents a transformative shift with the potential to revolutionize crime prevention, resource allocation, and investigative capabilities. Police departments are deploying AI technologies in various capacities, from predictive policing algorithms to target crime hotspots to facial recognition systems to identify suspects. Fueling this rapid adoption has been the allure of enhanced efficiency, data-driven decision-making, and the promise of safer communities.

However, this technological evolution is not without significant legal and ethical challenges. Deploying AI in such a sensitive domain intersects with fundamental constitutional rights. Existing legal frameworks, primarily designed for a pre-digital era, often struggle to adequately address the unique complexities of AI-driven surveillance, data collection, and automated decision-making.

Cities looking to integrate AI into their police department operation should carefully and critically evaluate existing legal frameworks, develop policies, and commit to ethical considerations to mitigate potential risks to civil liberties and ensure this technology is fairly and equitably applied.

2 EXISTING LEGAL FRAMEWORK AND ITS APPLICATION TO AI

Integrating AI into law enforcement practices necessitates carefully examining the existing legal framework to determine its applicability and adequacy in addressing the unique challenges posed by these technologies.

Constitutional Considerations

Fourth Amendment: Protecting Against Unreasonable Searches and Seizures: The Fourth Amendment safeguards individuals from unreasonable searches and seizures. Many AI-driven law enforcement tools significantly implicate this fundamental protection, particularly those involving surveillance and data collection. Several Supreme Court cases provide crucial context for understanding the Fourth Amendment's application in the digital age.

***Carpenter v. United States*, 585 U.S. 296 (2018):** In this landmark case, law enforcement's warrantless acquisition of a person's cell-site location records violated his Fourth Amendment right against unreasonable searches and seizures. The Supreme Court acknowledged that expectations of privacy in the digital age do not fit neatly into existing precedents. Still, tracking an individual's movements and location through extensive cell site records is far more intrusive than the precedents might have anticipated. The Court held narrowly that the government generally will need a warrant to access cell-site location information.

***United States v. Jones*, 565 U.S. 400 (2012):** The Supreme Court held that the police's warrantless placement of a GPS tracking device on a vehicle for an extended period constituted a search under the Fourth Amendment. The Court rejected the argument that there is no reasonable expectation of privacy in a person's movement on public thoroughfares. The unanimous opinion authored by Justice Scalia emphasized that the Fourth Amendment provided some protection for trespass onto personal property. Justice Sotomayor concurred, noting the Government violates a subjective expectation of privacy that society recognizes as reasonable, which is important in an era where physical intrusion is unnecessary to many forms of surveillance. Justice Alito concurred, asserting that the better analysis would be whether the intrusion violated the individual's reasonable expectations of privacy.

***Riley v. California*, 573 U.S. 373 (2014):** The Supreme Court unanimously held that a warrant (absent exigent circumstances) is generally required to search the digital contents of a cell phone seized during an arrest. The Court noted that mobile phones are minicomputers with the ability to store large volumes of pictures, emails, web search history, apps, text messages, and other personal information.

Implications for AI-Driven Surveillance: These cases raise questions about whether AI-driven surveillance technologies, which often involve collecting and analyzing vast amounts of digital data, must adhere to established warrant protocols. The "Time Machine" effect, where AI can analyze historical data to reveal patterns and insights that were previously unknowable, further complicates the Fourth Amendment analysis. Law enforcement agencies must carefully consider whether using AI to analyze large datasets retrospectively constitutes a search and whether a warrant is required for such analysis.

Privacy Considerations: The Center for a New American Security has described the privacy concerns of this emerging technology:

If you just walk down the street in Boston, in New York, in London, you are going to be recorded by many security cameras. Some of them [in] the possession of the local police force, most of them in possession of private companies who just have a security camera. So in society, we have really gotten used to the idea of being photographed constantly. What's new in facial recognition technology is that we're losing the anonymity that used to be associated with being recorded. So it's not just that you walk past a 7-Eleven, and the security camera notes that you're there. There's the possibility that the 7-Eleven will know that you specifically, as an individual, are there, and they know how many times you have passed by in the past few weeks. That's what's really changing in recent years is the ability to analyze this data and correlate it and draw insights from it. It really does raise a whole host of new privacy concerns.

(Peter O'Dowd, *As Facial Recognition Technology Booms, So Do Privacy Concerns* (Dec. 21, 2018) WBUR.)¹

Fourteenth Amendment Equal Protection Considerations: The Fourteenth Amendment guarantees all individuals equal protection under the law, prohibiting discrimination based on protected characteristics. This principle is particularly relevant to the police use of AI due to allegations of potential algorithmic bias.

Brown v. City of Oneonta, New York, 221 F.3d 329 (2d Cir. 2000): The Second Circuit found that police may stop and question members of a minority group without violating the Equal Protection Clause if they are doing so based upon a physical description given by a crime victim. However, the court could find that a racially neutral law or policy has a discriminatory intent and a disparate effect on a minority group.

In the AI context, if algorithms used in predictive policing or facial recognition lead to the disproportionate misidentification of protected classes, cities can expect Equal Protection Clause challenges, even if the algorithm itself was not designed with discriminatory intent.

AI Bias Studies and Mitigation Strategies: The National Institute of Standards and Technology (NIST) published a 2019 report analyzing the performance of 189 facial recognition algorithms. Many of these algorithms were between 10 and 100 times more likely to misidentify a Black or East Asian face than a white face. In some cases, American Indian faces were the most frequently misidentified. (Drew Harwell, *Federal study confirms racial bias of many facial-recognition systems, casts doubt on their expanding use*, WASH. POST, Dec. 19, 2019.)² However, others analyzing this report noted that "NIST found that, 'To the extent there are demographic differentials, they are much smaller,' pointing out error rates in verification-type algorithms are 'absolutely

¹ Found online at <https://www.wbur.org/hereandnow/2018/12/21/facial-recognition-privacy-concerns>.

² Found online at <https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use>.

low,’ generally below 1 percent and many below 0.5 percent.” Jane Parker, *What NIST Data Shows About Facial Recognition and Demographics*, Security Industry Association (2020).³

First Amendment: Preventing Chilling Effects on Free Speech: The First Amendment protects freedom of speech and association. The use of AI for surveillance, particularly of social media activity or protests, raises concerns about potentially chilling lawful expression.

Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449 (1958): The Supreme Court recognized the principle of associational privacy, protecting individuals from compelled disclosure of their group membership.

United States v. O’Brien, 391 U.S. 367 (1968): The Supreme Court established a test to determine whether governmental regulation involving symbolic speech was justified. The Court found a government regulation is sufficiently justified if (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (*Id.* at 376-77.)

AI monitoring of public spaces, protest activity, social media, and online platforms must be carefully tailored to avoid infringing on First Amendment rights.

Relevant Legislation

In addition to constitutional principles, several federal and state laws govern the collection, use, and disclosure of electronic information, which are highly relevant to the deployment of AI in law enforcement.

California Consumer Privacy Act (CCPA): On September 24, 2024, the Governor signed a bill that amended the California Consumer Privacy Act (CCPA) to specify that “personal information” includes “artificial intelligence systems that are capable of outputting personal information.” (AB 1008 “Personal Information and AI Systems” effective January 1, 2025, amending Civil Code 1798.140.) By expanding the definition of “personal information,” the bill extended privacy protections to large language models capable of collecting, storing, and disclosing such information.

Artificial Intelligence Training Data Transparency: On September 24, 2024, the Governor also signed AB 2013 which requires AI models to disclose the data used to train the AI model. (AB 2013 “Generative artificial intelligence: training data transparency” effective January 1, 2025, adding Civil Code 3110.)

³ Found online at <https://www.securityindustry.org/wp-content/uploads/2020/02/SIA-NIST-data-and-facial-recognition.pdf>.

Electronic Communications Privacy Act (ECPA): This federal law protects the privacy of electronic communications and sets forth specific requirements for obtaining warrants to access communications content. Police agencies must ensure that the AI system's access to and using this data complies with the ECPA.

For example, if AI intercepts communications protected by the ECPA without consent or a warrant, it could violate the ECPA.

Stored Communications Act (SCA): A part of ECPA, the SCA regulates access to stored electronic communications and transactional records held by third-party service providers. Police typically need a warrant or court order to compel providers to disclose such information.

For example, if an AI system used by police combs through a subject's email account without a search warrant, there would be SCA liability.

3 THE RISE OF AI IN POLICING: APPLICATIONS AND IMPLICATIONS

Integrating AI into law enforcement is driven by the promise of enhanced operational efficiency, improved decision-making capabilities, and a greater capacity for crime prevention. Proponents argue that AI tools can analyze vast datasets with speed and precision exceeding human capabilities, leading to more strategic resource allocation, more informed tactical decisions, and, ultimately, safer communities. However, deploying these emerging technologies also raises significant legal and ethical questions that demand careful consideration.

Examples of Emerging AI Technologies

Predictive policing (e.g., Geolitica): AI-based Predictive policing software uses data and algorithms to forecast criminal activity. By assigning risk scores to specific locations or times, these systems aim to guide police departments in strategically allocating resources like patrols to predicted high-risk areas for crime prevention. The New York Police Department tested predictive policing software as early as 2012. However, concerns exist regarding potential data and algorithm biases impacting fairness and accuracy. Some argue that predictive policing systems could threaten rights protected by the Fourth Amendment, which requires "reasonable suspicion" for detentions. (*See, e.g., Andrew Guthrie Ferguson, Predictive Policing and Reasonable Suspicion*, 62 EMORY L.J. 259 (2012).)

Facial recognition (e.g., Clearview AI): The legal battleground for facial recognition centers on privacy rights, the potential for mass surveillance, and the accuracy and fairness of the technology. This technology enables facial identification of individuals among large crowds and was used to identify many arrested during the January 6 Capitol attacks and the George Floyd protests. *See* FBI, Capitol Violence Images (found online at <https://perma.cc/8ZTC-TVHW>); *See, also*, United States Government Accountability Office, Facial Recognition Technology, GAO-21-518, at 17 (June 2021) (found online at <https://perma.cc/XT39-KV6D>).) However, opponents argue that continuously

scanning and identifying individuals implicates privacy considerations. Furthermore, there is a risk of misidentification. In June of 2024, Robert Williams, who was jailed for 30 hours, settled the first known lawsuit for false arrest resulting from facial recognition technology. (See *Williams v. City of Detroit*, Case No. 21-10827, ECF 73 (June 28, 2024).)

Advanced data analytics (e.g., Palantir Technologies): Police departments increasingly use big data analytics in their daily operations. (Sarah Brayne, *The Criminal Law and Law Enforcement Implications of Big Data*, 14 ANNU. REV. LAW SOC. SCI. 293 (2018)) While powerful for investigations, these tools raise concerns about the scope of data collection, how the data is being analyzed, and who has access to it.

AI drafting of police reports (e.g., Draft One): The use of AI to automate report writing offers potential efficiency gains. Technology exists to enable officers to get a head start on report writing by using AI to draft a report narrative using the officer's body-worn camera audio. The officer then reviews, edits, and signs off on the final report. However, legal questions arise regarding the accuracy and completeness of AI-generated reports, the potential for bias in the AI's language and focus, and the admissibility of such reports as evidence. Ensuring human oversight and accountability for the content of these reports will be crucial.

Integrating these AI technologies into law enforcement presents a complex web of potential benefits and significant legal challenges. As these tools become more sophisticated and widely adopted, police departments should ensure they are used in ways that are consistent with constitutional standards, promote fairness, and maintain public trust.

4 REAL-WORLD EXAMPLES AND THEIR LEGAL CONTEXT

The practical application of AI in policing is no longer a futuristic concept but a present reality, with various law enforcement agencies implementing these technologies. Examining specific examples provides crucial insight into the legal and ethical challenges that arise in real-world scenarios.

LAPD's use of Geolitica to allocate patrol resources efficiently: The Los Angeles Police Department's adoption of Geolitica (formerly PredPol) aimed to optimize the deployment of patrol officers by predicting when and where crimes were most likely to occur. While the intention was to enhance efficiency, this deployment has faced scrutiny regarding its potential to reinforce existing biases in policing. Critics argue that historical crime data, which forms the basis of these predictive models, may already reflect discriminatory policing patterns, leading the AI to target communities of color disproportionately. Some argue this raises Fourteenth Amendment Equal Protection Clause concerns regarding whether the technology leads to a disparate impact on particular racial or ethnic groups, even without explicit discriminatory intent.

FBI leveraging Palantir to disrupt human trafficking networks: The Federal Bureau of Investigation’s use of Palantir’s advanced data analytics platform to combat human trafficking showcases AI’s potential in complex investigations. By analyzing vast amounts of disparate data, including financial records, communication logs, and travel information, Palantir can help identify patterns and connections indicative of trafficking operations. Legal concerns could arise from the scope of the data collection and analysis.

Chicago PD’s Strategic Decision Support Centers integrating predictive analytics to reduce shootings: Due to high homicide rates, the Chicago Police Department claims to be the first police department in the nation to use real-time data analysis and predictive software in 2017. By dispatching patrols and social service teams to these areas to engage with at-risk individuals, homicide rates declined by 23% in the first year. (Spandan Kar, *Predictive Policing Examples and Case Studies*, IGNEA (Aug. 5, 2024).⁴ The legal considerations here involve the accuracy and reliability of the predictive models and the potential for them to misidentify individuals or communities as being at high risk.

NYPD’s use of ShotSpotter to detect gunfire and improve response times: The New York Police Department’s deployment of ShotSpotter, a technology that uses acoustic sensors to detect and locate gunfire, illustrates AI’s role in improving response times. While seemingly less controversial than predictive policing or facial recognition, legal questions can arise regarding the accuracy of the technology and its potential for false positives, which could lead to unwarranted police presence in certain areas. A 2024 audit found that “87 percent of the time, ShotSpotter is sending NYPD officers in response to loud noises that don’t turn out to be confirmed shootings.” (New York City Comptroller Press Release, *NYPD’s ShotSpotter Gunshot-Detection System Overwhelmingly Sends Officers to Locations Where No Confirmed Shooting Occurred, New Audit Uncovers*, June 20, 2024 (found online at <https://comptroller.nyc.gov/newsroom/nypds-shotspotter-gunshot-detection-system-overwhelmingly-sends-officers-to-locations-where-no-confirmed-shooting-occurred-new-audit-uncovers>).)

Florida’s use of Clearview AI to identify suspects in child exploitation cases: Florida’s use of Clearview AI to identify suspects in child exploitation cases highlights the potential of facial recognition technology in combating serious crimes. However, in 2024, Clearview AI settled an Illinois lawsuit alleging its collection of billions of online photographic faces violated the subjects’ privacy rights, a deal that attorneys estimate could be worth more than \$50 million. (Kathleen Foody, *Facial recognition startup Clearview AI settles privacy suit*, ASSOCIATED PRESS, June 21, 2024).⁵

⁴ Found online at <https://ignesa.com/insights/predictive-policing-example>.

⁵ Found online at <https://apnews.com/article/clearview-ai-facial-recognition-lawsuit-settlement-5a99ded04630a4e94af01f9f3adf1e29>.

London Police Department's live deployment of real-time facial recognition:

The London Metropolitan Police uses “live facial recognition” as a real-time deployment, comparing live camera feeds against a predetermined watchlist to locate people of interest, such as missing people or those with outstanding warrants. Faces are mapped by software. This dataset is then compared to the watchlist. Where an image is sufficiently similar to someone in its database, an alert is generated and sent to officers who speak to the person of interest. While initially used in small trials and public events like concerts and football matches, it will now be permanently installed for daily use in the summer of 2025 in a South London suburb. (Isiah Thomson, *UK's first permanent facial recognition cameras installed in South London*, The Register, Mar. 27, 2025.)⁶ However, legal challenges have been mounted based on privacy considerations and other UK law theories.

5 GENERATIVE AI: A NEW FRONTIER OF LEGAL CHALLENGES

Generative Artificial Intelligence represents a significant leap in AI capabilities, moving beyond analysis and prediction to creating novel content, including text, images, videos, and even audio. Examples like ChatGPT, DALL-E, and MidJourney have demonstrated the remarkable potential of these technologies. Potential uses for policing -- such as automated report writing, officer training scenarios, and digital forensics -- bring forth a unique set of legal and ethical dilemmas that law enforcement agencies must proactively address.

Potential for Misinformation: One challenge of generative AI is its capacity to create misinformation. The legal ramifications of relying on or disseminating such misinformation could compromise investigations. Police departments must develop protocols to verify the authenticity of any AI-generated information.

Authenticity Concerns (e.g., Admissibility of AI-Generated Evidence): Courtroom admissibility of AI-generated content is largely uncharted territory. Officers relying upon this evidence may lack the technical knowledge to sufficiently validate the foundation for the trustworthiness and admissibility of such evidence.

Ethical Dilemmas in Synthetic Evidence Creation: AI-generated synthetic evidence can be helpful if used ethically with strong safeguards. For example, AI can reconstruct crime scenes visually based on physical evidence, like bullet trajectories, GPS data, and forensics. It can also reconstruct partial data, such as blurry video footage, to better understand events. However, where AI-generated reconstructions are used in investigations or trials, there is a risk of misleading juries or judges, where reconstructions are perceived as “proof” rather than illustrative.

Misuse by Officers: Generative AI is susceptible to misuse, as the technologies could be used for non-legitimate purposes, such as generating false reports, creating misleading social media posts, or creating “deepfakes” for non-legitimate purposes. Departments need to adopt clear policies outlining permissible and prohibited uses and effective oversight mechanisms to mitigate these risks.

⁶ Found online at https://www.theregister.com/2025/03/27/uk_facial_recognition.

Lack of Public Trust: Transparency regarding the use of generative AI will be crucial for maintaining public confidence.

6 POTENTIAL LIABILITY ISSUES

The increasing reliance on AI in law enforcement introduces significant liability risks for both individual officers and the agencies employing these technologies. Errors, biases, or misapplications of AI can lead to wrongful arrests, civil rights violations, and a loss of public trust.

Wrongful Arrests Based on Faulty AI: Inaccurate AI identifications can lead to the detention and arrest of innocent individuals. It has been reported that there have been at least eight confirmed cases of misidentification due to facial recognition technology. (Douglas MacMillan, David Ovalle and Aaron Schaffer, *Arrested by AI: Police ignore standards after facial recognition matches*, WASH. POST, June 13, 2025.)⁷

Discriminatory Policing Practices: If AI algorithms used in predictive policing are found to have a discriminatory impact regarding disproportionate stops, searches, or surveillance of particular communities, individuals may bring Equal Protection Clause claims. Agencies may face *Monell* claims under 42 U.S.C. Section 1983 for failing to mitigate or take corrective action for known biases.

Privacy Violations: The use of AI for mass surveillance, facial recognition, or the analysis of vast amounts of personal data can lead to claims of privacy violations under the Fourth Amendment.

Beyond civil lawsuits, law enforcement agencies can face administrative consequences for the improper use of AI:

Lack of Training and Oversight: Departments are responsible for adequately training their officers on the proper use of AI tools and implementing effective oversight mechanisms to prevent misuse and errors. Departments face accountability for lack of training and oversight.

Failure to Implement Clear Operational Guidelines: The absence of clear and well-defined policies governing the use of AI can create ambiguity and increase the risk of misuse or errors.

Ethical Lapses: Police Departments must establish safeguards to prevent the unethical use of AI.

Thorough training and comprehensive policies are essential for mitigating liability risks associated with AI in policing. Training should cover the technical aspects of AI tools and their limitations, potential biases, and relevant legal considerations. Clear policies should define permissible use cases, establish data handling and analysis protocols, mandate regular audits for bias and accuracy, and outline accountability mechanisms for misuse.

⁷ Found online at <https://www.washingtonpost.com/business/interactive/2025/police-artificial-intelligence-facial-recognition>.

7 ACCOUNTABILITY, OVERSIGHT, AND POLICY DEVELOPMENT

The unique nature of AI requires a thoughtful development of proactive policies.

Department Responsibilities

Police departments are responsible for ensuring the fair and appropriate use of AI technologies. This encompasses several key aspects:

Ethical Responsibility: Police departments must ensure that AI usage aligns with principles of fairness, equity, and respect for civil liberties. Engaging in ongoing ethical discussions and seeking input from community stakeholders are means of deploying AI responsibly to enhance public safety without disproportionately infringing on individual rights.

Maintaining Human Oversight: Critical decisions with legal or constitutional implications must not be solely based on AI outputs but are subject to human review and judgment. Policies should establish clear protocols to define the role of AI in the decision-making process and ensure human accountability for outcomes.

Training: Departments should employ diverse training data to prevent discriminatory outcomes. Topics should include limitations, biases, and proper usage.

Auditing: Departments should implement regular auditing of AI systems to ensure that there are no racial, gender, or socioeconomic biases. Departments should maintain audit logs.

Public Disclosure of AI System Use and Safeguards: Public disclosure can help build trust. Agencies should consider disclosing the types of AI systems used, their intended purposes, capabilities, and limitations, and the safeguards to prevent misuse or errors.

Legal Compliance: Working with the City's legal teams can ensure AI technology aligns with constitutional and statutory mandates.

Developing AI Policies

In the previous decade, some police agencies implemented body-worn camera programs without comprehensive policies governing their use. One legal scholar wrote, “[M]any police departments have adopted body cameras without detailed policies on their use, public access, and data storage. Those body camera policies that do exist can vary considerably.” Elizabeth E. Joh, *Policing Police Robots*, 64 UCLA L. REV. DISCOURSE 516 (2016). Police departments should prepare AI policies to reduce legal risks and build public trust. By clearly defining acceptable uses, establishing safeguards, and outlining accountability mechanisms, agencies can mitigate the potential for constitutional violations, misuse, and erosion of public confidence.

Key Components: An effective AI policy should include several key components:

Clear Definition of AI Use Cases: The policy should explicitly define how AI technologies are authorized for use within the department, outlining the purpose and scope of each application.

Data Governance and Security: Establishing protocols for the collection, storage, use, and retention of data used by AI systems is crucial, ensuring compliance with privacy laws and security best practices.

Transparency: To the extent feasible, police departments should consider releasing information about the algorithms used, their logic, and how they arrive at their outputs.

Human Oversight and Accountability: Clearly defining the role of police officers and supervisors in using AI.

Training Requirements: Mandating comprehensive training for officers and staff on the proper and ethical use of AI tools.

Auditing and Review Processes: Establishing regular audits of AI technologies and updating policies and new technologies and legal standards evolve.

Suggestions for Policy Implementation

Involving Stakeholders: Engaging legal experts, technologists, and community leaders in developing AI policies is advisable.

Develop Use Provisions: Policies should clearly indicate when AI technology is permitted and prohibited.

Routine Reviews: Police departments should regularly review and update policies to reflect advancements in AI technology, changes in legal precedent, and evolving community expectations.

Transparency: Making the AI policy publicly available and communicating clearly about the agency's use of AI can foster trust and accountability.

Lexipol specializes in developing policies for police departments. A 2018 survey showed that 83 percent of California's 200 largest law enforcement agencies used Lexipol policies. (Ingrid V. Eagly and Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 958 (2018).) Lexipol has released a policy on generative artificial intelligence use for law enforcement. That policy communicates the benefits and risks of GenAI systems for law enforcement use, designates specific responsibilities to an AI coordinator, outlines the limitations for the use of AI systems and generated content, explains when protected information may be put into AI systems, and outlines the restrictions on the use of AI systems and information.⁸

⁸ Found online at https://www.lexipol.com/wp-content/uploads/2024/05/NEW_Global_National_Generative_Artificial_Intelligence_Use_Policy.pdf.

8 CONCLUSION

AI has enhanced productivity in many fields, including healthcare, education, and scientific research. While the benefits are evident, AI users must thoughtfully consider the legal implications of its use. Police departments are using AI for various purposes, such as identifying suspects, finding stolen vehicles, reconstructing crime scenes, and detecting patterns in criminal activity. The deployment of AI in policing requires balancing enhancing public safety with safeguarding fundamental constitutional rights.



Labor and Employment Litigation Update

Thursday, May 8, 2025

Elizabeth Tom Arce, Partner, Liebert Cassidy Whitmore

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Labor and Employment Litigation Update

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Labor and Employment Litigation Update Spring 2025

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I. INTRODUCTION

In the last several months, California and Federal appellate courts, the Public Employment Relations Board, and the Legislature have decided cases and implemented new laws that will significantly impact labor and employment law. Though there have been many important decisions since last fall, several are especially worthy of highlighting in this update as they are particularly impactful to cities as employers.

The recent case decisions and legislation discussed in this paper cover a wide range of employment issues that city employers commonly face. Amongst these decisions we saw several cases brought by employees alleging disability-related claims in violations of the Fair Employment and Housing Act. Further, the U.S. Supreme Court provided guidance on the applicable standard for employers seeking to demonstrate that an employee is exempt from overtime pay under the Fair Labor Standards Act (FLSA). We also saw cases from the Ninth Circuit analyzing FLSA exemptions for types of employees. In addition, the California legislature passed bills prohibiting employers from requiring employees to attend political meetings, and other bills allowing employees to file discrimination claims based on a combination of multiple protected traits.

The next section includes cases and laws with key developments in labor and employment law. We broke down these cases into the following six categories: (1) New Legislation; (2) Employee Discipline; (3) Labor Relations; (4) Retirement; (5) Disability and the Interactive Process; and (6) Fair Labor Standards Act.

II. CASES AND LEGISLATION

Chapter 1: Labor and Employment Related Legislation

A. SB 1137 – Employees May Bring Intersectional Claims for Relief from Discrimination

Under SB 1137, employees can seek relief in civil rights cases against an employer when the employer discriminates against the employee based on *two or more* protected traits. This law expands the existing provisions of the California Fair Employment and Housing Act (FEHA), by allowing remedies to alleged discrimination not just because of one protected trait, but also because of the combination of multiple protected bases.

B. SB 1340 – Local Entities Authorized to Enforce California Civil Rights Law

SB requires state contractors and subcontractors to report data on the demographic information of their employees to the California Civil Rights Department (CRD).

The bill also authorizes local entities to enforce the employment components of California's civil rights laws. The new enforcement process is as follows: the complainant must file their complaint first with the CRD, and then the CRD chooses whether to pursue the action. The CRD can then issue a right to sue letter and a right to seek a local agency enforcement letter. If the complainant pursues local enforcement, and the local agency chooses not to pursue the action, then the worker can go to court. This new process is designed to alleviate the voluminous case load of discrimination claims that CRD receives by ensuring that local agencies have the first choice as to whether to pursue the action.

Lastly, this law requires the Department of Industrial Relations (DIR) to establish a Public Infrastructure Taskforce (Taskforce) which consists of representatives from entities that engage in public infrastructure contracting and procurement projects including state agencies, local governments and agencies, contractors, unions, community colleges, job and worker centers, Tribal Employment Rights Offices, and women in Apprenticeship and Nontraditional Occupations grantees. The Taskforce is required to regularly conduct meetings to make recommendations regarding recruiting and removing barriers to employment in public infrastructure projects for underrepresented communities.

C. SB 399 – Employers Prohibited from Mandating Employee Attendance at Religious or Political Meetings

SB 399 prohibits employers from subjecting employees to any adverse action because the employee declines to attend an employment-sponsored meeting, the purpose of which is to communicate the employer's opinion about religious or political matters. The law requires that an employee who refuses to attend the meeting as described to continue to be paid. The law also imposes a civil penalty of \$500 on any employer who violates its provisions. Additionally, the law authorizes the Labor Commissioner to enforce the law's provisions and creates a private right of action for an employee who has suffered as a result of a violation of the bill's provisions.

D. SB 1100 – Employers May Not Discriminate on the Basis of Possession of a Driver’s License

SB 1100 expands the definition of discrimination under the FEHA to include discrimination against an employee based on not possessing a driver's license. The law makes it an unlawful employment practice to require and include in employment materials that an applicant must have a driver's license, unless the employer reasonably expects the duties of the position to require driving, and the employer reasonably believes that an alternative form of transportation would not be comparable in travel time or cost to the employer.

E. AB 2499 – Expanded Protections for Family Members of Crime Victims

AB 2499 expands on existing law that allows employees who are victims of crime or abuse to take time off work for specified reasons, including serving on a jury, appearing as a witness in a judicial proceeding, and obtaining or attempting to obtain relief for their injuries.

The law expands on previous law by prohibiting an employer with 25 or more full time employees from discharging, discriminating against, or retaliating against an employee who is a victim or *an employee who has a family member who is a victim* for taking time off work for prescribed purposes relating to a “qualifying act of violence.” A “family member” includes a parent or guardian, sibling, grandparent, or other relative living in the household of the victim. A “qualifying act of violence” constitutes domestic violence, stalking, or any act that includes brandishing a firearm or other dangerous weapon, a perceived or actual threat of force to cause physical injury or death, or an act which causes physical injury or death.

For an unscheduled absence, an employer can seek certification of the leave in the form of a document from a licensed medical professional, a court order separating employee or employee’s family member from the perpetrator of violence, a police report, or any other form of document that reasonably verifies that the violence occurred.

Chapter 2: Employee Discipline

Sunline Transit Agency, PERB Decision No 2928-M (2024) – Employee’s Critique of Employer is Protected Activity

Motor Coach Operator Anthony Garcia (Garcia) filed an unfair practice charge with the Public Employment Relations Board (PERB) against his employer SunLine Transit Agency. Garcia argued that SunLine violated the Meyers-Milias-Brown Act (MMBA) by retaliating against him when it: (1) issued Garcia notice of an impending written warning in January 2022 for engaging in protected activity; (2) placed Garcia on paid administrative leave pending investigation in May 2022; and (3) fired Garcia in September 2022. After a formal hearing, the ALJ sustained the first two claims and dismissed the third claim.

SunLine filed exceptions challenging the ALJ’s ruling in Garcia’s favor on the first two claims. In reviewing the ALJ's decision, the Public Employee Relations Board (PERB) rejected SunLine’s exception challenging its liability for issuing Garcia a written warning, but sustained

SunLine's exception regarding its decision to place Garcia on paid administrative leave pending an initial investigation.

SunLine is a public agency which employs bus drivers, who provide transit services in Riverside County. Garcia worked as a bus driver in SunLine's fixed route division for more than 26 years. Garcia had an unblemished employment record.

SunLine's employment handbook included provisions forbidding employees from posting social media content outside of SunLine's facilities, without a disclaimer indicating that the views posted are the views of the employee, rather than SunLine's own views.

Starting in 2021, Garcia began publicizing issues he had with SunLine, including commentary and complaints about working conditions, health and safety issues, and alleged poor management on a YouTube channel.

In January 2022, SunLine completed an internal investigation of Garcia, in which the investigator opined that Garcia's YouTube videos violated SunLine's social media policy. After receiving the investigator's report, SunLine's Human Resources personnel concluded that Garcia violated SunLine's policies by posting videos while in uniform and failing to mention that he was offering his own opinions rather than SunLine's views.

On January 19, 2022, Garcia received written notice of the investigation's outcome. The letter advised Garcia that he had violated SunLine's social media policies, but it did not indicate how Garcia had violated the policies. On January 26, SunLine issued Garcia a Notice of Impending Discipline (NID) stating that it proposed to issue him a written warning. The NID also notified Garcia that he had a pre-disciplinary right to challenge the proposed discipline. It appeared from the record that after the January 31 pre-disciplinary hearing, Garcia pursued a post-disciplinary grievance regarding the written warning which remained pending through the next series of events leading up to Garcia's termination.

Garcia briefly paused posting YouTube content based on SunLine's warnings. However, in April, three months after the issuance of the NID, Garcia resumed posting YouTube videos critiquing SunLine. Garcia posted approximately 70 videos during his employment. Garcia commonly collaborated with another employee named Joseph Raeck, and the two of them created a YouTube channel called "J&A Voices for Change." On May 18, SunLine informed Garcia that he was the subject of a "confidential personnel investigation" concerning whether statements made on the "J&A Voices for Change" violated company policies.

On August 23, SunLine provided Garcia with a second NID based upon Garcia's continued posting of social media videos containing recklessly false statements, among other employment violations. On September 7, after Garcia exhausted his pre-disciplinary appeal right, SunLine finalized Garcia's termination.

PERB affirmed the ALJ's finding that Garcia's activity was protected, and that SunLine violated the MMBA by issuing Garcia a written warning. Employees normally have a statutory right to criticize working conditions, management, or union leadership, if the criticism relates to

advancing employee interests or is a logical extension of group activity. Additionally, such speech does not lose protection merely because it is intemperate or engenders ill feelings and strong responses, unless the employer meets its burden to prove such speech was maliciously dishonest. PERB also determined Garcia's speech did not rise to the level of constituting reckless and flagrant disregard for the truth. In determining whether speech is flagrant, PERB considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of what occurred; and (4) the extent to which the speech or conduct at issue can fairly be said to have been provoked by the employer. Where speech about workplace issues occurs off duty, it is normally more difficult for the employer to show that it loses protection. Each of Garcia's videos occurred off-duty. Thus, PERB held that the issuance of the written warning violated the MMBA.

PERB also held SunLine did not act improperly in placing Garcia on paid leave pending the resolution of the investigation. PERB reviewed whether Garcia's protected activity was a substantial or motivating cause for SunLine's decision to investigate him. PERB found that the Garcia's alleged misconduct was sufficient to warrant beginning an investigation, even though the investigation involved off-duty social media activity that related to workplace concerns. SunLine thus did not violate the MMBA by placing Garcia on paid administrative leave pending investigation.

PERB did not issue a ruling with respect to Garcia's third claim, alleging that SunLine violated the MMBA by terminating him, because neither SunLine nor Garcia challenged the ALJ's ruling with respect to that claim. Instead, PERB incorporated the dismissal of Garcia's third claim into its decision.

This ruling demonstrates employers cannot discipline employees just because they criticize the organization or management in social media unless the speech is maliciously false or disruptive to operations. Also, employers should review social media policies to avoid infringing on employee rights.

Bedard v. City of Los Angeles, 106 Cal.App.5th 442, 458 (2024) – A Public Employee's Termination for Non-Compliance with the COVID-19 Vaccine is Lawful

In *Bedard v. County of Los Angeles*, the Court of Appeals affirmed the finding of the trial court, holding that the Los Angeles Police Department Board of Rights (the Board) did not abuse its discretion in finding that a police officer was properly terminated for refusing to comply with the COVID-19 vaccination mandate.

In March 2020, the City of Los Angeles declared an emergency due to the spread of COVID-19. Subsequently, the City Council passed an ordinance which required all City employees to be vaccinated against COVID-19 or request a religious or medical exemption. Exempted employees were subject to weekly testing during work hours at no cost. The ordinance articulated that the City's goal is to have a vaccinated workforce: "As such, employees will not have the option to 'opt out' of getting vaccinated . . . Only those with a medical or religious exemption and who are required to regularly report to a work location are eligible for weekly testing." *Bedard v. City of Los Angeles*, 106 Cal. App. 5th at 446.

LAPD negotiated with the Los Angeles Police Protective League (LAPPL) over the consequences for failing to abide by the Ordinance. After negotiations failed, LAPD issued a “Last, Best and Final Offer” (LBFO). The LBFO stated the City would issue a notice to its unvaccinated, nonexempt employees, instructing each employee to either be vaccinated, or be found to be exempt from the vaccination requirement by December 18, 2021. Employees who did not timely comply would be subject to “corrective action.” An employee terminated for noncompliance could seek “reemployment”, subject to the COVID-19 vaccination requirements. Or, an employee could resign or retire, and be eligible for rehire after the vaccination order was lifted.

The mayor issued a memo directing all departments to implement the LBFO and issue a notice to every unvaccinated employee to acknowledge the LBFO deadlines. Employees were required to sign the Notice of Mandatory COVID-19 Vaccination Policy Requirements (Notice), within 24 to 48 hours. Employees who refused to sign the notice were to “be placed off duty without pay,” and sworn employees were to “be subject to applicable Board of Rights proceedings.”

The Plaintiff, Jeannine Bedard, refused to sign the City’s notice enforcing the mandate, and she did not indicate that she was exempt from the mandate for religious or medical reasons. Instead, Bedard merely argued that her daughter had an adverse reaction to the vaccine, and due to “personal reasons” she would not get vaccinated. *Bedard v. City of Los Angeles*, 106 Cal. App. 5th at 456.

Due to Bedard's non-compliance, the Chief of Police sought to terminate her employment as a Los Angeles Police Department (LAPD) officer. The LAPD Board of Rights (the Board) reviewed the Chief's proposed discipline, found Bedard guilty of failing to comply with conditions of employment, and upheld the decision to discharge Bedard. The Board stated that the ordinance had the “full force and effect of the law,” and required all City employees to obtain a COVID-19 vaccine. *Id.* at 450. Since Bedard did not apply for a vaccination exemption and did not work remotely, Bedard was obliged to become vaccinated or seek an exemption and regular testing, which she did not do. The Board also found that the City failed to provide Bedard with sufficient time to respond to the charges in violation of *Skelly v. State Personnel Board* and awarded her backpay but not reinstatement.

Bedard filed a petition in the trial court seeking reinstatement and backpay. Bedard argued that the Board's decision was an abuse of discretion. An abuse of discretion is established if the public agency “has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” *Id.* at 453. A board's determination will rarely be disturbed unless the petitioner can demonstrate “jurisdictional excess, a serious error of law, or an abuse of discretion on the facts.” *Id.* at 454.

On appeal, the Court affirmed the lower court's ruling, concluding that the Board did not abuse its discretion in finding that termination was the appropriate remedy for Bedard’s failure to comply with the vaccination policy. Bedard’s non-compliance put her coworkers and the public at risk of harm. The Court also rejected an argument that Bedard raised for the first time on appeal — that her termination was improper because it was based solely on her refusal to sign

the Notice, which she claimed was an illegal contract. The Court found that her termination was based on both her failure to sign the Notice and her refusal to comply with vaccine requirements. The Court also found that the penalty of termination was within the Board's discretion. Finally, the Appellate Court held that the only remedy for the violation of the officer's right to have 30 days to respond to the charges was backpay, and reinstatement was not required. *Id.* at 442.

This ruling clarifies that when a public agency lawfully imposes a valid condition of employment, such as a condition intended to promote the health and security of its employees, an employer may impose discipline when an employee fails to comply with the condition of employment without providing a valid excuse.

Quesada v. County of Los Angeles, 106 Cal. App. 5th 880, 880 (2024) – Burden Shifting for Discrimination Claims is Only Applicable in Limited Contexts

In *Quesada v. County of LA*, the Court of Appeal determined that a deputy sheriff, bringing a claim for an improper denial of a promotion, was not entitled to shift his burden of proof. Instead, the plaintiff bore the burden of establishing the elements of his claim by a preponderance of the evidence.

The plaintiff, Marlon Quesada, was employed as a deputy sheriff for the Los Angeles County Sheriff's Department (the Department) since 1995. Over the course of his career, he was suspended for misconduct twice.

In 2015, the Department launched an administrative investigation into Quesada's alleged misconduct. The investigation concerned allegations that Quesada fraternized with someone transporting money or drugs. During the investigation, Quesada was put on administrative leave.

In 2017, the Department notified Quesada of its intent to discharge him. In turn, Quesada filed a petition to halt the Department from taking any further action with respect to his employment, indicating that the Department sent its notice 91 days after the statute of limitations expired. The trial court found in favor of Quesada and enjoined the Department from pursuing disciplinary action relating to the investigation. The Department reinstated Quesada's employment as a deputy sheriff later that same year. Further, the Department labeled the investigation as "inactive" which means that Quesada was neither found guilty or not guilty of the misconduct.

Upon reinstatement, Quesada was assigned to fleet and communications duties. In 2017, Quesada applied for promotion into a position as a sergeant. In determining whether or not to award a promotion, the Department evaluated a variety of factors, including the score on a promotional exam, along with "performance, personal characteristics, and other work-related criteria and merit factors." *Quesada v. County of Los Angeles*, 106 Cal. App. 5th at 885. Quesada took the sergeant's exam and placed in the 80th percentile, but the panel evaluating promotions declined to award him a promotion.

Quesada took the promotional exam again in 2019, this time scoring in the 90th percentile. In reviewing Quesada's application, the panel of evaluators noted that Quesada was

"generally a mediocre employee" who "did not have the best work ethic." *Id.* at 886. One evaluator noted that he did not consider the 2017 investigation in reviewing Quesada's application, commenting that "if the case has not been proven, I don't consider it." *Id.*

Quesada filed a second petition in March 2021 requesting that the Court compel the Department to promote him to sergeant and to give him back pay plus interest. The complaint alleged that the Department used the investigation against him in its review process. Quesada also requested that the trial court apply a burden-shifting test in evaluating the evidence, which is typically used in race discrimination claims. Under the burden-shifting test, as adopted in *McDonnell Douglas Corp. v. Green*, once the plaintiff sufficiently sets forth a claim of racial discrimination, the burden is on the defendant to articulate "some legitimate, non-discriminatory reason for the plaintiff's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973).

On appeal, the Court affirmed the ruling of the trial court, finding that "the concerns that motivated the *McDonnell Douglas* rule are absent here." *Quesada v. County of Los Angeles*, 106 Cal. App. 5th at 889. Rather than framing himself as a member of a historically oppressed and disfavored class, Quesada framed himself as a law enforcement officer seeking a supervisory promotion.

The *Quesada* ruling demonstrates that burden shifting is only appropriate in limited contexts. The test is not applicable when a generally aggrieved employee does not argue they were discriminated against because of a protected trait.

Ramirez v. City of Indio, 105 Cal.App.5th 939 (2024) – Unambiguous Language in an MOU Authorizes Termination Decisions

In *Ramirez v. City of Indio*, the Plaintiff appealed a city manager's decision to terminate his employment as a police officer at the conclusion of the appeals procedure set forth in a memorandum of understanding (MOU) between the city and a police officers' association. While an arbitrator had recommended the reinstatement of the officer, the city manager upheld the police chief's decision to terminate plaintiff. The MOU vested the City Manager with power to revoke the arbitrator's advisory findings.

The trial court concluded that under the Public Safety Officers Procedural Bill of Rights Act (POBRA) and the unambiguous language of the appeals procedure set forth in the MOU, the city manager was not required to defer to the arbitrator's findings. The city manager successfully shouldered its burden of proof by showing justifiable cause for the termination by a preponderance of the evidence.

The facts of *Ramirez* are as follows. Ramirez had been employed as a police officer in the City of Indio (City) since 2005. In August 2016, Ramirez was charged with rape and two additional counts of sexual assault of his 18-year-old niece. The City placed Ramirez on administrative leave, asked him to turn in his work cell phone, and initiated an internal affairs investigation. In June 2018, a jury acquitted Ramirez of all criminal charges.

The City's own investigation resulted in two conflicting reports. In a November 2018 memorandum, the sergeant who conducted the initial investigation concluded Ramirez had violated multiple standards of conduct set forth in the Department's policy manual, including misrepresenting material facts, dishonest or disgraceful off-duty conduct affecting the officer's relationship with the department, and conduct reflecting unfavorably on the department. After further investigation, a different sergeant concluded in a March 2019 memorandum that the previously identified policy violations were "not sustained."

In June 2019, the Chief issued a notice of intent to terminate Ramirez and conducted a *Skelly* meeting in September, which provided Ramirez with an opportunity to orally respond. Ramirez was ultimately terminated from his employment. Subsequently, Ramirez sought an administrative appeal of the City's decision.

In September 2021, an arbitrator issued a written statement of advisory findings, recommending the Chief's decision to terminate Ramirez "be overturned and that Ramirez be reinstated and made whole with full back pay and benefits." *Ramirez v. City of Indio*, 105 Cal. App. 5th at 944. After carefully reviewing the arbitrator's written statement of advisory findings and recommendations, the MOU, the Chief's notice of intent to terminate and notice of termination and associated attachments, and other related policies, the City Manager issued a detailed final written decision on December 14, 2021, rejecting the arbitrator's findings and affirming Ramirez's termination.

The City Manager explained his decision was "based on Ramirez's poor judgment and conduct." *Id.* at 945. The City Manager concluded that the City had demonstrated, by a preponderance of evidence, that Ramirez drove under the influence, reset his department-issued cell phone with the intention to prevent the discovery of incriminating information, and made dishonest and/or inconsistent statements during the investigations and trial regarding the alleged rape and sexual assault.

On appeal, the Court affirmed the ruling of the lower court. The Court analyzed the MOU in accordance with the rules of contract interpretation, finding that the language of the MOU, if clear and explicit, governs the conduct of the parties. The Court also concluded that the MOU's Appeals Procedure also satisfies due process requirements. Ramirez was provided with a notice of termination that included the specific reasons and materials upon which the proposed termination was based, and Ramirez had an opportunity to respond to the Chief in writing. At the appeal hearing, the City maintained the burden of proof while Ramirez was given an opportunity to present his side of the story by presenting evidence and cross-examining witnesses.

Accordingly, the Appellate Court concluded that the City and the City Manager "proceeded in the manner required by law," and there was no abuse of discretion.

This ruling clarifies that when an MOU governs conduct between the parties, including the dispute resolution process, courts are disinclined from interfering or overturning decisions made in accordance with the MOU. This is because both parties, including the union as the representative of the bargaining unit members, already negotiated and agreed to the dispute resolution process set forth in the MOU after a process of meeting and conferring.

Chapter 3: Labor Relations

A.L.A.D.S. v. County of Los Angeles, 106 Cal.App.5th 982 (2024) – County Must 'Meet and Confer' Before Initiating Investigation into Sheriff Gangs

In *A.L.A.D.S.*, a preliminary injunction was properly issued when it halted an investigation into gang activity among law enforcement officers, pending collective bargaining on the investigation's effects or the resolution of an unfair labor practice claim, whichever occurred first. Although the decision to investigate gang activity was lawful, the investigation itself directly implicated certain officers and created a new basis for disciplinary action, which would have had significant and adverse effects on working conditions.

On May 12, 2023, the Office of the Inspector General for the County of Los Angeles (OIG) sent a letter to 35 individual Los Angeles Sheriff's Department (LASD) deputies. The letter directed the deputies "to participate in an interview" "to establish the membership of the Banditos and Executioners" and advised that the deputies "must appear and answer questions." *Assn. for Los Angeles Deputy Sheriffs v. Cnty. of Los Angeles*, 106 Cal. App. 5th at 990. The letter informed the deputies that their legs would be inspected at the interview.

Six days after the issuance of OIG's letter, Los Angeles County Sheriff Robert Luna sent the deputies his own letter, ordering them to participate in the interviews, and warning that refusal to cooperate would be grounds for discipline, including termination.

The union representing the deputies—the Association for Los Angeles Deputy Sheriffs (ALADS)—filed an unfair labor practice claim with the Employee Relations Commission (ERCOM) and simultaneously sought injunctive relief from the trial court to enjoin the OIG from proceeding with the interviews without first meeting and conferring with ALADS under the MMBA and the Employee Relations Ordinance of the County of Los Angeles (ERO).

On June 2, 2023, the trial court issued a temporary restraining order, and scheduled a hearing regarding a preliminary injunction, specifying that while it rejected ALADS' constitutional rights-related arguments - that the planned interrogations would violate the deputies' Fourth and Fifth Amendment rights – against the investigation, it would hear argument on other grounds.

In its July 10, 2023, written ruling on the preliminary injunction hearing, the trial court concluded ALADS had shown a likelihood of success on its claim under the MMBA and ERO. Under the ERO, "[a]ll matters affecting employee relations, including those that are not subject to negotiations, are subject to consultation between management representatives and the duly authorized representatives of affected employee organizations. Every reasonable effort shall be made to have such consultation prior to effecting basic changes in any rule or procedure affecting employee relations." *Id.* at 996.

The trial court concluded that "the consequences of those interviews include the duty to cooperate on pain of discipline, the discretionary application of discipline and its range, and the

referral to POST for possible decertification, all of which are easily the subject of bargaining.” *Id.* at 991. The court also weighed the “irreparable harm [that would result] from the County’s failure to meet and confer” before implementing its interviews, against the “need for immediate investigation,” and concluded that “the balancing of the harms works in favor of a preliminary injunction that will maintain the status quo.” *Id.* The trial court issued a preliminary injunction enjoining the OIG’s interviews of the deputies “until the County completes its bargaining or until ERCOM decides the unfair labor practices charge.” *Id.*

In affirming the trial court’s ruling, the Court of Appeal held that the interviews target specific deputies with questions about their personal affiliations with gangs. The letter mandating the interviews also cites legislation that expressly prohibits deputies’ membership in gangs and mandates disciplinary action on that basis. As a result, the interviews, with such a close link to disciplinary action, have a “significant and adverse effect” on working conditions. *Id.* at 982. In accordance with the parties’ collective bargaining agreement, the parties were required to meet and confer before the interview directive, as the interviews would create a new basis for imposing discipline on employees. Under the MMBA, “management directives” which “impact employee discipline” trigger the MMBA’s meet and confer requirements. *Id.* at 995.

In this decision, the Court of Appeal reinforces for public employers that when the parties are governed by a collective bargaining agreement, the parties must meet and confer with respect to matters that have a significant and adverse effect on working conditions that could lead to employee discipline. It is also important to note that while public employers are not subject to the meet and confer requirement before initiating an investigation, this requirement is triggered when the employer implements a condition of employment, such as the “interview directive” at issue, that would have had a direct impact on the employment conditions (e.g. potential discipline) of the deputies being investigated.

Chapter 4: Retirement

Petree v. Public Employees' Retirement System, 106 Cal. App. 5th 585 (2024) – County and City Entities Do Not “Merge” Without One Entity Assuming the Functions of the Other

In *Petree*, former city police officers claimed the simultaneous closing of the City’s police department and the hiring of the officers by the County sheriff’s department resulted in a merger of the departments entitling them to a higher pension. The trial court found that there was no effective merger of the County and the City because the County never assumed any municipal obligations of the City. Law enforcement inside the municipality remained the City’s obligation, which it fulfilled by contracting with the County. Therefore, the pensions for city officers and sheriff deputies were calculated and paid out under separate contracts.

The plaintiffs in *Petree* were former officers with the City of Perris Police Department (Perris PD). In 1996, the City of Perris (City) decided to close its police department and contract with Riverside County (County) for municipal law enforcement services, subsequently, the officers were hired as deputies with the Riverside County Sheriff. As a result of this closure, plaintiffs contend that the County and the Public Employees’ Retirement System (CalPERS)

must credit the officers' service with the Perris PD as service with the Sheriff's Department, which would entitle them to a more generous pension.

Under the City's formula for law enforcement officers, former officers who retired at age 55 or older were entitled to annual pension payments equal to 2.5 percent of their final salary multiplied by their years of service. Under the County's formula, law enforcement officers who retired at age 50 or older could draw annual pensions equal to 2 percent of their final salary multiplied by their years of service. In 2001, the County changed this formula to 3 percent at age 50 or older, and applied it to deputies' "credited prior and current service." The Court concluded that since the plaintiffs did not become employed by the County before 1996, the increase to the pension formula did not apply to credits earned with the Perris PD. Rather, plaintiffs' pension benefits are calculated in two separate segments: (1) one based on service credit with the Perris PD (2.5 percent at 55), and (2) another based on service credit with the Sheriff's Department (now 3 percent at 50).

Plaintiffs' sought a declaration that the closing of the Perris PD and the Sheriff's Department's hiring of the officers resulted in a merger of the departments. They also sought a declaration that the County is liable for the officers' service credit with the Perris PD and because the departments merged. The trial court entered judgment in defendants' favor. The County was not required to treat the former police officers' service as service with the Sheriff's Department.

On appeal, the Court affirmed the lower court's ruling, finding that the City and the County both continue to exist as separate entities, and thus the contracts have not merged for the purpose of providing an increased pension. In determining whether a contract has necessarily "merged," the Court of Appeal concluded that courts should consider whether an agency has succeeded a prior agency or assumed its functions. In the present case, the County never assumed any municipal obligations for the City, it merely contracted with the City to provide certain governmental services. Thus, the City did not give away its obligation to provide its residents with law enforcement services, it merely contracted those services out to the County, while retaining its right to end the contract at any time and retaining its status as a separate municipality.

The Court of Appeal's analysis sets forth the test for determining whether two separate municipalities have effectively merged: whether the entities continue to exist as separate entities, or whether the one agency assumes the functions of the other. Additionally, consideration should be given to whether the agencies have taken any steps to merge their contracts.

Chapter 5: Disability Discrimination and the Interactive Process

Howell v. State Department of State Hospitals, 107 Cal.App.5th 784 (November 7, 2024) – Employee Seeking Non-Economic Damages Must Prove Termination Actually Caused Non-Economic Injuries

In *Howell v. State Department of State Hospitals*, the Appellate Court determined that a viable FEHA claim for non-economic damages must actually set forth facts demonstrating that the employee incurred injuries as a direct result of being terminated or experiencing another adverse employment action.

At the trial court level, the jury found plaintiff Ashley Howell had been discriminated against by her former employer, State Department of State Hospitals (DSH). The jury awarded Howell \$36,751.25 in lost earnings and health insurance benefits but nothing for pain and suffering (noneconomic damages). After trial, the court denied Howell's motion for a limited new trial regarding noneconomic damages and granted DSH's motion for judgment notwithstanding the verdict. In addition, Howell sought \$1.75 million in attorney fees and prejudgment interest, but the court awarded her \$135,102.

The facts of *Howell* are as follows. During DSH's hiring process, Howell underwent a preliminary health screening, which required Howell to disclose, "disorders of the nervous system," any "respiratory trouble," and any shortness "of breath." *Howell v. State Dept. of State Hospitals*, 107 Cal. App. 5th at 147. Although Howell disclosed having asthma, she responded "no" to the other questions.

However, Howell had been previously diagnosed with major depressive disorder and post-traumatic stress disorder following a 2017 sexual assault by a patient inmate at a Department of Corrections and Rehabilitation (CDCR) hospital in Stockton, where Howell previously worked. After the assault, Howell experienced panic attacks with trouble breathing.

When Howell commenced working with DSH, she was still on medical leave with CDCR. DSH was not aware of Howell's medical leave status until it communicated with CDCR regarding employment transfers. DSH discovered that Howell had sustained an injury to her nervous system, which was inconsistent with Howell's representations on her DSH health questionnaire. Subsequently, DSH terminated Howell's employment. After the trial court's ruling denied her noneconomic damages, Howell sought a new trial limited to the noneconomic damages award, which the court denied.

On Appeal, the Court affirmed the ruling of the lower court, finding that the termination by DSH did not cause Howell physical injury, additionally, there was undisputed evidence that Howell endured pain and suffering in connection with the 2017 assault, rather than the termination from employment at DSH. In ruling, the Court relied on the evidence from Howell's physician, who testified that Howell's "mental health symptoms," including her panic attacks, "were substantially caused by the sexual assault at the CDCR." *Id.* at 151. In addition, Howell acknowledged that her physician "testified he did not believe the termination exacerbated any mental disorder." *Id.* at 152.

As to the award of attorney fees, the Court affirmed the lower court's finding that the total hours expended were "outside all bounds of reason given the number of issues involved in the matter and their relative lack of complexity." *Id.* at 146. It concluded that "given the unreasonably inflated fee request, the court was authorized to substantially reduce the requested amount." *Id.*

Through *Howell*, the Appellate Court demonstrates that there must be a link between the alleged adverse employment action or wrongful termination and the injury that the employee incurs for the employee to recover noneconomic damages.

Miller v. Department of Corrections, 105 Cal.App.5th 261 (2024) – A Reasonable Accommodation Must Facilitate an Employee's Return to Work

Plaintiff Maria Miller was employed as a correctional officer with the Department of Corrections and Rehabilitation (CDCR) at the California Institution for Women (CIW). Eight years into her employment, she was injured as the result of a slip and fall incident while working offsite in a temporary assignment. The CDCR offered to demote Miller to an alternative available position that would accommodate her work restrictions. In turn, Miller did not accept the position offered, and she informed CDCR that she suffered from a previously undisclosed mental disability that prevented her from returning to work while receiving treatment. When Miller did not accept the position, she was placed on an unpaid leave of absence. In addition, Miller sought CDCR's assistance in applying for disability retirement as an "alternative accommodation," and disagreed with CDCR's decision not to assist her in applying.

In 2020, Miller filed suit against CDCR under FEHA, alleging claims for disability discrimination, failure to accommodate, failure to engage in the interactive process, failure to prevent discrimination, and retaliation. Miller's original complaint also included a claim for violation of Government Code section 21153, which requires a public employer to apply for a CalPERS disability retirement on an employee's behalf in certain situations, but Miller voluntarily dismissed that claim. CDCR filed a motion for summary judgment on the remaining claims.

In support of its motion for summary judgment, CDCR presented the undisputed fact that in August 2018, Miller's doctor determined that she had reached maximum medical improvement and would be subject to permanent work restrictions. Miller's doctor's medical orders precluded her from lifting, pushing, or pulling items over 30 pounds in weight; repetitive bending, twisting, or stooping; and kneeling or squatting. CDCR presented additional undisputed facts to demonstrate that the essential functions of a CDCR correctional officer require the physical ability to run, climb, lift and carry, stoop, crawl and crouch, push and pull, brace, and twist. Due to her permanent restrictions, Miller sought, but did not receive, CDCR's assistance in applying for disability retirement under CalPERS (California Public Employees' Retirement System). Miller's manager informed her that disability retirement is only pursued after CDCR has "exhausted all potential options that might permit an employee to return to work." *Miller v. Department of Corrections & Rehabilitation*, 105 Cal. App. 5th at 270.

In December 2018, Miller agreed to accept a medical demotion and placement in alternative positions as an accommodation that would permit her to return to work. CDCR identified three potential positions for Miller and offered to medically demote her to the position that had the highest salary. However, Miller failed to appear for two orientations for the new position. Miller informed CDCR that her absences coincided with her commencing mental health treatment, and that her treating psychologist had determined she was unable to work while receiving treatment for her mental health.

In support of her Opposition to the summary judgment motion, Miller submitted excerpts from her own deposition stating that (1) as a result of being placed on unpaid leave, she was not paid, stopped accruing seniority, was not receiving health benefits, and did not receive a renewed state identification card; (2) she recalled that other officers had been given “light duty” positions as an accommodation; (3) she declined to attend orientation for the alternative position offered to her because it was not at her regular work location and CDCR did not offer to pay for her travel to the new location; and (4) she disagreed with CDCR's decision not to apply for disability retirement on her behalf.

CDCR presented evidence that Miller's permanent restrictions were incompatible with the essential duties of a correctional officer, Miller's own testimony admitted that her permanent restrictions rendered her incapable of performing the essential duties of a correctional officer, and Miller's own testimony conceded that she has been unable to return to work while receiving treatment for her mental disability. Additionally, CDCR offered evidence to show that (1) it communicated with Miller on multiple occasions regarding potential alternative positions; (2) it identified medical demotion to an alternative position as a potential option; (3) once Miller consented to a medical demotion, CDCR offered her an alternate position; and (4) Miller declined to accept the alternate position. This was evidence that a reasonable accommodation was offered and refused.

Miller did not present any evidence to dispute the essential duties of a correctional officer or any evidence to suggest that her disability-related restrictions would permit her to perform the essential duties of a correctional officer. As a result, Miller failed to meet her burden to refute the summary judgment motion.

Under FEHA, a reasonable accommodation means “a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.” *Id.* at 280. Reasonable accommodations must constitute efforts intended to facilitate the disabled employee's eventual return to work.

In affirming the lower court's ruling, the Court of Appeal found that a reasonable accommodation is limited to efforts that facilitate an employee's return to work. In contrast, the purpose of disability retirement is to separate an employee from work. Although the CalPERS retirement law at Government Code section 21153 requires an employer to file for a disability retirement on an employee's behalf in some circumstances, Miller had voluntarily dismissed her section 21153 claim. The Court said that even if CDCR wrongfully refused to apply for disability benefits on Miller's behalf, that fact would not have created a material dispute of fact on CDCR's motion.

Finally, the Court found that Miller's claim for retaliation failed because there was no evidence that Miller undertook any protected activity, which is an essential element of a retaliation claim. Miller's complaint alleged that her sole protected activity was becoming disabled. The Court found that neither the involuntary act of becoming disabled, nor the fact that Miller notified the CDCR that she had a disability, was protected activity.

The Appellate Court's ruling explains that disability retirement in the PERS system does not constitute an accommodation under FEHA, as it does not make it possible for the employee to return to work.

Wentworth v. Regents of University of California, 105 Cal. App. 5th 580 (2024) – A Reasonable Accommodation Does not Excuse an Employee from Performing the Essential Functions of Their Role

Plaintiff Blake Wentworth, formerly a professor at the University of California, Berkeley (UC Berkeley), appealed from a trial court order granting the defendant, Regents of the University of California (Regents), summary judgment as to Wentworth's claims under the FEHA that he was denied a reasonable accommodation, and that the Regents failed to engage in the interactive process. Wentworth's remaining causes of action went to a jury, where they returned a verdict in favor of the Regents on all of Wentworth's causes of action with the exception of failure to disclose Wentworth's personnel file.

Wentworth additionally contested the trial court's ruling on summary judgment as to Information Privacy Act claims, but for this paper's purposes, this summary will only describe the FEHA claims. A brief summary of the events of *Wentworth* is as follows.

Wentworth commenced employment in 2012 as an assistant professor in South and Southeast Asian Studies at UC Berkeley. In 2014, Wentworth wrote to Jeffrey Hadler, chair of his department at the time, explaining that he was suffering from certain mental health issues stemming from a bipolar diagnosis but would “pull through.” *Wentworth v. Regents of University of California*, 105 Cal. App. 5th at 588. In February 2015, Wentworth was hospitalized after attempting to commit suicide.

Hadler initiated a meeting with Wentworth, as he was unsure how Wentworth's mental condition would affect his job performance. Hadler wanted to explore whether there were any accommodations that would allow Wentworth to fulfill the essential functions of his job. Hadler suggested that Wentworth review the processes for faculty accommodations. Wentworth agreed to meet but initially resisted any suggestion that his disability would require accommodations.

At the February 2015 meeting, Hadler offered Wentworth a medical leave, which involved: 1) relieving him of all duties; 2) stopping his tenure clock, which would require him to continue to teach and perform other duties, but push back his deadlines for completing a body of research for consideration for tenure purposes; and 3) other accommodations. In an e-mail after the meeting, Wentworth thanked Hadler for the “deeply humane” conversation and said Hadler could get in touch with his doctor about his prognosis. Hadler responded that Wentworth simply needed to provide medical documentation of the limits of his condition. Hadler also told Wentworth to discuss with his doctors what would be best for him, such as medical leave, stopping his tenure clock, or a request for accommodations. Hadler provided Wentworth a copy of the university's procedures for providing accommodations. Later in April 2015, Wentworth provided doctors notes: 1) saying that he had a partial disability that prevented him from satisfying the research component of his duties; and 2) requesting to stop his tenure clock for two semesters. In July 2015, the University approved his request for accommodation.

During the interactive process, the university was also investigating student complaints against Wentworth for sexual harassment. Some of the students who alleged Wentworth had sexually harassed them discussed their experiences with the media. Soon articles were published about Wentworth. The article in the San Francisco Chronicle included a description of a letter department professors had written to the department head regarding Wentworth. Also, in a faculty-student department meeting in April 2016, the head of the department described the interactive process conversations he had with Wentworth, among other confidential information regarding the complaints against Wentworth.

In September 2016, Wentworth filed an action against the university, alleging several causes of action under the Fair Employment and Housing Act (FEHA) (including disability harassment, disability discrimination, retaliation, failure to engage in the interactive process, failure to provide reasonable accommodation, and failure to prevent discrimination, harassment, and retaliation). Wentworth claimed that the University failed to engage in the interactive process and provide reasonable accommodations for his bipolar disorder. Wentworth also alleged privacy-related causes of action related to the university's disclosure of information related to the student complaints and disability accommodations.

Ultimately, the Court of Appeal affirmed the trial court's rulings on the interactive process and reasonable accommodation claims because the evidence showed that the university engaged in the interactive process in good faith and offered a reasonable accommodation.

In accordance with the FEHA, it is an unlawful employment practice to fail to make reasonable accommodations for the known physical or mental disability of an employee, unless the employer demonstrates that doing so would impose an undue hardship. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions.

The Regents pointed to evidence that after Wentworth's hospitalization, Hadler met with Wentworth and offered different accommodations. Wentworth did not tell Hadler he was unable to teach. Similarly, after Hadler asked Wentworth to provide medical documentation of the functional limitations of his condition, Wentworth and his doctors only said he was unable to perform research, not unable to teach. In affirming the ruling of the lower court, the Appellate Court held that this evidence is sufficient to establish that the Regents engaged in the interactive process in good faith and offered accommodations that would reasonably meet Wentworth's needs as he identified them.

The Court determined that each of Wentworth's arguments against summary adjudication lacked merit. First, Wentworth argued that the Regents should have accommodated him by excusing his frequent absences, and instead the Regents punished him by denying him reappointment and disciplining him. The Court denied this contention, noting that this claim was merely a reformulation of Wentworth's complaint that the Regents discriminated against him by subjecting him to adverse actions. The discrimination claim was already rejected by the jury. Second, Wentworth argued that the Regents should have engaged further in the interactive process by offering him research leave or modified duty. The Court denied this claim because Wentworth told the Regents that his disability impaired his ability to conduct research. Thus, it

would not make sense for the Regents to place Wentworth on modified duty to perform a task that he indicated he could not perform.

Wentworth next disputed that stopping his tenure clock constituted a reasonable accommodation. Instead, Wentworth argued that the Regents should have accommodated him by relieving him of his research duties and allowing him to progress to tenure at the same pace as his peers. The Court denied this argument on the basis that since research and writing were essential functions of employment as a professor, it could not be a reasonable accommodation to relieve Wentworth of those duties. The Court concluded that “elimination of an essential function is not a reasonable accommodation.” *Wentworth*, 105 Cal. App. 5th at 602. Lastly, Wentworth argued that the Regents failed to engage in the interactive process by denying him reappointment as a professor based on his insufficient research. The Court again concluded that this argument was a reformulation of his complaint that he was subject to adverse action. The Court noted that this issue was already decided and resolved in the Regents’ favor by the jury.

The Court reversed the summary adjudication of the invasion of privacy causes of action, finding that there were triable issues of fact regarding whether the University violated the Information Practices Act (IPA). The IPA prohibits state agencies, like the University from disclosing information that identified or described employees like Wentworth, including information about medical or employment history. The letter about student complaints and the discussion at the April 2016 student-faculty meeting contained information regarding Wentworth’s medical and employment history. The University did not dispute that the leaks of information about Wentworth could be attributed to it. The Court held that a reasonable jury could conclude from this evidence that someone in the department leaked the letter to the media to bring attention to Wentworth. The IPA claim was remanded to the trial court for further proceedings.

This decision reminds public agency employers to engage in the interactive process in good faith by offering accommodations that allow an employer to perform their essential job functions, however, an employer does not need to excuse an employee from the performance of functions which are essential to their employment. A reasonable accommodation cannot be an action which ultimately relieves the employee from the performance of their essential job duties.

Chapter 6: Fair Labor Standards Act

E.M.D. Sales, Inc. v. Carrera, 604 S. Ct. 45, 46 (2025) – The Preponderance of the Evidence Standard Applies When Alleging that an Employee is FLSA Exempt

EMD Sales sets forth the legislative history behind the Fair Labor Standards Act (FLSA), as a means of providing further context as to why the preponderance of the evidence standard is most appropriate when determining FLSA exemptions. In 1938, Congress enacted FLSA, guaranteeing a federal minimum wage, and requiring overtime pay for those working more than 40 hours per week. Congress exempted many types of employees from the FLSA’s overtime-pay

requirement, including outside salesmen who primarily work away from their employer's place of business. The employer shoulders the burden of showing that an exemption applies.

The petitioner, EMD Sales, distributes food products and employs sales representatives to manage inventory and take orders at local stores. In 2018, several sales representatives sued EMD Sales at the Maryland District Court, alleging that the company violated the FLSA by failing to pay them overtime. EMD Sales argued that the sales representatives were outside salesmen and therefore exempt from the FLSA's overtime-pay requirement. After a bench trial, the District Court found EMD Sales liable for overtime because EMD Sales did not prove by ***clear and convincing evidence*** that its sales representatives were outside salesmen. In holding that the sales representatives were not outside salesman, the district court noted that the employees primarily executed the terms of sales already made, rather than making new sales themselves. The court therefore ordered EMD Sales to pay overtime wages and liquidated damages.

On appeal, EMD Sales argued that the clear and convincing standard was inapplicable to FLSA exemption matters, and instead the preponderance-of-the-evidence standard was applied. The Fourth Circuit court disagreed and affirmed the District Court's judgment.

When Congress enacted the FLSA, the preponderance-of-the-evidence standard was the default. The Court has only deviated from this standard when 1) a statute requires a heightened standard of proof, 2) The Constitution mandates a heightened standard of proof, or 3) when the matter involves coercive Government action, such as taking away a person's citizenship.

In rejecting the Fourth Circuit's decision, the U.S. Supreme Court indicated that the preponderance of the evidence standard was appropriate in FLSA matters where the case does not involve constitutional rights. In addition, FLSA cases do not involve the government taking unusual or coercive action against an individual. Instead, FLSA cases are similar to Title VII employment-discrimination cases, where the Court has applied the preponderance standard. Finally, the FLSA does not specify a standard of proof for the Act's exemptions. Given the silence in the statute, courts usually apply the default preponderance standard.

The employees argued that the heightened standard is applicable because the FLSA protects the public interest in a fair economy. However, the Supreme Court noted that other workplace protections, like those under Title VII, also serve important public interests but are subject to the preponderance standard. The employees argue that rights under the FLSA are nonwaivable and therefore different from other rights subject to the preponderance standard. However, the Court pointed out that the waivability or non-waivability of a right does not relate to the standard of proof.

Ultimately, the Court concluded that the preponderance-of-the-evidence standard is apt when an employer seeks to show that an employee is exempt from the minimum-wage and overtime-pay provisions of the FLSA. This ruling is favorable to public employers, as it does not impose heightened standards of proof for proving that a particular employee is exempt from FLSA.

Kennedy v. Las Vegas Sands Corp., 110 F.4th 1136 (9th Cir. August 1, 2024) – An Employee’s High Level of Complex Decision-Making can Lead Towards Exemption Under FLSA

In *Kennedy v. Las Vegas Sands*, the Ninth Circuit Court of Appeals held that the plaintiffs, a group of corporate jet pilots, were considered exempt workers under the FLSA and thus, not subject to FLSA's overtime or minimum wage provisions.

Under the FLSA, there are exemptions for specified employees which excuse an employer from having to pay overtime. The FLSA particularly exempts employees whose primary duties are of an executive, administrative, or professional nature. In determining whether an exemption is applicable, courts look to the employee's primary duties, or the "principal, main, major, or most important" duties of the role. *Kennedy v. Las Vegas Sands Corp.*, 110 F.4th at 1140.

After a bench trial, the 9th Circuit Court of Appeals affirmed the district court's judgment, holding that because the corporate jet pilots' duties primarily involved complex decision-making, and exercising discretion over significant matters, they were exempt from overtime pay. Further, the court held that the pilots were also not entitled to overtime pay because the pilots did not work over 40 hours per week.

The five plaintiffs were a group of full-time corporate jet pilots who flew their employer's customers, high level executives, and family members. The pilots were assigned to scheduled flights but often were assigned to "pop-up flights" where they might be needed to fly a plane if the actual scheduled pilot was unable to fly. The pilots argued that they were entitled to overtime pay for "on-call" time spent between scheduled flights.

The trial court held that: 1) the pilots were not entitled to overtime pay because of the independent judgment the pilots exercised in their duties, and 2) the pilots' on-call time did not constitute compensable work, because it was not actual hours worked in service of the employer, and thus the pilots did not meet the minimum threshold for overtime pay of 40 hours per week.

On appeal, the pilots argued that the district court erred in declaring them exempt because: 1) the pilots performed manual labor, and 2) the pilots followed a set of procedures and checklists as part of carrying out their job duties.

Under the FLSA, jobs whose primary duties require the employee to perform tasks of a demanding or physical nature are non-exempt employees entitled to overtime. The pilots argued that because their jobs required physical training, and because they had to frequently operate the planes manually, they were non-exempt. The court concluded that while the pilots were required to undertake some physical duties, their primary duties or “principal, main, major, or most important” duties were not physical in nature. In contrast, the pilots' primary duties involved the “safe transport” of the passengers and the pilots' “judgment, aviation acumen, and decision-making skills were far more important to the job of piloting a plane.” *Id.* at 1142.

Secondly, the pilots argued that they were non-exempt because they rarely exercised discretionary judgment, and instead their duties were limited to a set of established procedures and checklist. In turn, the court held that the primary duties were still of a discretionary nature as the pilots were required to create their own flight plans, detail the amount of fuel balances, and confirm all safety checks. Even absent emergency conditions, the pilots regularly and customarily made discretionary decisions.

As a final conclusion, the court clarified that due to the highly complex nature of their roles, and the pilots' ability to freely spend their on-call waiting time, the pilots were exempt from the FLSA and not entitled to overtime. Even if the pilots did not qualify as exempt employees under the FLSA, they still would not be entitled to overtime for the time spent waiting "on-call" for a "pop-up flight". The Court found that the pilots' on-call time was not work time because the pilots could and did participate in personal activities. If a pilot said they were unavailable for a pop-up flight, the scheduler moved to the next pilot on the list. The pilots did not receive compensation for the on-call time, which also indicated that the time was not work.

In considering whether on-call work constitutes compensable work, the court considered the degree to which the employee is free to engage in personal activities, and any agreement between the parties suggesting that wait time is compensable. The court held that there was no explicit agreement governing on-call time. Further, the pilots were free to engage in personal activities without geographical or physical restrictions.

This ruling is helpful to cities and other public agencies that pay employers to wait for a particular event to happen, such as cities that employ on-call bus operators. The language characterizing the pilots' on-call work clarifies that when the employee is not restricted in their physical movement or geographical location, it is less likely that the on-call time is compensable.

Further, the ruling clarifies that even when an employees' duties include tasks that are associated with non-exempt roles, employers should ascertain whether the employee's **primary duty** falls under an applicable exemption.

Silloway v. City & Cnty. of San Francisco, 117 F.4th 1070 (9th Cir. 2024) – Under FLSA, Salary Pay Weighs Towards Classifying an Employee as Exempt

In *Silloway v. City and County of San Francisco*, the 9th Circuit Court determined that there were factual questions as to whether the plaintiffs, staff nurses, were compensated on a salary basis, and thus, it was improper to grant a summary judgment motion in favor of the defendants. The court concluded that the focus in determining whether an employee is compensated on a salary basis is whether an employee receives a predetermined amount of compensation on a weekly or less frequent basis "irrespective of any promises made in an employment contract." *Silloway v. City & Cnty. of San Francisco*, 117 F.4th at 1072.

The plaintiffs, who were employed by the City and County of San Francisco, claimed that they were paid on an hourly, rather than salary basis. As such, the nurses argued that they were entitled to overtime pay under the FLSA. In turn, the defendants argued that the nurses were

exempt from overtime pay as salaried, professional employees. The defendant payroll department translated each nurse's annual salary into an hourly rate by dividing the annual amount by 2,080, which amounted to the number of hours a full-time nurse working 40 hours per work would make.

The professional exemption to overtime pay under the FLSA covers positions wherein employees' primary duties relate to work requiring advanced knowledge in a field of science or learning which is predominantly intellectual in nature. The professional exemption typically covers professions like attorneys, accountants, engineers, accountants, and teachers.

At the district court level, the court held that because annual pay figures for the nurses were published in a salary ordinance, the nurses were definitively compensated on a salary basis.

On appeal, the 9th Circuit Court concluded that the county must analyze how employees are *actually paid* when determining whether an employee is paid a salary. An employer generally loses the benefit of the professional capacity exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An employer's intent not to pay employees on a salary basis can be demonstrated by an actual practice of making improper deductions.

The court concluded that even the City's 3.2% error rate in making improper deductions was high enough to preclude summary judgment. The City made at least one improper deduction in 46% of pay periods, which weighed in favor of finding that the City maintained an actual practice of making improper deductions. Given the number of improper deductions, there were factual questions that needed to be resolved as to whether the nurses were paid at a salary basis.

This ruling provides additional clarity on the professional exemption from FLSA's overtime provisions. When determining whether to classify an employee as exempt, employers should consider strongly whether the employee is paid on a salary or hourly basis.



General Municipal Litigation Update

Friday, May 9, 2025

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GENERAL MUNICIPAL
LITIGATION UPDATE
FOR
LEAGUE OF CALIFORNIA CITIES
ANNUAL CONFERENCE
SPRING 2025

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I. ELECTIONS / FIRST AMENDMENT

A. *Moving Oxnard Forward, Inc. v. Ascension* (9th Cir. 2024) 124 F.4th 605

Holding: A nonprofit corporation brought an action under 42 U.S.C. section 1983 challenging a voter-approved measure that placed limits on campaign contributions to candidates in city elections. The Ninth Circuit held that, although local agencies are normally provided deference on their determinations of campaign-contribution limits, heightened scrutiny was justified here because of facts indicating that a particular individual (who was affiliated with the nonprofit-entity plaintiff) was the target of the city

council when it proposed the measure, and that the measure raised a sufficient danger of “invidious discrimination” against that individual. Under heightened scrutiny, the Court held that the measure was not “closely drawn” to match the city’s interest in avoiding quid pro quo corruption, and that the measure therefore violated the First Amendment’s Free Speech Clause.

Facts/Background: In October of 2019, the City Council of the City of Oxnard placed “Measure B” on the ballot for the election scheduled for March of 2020. Measure B proposed to (1) limit contributions to City Council candidates per election to \$500 for individuals and \$1,000 for political action committees, and (2) limit contributions to City-wide candidates (such as for Mayor) per election to \$750 for individuals and \$1,500 for PACs. The voters approved Measure B at the March 2020 election, and it took effect on May 1, 2020.

Shortly after Measure B took effect, a nonprofit entity called Moving Oxnard Forward, Inc. (“MOF”) filed a lawsuit under 42 U.S.C. section 1983, claiming that Measure B violated the Free Speech Clause of the First Amendment.

The president of MOF was an individual named Aaron Starr, who had been very active in Oxnard politics, and who consistently relied on larger-dollar contributions compared to other City candidates. The year prior to the adoption of Measure B, Starr had orchestrated an unsuccessful recall effort against a majority of the City Council, and had come in second in the race for Mayor. Prior to that, Starr and MOF had successfully supported a ballot initiative that overturned an increase in certain fees that was passed by the City Council and that then became the subject of litigation between Starr and the City.

In response to cross-motions for summary judgment, the district court granted summary judgment in favor of the City, and MOF appealed.

Analysis: The Ninth Circuit analyzed MOF’s First Amendment claim as follows: Under the Supreme Court case of *Randall v. Sorrell* (2006) 548 U.S. 230, campaign-contribution limits “are permissible as long as the Government demonstrates that the limits are ‘closely drawn’ to match a ‘sufficiently important interest.’” (*Id.* at 247.) Moreover, the Supreme Court has “identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption”—specifically, “quid pro quo corruption,” defined as “a direct exchange of an official act for money.” (*McCutcheon v. FEC* (2014) 572 U.S. 185, 192, 206-07.)

According to the Court, this analysis is normally applied with a fair amount of deference to the local legislature. First, in order to justify any limit on campaign contributions, the legislative record must simply reflect *some* threshold evidence—which the Ninth Circuit described as a “low burden”—that “would tend to identify a big donation with a corrupt purpose.” (*Nixon v. Shrink Mo. Gov’t PAC*, (2000) 528 U.S. 377, 391-92; *Lair v. Motl* (9th Cir. 2017) 873 F.3d 1170, 1178.) If the government meets this burden, the court must then consider whether the contribution limits are “closely drawn” to the legitimate interest of curbing quid pro quo production. (*Lair*, 873 F.3d at 1180.) On this issue, the Supreme Court has noted that local legislative bodies are “better equipped to make such empirical judgments,” and that the courts therefore should “ordinarily” “defer[] to the legislature’s determination of such matters.” (*Randall*, 548 U.S. at 248.)

However, there is an exception to such deference where there are “strong indicia in a particular case, i.e., danger signs,” that the contribution limits will present “constitutional risks to the democratic electoral process” that are “too great.” (*Randall*, 548 U.S. at 248.) In such cases, courts are required to exercise “independent judicial judgment” and review the record “independently and carefully” to assess the “proportionality of the restrictions.” (*Id.* at 249.) In this context, courts must determine whether there is “any special justification” that would warrant upholding the statute’s restrictions in light of the constitutional concerns. (*Id.* at 261.)

Applying these standards, the Court in *Move Oxnard Forward* held that the City’s contribution limits presented sufficient “danger signs” of constitutional risks to the democratic electoral process to require heightened scrutiny. Specifically, the record showed that the City may have engaged in “invidious discrimination” against Starr. The legislative record, including staff reports and Council comments on Measure B, indicated that (1) Starr and his contributions were an express target of the City Council when it proposed and promoted Measure B; (2) Starr was the person who would be most affected by Measure B, if not the only person affected; and (3) there was a considerable history of antipathy between Starr and the City’s elected officials in recent years. In terms of the particular impact on Starr, a study on campaign contributions in recent City elections showed that the vast majority of the money received by Starr (who had run for Mayor) came from contributions over \$750, whereas most other candidates received few or no contributions over that limit.

Reviewing the record under heightened scrutiny, the Court concluded that Measure B’s contribution limits were not narrowly tailored to match the City’s interest in avoiding

quid pro quo corruption. Although the City cited a 2010 City corruption scandal as a basis for the limits, the Court held that this scandal bore little to-no-relationship to Measure B, as the scandal involved gifts to elected officials, not campaign contributions. According to the Court, under the record as a whole, Measure B's contribution limits seemed much more closely drawn to the prohibited objective of stopping Starr than remedying corruption concerns.

Impact: This case creates a risk that campaign-contribution limits will be subject to heightened scrutiny where the legislative record indicates that certain individuals will be disproportionately impacted by them. On the other hand, because the facts of this case are fairly extreme—*i.e.*, one person with a certain history of animosity and campaign challenges against the current city council was the only person significantly impacted by the limits—the case may have limited reach. At the very least, the case provides a roadmap to avoid heightened scrutiny by ensuring that contribution limits are fair and address legitimate corruption concerns.

B. *Bonta v. Superior Court (2024) 104 Cal.App.5th 107 (Third District)*

Holding: The Court of Appeal held that the ballot label for Proposition 5, which would have amended the California Constitution to allow local bonds for infrastructure and affordable housing to be approved by a vote of 55% of the electorate, was not false or misleading, and provided a concise and accurate description of the measure as required by law, despite the fact that the label failed to mention that existing law would require a two-thirds vote. In addition to determining the terms of the ballot label to be accurate, the Court noted that the label as a whole indicated that the measure would relax the standards for the adoption of the bonds, and that other ballot materials, such as the title and summary, mentioned the current two-thirds voting requirement.

Facts/Background: Proposition 13, adopted in 1978, requires that local bonds, and taxes to support those bonds, must generally be approved by a two-thirds vote of the electorate. (Cal. Const., Art. XIII A, § 1, subd. (b)(2).) Proposition 5, which was on the ballot for the November 2024 election, would have amended the California Constitution to permit local bonds for public infrastructure and affordable housing to be approved with 55-percent voter approval.

Pursuant to its statutory duties, Attorney General Rob Bonta prepared both a ballot title and summary for the measure, which was limited to 100 words, and a ballot label, which was limited to 75 words. Under the Elections Code, the ballot label was supposed to be a

“condensed version” of the title and summary. Unlike the 100-word limit for the title and summary, the 75-word limit for the ballot label had to account for and include the Legislative Analyst’s “fiscal impact” statement for the measure. (Elec. Code §§ 9051(b), 303(b).)

Against this backdrop, the ballot label for Proposition 5 consisted of the following: **“ALLOWS LOCAL BONDS FOR AFFORDABLE HOUSING AND PUBLIC INFRASTRUCTURE WITH 55% VOTER APPROVAL. LEGISLATIVE CONSTITUTIONAL AMENDMENT.** Allows approval of local infrastructure and housing bonds for low- and middle-income Californians with 55% vote. Accountability requirements. **Fiscal Impact:** Increased local borrowing to fund affordable housing, supportive housing, and public infrastructure. The amount would depend on decisions by local governments and voters. Borrowing would be repaid with higher property taxes.”

Howard Jarvis Taxpayers Association filed an action challenging the ballot label as false and misleading because it failed to mention the existing two-thirds vote requirement. The trial court agreed, and ordered the Attorney General to amend the phrase “with 55% vote” to “with 55% voter approval, rather than current two-thirds approval requirement.” In response, the Attorney General filed a petition for writ of mandate in the Court of Appeal, seeking review.

Analysis: The Court of Appeal reversed the trial court and upheld the original terms of the ballot label as accurate, non-misleading, and as an appropriate exercise of the Attorney General’s discretion in preparing a “condensed version” of the ballot title and summary.

The Court began its analysis by noting that the Elections Code requires the Attorney General to prepare both the ballot title and summary, and the ballot label, in true and impartial terms that are neither argumentative nor misleading. The Court noted that, in performing this discretionary function, the Attorney General is entitled to considerable deference, and that a reviewing court must “indulge all legitimate presumptions in favoring the propriety of the Attorney General’s actions.” The Court further noted that ballot materials prepared by the Attorney General may only be invalidated upon clear and convincing evidence that they are false, misleading, or inconsistent with the requirements of the Elections Code.

Under these standards, the Court held that the ballot label—even if viewed on its own—was both factually accurate and non-misleading. On the two-thirds vote requirement, the Court noted that the ballot label (1) referred to “allowing” approval of the subject bonds

with a 55% vote requirement, and (2) stated that this would increase “local borrowing.” According to the Court, this language would cause voters to understand the measure to be “relaxing the rules for authorizing” the subject bonds. According to the Court, “[w]hat Proposition 5 would itself effectuate is couched in concise language that is easy to understand.”

Although the Court held that the ballot label was accurate and non-misleading when read in isolation, it nevertheless noted that the title and summary included a reference to the two-thirds voting requirement, which the Court stated would reduce any risk that the public would be misled.

Finally, the Court noted that the deference to be afforded to the Attorney General is heightened in the context of the ballot label, where the Attorney General is required to provide a “condensed version” of the title and summary, and where, in applying the 75-word limit, it must also account for the Legislative Analyst’s “fiscal impact,” which the Attorney General often receives (as it did in this case) at the last minute.

In this context, the Court held that, “[t]he fact that the Attorney General included language in the title and summary that is omitted in the ballot label is entirely consistent with his discretion and the statutory requirement that the label be a ‘condensed version of the ballot title and summary.’”

Impact: This case reduces the risk of successful challenges to ballot materials. The case both highlights the deference to which elections officials are entitled in preparing such materials, and supports an argument that a ballot label may be read in conjunction with other ballot materials when determining whether it is false and misleading.

II. BROWN ACT

A. *Burton v. Campbell* (2024) 106 Cal.App.5th 953 (Fourth District, Division I)

Holding: The Court of Appeal held that a city resident could not bring an action under the Brown Act challenging a city decision where the resident herself did not first send a pre-litigation “cure or correct” letter to the city as required by Government Code section 54960.1, even though a timely letter raising the resident’s claim had been sent by someone else. According to the Court, the plaintiff in a Brown Act challenge under Section 54960.1 must be the same person who sent the pre-litigation letter. The Court reached this conclusion even though the letter raising the issue was sent by the plaintiff’s

attorney, because the attorney had not yet been retained by the plaintiff at the time the letter was sent, and the letter did not mention the plaintiff.

Facts/Background: In May of 2021, the San Diego City Council voted to approve franchise agreements that give San Diego Gas & Electric Company (“SDG&E”) the exclusive right to provide gas and electric services to San Diego residents.

A few days before that decision, attorney Maria Severson of Aguirre & Severson, LLP sent a letter to the City alleging that the City Council members engaged in a “secret serial meeting” in violation of section 54952.2, subdivision (b)(1), of the Brown Act, with respect to the franchise agreements. Citing section 54960.1 of the Brown Act (the provision that authorizes lawsuits to invalidate actions taken in violation of certain sections of the Act), the letter requested that the City “cure and correct” the issue by taking the franchise agreement off the agenda for the upcoming City Council meeting.

The City nevertheless moved forward with the meeting and approved the agreements. The next day, Severson sent a second letter, claiming that the agreements had been discussed in an unlawful serial meeting, citing section 54960.1, and requesting that the City “cure and correct” the violation by rescinding its approval of the agreements.

Thereafter, in early June, Plaintiff Kathryn Burton retained Severson’s firm to represent her. On Burton’s behalf, the firm filed a complaint against the City and SDG&E under the Brown Act, seeking to invalidate the City’s approval of the franchise agreements under section 54960.1. During discovery, Burton admitted that she did not retain the Severson firm until after the cure-and-correct letters were sent, and that she was not involved in preparing the letters.

SDG&E thereafter filed a motion for summary judgment on the ground that Burton had not sent a “cure or correct” letter to the City prior to filing suit as required by section 54960.1. In response, Burton sought to rely on the letters sent by Severson, which she claimed to have “adopted, authorized, and ratified” in her complaint. The trial court rejected this argument and granted the motion. Burton appealed.

Analysis: Government Code section 54960.1 authorizes lawsuits to invalidate actions taken in violation of certain provisions of the Brown Act. Amongst those provisions is section 54953, which requires that meetings of the legislative bodies of local agencies be “open and public.”

Lawsuits permitted by section 54960.1 may be filed by “the district attorney or any interested person.” (Gov. Code § 54960.1(a).) However, section 54960.1 requires that, before such a lawsuit can be filed, “the district attorney or interested person” must submit a written demand to the legislative body to “cure or correct” the action. (Gov. Code § 54960.1(b).) This demand must be sent within 90 days of the challenged action, unless the alleged violation involves section 54954.2 (relating to the posting of meeting agendas), in which case it must be sent within 30 days of the challenged action.

Based on this language, the Court of Appeal held that, in order to satisfy section 54960.1’s demand requirement, the plaintiff in the lawsuit must have been the same person who sent the demand. In reaching this conclusion, the Court stated that, although subsection (a) of section 54960.1 authorizes lawsuits to be filed by “*any* interested person,” subsection (b) then states that the pre-litigation demand must be sent by “*the . . .* interested person,” implying that the demand must have been sent by the suing plaintiff.

Based on this law, the Court held that Burton could not satisfy section 54960.1’s demand requirement because no letter was sent by her or on her behalf. In reaching this conclusion, the Court noted that (1) Burton had not retained the Severson firm until after it had sent the two “cure or correct” letters, (2) the letters did not mention Burton, and (3) Burton admitted in her deposition that she was not involved in the preparation of the letters.

In response, Burton claimed that she could “adopt and ratify” the Severson letters after the fact. However, the Court rejected this argument. The Court held that ratification involves a person adopting the act of another when the act was “purportedly done on [their] behalf,” citing *Cavey v. Tualla* (2021) 69 Cal.App.5th 310, 339, fn. 9, and *Anderson v. Fay Improvement Co.* (1955) 134 Cal.App.2d 738, 748. Here, because it was undisputed that the letters were not sent on Burton’s behalf, the doctrine did not apply.

The Court also rejected Burton’s argument that she had substantially complied with section 54960.1. According to the Court, this argument failed because (1) Burton raised this argument for the first time on appeal, and (2) the doctrine requires at least some attempt at compliance, which did not occur here, at least not on behalf of Burton. The Court also noted that, at the time her lawsuit was filed in June of 2021, Burton still had time to submit a cure-or-correct demand on her own behalf.

Impact: This case narrows the circumstances under which a “cure or correct” demand will be deemed compliant with section 54060.1, and broadens the public agency’s potential arguments in a Brown Act lawsuit under that provision. Also, because of the

similarity in statutory language, the reasoning likely also applies to cases brought under section 54960.2, which applies to lawsuits seeking to apply the Brown Act to past violations, without seeking to invalidate them.

III. ANTI-SLAPP

A. *Howard Jarvis Taxpayers Association v. Powell (2024) 105 Cal.App.5th 955 (Fourth District, Division 2)*

Holding: The Court of Appeal held that the “public interest” exemption to the anti-SLAPP statute, set forth in Code of Civil Procedure section 425.17, did not apply to a lawsuit against a water district, its board members, and its general manager, because the relief requested could only be provided by the water district itself, not its board members or staff, and “the public interest is not advanced when individual members of an official government body are sued for relief only the government body can provide.”

Facts/Background: A resident (later joined by the Howard Jarvis Taxpayers Association) sued the Coachella Valley Water District, as well as its five board members, its general manager, and three of its consulting firms. The plaintiffs claimed that certain replenishment charges imposed by the District were unconstitutional and forced taxpayers and ratepayers in one part of the Valley to subsidize agricultural property owners in other parts of the Valley. The lawsuit alleged several causes of action, including claims for writ of mandate and conversion against the District, its board members, and its general manager.

All defendants except the District filed an anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16. That section, known as the “anti-SLAPP statute,” allows a defendant to bring a special motion to strike against any cause of action that “arises from” an act in furtherance of the defendant’s constitutional rights of petition or free speech. (Code Civ. Proc. § 425.16(b)(1).) If the defendant can show that the claim arises from such activity, to defeat the motion, the plaintiff must then demonstrate a probability that it will prevail on the claim. (*Id.*)

The moving defendants claimed that the protected conduct for which they were being sued consisted of (1) the board members’ vote to set the replenishment charges, (2) the general manager’s discussion of the cost-of-service study with board members, and (3)

the consultants' preparation of a cost-of-service study that the board relied on in setting the replenishment charges

In response to the anti-SLAPP motion, the plaintiffs asserted that their lawsuit was exempt from the anti-SLAPP statute under the "public interest" exemption, contained in Code of Civil Procedure section 425.17, subdivision (b). That exemption states that the anti-SLAPP statute "does not apply to any action brought solely in the public interest or on behalf of the general public," subject to certain conditions stated in that section. (Code Civ. Proc. § 425.17(b).)

The trial court agreed with the plaintiffs and held that the public-interest exemption applied to their lawsuit. The defendants then sought a writ of mandate on the issue, which the Court of Appeal summarily denied. At the conclusion of the case, the anti-SLAPP defendants appealed.

Analysis: The Court of Appeal overturned the decision of the trial court and held that the public-interest exemption set forth in Section 425.17, subdivision (b), did not apply.

The Court first noted that, to qualify for the public-interest exemption, three conditions must be met, as set forth in the section itself: (1) the plaintiff cannot seek any relief greater than or different from the relief sought for the general public or a class of the public, (2) the action, if successful, "would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons," and (3) private enforcement is deemed to be "necessary" and "disproportionate financial burden on the plaintiff." (Code Civ. Proc. § 425.17(b).)

In addition, case law establishes that, to qualify for the exemption, the "action" as a whole, as opposed to the challenged causes of action themselves, must be brought solely in the public interest. Thus, according to the Court, "[i]f *any* portion of the lawsuit contravenes section 425.17, subdivision (b), then the public interest exemption does not apply *at all*."

Under these rules, the Court held that the public-interest exemption did not apply because the individual board members and the general manager were included as defendants even though only the District itself could provide the requested relief, and "the public interest

is not advanced when individual members of an official government body are sued for relief only the government body can provide.”

In reaching this conclusion, the Court focused on the writ of mandate and conversion claims, which sought to direct defendants to stop collecting the replenishment charges, vacate all resolutions imposing the charges, and return the charges collected to date. The Court stated that this relief can only be provided by the District itself, and that including the individual defendants in the case was therefore “gratuitous” and had a “chilling effect” on the exercise of their rights.

The Court further noted that, had the individual defendants not been included, the exemption would have applied. However, because at least a portion of the case did not meet the requirements of the exemption, the exemption did not apply to any portion of it.

Impact: This case provides further protection against a common trend of plaintiffs suing individual board members and staff members where only the local agency itself is a proper defendant. In addition, its sweep is broad enough to allow for anti-SLAPP motions on behalf of all defendants, including the agency itself, where individual board members are sued unnecessarily.

IV. MUNICIPAL FINANCE

A. *Howard Jarvis Taxpayers Association v. Coachella Valley Water District* (2025) 108 Cal.App.5th 485 (Fourth District, Division 2).

Holding: The Court of Appeal ruled against Coachella in a proportionality challenge to water rates. The Court ruled Coachella failed to demonstrate the rate charged to domestic customers did not exceed the proportional cost of providing the customers water. The Court held the pay under protest requirement in Health and Safety Code section 5472 applicable to city and county ratepayers, does not apply to special district ratepayers. The Court further held domestic customers were entitled to a refund of overcharges. Finally, the Court ruled the injunction requiring Coachella to comply with Proposition 218 was overbroad.

Facts/Background: The case concerns Coachella’s charges for canal water. Canal water is primarily low cost Colorado River water allotted under various water allotment agreements. It also includes supplemental river water purchased from other agencies at a significantly higher cost. Coachella primarily uses canal water for agriculture and

groundwater replenishment. Domestic customers benefit from the use of canal water for groundwater replenishment because they use groundwater. While domestic customers are not directly billed for canal water, the cost of canal water is incorporated in their bills indirectly through Coachella's interfund transfers. Coachella charged agricultural customers Class 1 rates for canal water which are substantially less than the Class 2 rates allocated to domestic customers.

A class of domestic customers challenged the canal rates as violating Propositions 218 and 26. The class sought a writ directing Coachella to stop using the canal water rate structure and a refund of all amounts overcharged for Class 2 rates.

The trial court ruled Coachella's canal rates violate proposition 218's proportionality requirement. The trial court rejected Coachella's historical argument the rates are lawful because Class 1 customers primarily bore the expense for the canal infrastructure. On damages, the trial court refused to consider Coachella's expert evidence and instead awarded \$17.5 million in damages. The order held that former customers would be paid damages from a common fund and current customers would receive bill credits. The trial court issued an injunction directing canal rates imposed by Coachella in the future shall comply with Proposition 218.

Analysis: On appeal, Coachella contested the liability and remedies rulings. The Court ruled against Coachella on liability. Coachella argued that because the Class 1 customers paid assessments to fund the canal infrastructure, Coachella lawfully allocated the cheap canal water solely to agricultural customers and the expensive canal water solely to domestic customers. The Court rejected the argument as unsupported by the evidence. For example, evidence showed domestic customers also paid assessments that funded canal infrastructure.

On the monetary remedy, Coachella argued no refund relief is authorized for violations of Propositions 218 and 26. Coachella also argued the amount awarded was excessive.

First, Coachella argued Health and Safety Code section 5472 bars a refund because the domestic customers failed to pay the water rates under protest. Section 5472 states "[a]fter fees, rates, tolls, rentals or other charges are fixed pursuant to this article [i.e., Article 4 of the Health and Safety Code], any person may pay such fees, rates, tolls, rentals or other charges under protest and bring an action against *the city or city and county* in the superior court to recover any money which the legislative body refuses to refund." The Court rejected Coachella's argument because it is not a city or city and county. While "cities, city and counties, counties, sanitary districts, county sanitation

districts, and sewer maintenance districts may all impose what we will call Article 4 exactions, refund actions were limited to those against the city or city and county.” Therefore, section 5472’s pay under protest requirement did not bar a refund.

Next, Coachella argued a refund remedy is not available under *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300. The Court recognized *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785 recently upheld a refund in a Proposition 218 case. The Court agreed with the holding in *Coziahr* that refunds are allowed but on different grounds. Relying on *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida* (1990) 496 U.S. 18, the Court found the Due Process Clause of the U.S. Constitution mandates when a government does not allow a predeprivation process for tax relief, it must provide a meaningful opportunity for postpayment relief. The Court then reasoned the only meaningful postpayment relief in this instance is an opportunity for a refund. Therefore, a refund remedy is required “no matter what answer the *Katzberg* framework might yield, to avoid a violation of federal due process.”

The Court then rejected Coachella’s argument regarding the refund amount. The Court reviewed the trial court’s refund amount decision for abuse of discretion. Coachella argued the trial court was required to remand the rate issue to Coachella to allow it to determine a “lawful rate” or allow Coachella’s experts to testify during the remedies phase of the trial. The Court found Coachella failed to show the trial court abused its discretion by taking a different approach to determining the refund amount.

Finally, the Court reversed the trial court’s injunction mandating “any Canal rates and Charges ... imposed by Coachella in the future shall comply with the requirements of Proposition 218.” Citing *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 416, the Court found the injunction overbroad because “Charges” was not defined in the judgment, therefore the injunction may subject Coachella to contempt proceedings for behavior unrelated to the original allegations in the litigation.

Impact: There are two key takeaways from this case. First, this case serves as a reminder a city bears the burden to produce evidence documenting their reasoning to prove a levy, charge, or other exaction is allocated in a manner that no customer is charged more than the proportional cost of providing service to that customer. Also, it is unclear whether the holding the federal Due Process clause requires a refund remedy conflicts with recently enacted Government Code section 53758.5 which denies a monetary refund in

Proposition 218 cases and mandates any refund award instead be credited to reduce the cost of service in future ratemakings.

**B. *City of Gridley v. Superior Court (2024) 104 Cal.App.5th 1201*
 (Third District).**

Holding: On a petition for writ of mandate, the Court of Appeal issued a writ directing the trial court to set aside its order denying the City of Gridley’s motion for summary judgment and to enter an order granting the motion. The Court held claimants cannot challenge Gridley’s electric rates imposed in June 2020 by challenging the city’s September 2020 action to reduce rates within 120 days because Gridley did not impose, increase, or extend the electric rates when it reduced the rates. Further, claimants cannot state a claim under the federal and state takings because the unconstitutional conditions doctrine does not apply to a user fee rather than a land use permit.

Facts/Background: Gridley set electric rates in June 2020. Gridley used five rate tiers. Claimants did not challenge the June 2020 action. In September 2020, Gridley reduced the rates of the first three tiers and eliminated the top two tiers.

On the last day to challenge Gridley’s September approval of the reduced rates, claimants—four residential ratepayers—filed a petition for writ of mandate and class action complaint alleging Gridley violates Proposition 26 because it sets electric rates higher than necessary, collects excessive revenues from ratepayers, and transfers the excess revenues to its general fund. Claimants also alleged Gridley’s rates violate the state and federal takings clauses under the unconstitutional conditions doctrine because the unlawfully high rates subjected them to a constitutionally impossible choice—either pay excessive electric charges or forego its property right to continued electric service altogether.

Gridley moved for summary judgment. The trial court denied Gridley’s motion. It rejected the City’s argument rate revenues do not finance the transfers to the general fund, stating the transfers are evidence there may be excessive charges and triable issues of fact remained on the issue. It also rejected Gridley’s argument Proposition 26 is inapplicable because it applies only when a local government imposes, extends, or increases a tax. It concluded claimants could challenge Gridley’s approved rate changes in September 2020, even though Gridley’s action only decreased rates. For the takings cause of action, the trial found triable issues of fact precluded it from finding claimants lack a property interest in continued electric service. Gridley filed a petition for writ of mandate in the Court of Appeal to reverse the trial court.

Analysis: The Court of Appeal granted the writ. The Court found Proposition 26 inapplicable because Gridley did not “impose, extend, or increase” any tax covered by Proposition 26 when it approved reduced electric rates in September 2020. The Court rejected the trial court’s and claimants’ argument *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685 requires a different result. *Barratt American* considered whether a city’s reenactment of certain fees—without any change in the amount of these fees—constituted a modification or amendment of an existing fee within the meaning of the Mitigation Fee Act provision allowing a challenge to an action “modifying or amending an existing fee.” The trial court and claimants focused on *Barratt American*’s language saying the city, in reenacting its fees, implicitly represented that the fees did not exceed the estimated reasonable cost of the services. The Court rejected this use of *Barratt American* because the Mitigation Fee Act uses different language than Proposition 26. Proposition 26 does not broadly allow challenges to any modification or amendment. It instead covers a challenge to action imposing, extending, or increasing the tax. The Court found decreasing an electric rate “is none of these things.”

Prior to oral argument, the Court requested supplemental briefing regarding the application of the U.S. Supreme Court’s discussion of the unconstitutional conditions doctrine in *Sheetz v. County of El Dorado* (2024) 601 U.S. 267, 274.

Citing *Koontz v. St. Johns River Water Management District*. (2013) 570 U.S. 595, 607, the Court recognized the unconstitutional conditions doctrine mandates the government violates the federal takings clause when it makes “[e]xtortionate demands for property in the land-use permitting context.” To ensure against “extortionate demands” against a permit applicant, courts apply a two-part test for evaluating land use permitting conditions. *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374. The exaction must have an essential nexus to the government’s land-use interest, and the permit conditions must have rough proportionality to the development’s impact on the land-use interest.

The Court found the unconstitutional conditions doctrine does not apply to the claim electric rates violate the state and federal takings clauses because the claim involves a user fee rather than a land use permit. First, the Court noted *Koontz* specifically carved out user fees such as electric rates from the *Nollan/Dolan* test by holding the unconstitutional conditions doctrine “does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.” *Koontz, supra*, 570 U.S. at p. 615. Second, the Court

rejected claimant's invitation to craft an expanded application of the unconstitutional conditions doctrine to fit this case. The Court refused to apply a modified *Nollan/Dolan* test to require an essential nexus and rough proportionality showing any time government demands money under threat of a penalty that may impact a person's property rights. The Court concluded the unconstitutional conditions doctrine does not apply outside the land use permitting context.

Impact: Claimants frequently challenge rates and fees under new liability theories like the unconstitutional conditions claim in *Gridley* in order to increase the avenues to sue governments and to have all or part of a dispute decided by a jury. Cities must vigorously defend against these new liability theories and seek published appellate decisions rejecting the theories when possible.

C. *Beck v. City of Canyon Lake* (2025) 2025 WL 866966, Case No. D083322 (Fourth District, Division I) (UNPUBLISHED).

Holding: Deciding a question of first impression, the Court of Appeal affirmed a trial court's ruling invalidating the City of Canyon Lake's general utility user's tax ("UUT") on water and sewer service for violating sections 3 and 6 of article XIII D of the California Constitution. The Court of Appeal held the City may only impose a UUT on property-related services (water, sewer and trash service) as a voter-approved special tax that segregates and uses the tax revenues for the specific purpose approved by the voters.

Facts/Background: In 2014, a majority of Canyon Lake's electorate approved a UUT on numerous utility services, including water and sewer service. In 2018, 77% of the City electorate voted to extend the UUT. The UUT was imposed on every person in the City using water and sewer services. The City did not operate a water or sewer utility. Instead, the Elsinore Valley Municipal Water District ("EVMWD") provides water or sewer services. EVMWD collected the UUT from water and sewer customers and remitted the tax revenue to the City. Although deposited in the general fund, the City used the UUT revenues to fund a fire station and to improve emergency response times. The UUT on all utilities accounted for approximately 20% of Canyon Lake's general fund.

In July 2022, Beck filed a petition for writ of mandate and complaint for declaratory relief challenging the water and sewer portions of the UUT as unconstitutional. Beck alleged the UUT is imposed as an incident of property ownership and violates the restrictions placed on property-related fees and property taxes by article XIII D of the California Constitution.

After full briefing by the parties, the trial court declared the City's water and sewer UUT violates the California Constitution, article XIII D, sections 3 and 6. The trial court granted Beck's petition for writ of mandate and directed the City to rescind the portions of the UUT on water and sewer service.

Analysis: Article XIII D, section 3 prohibits local governments from assessing any tax, assessment, fee, or charge upon any parcel of property or upon any person as an incident of property ownership except: (1) ad valorem property tax; (2) special tax; (3) assessments; and (4) fees or charges for property related services.

Beck argued Article XIII D, section 3 is clear on its face and the Court need not look at the ballot materials to aid interpretation. According to Beck, because water and sewer service are property-related services governed by Article XIII D, section 6, taxes on such services are imposed "as an incident of property ownership." The City argued Article XIII D, section 3 must be harmonized with Article XIII C, section 2 allowing voter approval of general taxes. The City also argued Beck's interpretation of section 3 conflicts with the proponent's statements in the Proposition 218 ballot materials promising voters the right to vote on UUTs. Finally, relying on *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839, the City argued the UUT imposed on water or sewer service is not imposed "as an incident of property ownership" because it is imposed not because the parcel is owned but because the owner makes a voluntary use of the property.

Relying on *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 420 and *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216, the Court held a fee for ongoing water or sewer service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. The Court agreed with *Richmond's* reliance on the legislative analysis in the Proposition 218's ballot materials: "The Legislative Analyst apparently concluded that water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount to any delinquent service charges." The Court also found Article XIII D's exclusion of electricity and gas service implies similar charges for water and sewer are property-related fees subject to article XIII D, section 3.

The Court then agreed with the language discussing section 3 in *Lejins v. City of Long Beach* (2021) 72 Cal.App.5th 303, 311: “Article XIII D makes clear that regardless of whether the imposition is characterized as a tax, assessment, fee, or charge, if it is imposed upon a parcel of property or upon a person as an incident of property ownership—as we have concluded the [m]easure ... is—it must satisfy one of the exceptions to the prohibition on an agency’s imposition of a tax, assessment, fee, or charge upon a parcel of property or upon a person as an incident of property ownership, enumerated in article XIII D, section 3.”

Regarding the City’s argument the ballot materials promised taxpayers a right to vote on utility taxes, the Court stated: “We reject the City’s attempt to use this shield protecting the electorate’s ability to reduce or repeal a tax or fee as a sword to carve out article XIII D’s express limitations and requirements.”

Impact: About 100 cities and counties have voter-approved general UUTs on water and sewer service – many of which were imposed, increased, or extended after Proposition 218’s adoption in 1996. While this unpublished opinion directly impacts only Canyon Lake’s UUT, we believe all UUTs on water and sewer service are now at risk. Cities and counties with UUTs on water and sewer service should consider returning the issue to the electorate to: (1) obtain two-thirds voter approval of a UUT on water and sewer service as a special tax proposed by the local government; or (2) obtain approval from a majority of the electorate for a UUT on water and sewer service as a special tax proposed by citizen initiative. In each instance, the tax revenues must be used for the specific purpose identified in the ballot measure.

V. UTILITY FRANCHISES

A. *California Resources Production Corporation v. Antioch City Council* (2024) 107 Cal.App.5th 481 (First District, Division 4).

Holding: In a partially published opinion, the Court of Appeal affirmed the trial court’s decision sustaining the City of Antioch’s demurrer and judgment of dismissal in a case arising from Antioch’s refusal to extend the term of California Resources Production Corporation’s (“CRPC”) franchise to operate a natural gas pipeline within the city’s right-of-way. In the published portion of the opinion, the Court rejected CRPC’s equal protection claim and mandate claim based on the Franchise Act of 1937 (Cal. Public Utilities Code § 6201 et seq.).

Facts/Background: CRPC began operating a gas pipeline in Antioch’s public right-of-way in 1991 pursuant to a franchise granted under the Franchise Act. In 2021, CRPC applied to extend the franchise. At the public hearing on the extension, protestors and councilmembers expressed concerns regarding environmental justice, natural gas pipeline safety, and climate change. The City Council voted against the extension.

CRPC sued Antioch. After two sustained demurrers with leave to amend, CRPC’s third amended complaint alleged causes of action for violation of equal protection, deprivation of rights under section 1983, writ of mandate, and declaratory relief.

CRPC’s “class of one” equal protection and section 1983 claims argued Antioch previously granted all pipeline franchise extensions, and Antioch’s decision to deny CRPC’s extension was therefore intentional, arbitrary discrimination against CRPC without any rational basis. CRPC’s mandate claim sought to compel Antioch to perform a ministerial duty purportedly imposed by the Franchise Act to “hear and pass upon” all public objections to the franchise and argued Antioch abused its discretion by denying the franchise extension.

The trial court sustained Antioch’s demurrer to the third amended complaint without leave to amend.

Analysis: The Court found the trial court did not abuse its discretion in ruling CRPC’s allegations did not establish a viable equal protection claim. To survive demurrer on a “class of one” equal protection claim, CRPC was required to allege Antioch treated CRPC differently from other similarly situated persons, the difference in Antioch’s treatment of CRPC was intentional, and there was no rational basis for Antioch’s different treatment of CRPC. The Court found CRPC was not similarly situated with the prior entities that received franchise extensions because the extensions were years prior or involved transport of different materials. Changes in public sentiment regarding fossil fuels and the makeup of the City Council reasonably explain the different treatment of CRPC’s extension application. Therefore, Antioch demonstrated a rational basis for its decision to deny CRPC’s extension.

The Court rejected CRPC’s mandate claim. Mandate relief is available to compel performance of a ministerial duty by a local government. Mandate is also available to correct a local government’s unreasonable and arbitrary exercise of discretionary legislative power.

The Franchise Act establishes the process for a city to consider and grant a pipeline franchise. Pursuant to section 6234, a city is required to “to hear and pass upon all protests” against granting the franchise. The Court rejected CRPC’s argument that “pass upon” required Antioch make express findings as to the merits of each objection before denying the franchise extension. Instead, section 6234 only required Antioch “determine” the protests were “insufficient” or “overrule or deny” the protests before *granting* a franchise extension. The section imposes no duties on Antioch before denying a franchise extension. Finally, the Court held CRPC’s allegations failed to overcome the presumption under Evidence Code section 664 that the Antioch City Council determined the merits of the protests before denying the extension.

Finally, the Court determined Antioch’s extension denial was not unreasonable or arbitrary. The Court rejected CRPC’s argument Antioch improperly relied on generalized concerns expressed by protestors regarding environmental justice, natural gas pipeline safety, and climate change constituting an abuse of discretion that rendered the decision unreasonable and arbitrary. The Court ruled Antioch was not required to tie the protesters’ concerns to CRPC safety records before denying the extension. The Court also determined Antioch’s treatment of CRPC was not arbitrary because Antioch reasonably explained the different treatment of CRPC’s extension application from pipeline franchises and extensions granted in prior years.

Impact: The decision provides a pathway for local governments to take action to reduce the environmental risk posed by fossil fuel transport in the right-of-way. It also allows local governments to answer constituent demands for local action to address climate change.



CARE Court: Can California Cities Make it Work?

Friday, May 9, 2025

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**League of California Cities
City Attorneys Spring Conference May 2025**

CARE Court: Can Cities Make It Work?

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INTRODUCTION¹

There are many individuals in the state with severe mental illness and other co-occurring disorders who are served primarily by city first responders.² First responders welcomed the Community Assistance, Recovery, and Empowerment Act (CARE Act) Program when first announced in May 2022 because it marked the first major advancement in access to mental health treatment since the implementation of the Lanterman-Petris-Short (LPS) Act in 1967.

While emergency medical services (EMS) are often handled by cities, California primarily authorizes counties to service behavioral health needs, regardless of the size of the city within its borders. The hope of the CARE Act was to hold counties accountable for providing services to individuals with the most severe mental illness whose vulnerability causes them to slip through the cracks of the system.³ With homelessness and untreated mental illness on the rise, California's governor and city mayors have publicly called on counties to do more for those with the most severe mental health needs.⁴

Accompanying this directed request, the state has allocated nearly 300 million dollars a year to support this program.⁵ While there is still room for growth, the CARE Act has the

¹ Special thanks to Norrine Russel Ph.D. for her thoughtful feedback, and to Tyler Wieland, Justina Robinson, Natalia Murphy, Jenna Scott, and Elizabeth Wallin for their critical help in cite checking and editing the extensive footnotes.

² See E.B. Egart, *The Criminalization of Mental Illness and Substance Use Disorder: Addressing the Void Between the Healthcare and Criminal Justice Systems*, 50 MITCHELL HAMLINE L. REVIEW 1, 19-21 (2024), for a discussion on the prevalence of co-occurring disorders in the general population.

³ Office of the State Governor, *Governor Newsom Signs CARE Court Into Law, Providing a New Path Forward for Californians Struggling with Serious Mental Illness* (2022), <https://www.gov.ca.gov/2022/09/14/governor-newsom-signs-care-court-into-law-providing-a-new-path-forward-for-californians-struggling-with-serious-mental-illness/>; and Lisa Halverstadt, *San Diego's CARE Court Isn't Forcing Treatment*, VOICE OF SAN DIEGO (Feb. 27, 2025), <https://voiceofsandiego.org/2025/02/27/san-diegos-care-court-isnt-forcing-treatment/>.

⁴ K. Hwang & A. Ibarra, *'You have a crisis out there': Gavin Newsom scolds counties over delays in mental health law*, CALMATTERS (2023), <https://calmatters.org/health/mental-health/2023/12/mental-health-conservatorship-newsom/>;

City News Team, *Mayor Gloria in State of the City: We Will Tackle Fiscal Challenges and Keep Moving San Diego Forward*, INSIDE SAN DIEGO (2025), <https://www.insidesandiego.org/mayor-gloria-state-city-we-will-tackle-fiscal-challenges-and-keep-moving-san-diego-forward>; and

Cal. Health & Human Services Agency (CalHHS), *Community Assistance, Recovery & Empowerment (CARE) Act Working Group Meeting Minutes*, slides 51-54 (Nov. 8, 2023), https://www.chhs.ca.gov/wp-content/uploads/2023/11/11082023-CARE-WG-Meeting_slides-posting.pdf.

⁵ Governor Gavin Newsom, *California State Budget 2023-24* at 58, <https://ebudget.ca.gov/2023-24/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf#page7>. In the state budget, the allocation for CARE includes "\$128.9 million General Fund in 2023-24, \$234 million General Fund in 2024-25, \$290.6 million in 2025-26, and \$290.8 million General Fund in 2026-27 and annually thereafter for the Department of Health Care Services and Judicial Branch to implement the CARE Act (Chapter 319, Statutes of 2022). Of this amount, \$67.3 million General Fund in 2023-24, \$121 million General Fund in 2024-25, and \$151.5 million in 2025-26 and annually thereafter is to support estimated county behavioral health department costs for the CARE Act, including \$15 million one-time General Fund for Los Angeles County start-up funding. For Judicial Branch and legal services funding, see the Criminal Justice and Judicial Branch Chapter for additional information." *Id.*;

M. Tobias & J. Wiener, *California Lawmakers Approved CARE Court. What Comes Next?*, CAL. HEALTH CARE FOUNDATION (Sept. 22, 2022), <https://www.chcf.org/blog/california-lawmakers-approved-care-court-what-comes-next/>;

Disability Rights California, *Summary of the 2023-24 State Budget* (July 24, 2023), <https://www.disabilityrightscalifornia.org/latest-news/disability-rights-californias-summary-of-the-2023-24-state-budget>;

potential to bridge the city to county gaps in services for those who need it the most and allow for improved quality of care for those who cannot self-advocate. However, to reach this potential, numerous issues must be addressed.

I. The CARE Act

Senate Bill (SB) 1338, signed into law on September 14, 2022, enacted the CARE Act.⁶ It was based on findings that thousands of Californians are suffering from untreated schizophrenia spectrum and psychotic disorders, and that advancements in behavioral health treatment make stabilization and in-community healing possible.⁷ Recognizing that necessary comprehensive care is often available only after more significant interventions, such as arrest or institutionalization, the legislature acted on the need for a new approach that sought to provide support and accountability to both affected individuals and local governments.⁸ Appropriately, this treatment-focused effort was paired with a recognition of significant concerns regarding self-determination and civil liberties.⁹

The CARE Act followed a bifurcated timeline of implementation, requiring seven counties to begin implementation no later than October 1, 2023, with the remaining counties required to do so by December 1, 2024.¹⁰

Once implemented, the CARE Act established eligibility for the program based on six factors.¹¹ To be eligible, a person must be over the age of 18.¹² They must currently be experiencing a severe mental illness with a specific diagnosis “identified in the disorder class: schizophrenia and other psychotic disorders”, but psychotic disorders due to physical conditions (e.g. traumatic brain injury or autism) are excluded from eligibility.¹³ The person must not be clinically stabilized in on-going voluntary treatment.¹⁴ They must either be unlikely to survive safely in the community without supervision with a substantially deteriorating condition, or be in need of services to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm to either that person or others, as defined in Welfare and Institutions Code section 5150 (all subsequent statutory references are to the Welfare and Institutions Code unless specifically noted).¹⁵ Participation in a CARE Plan or CARE Agreement must be the “least restrictive alternative necessary to ensure the person’s recovery and stability.”¹⁶ Finally, it must be “likely that the person will benefit” from participation in the CARE Plan or CARE

and Disability Rights California, *Summary of the Governor’s Proposed 2024-25 Budget* (Jan. 31, 2024), <https://www.disabilityrightsca.org/latest-news/disability-rights-californias-summary-of-the-governors-proposed-2024-25-budget#1>.

⁶ SB 1338, 2022 Leg., Reg. Sess. 2021-22 (Cal. 2022).

⁷ *Id.* § 1(a)-(b).

⁸ *Id.* § 1(c).

⁹ *Id.* § 1(d)-(e).

¹⁰ Cal. Welf. & Inst. Code § 5970.5. The first cohort of counties, which began implementation of the CARE Act on October 1, 2023, included the Counties of Glenn, Orange, Riverside, San Diego, Stanislaus, and Tuolumne, and the City and County of San Francisco. *Id.* subd. (a).

¹¹ Cal. Welf. & Inst. Code § 5972.

¹² *Id.* subd. (a).

¹³ *Id.* subd. (b).

¹⁴ *Id.* subd. (c).

¹⁵ *Id.* subd. (d).

¹⁶ *Id.* subd. (e).

Agreement.¹⁷ Notably, while the chaptered CARE Act narrowly limits eligibility, the Legislature has demonstrated its intent to eventually expand the program.¹⁸

Under the CARE Act, the “respondent” is “the person who is subject to the petition for the CARE process.”¹⁹ Proceedings may be commenced in the respondent’s county of residence, the county in which they are found, or the county in which they face criminal or civil proceedings.²⁰

The “petitioner” is the person²¹ who files the CARE Act petition using the Judicial Council CARE-100 petition form.²² If that person is not the director of a county behavioral health agency, the petitioner has the right to file the CARE-100 petition but will be replaced by the county behavioral health agency director at the initial hearing.²³ Most notably for cities, first responders who have had multiple previous interactions with the respondent are eligible to file petitions for CARE Court.²⁴ First responders may also submit a petition based on multiple detentions and transportations per section 5150.²⁵ Under the CARE Act, the definition of “first responder” includes peace officers, firefighters, paramedics, emergency medical technicians, mobile crisis response workers, and homeless outreach workers.²⁶

Other eligible petitioners include persons the respondent resides with, spouses and family members, directors of a hospital in which the petitioner is hospitalized, directors of public or charitable organizations or agencies who are providing services or have provided services to the respondent in the prior 30 days, licensed behavioral health professionals who have treated or supervised the treatment of the respondent within the prior 30 days, public guardians or conservators of the county in which the respondent is present, directors of county behavioral health agencies, the director of county adult protective services, the director of a California Indian health services program or tribal behavioral health department, and judges of a tribal court in California.²⁷ Hospital directors may submit a petition based on a potential respondent’s hospitalizations, including hospitalization pursuant to either section 5150 or 5250.²⁸

In addition, many of these identified persons may act through their designee, and respondents themselves are eligible to file a CARE Act petition on their own behalf.²⁹ Respondents may also be referred to CARE Act proceedings from assisted outpatient treatment and conservatorship proceedings, with either the county behavioral health director or their designee standing in as the petitioner in the former circumstance, and the conservator being the petitioner in the latter.³⁰ Respondents may also be referred from misdemeanor proceedings.³¹

¹⁷ *Id.* subd. (f).

¹⁸ See SB 823, 2025 Leg., Reg. Sess. 2025-26 Reg. Sess. (Cal. 2025) (introduced Feb. 21, 2025) (with the goal of adding bipolar I disorder to the CARE Act eligible diagnosis criteria).

¹⁹ Cal. Welf. & Inst. Code § 5971(o).

²⁰ Cal. Welf. & Inst. Code § 5973(a).

²¹ While some court proceedings allow for CARE referrals, petitions can only be filed by persons listed in Cal. Welf. & Inst. Code § 5971(m); see Cal. Welf. & Inst. Code § 5978(a).

²² Cal. Welf. & Inst. Code § 5971(m).

²³ *Id.*

²⁴ Cal. Welf. & Inst. Code § 5974(f).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Cal. Welf. & Inst. Code § 5974.

²⁸ *Id.* subd. (c).

²⁹ *Id.* subd. (l).

³⁰ Cal. Welf. & Inst. Code § 5978(a).

³¹ *Id.* subd. (b).

Pursuant to the requirements of section 5975, the Judicial Council has developed and published a mandatory form, referred to as the CARE-100 petition, for use in initiating the CARE process.³² The CARE-100 petition requires petitioners to provide information about the respondent, their relation to the respondent, and facts supporting the respondent's eligibility under the CARE Act's criteria, as well as relevant affidavits and evidence.³³

To establish that a respondent meets the CARE Act criteria, the CARE-100 petition must either be accompanied by an affidavit from a licensed behavioral health professional detailing actual or attempted examinations leading to a determination of eligibility for CARE Court, or evidence that the respondent has been hospitalized involuntarily for at least two intensive treatments pursuant to section 5250, with the most recent instance occurring within the previous 60 days.³⁴ Petitioners planning to establish a respondent's eligibility for CARE Court with an affidavit from a licensed behavioral health professional must do so by attaching the completed Judicial Council CARE-101 Mental Health Declaration Form³⁵ to the CARE-100 petition before filing the petition with the superior court.

The CARE Act establishes requirements for CARE Court procedures and hearings, including presumptively private hearings that may be made public only upon an appropriate showing that a public interest clearly outweighs the respondent's interest in privacy.³⁶ It also includes allowances for certain people to attend the proceedings upon the respondent's request, without waiving the respondent's right to a closed hearing.³⁷ The respondent must be provided with notice of hearings and copies of court-ordered reports and evaluations. Respondents are entitled to legal representation regardless of their ability to pay, the right to be present at hearings, the right to have a volunteer supporter (when provided by the respondent), to present evidence, to call and cross-examine witnesses, and to appeal decisions.³⁸

The CARE Act sets out detailed procedural requirements including an initial assessment of the prima facie showing of the respondent's eligibility for CARE,³⁹ assessment of the merits of the case,⁴⁰ case management hearings,⁴¹ and status review hearings.⁴² If the petition was not initiated by a county behavioral health agency and the court finds that the petitioner has made a prima facie showing of the respondent's eligibility for CARE Court, the court will order the county behavioral health agency to investigate and file a written report within 14 court days. This investigation will assess whether the respondent meets the CARE criteria and recommendations about the respondent's ability to voluntarily engage in behavioral health services.⁴³

³² California Judicial Council, *CARE-100: Petition to Commence CARE Act Proceedings* (2023), <https://courts.ca.gov/sites/default/files/courts/default/2024-11/care100.pdf>.

³³ Cal. Welf. & Inst. Code § 5975.

³⁴ *Id.* subd. (d). Involuntary detentions pursuant to Cal. Welf. & Inst. Code § 5150 do not meet this standard.

³⁵ California Judicial Council, *CARE-101: Mental Health Declaration—CARE Act Proceedings* (2023), <https://courts.ca.gov/sites/default/files/courts/default/2024-11/care101.pdf>.

³⁶ Cal. Welf. & Inst. Code § 5976.5.

³⁷ *Id.* subd. (c).

³⁸ Cal. Welf. & Inst. Code § 5976. [Note: Volunteer supporters are optional and provided by the respondent. There are no provisions requiring that the local government entity provide them.]

³⁹ Cal. Welf. & Inst. Code § 5977.

⁴⁰ *Id.*

⁴¹ Cal. Welf. & Inst. Code § 5977.1.

⁴² Cal. Welf. & Inst. Code § 5977.2.

⁴³ Cal. Welf. & Inst. Code § 5977(a)(3)(B).

Within 5 days of receiving the county's report, if the court determines that the respondent is likely to meet the CARE criteria and that the respondent is not likely to voluntarily engage in services, the court will set an initial appearance and hearing on the merits.⁴⁴ Before the initial appearance, the court will appoint legal counsel (e.g., a public defender) to represent the respondent.⁴⁵

If the court finds by clear and convincing evidence that the respondent meets the CARE criteria, it will order the county behavioral health agency to work with the respondent, the respondent's counsel, and the respondent's volunteer supporter (if one is invited to participate by the respondent), to engage the respondent in behavioral health treatment and attempt to enter into a "CARE Agreement."⁴⁶ The court will also set a case management hearing within 14 days of the hearing on the merits of the petition.⁴⁷ At the case management hearing, if the court determines that the parties are likely to enter into a CARE Agreement, a progress review hearing will be scheduled in 60 days.⁴⁸ Alternatively, the county can request dismissal of the case under certain circumstances.

If a progress review hearing is set, and at that proceeding the court determines it is unlikely that the parties will enter into a CARE Agreement, it will order the county to conduct a clinical evaluation, followed by a clinical evaluation hearing.⁴⁹ After this hearing, if the court finds that the respondent meets the CARE criteria by clear and convincing evidence, it will order all parties to jointly develop a "CARE Plan."⁵⁰ The court may dismiss the petition without prejudice if clear and convincing evidence does not support that conclusion.⁵¹

If the parties are ordered to develop a CARE Plan, the court will schedule a CARE Plan review hearing where the parties present their plans to the court and the court will adopt the elements of the CARE Plan that support the recovery and stability of the respondent,⁵² including the issuance of any orders necessary to support the respondent's access to necessary services, supports, or prioritization for those supports or services.⁵³ The court is required to hold a status review hearing within 60 days of issuing the CARE Plan order to detail the progress made by the respondent.⁵⁴ This review hearing allows the court to review which services and supports were provided, which were not, if there were any issues with the respondent's adherence to the plan, and any recommendations for necessary changes to make the plan more successful.⁵⁵

CARE Agreements and CARE Plans are both written documents that specify services to support the recovery and stability of the respondent. While CARE Agreements are voluntary agreements, a CARE Plan is a court order.⁵⁶ Both a CARE Agreement or a CARE Plan may include the provision of clinical services, behavioral health care, counseling, prioritization for services and supports, medically necessary stabilization medications, and a housing plan. The

⁴⁴ *Id.* subd. (b).

⁴⁵ *Id.* subd. (a)(3)(A)(ii) and (a)(5)(C)(ii).

⁴⁶ Cal. Welf. & Inst. Code § 5977(c)(2).

⁴⁷ *Id.*

⁴⁸ Cal. Welf. & Inst. Code § 5977.1(a)(2)(B)

⁴⁹ *Id.* subd. (b)-(c).

⁵⁰ *Id.* subd. (c)(3).

⁵¹ *Id.* subd. (c)(3)(B).

⁵² *Id.* subd. (d)(1)-(2).

⁵³ *Id.* subd. (d)(2).

⁵⁴ Cal. Welf. & Inst. Code § 5977.2(a)(1).

⁵⁵ *Id.*

⁵⁶ Cal. Welf. & Inst. Code § 5971(a)-(b).

court may order the respondent to take necessary medications where the local agency shows by clear and convincing evidence that the respondent lacks the capacity to give informed consent for the administration; however, there is no legal consequence if the respondent decides not to take them.⁵⁷ Under the CARE Act, the court can never force medication or treatment.

During the eleventh month of the program timeline, a one-year status review hearing is held, at which the county behavioral health agency is required to produce a report including information about the respondent's progress with the CARE Plan and a final assessment of the respondent's stability.⁵⁸ This report also includes which services and supports were or were not provided over the course of the program, respondent's issues with adherence, if any, and recommended services for next steps.⁵⁹ Depending on whether the respondent elects to graduate from the program, elects to remain in the program, or is involuntarily reappointed to the program, the court will, accordingly, issue an order for the respondent and county agency to work cooperatively on a graduation plan or a continuance of the CARE process, for up to one year.⁶⁰ Alternatively, based on the report, the court may deny such a continuance.⁶¹

The CARE Act also contains provisions intended to ensure some accountability for both respondents and counties. The court may terminate a respondent's participation in the CARE process if it determines that the respondent is not participating in the CARE process, or is not adhering to their CARE Plan.⁶² Under specified circumstances, the fact that a respondent failed to successfully complete their CARE Plan may be considered by the court in a subsequent hearing under the LPS Act during conservatorship proceedings and may create a presumption that the respondent needs additional interventions beyond those provided by the CARE Plan.⁶³

At any point during the CARE process, if the court determines that a county or other local government entity is not complying with its orders, the CARE Act provides that the judge shall refer the non-compliance to the presiding judge or their designee.⁶⁴ The presiding judge is entitled to order the local government to show cause as to why it should not be fined.⁶⁵ If the presiding judge finds that the local government entity has substantially failed to comply with lawful orders issued by the court under the CARE Act, the local government entity may be fined up to one thousand dollars per day (up to twenty-five thousand dollars total) for each individual violation.⁶⁶ All money collected from fines is redistributed back to the local government entity that paid the fine to serve eligible CARE respondents.⁶⁷

⁵⁷ Cal. Welf. & Inst. Code § 5977.1(d)(3).

⁵⁸ Cal. Welf. & Inst. Code § 5977.3(a).

⁵⁹ *Id.*

⁶⁰ *Id.* subd. (a)(3).

⁶¹ *Id.* subd. (a)(3)(C).

⁶² Cal. Welf. & Inst. Code § 5979(a)(1). In contrast, there is no adherence requirement for a CARE Agreement.

⁶³ *Id.* subd. (a)(3). In contrast, there is no similar presumption where a respondent fails to complete a CARE Agreement.

⁶⁴ *Id.* subd. (b)(1).

⁶⁵ *Id.* subd. (b)(2)(A).

⁶⁶ *Id.* subd. (b)(2)(C).

⁶⁷ *Id.* subd. (b)(2)(D)(ii).

II. Legislative Attempts to Improve the CARE Act

Since the enactment of the CARE Act, the Legislature has made several attempts to amend the statutory scheme and close or correct gaps in the CARE process. The most notable amendment efforts include SB 35, SB 42, and SB 1400.⁶⁸

A. Senate Bill 35

Chaptered in September 2023, SB 35 clarified requirements for the CARE process and made technical changes to the CARE Act. Most significantly, it added provisions to the Welfare and Institutions Code requiring county behavioral health agencies to provide respondents' protected health information in support of findings reached by the county in its initial written report to the superior court, and exempted counties from civil or criminal liability for the disclosure of such information for the purposes of the CARE process.⁶⁹ Similarly, SB 35 also permitted health care providers and covered entities to disclose health information to behavioral health agencies in specified circumstances, and *required* health care providers and covered entities to disclose protected health information to county behavioral health agencies in instances that a provider or covered entity filed a CARE-100 petition or completed a CARE-101 mental health declaration.

B. Senate Bill 42

Prior to the enactment of SB 42 in September 2024,⁷⁰ the CARE Act permitted—but did not require—the court to assign ongoing notification rights to the original CARE Court petitioner if they either lived with the respondent or if they were the respondent's close family member (i.e., spouse, parent, sibling, child, grandparent, or an individual standing in loco parentis). SB 42 provided that, unless the court deems it detrimental to the respondent's wellbeing, it is required to provide ongoing notice to the original petitioner if the petitioner lived with the respondent or was a close family member. The bill specified that notice must be provided throughout the CARE proceedings. While a general reason is sufficient when a continuance is granted, a specific reason must be provided if the case is dismissed. However, protected health information may not be disclosed without the respondent's consent.

SB 42 also created an additional pathway for referring eligible individuals receiving involuntary treatment in LPS designated facilities to the less restrictive CARE Act process.

C. Senate Bill 1400

SB 1400 enacted further changes to the CARE process by amending several provisions of the Welfare and Institutions Code and the Penal Code related to “misdemeanor incompetent to stand trial” (MIST) hearings.⁷¹ This bill added a requirement for courts in a MIST hearing to first determine if the incompetent to stand trial individual is eligible for assisted outpatient treatment,

⁶⁸ SB 35, 2023 Leg., Reg. Sess. 2023-24 (Cal. 2023); SB 42, Reg. Sess. 2023-24 (Cal. 2024); and SB 1400, Reg. Sess. 2023-24 (Cal. 2024).

⁶⁹ Cal. Welf. & Inst. Code § 5977.4(d).

⁷⁰ SB 42, 2024 Leg., Reg. Sess. 2023-24 (Cal. 2024).

⁷¹ SB 1400, 2024 Leg., Reg. Sess. 2023-24 (Cal. 2024).

conservatorship, or the CARE process before dismissing a case. For defendants accepted into the CARE process, it provided for the dismissal of criminal charges six months after the date of referral to CARE, unless the defendant's case is referred back to the criminal court prior to the end of the six-month time period. It also expanded annual data reporting obligations to be compiled and reported to the Judicial Council by county behavioral health agencies.

III. Least Restrictive Alternative

According to the CARE Act, participation in a CARE Plan or CARE Agreement is only appropriate if it is the “least restrictive alternative necessary to ensure the person’s recovery and stability.”⁷² A “least restrictive” treatment option embodies the principle that public health measures should interfere with personal freedoms as little as possible.⁷³

The inclusion of the court in the CARE Act makes it inherently more restrictive than a completely voluntary program. Thus, while voluntary in itself, a CARE petition should be filed only when other voluntary programs have been insufficient.

There are many voluntary program options, but for those suffering from severe mental illness, the primary county assistance comes in the form of Full-Service Partnership (FSP)⁷⁴ programs. These programs provide a full spectrum of community services to support those who can participate voluntarily. There are numerous Evidence-Based Practices (EBPs) that can be utilized in a successful FSP. The main EBPs used in California counties include (1) Assertive Community Treatment (ACT), which uses a team-based model for those with a complex history of behavioral health needs; Forensic ACT (FACT), which focuses on the needs of ACT qualifying individuals involved in the criminal justice system; Coordinated Specialty Care (CSC) for First Episode Psychosis (FEP), which assists those with FEP; Individual Placement and Support (IPS) Model of Supported Employment, which offers supports to help individuals maintain employment; and Clubhouse services, which support individuals in their recovery and provide on-site opportunities for skill development and assistance with independence.⁷⁵

While the aforementioned programs have the potential to help individuals with the independent ability and willingness to seek out care, all of these programs are completely voluntary. The initial momentum behind the CARE Act stemmed from a concern for individuals who are unable or unwilling to engage with such programs voluntarily.

⁷² Cal. Welf. & Inst. Code § 5972(e).

⁷³ Morten F. Byskov, *Qualitative and quantitative interpretations of the least restrictive means*, 33(4) BIOETHICS 11-521 (May 2019), Epub (Jan. 18, 2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6590346/>.

⁷⁴ Cal. Code Regs, Tit. 9, § 3620 and Cal. Welf. & Inst. Code § 5887;

Over 35,000 individuals per month are engaged in FSP treatment for those with serious mental illness and co-occurring substance use disorder (unverified county data). Cal. Dept. of Health Care Services. (DHCS), *CARE (Community Assistance, Recovery, And Empowerment Act: Early Implementation: First 8 County CARE Courts, First 9 months, First 90 People*, DHCS LEGISLATIVE REPORT (Nov. 2024) at 12.

⁷⁵ BH-Connect Evidence-Based Practice Policy Guide, Draft for Public Comment (Dec. 2024), <https://www.dhcs.ca.gov/Documents/EBP-Policy-Guide.pdf>.

IV. Initial Versions of the CARE Act

Early versions of the CARE Act were quite different from the Act as we know it today. While this is true of most legislative proposals, subsequent changes made to the CARE Act considerably affected its processes and scope.⁷⁶

The original language proposed was as follows in its entirety (emphasis added):

SECTION 1.

Part 1.3 (commencing with Section 5565) is added to Division 5 of the Welfare and Institutions Code, to read:

PART 1.3. Community Assistance, Recovery, and Empowerment (CARE) Court Program
5565.

(a) The Community Assistance, Recovery, and Empowerment (CARE) Court Program is hereby established to connect a person struggling with untreated mental illness and substance use disorders with a court-ordered CARE plan.

(b) (1) ***A court may order a person who is the subject of a petition filed pursuant to this section to obtain treatment and services under a CARE plan*** if the court finds that the facts stated in the verified petition are true and established and the criteria set in this section are met, including, but not limited to, each of the following:

(A) The person is 18 years of age or older.

(B) ***The person is suffering from a mental illness and a substance use disorder.***

(C) The person lacks medical decisionmaking [sic] capacity.

(2) A court may order the person to have a CARE plan for up to 12 months, and may renew the plan for up to another 12 months. The court shall conduct periodic review hearings.

(3) ***A person who is ordered under a CARE plan who does not complete the plan may be referred to conservatorship*** pursuant to Chapter 3 (commencing with Section 5350) of Part 1, and it shall be presumed that there are no suitable alternatives to conservatorship available to the person

(c) A petition for an order authorizing a CARE plan may be filed by a family member, county representative, community-based social services provider, behavioral health provider, or first responder in the superior court in the county in which the person who is the subject of the petition is present or reasonably believed to be present.

(d) (1) A CARE plan shall be managed by a CARE team in the community, and may include clinically prescribed and individualized interventions with several supportive services, including, but not limited to, medication and housing.

(2) The CARE team shall consist of clinical team members, a public defender, and a support person to help make self-directed care decisions.

⁷⁶ Early released CARE Court Fact Sheet (March 2022) at 2 https://www.gov.ca.gov/wp-content/uploads/2022/03/Fact-Sheet_-CARE-Court-1.pdf, which states “The court-ordered response can be initiated by family, county and community-based social services, behavioral health providers, or first responders. Individuals exiting a short-term involuntary hospital hold or an arrest may be especially good candidates for CARE Court. The Care Plan can be ordered for up to 12 months, with periodic review hearings and subsequent renewal for up to another 12 months. Participants who do not successfully complete Care Plans may, under current law, be hospitalized or referred to conservatorship - with a new presumption that no suitable alternatives to conservatorship are available.”

- (e) (1) Each county shall participate in providing services under the program.
(2) ***The court may order sanctions or appoint an agent to ensure the county provides services under the program.***

SEC. 2.

If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.⁷⁷

While all bills evolve as they make their way through the legislative process, the changes made to the CARE Act added numerous new court deadlines for the counties to manage, while removing the previous power of the court to direct the most severely disabled participants to a more structured level of care, when appropriate. The original bill language referenced above granted significant authority to the court allowing it to:

- (1) grant court orders for a CARE Plan for individuals suffering from a co-occurring mental illness and substance use disorder and lacking medical decisionmaking [sic] capacity;
- (2) refer a CARE participant to the county for an LPS conservatorship if the participant did not complete the plan; and
- (3) order sanctions against the county or appoint an agent to ensure the county provided these services.

In contrast to the original language, CARE Plans, while still court-ordered, now only occur after a clinical evaluation review hearing, where the county and/or respondent supplies witnesses and/or reports.⁷⁸ Per data collected at the end of the first year of implementation, it appears that not all counties utilize CARE Plans.⁷⁹ CARE Agreements are used in the place of CARE Plans to document the respondent's treatment plan. However, sanctions for non-compliant counties and termination for a respondent's lack of adherence to the program can only occur with a CARE Plan, since a CARE Agreement is not a court order.

In every version of the CARE Act, the intent was to supplement the Assisted Outpatient Treatment Demonstration Project Act of 2002 (AOT), also known as Laura's Law, and find a way to help the severely mentally ill who are otherwise not receiving treatment.⁸⁰ AOT allows for the county to pursue court-ordered treatment for individuals who meet very restrictive eligibility criteria.⁸¹ In contrast to AOT, which can only be petitioned by the county, the CARE Act allows numerous individuals to serve as petitioner. This original intent to expand the number of eligible petitioners remained in all versions of the CARE Act.

Unfortunately, due to strict eligibility criteria, including a requirement of prior hospitalization or serious and violent behavior,⁸² AOT is difficult to access.⁸³ Moreover, even

⁷⁷ SB 1338, 2022 Leg., Reg. Sess. 2021-22 (Cal. 2022) (as amended in Senate on Mar. 3, 2022) (First language replacing non-related, initial placeholder language about theft) (CARE Act original language).

⁷⁸ Cal. Welf. & Inst. Code § 5977.1(c)(2).

⁷⁹ In the County of San Diego, no CARE Plans have been created. Cassie N. Saunders, *County Highlights First Year of CARE Act Accomplishments*, COUNTY OF SAN DIEGO COMMUNICATIONS OFFICE (Oct. 24, 2024), <https://www.countynewscenter.com/county-highlights-first-year-of-care-act-accomplishments/>

⁸⁰ SB 1338 (2021-2022 Reg. Sess.)

⁸¹ Cal. Welf. & Inst. Code § 5346.

⁸² Cal. Welf. & Inst. Code § 5346(a)(4).

⁸³ Governor Gavin Newsom, *Governor Newsom Delivers State of the State Address on Homelessness* (Feb. 19, 2020), <https://www.gov.ca.gov/2020/02/19/governor-newsom-delivers-state-of-the-state-address-on-homelessness/>.

though counties are the only approved AOT petitioners, the law allows counties to opt out of the program by resolution of their respective Board of Supervisors.⁸⁴ Currently, while 31 counties have opted in, 26 counties have opted out by adopting resolutions.⁸⁵ But even in jurisdictions that have opted in, AOT filings remain low. For instance, San Diego County, which adopted AOT in 2015, had obtained AOT for less than a dozen people over a seven-year period.⁸⁶

The stated intent of the CARE Act was “to connect a person struggling with untreated mental illness and substance use disorders with a court-ordered CARE plan.”⁸⁷ In the originally introduced bill, eligibility included a broad spectrum of mental health and co-occurring substance use disorders, but the final version limited eligibility to “schizophrenia spectrum and other psychotic disorders.”⁸⁸ Examples of severe mental health diagnosis that could benefit from the CARE Act, but were ultimately excluded, include bipolar disorders and standalone substance use disorders.⁸⁹

The original language also focused on individuals who lacked medical decision-making capacity. This demonstrates an intent to make the original CARE Act an alternative to involuntary conservatorships—as evidenced by the fact that the original CARE Act offered court-ordered outpatient treatment with housing assistance. However, the chaptered version of the CARE Act no longer requires proof that a participant lacks medical decision-making capacity. While the clinical evaluation requires assessing the respondent’s capacity to accept psychotropic medication, forced medication administration may not be ordered.⁹⁰

The strong role of the court in the original version was also seen in its power to refer a participant for an involuntary conservatorship under Welfare & Institutions Code sections 5350 et seq. if the participant did not complete the CARE Plan. This court authority was removed in the chaptered version. Under current law, a court can no longer refer a participant for a conservatorship. The court can make an order for a grave disability evaluation pursuant to Welfare and Institutions Code section 5200 (5200-order), but only if the county files a petition making this request.⁹¹

The court’s power to order sanctions against the county was also diluted in the later version of the CARE Act. No details were given with regard to distribution of sanctions collected in the original version, but under the chaptered version, any sanctions deposited to the CARE Act Accountability Fund must be distributed to “local government entities.”⁹² In the original version, the court was able to appoint an agent to ensure the county provided these services or could sanction the county for failure to comply. However, under the chaptered version, if the county or local government entity fails to comply with a court order, “the court shall report that

⁸⁴ Cal. Welf. & Inst. Code § 5349.

⁸⁵ California Department of Health Care Services (HCS), *Assisted Outpatient Treatment: AOT Participation*, <https://www.dhcs.ca.gov/formsandpubs/Pages/Assisted-Outpatient-Treatment-Program.aspx> (accessed Feb. 18, 2024).

⁸⁶ Gary Warth, *Since 2015, only 10 people in San Diego have been forced into mental health treatment under Laura’s Law*, SAN DIEGO UNION-TRIBUNE (Mar. 20, 2020), <https://www.sandiegouniontribune.com/2022/03/20/since-2015-only-10-people-in-san-diego-have-been-forced-into-mental-health-treatment-under-lauras-law>.

⁸⁷ CARE Act original language, *supra* note 77.

⁸⁸ *Id.*; and Cal. Welf. & Inst. Code § 5972(b).

⁸⁹ See the current DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5TH EDITION (2013) (DSM 5).

⁹⁰ Cal. Welf. & Inst. Code § 5977.1(b)(2).

⁹¹ Cal. Welf. & Inst. Code § 5979(a)(2).

⁹² *Id.* subd. (b)(2)(D).

finding to the presiding judge of the superior court or their designee.”⁹³ Then it is the duty of the presiding judge to issue an order to show cause.⁹⁴ In other court settings, the court that issues an order initiates and issues its own order to show cause.⁹⁵

V. The Criminal Justice System Approach

Part of the impetus for the introduction of the CARE Act was the inescapable understanding that the current mental health treatment system in California has been insufficient to help the severely mentally ill.⁹⁶ Sadly, as a result, many severely mentally ill individuals end up incarcerated rather than conserved. In 1939, the renowned psychiatrist and psychiatric researcher, Lionel Penrose, found an inverse relationship between mental health facilities and

⁹³ Cal. Welf. & Inst. Code § 5979(b)(1).

⁹⁴ *Id.* subd. (b)(2).

⁹⁵ California Rule of Court 2.30: Sanctions for rules violations in civil cases

⁹⁶ Auditor of the State of California, *Lanterman-Petris-Short Act: California Has Not Ensured That Individuals with Serious Mental Illnesses Received Adequate Ongoing Care* (July 2020),

<https://information.auditor.ca.gov/pdfs/reports/2019-119.pdf>;

Budget and Legislative Analyst’s Office, *City and County of San Francisco Board of Supervisors Budget and Legislative Analyst, Review of Lanterman-Petris-Short (LPS) Conservators in San Francisco* (Jan. 10, 2022), https://sfbos.org/sites/default/files/BLA%20Policy%20Report_LPS%20Conservatorships_011022.pdf;

Anita Chabria, *California’s most famous homeless man is dead. His life should guide CARE Court*, LOS ANGELES TIMES (Feb. 2, 2023), <https://www.latimes.com/california/story/2023-02-02/la-me-column-mark-rippee-california-care-courts-mental-illness-homeless>;

San Diego County Grand Jury 2018/2019, *San Diego Psychiatric Services: Tri-City’s Shutdown of Psych Units... Tip of the Iceberg* (filed May 2, 2019), <https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2018-2019/SDPsychiatricServicesReport.pdf>;

California Hospital Association, *California’s Acute Psychiatric Bed Loss* (Feb. 2019), <https://calhospital.org/wp-content/uploads/2021/04/psychbeddata2017.pdf>;

Cal. Dept. of Health Care Services (DHCS), *Assessing the Continuum of Care for Behavioral Health Services in California: Data, Stakeholder Perspectives, and Implications* (2022),

<https://www.dhcs.ca.gov/Documents/Assessing-the-Continuum-of-Care-for-BH-Services-in-California.pdf>;

Amanda Lechner et al., *Bed Checks in Three California Counties* (2020),

<https://www.chcf.org/wp-content/uploads/2020/04/BedCheckInpatientPsychiatricCareThreeCACounties.pdf>;

Crane Friedman, *San Diego City Council Declares Behavioral Health Bed Crisis*, THE OFFICE OF COUNCILMEMBER RAUL A. CAMPILLO (Dec. 5, 2023), https://www.sandiego.gov/sites/default/files/2023-12/San%20Diego%20City%20Council%20Unanimously%20Declares%20Behavioral%20Health%20Bed%20Crisis_2.pdf;

San Diego County Grand Jury, *Long Term Psychiatric Beds* (2015/2016),

[https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2015-](https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2015-2016/LongTermPsychiatricBedsReport.pdf)

[2016/LongTermPsychiatricBedsReport.pdf](https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2015-2016/LongTermPsychiatricBedsReport.pdf); San Diego County Grand Jury, *The Mental Health Services Act In San Diego County: Unspent Funds, Ongoing Needs* (filed June 9, 2016),

[https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2015-](https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2015-2016/MHSAinSanDiegoCountyReport.pdf)

[2016/MHSAinSanDiegoCountyReport.pdf](https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2015-2016/MHSAinSanDiegoCountyReport.pdf);

The California State Auditor, *Mental Health Services Act: The State Could Better Ensure the Effective Use of Mental Health Services Act Funding* (2018), <https://information.auditor.ca.gov/pdfs/reports/2017-117.pdf>;

The California State Auditor, *Mental Health Services Act: The State’s Oversight Has Provided Little Assurance of the Act’s Effectiveness, and Some Counties can Improve Measurement of Their Program Performance* (2010),

<https://information.auditor.ca.gov/pdfs/reports/2012-122.pdf>; and

County of San Diego’s Office of Audits and Advisory Services, *Public Administrator/Guardian/Conservator Performance Audit: Final Report* (2020),

<https://www.sandiegocounty.gov/content/dam/sdc/auditor/audit/fy1920/Public%20Administrator%20Guardian%20Conservator%20Performance%20Audit.pdf>.

adult incarcerations.⁹⁷ A reduction in mental health facilities results in an increase in adult incarcerations.

Prior to the CARE Act, the primary method for court oversight of behavioral health programming was through the criminal courts.⁹⁸ Many criminal cases involve defendants with co-occurring mental health and substance use disorders.⁹⁹ Eligible CARE Court respondents fit into the same category.

In California, individuals in the criminal justice system have a substantially higher rate of substance use and other mental health concerns than the general population.¹⁰⁰ Sadly, approximately 75 percent of individuals with untreated mental health issues suffer from co-occurring substance use disorders.¹⁰¹ Another disappointing fact is that these disorders are often the cause of their incarceration.¹⁰² Given these facts, this unfortunate reality would be true for CARE Act participants as well, since an unstabilized, severe mental health disorder is required for eligibility. Thus, to discuss the criminal justice system's prior intervention strategies, incentivized treatment for substance use disorders must be acknowledged, along with mental health treatment.

Historically, those in the criminal justice system could be encouraged to complete certain mental health treatment programs in lieu of incarceration, even if they did not have the independent ability to voluntarily complete the program without incentive. This process of duress, while not ideal, was fairly effective when used.¹⁰³ Mental health and substance use disorder treatment is often made available for offenders who have criminal convictions or cases pending.¹⁰⁴ While these options can improve the outcomes for defendants, many individuals with

⁹⁷ G.G. Grecco & R. Andrew Chambers, *The Penrose Effect and its acceleration by the war on drugs: a crisis of untranslated neuroscience and untreated addiction and mental illness*, 9(1) TRANSL. PSYCHIATRY 320 (Nov. 28, 2019).

⁹⁸ S. Silver & E.S. Hancq, *Prevention over Punishment: Finding the Right Balance of Civil and Forensic State Psychiatric Hospital Beds*, TREATMENT ADVOCACY CENTER RESEARCH REPORT (2024), which states "In 2016, Treatment Advocacy Center wrote, 'The reality that an immeasurable number of people with treatable diseases only get treatment when they get sick enough to commit crimes that send them to jail and then to a forensic bed should be a source of national shame and outcry for reform.'" In the seven years since, the situation has gotten worse. The number of beds per 100,000 people occupied by civil patients has decreased by 17 percent since 2016."

⁹⁹ Egart, *supra* note 2, at 19-21.

¹⁰⁰ DHCS, *Assessing the Continuum of Care*, *supra* note 96, at 10 (2022).

¹⁰¹ Roger H. Peters & Fred C. Osher, *Co-Occurring Disorders and Specialty Courts*, THE NATIONAL GAINS CENTER, 2 (Apr. 2024) (citing National GAINS Center for People with Co-Occurring Disorders in the Justice System, *The Prevalence of Co-Occurring Mental Health and Substance Use Disorders in Jails*, Fact Sheet Series, Delmar, NY: THE NATIONAL GAINS CENTER (2001)).

¹⁰² Cal. Health & Human Services Agency (CalHHS), *Community Assistance, Recovery & Empowerment (CARE) Act Working Group Meeting Minutes*, 17 (Aug. 9, 2023), <https://www.chhs.ca.gov/wp-content/uploads/2023/11/CARE-Act-Working-Group-Minutes-Aug-9-2023.pdf>;

Lisa Halverstadt, *An Advocate Thought CARE Court Would Be a Lifeline. Then She Used It*, VOICE OF SAN DIEGO (Mar. 4, 2025), <https://voiceofsandiego.org/2025/03/04/an-advocate-thought-care-court-would-be-a-lifeline-then-she-used-it/>; and

DHCS, *Assessing the Continuum of Care*, *supra* note 96, at 10 (2022).

¹⁰³ Judicial Council of California, *California Drug Court Cost Analysis Study* (May 2006), https://courts.ca.gov/system/files/2024-10/cost_study_research_summary.pdf

¹⁰⁴ Cal. Penal Code §§ 1000 et seq. (pre-conviction diversion programs), 11550(c)(1) (rehabilitation substitution for custody), 1210 et seq. (establishment of post-conviction diversion program), and 11395 (establishment of 2024 Treatment-Mandated Felony Act) are just some examples.

severe mental health issues outside the criminal justice system have no understanding about how to access care.¹⁰⁵

With recent changes in California law in the last few years, criminal court facilitated treatment is now only available for those committing felonies. While this occurred in part due to the social movement to provide mental health and substance use disorder treatment outside the criminal justice system, the unexpected result is that misdemeanor defendants and non-offenders now often receive less help than those facing criminal felony charges.¹⁰⁶

The reduction in criminal court-mandated treatment was caused by several factors, two of the primary being the reduction in criminal probation periods,¹⁰⁷ and the decrease in jail terms for non-violent offenders.¹⁰⁸ While the severely mentally ill who commit felonies or are found incompetent to stand trial are sometimes still given mandated treatment,¹⁰⁹ those with lesser sentences are often released without any treatment, mandated or otherwise.¹¹⁰

¹⁰⁵ P. Chodoff, *The case for involuntary hospitalization of the mentally ill*, 133 AM. J. PSYCHIATRY 496-501 (May 1976);

Involuntary hospitalization of the mentally ill as a moral issue, 141(3) AM. J. PSYCHIATRY 384 (1984), <https://doi.org/10.1176/ajp.141.3.384>;

Ryan P. McCormack et al., *Commitment to assessment and treatment: comprehensive care for patients gravely disabled by alcohol use disorders*, 382 THE LANCET 995 (Sept. 2013); and J. Silberstein & P.D. Harvey, *Impaired introspective accuracy in schizophrenia: an independent predictor of functional outcomes*, 24 COGN. NEUROPSYCHIATRY 28-39 (Jan. 2019).

¹⁰⁶ Cal. Health & Human Services Agency, *Community Assistance, Recovery & Empowerment (CARE) Act Working Group Meeting Minutes*, 5 and 7 (Oct. 16, 2023), https://www.chhs.ca.gov/wp-content/uploads/2023/11/Minutes_CARE-Data-10.16.23.pdf.

¹⁰⁷ Assembly Bill 1950, 2019-2020 Leg., Reg. Sess. (Cal. 2020) (reducing adult probation to a maximum of one year for most misdemeanor offenses and two years for most felonies).

¹⁰⁸ J.L. Streeter, *Homelessness in California: causes and policy considerations*, STAN. INSTITUTE FOR ECON. POLICY RSCH. May 2022); and

Sarah B. Hunter et al., *Impact of Proposition 47 on Los Angeles County Operations and Budget*, RAND RESEARCH REP. 2017), https://www.rand.org/pubs/research_reports/RR1754.html.

¹⁰⁹ Cal. Health & Human Services (Cal.HHS), *Community Assistance, Recovery & Empowerment (CARE) Act Working Group Meeting Slides*, 44 (Nov. 8, 2023);

S.B. Holliday et al., *Estimating the Size of the Los Angeles County Jail Mental Health Population Appropriate for Release into Community Services*, 16(2) Rand Health Q. 7 (Aug. 2021);

Jerry L. Jennings & Kevin Rice, *The future of jail-based competency treatment: Commentary from 30,000 feet*, 1(1) THE ARCHIVES OF PSYCHIATRY 1-6 (Nov. 22, 2022); and

Alex Sizemore et al., *Equity considerations in mental health diversion in California*, 26(3) J. OF OFFENDER REHABIL. 131-150 (Apr. 2, 2024).

¹¹⁰ See Katherine Warburton, *Failure to treat: an American policy perspective*, CNS SPECTRUMS 1-5 (Oct. 28, 2024); Egart, *supra* note 2, at 19-21;

Carly Finkle, *In(Justice) in Riverside: A Case for Change and Accountability*, AM. C.L. UNION FOUND. 2020), <http://followourcourts.com/wp-content/uploads/rda-report-022822.pdf>;

Jalayne J. Arias et al., *Crime, Incarceration, and Dementia: An Aging Criminal System*, 49(2-3) AM. J. OF LAW & MEDICINE 193-204 (Jul. 2023);

Judy Ann Clausen & Joanmarie Davoli, *No-One Receives Psychiatric Treatment in A Squad Car*, 54 TEX. TECH L. REV. 645 (2021);

Aviram H. Bottleneck, *The place of county jails in California's COVID-19 correctional crisis*, 2 HASTINGS J. CRIME & PUNISHMENT, 76 (2021);

Jess Bendit et al., *Interrupting the Cycle of Incarceration for Individuals with Mental Illness: An Analysis of Los Angeles County's Rapid Diversion Program* UCLA LUSKIN INSTITUTE ON INEQUALITY AND DEMOCRACY 2021), <https://luskin.ucla.edu/wp-content/uploads/2021/07/11RapidDiversionWY.pdf>;

When discussing mandated treatment for behavioral health, it is important to note that jail inmates suffer from serious mental illness at a rate 7 percent higher than the general population.¹¹¹ Thus, proportionally, individuals with mental health disorders are arrested at a higher rate than those without.¹¹² As discussed above, co-occurring mental health and substance use disorders in jail inmates are more usual than not, as well. Therefore, to fully analyze the effect of reduction in mandated treatment for behavioral health, it is important to first understand the recent reductions in drug prosecution.

In 2014, Proposition 47, referred to by supporters as the Safe Neighborhood and Schools Act,¹¹³ reformed theft and drug prosecution laws in California. Prop. 47 reclassified several shoplifting, drug use, and possession offenses from felonies to misdemeanors.¹¹⁴ As such, there are fewer prosecutions and fewer jail terms for those arrested for these charges. This has had a significant impact on the criminal justice system's ability to mandate treatment.

In 2021, California reduced probation periods for misdemeanors from three years to one year. For felonies, most probation periods were reduced from four years to two years.¹¹⁵ As a result, there is less court supervised time in which to mandate treatment.

Over the last few decades, one of the court strategies to incentivize treatment has been the use of Drug Courts. Completion of Drug Court requires at least 18 months of participation.¹¹⁶ Successful participation in Drug Court can mean a termination of probation or a dismissal of the entire criminal conviction.¹¹⁷

Collaborative Drug Courts have proven success records, with 17 percent lower recidivism rates than non-participating defendants.¹¹⁸ Collaborative Behavioral Health Courts use similar strategies and also boast lower recidivism rates and higher rates of treatment service utilization

Sandra M. Leotti & Erin Slayter, *Criminal legal systems and the disability community: an overview*, 11(6) SOCIAL SCIENCES 255 (2022); and

Rebecca Bedard et al., *Elderly, detained, and justice-involved: the most incarcerated generation*, 25 CUNY L. REV. 161 (2022).

¹¹¹ Peters & Osher, *supra* note 101, at 2 (citing Lamb H.R. & Weinberger L.E., *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49(4) PSYCHIATRIC SERVICES 483-492 (1998)).

¹¹² Peters & Osher, *supra* note 101 (citing H.J. Steadman et al., *A SAMHSA research initiative assessing the effectiveness of jail diversion programs for mentally ill persons*, 50(1) PSYCHIATRIC SERV. 1620-3 (Dec. 1999)).

¹¹³ *California Proposition 47, Reduced Penalties for Some Crimes Initiative*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_\(2014\)](https://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_(2014)) (last visited Feb. 2025).

¹¹⁴ Aaron Arnold et al., *Drug Courts in the Age of Sentencing Reform*, CENTER FOR COURT INNOVATION (2020), https://www.innovatingjustice.org/sites/default/files/media/documents/2020-03/report_sentencingreform_03262020.pdf.

¹¹⁵ Assem. Bill 1950, 2019-2020 Leg., Reg. Sess. (Cal. 2020) (created the reduced adult probation terms).

¹¹⁶ Super. Ct. of Cal., *Drug Court*, SUPER. CT. OF CAL. (accessed Mar. 4, 2025), <https://www.sdcourt.ca.gov/sdcourt/criminal2/criminalsubstanceabuse/criminaldrugcourt#:~:text=Upon%20successful%20completion%20of%20the,drug%20charge%20may%20be%20dismissed.>

¹¹⁷ *Id.*

¹¹⁸ Jud. Council of Cal., *California Drug Court Cost Analysis Study* (May 2006),

https://courts.ca.gov/system/files/2024-10/cost_study_research_summary.pdf;

John R. Gallagher et al., *A qualitative interpretive meta-synthesis (QIMS) of women's experiences in drug court: Promoting recovery in the criminal justice system*, 22(3) J. OF SOCIAL WORK PRACTICE IN THE ADDICTIONS 212-32 (July 2022); and

M. Gottschalk, *The opioid crisis: the war on drugs is over. Long live the war on drugs*, 6(1) ANNUAL REVIEW OF CRIMINOLOGY 27, 363-98 (Jan. 2023).

for participants.¹¹⁹ Unfortunately, given the complexity of intervention for individuals with severe co-occurring disorders, success rates in collaborative courts are lower for those with co-occurring mental health and substance use disorders.¹²⁰ While reported success rates in this program vary, data shows that participants receive treatment and experience progress that they otherwise would not have received. There are still numerous gaps in the system of care for treating co-occurring disorders,¹²¹ and while discussions about the need for treatment have been ongoing for decades, investments in the area of substance use disorder treatment, such as the Drug Medi-Cal Organized Delivery System (DMC-ODS), only started as recently as 2016.¹²²

Despite proven record of success in these collaborative programs, the criminal justice system changes mentioned above have reduced participation in these programs dramatically. According to a Center for Court Intervention study from 2020,¹²³ 67 percent of California Courts surveyed reported declines in their caseloads post-Prop. 47, with the average reporting a 24 percent decrease.¹²⁴ Those facing non-violent charges and charges for drug use—now classified as misdemeanors with only one year probation periods—no longer receive the benefit of the Drug Court Program. Due to this decrease in the number of eligible defendants, participation in Drug Court expanded to those with a history of violence.¹²⁵

Less arrests are occurring overall, due to the changes in criminal penalties mentioned above and the movement to have non-law enforcement personnel respond to situations involving mental health disorders. As a result, individuals with untreated behavioral health disorders, often complicated by drug use, are not mandated to complete treatment, cannot independently access and participate in treatment, and thus, receive no treatment. Facing these decreases in criminal mandated treatment, no equivalent increase in non-criminal mandated treatment has occurred.

Recognizing the resultant reduction in mandated treatment and the resultant increase in misdemeanor crimes, voters adopted Proposition 36 in 2024. Titled “The Homeless, Drug Addiction and Theft Reduction Act,” Prop. 36 reversed some of the changes initiated by Prop. 47. This new law became effective as of December 18, 2024, and created Treatment-Mandated Felonies, for what the bill termed “hard drugs,” in cases involving an offender with two prior drug-related convictions. The definition of “hard drugs” excludes hallucinogens, lysergic acid

¹¹⁹ Dale E. McNeil, PhD, & Renee L. Binder, M.D., *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395-1403 (2007), <https://sf.courts.ca.gov/system/files/2215.pdf>; Marie-Helene Goulet et al., *Effectiveness of forensic assertive community treatment on forensic and health outcomes: a systematic review and meta-analysis*, 49(6) CRIMINAL JUSTICE AND BEHAVIOR 838-852 (June 2022), <https://journals.sagepub.com/doi/full/10.1177/00938548211061489>.

¹²⁰ Peters & Osher, *supra* at 101, 2 (citing T.W. Haywood et al., *Predicting the “revolving door” phenomenon among patients with schizophrenic, schizoaffective, and affective disorders*, 152 AM. J. OF PSYCHIATRY 856-861 (1995) and other works).

¹²¹ SB 367, 2025 Leg., Reg. Sess. 2025-26 (Cal. 2025) (as amended on March 24, 2025); K. Warburton, *Failure to treat: an American policy perspective*, CNS SPECTRUMS 1-5 (Oct. 28, 2024); and Egart, *supra* note 2.

¹²² Cal. Health & Human Services (CalHHS), *Community Assistance, Recovery & Empowerment (CARE) Act Working Group Meeting Minutes*, 3-6 (Nov. 6, 2024) (reflects the Keynote address by Brian Hurley, MD, MBA, FAPA, DFASAM, Medical Director, *Substance Abuse Prevention and Control*, County of Los Angeles, Dept. of Public Health on CARE for People with Co-Occurring Disorders), <https://www.chhs.ca.gov/wp-content/uploads/2025/02/CARE-11.6.24-Working-Group-Minutes.pdf>.

¹²³ Arnold et al., *supra* note 114 at 2.

¹²⁴ *Id.*

¹²⁵ McNeil et al., *supra* note 119.

(LSD), other psychedelic drugs, and most stimulants.¹²⁶ The previous law did not contain these exclusions, which shows that Prop. 36 is narrower in scope than the law it replaced. That being said, with the potential for new felony sentences, it may have a significant impact on arrests, prosecution, and collaborative court participation.

With the potential for the criminal justice system to once again mandate treatment, the question becomes whether individuals should receive treatment through the criminal justice system or through civil options. The CARE Act has the potential to influence these unknown potentials. If the CARE Act can be successful in California, the seriously mentally ill will have more options to receive court oversight for treatment, thereby hopefully reducing the commission of mental health and substance use disorder related crimes. However, if the state truly wants to move mental health treatment out of the criminal justice system, more opportunities for access to the mental health system are necessary.

VI. Untreated Mental Health Disorders in California

While Senate Bill 43 recently expanded the definition of grave disability to include severe substance use disorders, it did not increase access to the mental health system. Thus, though the need for severe substance use disorder treatment remains a problem, the state has not improved access to higher levels of care, especially ones involving the courts.¹²⁷

While a small percentage of individuals with co-occurring disorders have been helped by the criminal justice system in the past, California has seen an undeniable surge in calls for individuals experiencing mental health crises.¹²⁸ Although there are numerous reasons for this increase in the demand for mental health services, California's growing homeless population is one of the largest contributing factors. California holds 12 percent of the nation's population, but is home to 30 percent of the nation's homeless.¹²⁹ According to a 2023 study published by the University of California, San Francisco, out of 3,200 adults surveyed experiencing homelessness in California, 82 percent of responding participants reported having a serious mental health condition at some point in their lives.¹³⁰ While financial reasons, incarceration, and other traumas have all led to an increase in homelessness,¹³¹ the overall lack of access to mental health treatment must be explored.

According to the California Department of Health Care Services, "the rate of serious mental illness in California has increased by more than 50 percent from 2008 to 2019."¹³² Movements in the nation complain that the criminal justice system cannot and should not be the

¹²⁶ Cal. Health & Safety Code § 11395(e).

¹²⁷ Paul Sisson, *County says few detained under new definition of grave disability*, SAN DIEGO UNION TRIBUNE (Feb. 18, 2025), <https://www.sandiegouniontribune.com/2025/02/16/county-says-few-detained-under-new-definition-of-grave-disability/>.

¹²⁸ DHCS, *Assessing the Continuum of Care*, *supra* note 96, at 8 (2022).

¹²⁹ M. Kushel, T. Moore et al., *Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness*, UCSF BENIOFF HOMELESSNESS AND HOUSING INITIATIVE (2023) at page 4

¹³⁰ *Id.* at 7.

¹³¹ *Id.* at 5 (revealing that nine of ten participants, out of 3,200 surveyed, reported losing their last housing in California, 72 percent reported having experienced physical violence, and 19 percent became homeless after being released from jail or prison. Low household incomes and increased housing costs also contributed to homelessness).

¹³² DHCS, *Assessing the Continuum of Care*, *supra* note 96, at 37 (2022).

primary intervener in this area.¹³³ The need for available mental health services is critical, with 280,000 individuals calling California’s new 988 Suicide and Crisis Lifeline in its first year.¹³⁴ That is double the volume of calls any other state has received and shows the severity of the problem that California is wrestling.¹³⁵

In California, 43 percent of surveyed individuals seeking mental health services also reported it was “somewhat or very difficult to secure an appointment with a provider who accept[ed] their insurance.”¹³⁶ However, only 15 percent of the same individuals surveyed felt the same way about appointments for physical health services.¹³⁷ This disparate access has prompted efforts to ensure parity between physical and mental health benefits. Notably, Medi-Cal covered individuals have nearly double the rate of serious mental illness and substance use disorders than those with other sources of insurance.¹³⁸

Opponents of the CARE Act cited the desire for self-determination and voluntary treatment without court oversight or mandates. Opponents mainly consisted of disability rights groups and counties.¹³⁹ Proponents consisted of cities and families of individuals unable to access care. They cited human dignity and the hope that vulnerable individuals could finally get access to mental health treatment through this new program.¹⁴⁰

Likely due to strong opposition, all references to the potential for the CARE Act to force treatment were removed from the final version as codified. While the CARE Act references the

¹³³ Esther Anene et al., *Revisiting Research Safety Protocols: The Urgency for Alternatives to Law Enforcement in Crisis Intervention*, 74(3) PSYCHIATR. SERV., 325-328 (Mar. 1, 2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10027434/>.

¹³⁴ Anabel Sosa, ‘A lifesaving tool’: California’s new mental health crisis line sees a surge in calls, CALMATTERS (Jul. 19, 2023), <https://calmatters.org/health/mental-health/2023/07/988-hotline-california-mental-health/>.

¹³⁵ *Id.*

¹³⁶ DHCS, *Assessing the Continuum of Care*, *supra* note 96, at 10 (2022).

¹³⁷ *Id.*

¹³⁸ *Id.* at 11.

¹³⁹ Disability Rights Cal., *SB 1338 (Umberg) – Disability Rights California Information on CARE Act*, DISABILITY RIGHTS CAL. (Feb. 7, 2023), <https://www.disabilityrightsca.org/latest-news/sb-1338-umberg-disability-rights-california-information-on-care-act>;

Jim Wood, *Opposition to CARE Court (SB 1338) as Amended June 16, 2022*, HUMAN RIGHTS WATCH (June 24, 2022), <https://www.hrw.org/news/2022/06/24/opposition-care-court-sb-1338-amended-june-16-2022>; and

Cal. State Association of Counties, *CARE Courts/SB 1338*, CAL. STATE ASSOCIATION OF COUNTIES, <https://www.counties.org/node/20254>.

County concerns, <https://www.counties.org/node/20254>.

¹⁴⁰ LegiScan, *Bill Sponsors: CA SB1338 | 2021-2022 | Regular Session*, LegiScan <https://legiscan.com/CA/sponsors/SB1338/2021>;

NAMI Cal., *Care Act*, <https://namica.org/care/>;

City of San Diego, *Mayor Gloria Joins Governor for Signing of CARE Court Legislation*, CITY OF SAN DIEGO (Sept. 14, 2022), <https://www.sandiego.gov/mayor/mayor-gloria-joins-governor-signing-care-court-legislation>; and see Cal. Health & Human Services (CalHHS), *Community Assistance, Recovery & Empowerment (CARE) Act Working Group Meeting Minutes*, 2, 11, 14, & 21 (Nov. 8, 2023), <https://www.chhs.ca.gov/wp-content/uploads/2023/12/CARE-Act-Working-Group-Minutes-Nov-8-2023.pdf>, reflecting the Public Comment Statement of Lauren Rettagliata, author of *Housing that Heals*, member of the California Health & Human Services Agency CARE Act Working Group, and family member of someone with a serious mental illness and substance use disorder. Rettagliata opined that agreements should make housing dependent on required treatment because the mentally ill often lack insight into their own needs. The Working Group also contains a Public Comment Statement from “Tanya,” who filed a CARE petition for her son, but says voluntary medication and giving him choices will not work because he suffers from auditory hallucinations and will make the wrong choices.

power of 5200-orders, as discussed above, it is referenced as “existing legal authority,” and not a CARE Act power. Under Welfare and Institutions Code sections 5200 et seq., counties have the power to ask courts for a grave disability evaluation through a 5200-order petition process. A 5200-order for evaluation can never force treatment, but can allow a gravely disabled individual, who cannot be helped by the voluntary nature of the CARE Act process, to potentially obtain needed services through the LPS system. If the individual is, in-fact, found to be gravely disabled, services can then be mandated through the LPS system, but only after a referral from a professional in charge of an LPS facility or their designee. Currently, the power to file 5200-order petitions remains solely in the hands of counties. The court itself cannot issue such an order on its own motion. Thus, in form and in practice, CARE Court is an exclusively voluntary program, and if the county does not seek a 5200-order, one cannot be ordered. As Sacramento County’s Judge Brown has stated, “...[A CARE Plan] is a court order to have a person get involved in treatment and work with a treatment professional. There is no power for the court to order someone to a hospital setting with CARE Court.”¹⁴¹ In response to opponents’ earlier concerns, a CARE Plan, if ordered, directs the county to act, but not the respondent.¹⁴²

Ironically, news articles paint a different picture of the CARE Act, contributing to the confusion over the power and use of the Act in practice. Recent articles still reference forced or compelled treatment, which is not the practice of the CARE process as codified.¹⁴³

As mentioned above, the CARE Act was not the first civil program to use non-criminal court oversight to encourage participation in mental health treatment. AOT is a similar, nationally used program, where the court can be petitioned to encourage the respondent to engage in treatment. The CARE Act was set up similarly to AOT, by offering court-ordered voluntary treatment, with the “black robe effect” of the judge’s presence being the only means to motivate compliance. AOT has been successful in some states, such as New York (with an average of 1500 petitions a year and 96 percent of petitions granted),¹⁴⁴ but not nearly as successful in California (with an average of 2,000 petitions a year and approximately 50 percent of petitions granted).¹⁴⁵ Of note, state laws vary. For example, in New York, numerous petitioners can file for AOT, but in California, only counties have this ability.¹⁴⁶

Under California’s AOT law, eligibility requires the very high threshold of multiple, failed mental health holds. This is likely one of the reasons for the low number of petitions. In a

¹⁴¹ Devin Trubey, *Inside Sacramento County Care Court: The first few months in review*, ABC10 (Jan. 20, 2025), <https://www.abc10.com/article/news/local/sacramento/inside-sacramento-county-care-court/103-54072256-e72d-49b9-be2d-9f50e3fd30f0>.

¹⁴² As discussed below in Section VII, there is a conflict with this process that grants sanctionable court orders against the county, since only counties can initiate CARE Plan hearings.

¹⁴³ See Christine Mai-Duc, *California Falling Short of Enrollment Goal as Mental Health Courts Roll Out Statewide*, CAL. HEALTHLINE (Nov. 27, 2024), <https://californiahealthline.org/news/article/mental-illness-california-care-court-gavin-newsom-counties/>; and

Jeanne Kuang, *Families have high hopes for Gavin Newsom’s CARE Courts. Providers want to lower expectations*, CALMATTERS (Aug. 28, 2023), <https://calmatters.org/housing/2023/08/care-court-california-start/>.

¹⁴⁴ New York State Office of Mental Health, *AOT Reports: Program Statistics* (accessed Feb. 20, 2025), https://my.omh.ny.gov/analytics/saw.dll?Dashboard&PortalPath=%2Fshared%2FAOT%2F_portal%2FAOT%20Assisted%20Outpatient%20Treatment%20Reports&page=Program%20Statistics%20-%20Petitions%20Filed&nquser=BI_Guest&nqpassword=Public123

¹⁴⁵ Cal. Dept. of Health Care Services (DHCS), *Laura’s Law: Assisted Outpatient Treatment Demonstration Project Act of 2002* (2023), <https://www.dhcs.ca.gov/Documents/2022-Lauras-Law-Assisted-Outpatient-Treatment-Demonstration-Project-Act-of-2002.pdf>.

¹⁴⁶ N.Y. Consolidated Laws, Mental Hygiene Law § 9.60(e).

letter to the state auditor, the Los Angeles County Department of Mental Health identified the need for state law to recognize that not all individuals who qualify for a 5150 hold will qualify for additional holds.¹⁴⁷ Thus, AOT begs the question: how is an individual consistently released from the hospital without psychiatric help supposed to show failed holds to initiate court ordered mental health treatment? The California State Auditor's 2019 report highlights the significant number of individuals placed on multiple 5150 holds. However, without transitioning to inpatient psychiatric hospitalization, these short-term involuntary holds are not a factor in deciding AOT eligibility.

This issue is especially true for individuals suffering from co-occurring disorders. For instance, when an individual with an underlying untreated psychiatric disorder comes to the emergency department with alcohol intoxication, it is not uncommon for the patient to be released after their intoxication has resolved.¹⁴⁸ The cycle then continues with no access to care and no eligibility for AOT.¹⁴⁹

The CARE Act was the first program of its kind in California to allow many individuals to petition the court directly. Like AOT in New York, it is not limited to county petitions alone. While only those with schizophrenia are currently eligible for the CARE Act, it also has a lower threshold for eligibility than AOT, with involuntary inpatient hospitalization being a consideration—but not a necessary requirement—for eligibility.

VII. How *City of Grants Pass v. Johnson* Affects City Use of CARE Court

With the recent U.S. Supreme Court decision in the case of *City of Grants Pass v. Johnson*¹⁵⁰ (*Grants Pass*) and the timely implementation of the CARE Act, California cities now have another opportunity to pivot away from criminal prosecution toward civil proceedings. The *Grants Pass* decision has already impacted individuals experiencing homelessness, including those individuals with mental health conditions.¹⁵¹ This 2024 decision allows cities to arrest and fine individuals for sleeping outside, even if there are no shelter beds available. Since this

¹⁴⁷ Auditor of the State of Cal., *Lanterman-Petris-Short Act California Has Not Ensured That Individuals With Serious Mental Illnesses Receive Adequate Ongoing Care, Letter to Auditor from County of Los Angeles Dept. of Mental Health*, 87 (July 2020), <https://information.auditor.ca.gov/pdfs/reports/2019-119.pdf>.

¹⁴⁸ Carolin Kilian et al., *Stigmatization of people with alcohol use disorders: An updated systematic review of population studies*, 45 ALCOHOL CLIN. EXP. RES. 899-911 (May 10, 2022), <https://doi.org/10.1111/acer.14598>

¹⁴⁹ Auditor of the State of Cal., *supra* note 147;

Gary Warth, *Since 2015, only 10 people in San Diego have been forced into mental health treatment under Laura's Law*, SAN DIEGO UNION TRIBUNE (March 20, 2022), <https://www.sandiegouniontribune.com/2022/03/20/since-2015-only-10-people-in-san-diego-have-been-forced-into-mental-health-treatment-under-lauras-law/>;

Tooba Naveed, *California's CARE Act: A Step Forward for Mental Healthcare, or a Step Back for Individual Liberties?*, 55 UNIV. OF THE PACIFIC L. REV. 1 (2023),

<https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1488&context=uoplawreview>;

Paul S. Appelbaum, *Ambivalence codified: California's new outpatient commitment statute*, PSYCHIATRIC SERV. (2003), <https://doi.org/10.1176/appi.ps.54.1.26>; and

Andrea Reynoso, *Is California Committed?: Why California Should Take Action To Address The Shortcomings Of Its Assisted Outpatient Commitment Statute*, 88 SOUTH. CALIF. L. REV. 4 (May, 2015), https://southerncalifornialawreview.com/wp-content/uploads/2018/01/88_1021.pdf.

¹⁵⁰ *City of Grants Pass v. Johnson* (*Grants Pass*), 603 U.S. 520 (2024).

¹⁵¹ Theresa Clift & Phillip Reese, *Sacramento quietly ramped up criminal citations to homeless people, 'I can't afford to pay it'*, THE SACRAMENTO BEE (Feb. 03, 2025), <https://www.sacbee.com/news/local/article295387299.html>

decision, criminal citations for unlawful camping have increased in some California cities.¹⁵² While cities have been using police to respond to homelessness through punitive civil and criminal penalties for some time,¹⁵³ theoretically, they now have the new option of utilizing CARE Court to intervene with unmet needs, instead of prosecuting individuals for unlawful camping.

A. Grants Pass Overview

In *Grants Pass*, unhoused plaintiffs sued the Oregon town of Grants Pass in federal court, arguing that its camping ban violated the Eighth Amendment’s protections against cruel and unusual punishment.¹⁵⁴ The City of Grants Pass enacted ordinances barring people from sleeping outside in public using a blanket, pillow, or even a cardboard sheet to lie on.¹⁵⁵

The six conservative justices on the Supreme Court disagreed with plaintiffs’ arguments. Writing for the majority, Justice Neil Gorsuch opined, “The Court cannot say that the punishments Grants Pass imposes here qualify as cruel and unusual.” In her dissent, Justice Sonia Sotomayor accused her colleagues of criminalizing the very condition of being homeless, calling on the court to “prohibit punishing the very existence of those without shelter.”¹⁵⁶

The *Grants Pass* ruling overturns several decisions by the Ninth Circuit, which has jurisdiction over western states, including California. In 2018, the U.S. Court of Appeals for the Ninth Circuit held in *Martin v. City of Boise* that cities cannot punish people for sleeping outside without providing adequate shelter options.¹⁵⁷ The Ninth Circuit then reinforced that decision in 2022 when it struck down Grants Pass’ camping ban, siding with the plaintiffs. These rulings established some protections from aggressive removal of homeless encampments in western states. *Martin v. City of Boise* has effectively been overruled by *Grants Pass*.

B. Grants Pass Decision and CARE Court

Beginning in late 2024, California’s rollout of CARE Court and the *Grants Pass* decision overlapped. The Supreme Court issued the *Grants Pass* decision on June 28, 2024, and CARE Court began in the majority of California counties on December 1, 2024. With CARE Court, California cities now have the opportunity to pivot from criminal prosecution of charges such as unlawful camping, public nudity, and trespassing, to civil proceedings—where California counties must try to offer shelter and support under the CARE Act. Many jurisdictions, including California cities, have sought quick fix responses that can remove individuals off a corner, using

¹⁵² Robbie Sequeira, *Many More Cities, Including Several in Southern California, Ban Sleeping Outside Despite Lack of Shelter Space*, TIMES OF SAN DIEGO (Jan. 29, 2025), <https://timesofsandiego.com/life/2025/01/29/many-more-cities-including-several-in-southern-california-ban-sleeping-outside-despite-lack-of-shelter-space/>; and Megan Vaz, *After Supreme Court’s contentious homelessness ruling, what’s next for California cities?*, THE SACRAMENTO BEE (July 3, 2024), <https://www.sacbee.com/news/politics-government/article289705924.html>.

¹⁵³ Trevor Morgan & Kathleen Quinn, *Homelessness charges spiked in Modesto before court ruling. What’s behind the increase?*, THE MODESTO BEE (Dec. 21, 2024), <https://www.modbee.com/news/politics-government/article297010089.html>.

¹⁵⁴ *Grants Pass*, 603 U.S. 520 (2024).

¹⁵⁵ Marisa Kendall, *Supreme Court gives cities in California and beyond more power to crack down on homeless camps*, CALMATTERS (June 28, 2024), <https://calmatters.org/housing/2024/06/california-homeless-camps-grants-pass-ruling/>.

¹⁵⁶ *Grants Pass*, 603 U.S. at 592.

¹⁵⁷ *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

the threat of law enforcement.¹⁵⁸ However, because merely shifting people around after a removal does not solve homelessness, the lack of treatment remains a problem. This is where cities and counties can utilize the CARE process to obtain treatment for these individuals.

In 2024, Sacramento County reported a 41 percent decrease in homelessness since 2022.¹⁵⁹ Sacramento County achieved this dramatic progress by increasing temporary housing capacity by 84 percent and permanent housing slots by 29 percent.¹⁶⁰ Local officials say that Sacramento County's decline in homelessness follows a drop in homeless populations in nearby counties. In 2023, Yuba and Sutter Counties experienced a 10 percent drop in homelessness over the past year, while other recent counts show a 6 percent decrease in Placer County and a 2 percent decrease in Nevada County. San Francisco also saw a recent 7 percent decline in its homeless population.¹⁶¹ Yet, these numbers reflect a pre-*Grants Pass* era. California cities and counties can now arrest and fine individuals for sleeping outside, even if they have nowhere else to go.¹⁶² The dissenting justices in the *Grants Pass* decision raised the concerns that there are tens of thousands of unsheltered individuals in the United States who are the victims of poverty, there is a grave shortage of affordable housing, and there are many who suffer from underlying physical, mental health, and substance use conditions. The dissenting justices understandably questioned where these individuals are supposed to go.¹⁶³

C. Considerations after *Grants Pass*

The *Grants Pass* decision does not directly impact CARE Court; rather, it gives cities the option of seeking treatment instead of punishment for individuals suffering from mental health conditions. Thus, California cities can now reconsider whether the *Grants Pass* ruling of criminalizing poverty, homelessness, and mental illness is a solution to removing individuals from the streets. Cities may also consider whether using the CARE process for individuals to obtain supportive housing, peer support services, and mental healthcare are evidence-based interventions that could prevent and end homelessness for those with mental health conditions.

VIII. Challenges for Cities with the Current CARE Act

While the CARE Act was implemented with promises of better access to mental health treatment with court oversight, critical limitations inherent in the program have blocked many opportunities for success.

¹⁵⁸ Camille Squires, “Designed to be Cruel”: How Grants Pass Will Ramp Up the Policing of Homelessness, BOLTS (July 2, 2024), <https://boltsmag.org/grants-pass-ruling-homelessness/>

¹⁵⁹ Darrell Steinberg, *How the Grants Pass ruling gives California a shot at a better law to address homelessness*, CALMATTERS (June 28, 2024), <https://calmatters.org/commentary/2024/06/homeless-grants-pass-supreme-court/>

¹⁶⁰ Chris Nichols, *Sacramento County's unhoused population drops 29%, bucking recent trends*, CAPRADIO (June 5, 2024), <https://www.capradio.org/articles/2024/06/05/sacramento-countys-unhoused-population-drops-29-bucking-recent-trends/>.

¹⁶¹ *Id.*

¹⁶² *Grants Pass*, 603 U.S. 520 (2024).

¹⁶³ *Id.* at 564-566.

A. CARE Act Dismissals Have No Codified Alternate Pathway to Care

CARE Act petitions are dismissed when (1) the respondent's petition does not meet the prima facie burden,¹⁶⁴ (2) the respondent is enrolled or is likely to enroll in voluntary treatment,¹⁶⁵ (3) the respondent does not appear for court,¹⁶⁶ or (4) the respondent does not voluntarily cooperate with the process.¹⁶⁷

Petitions that do not meet the prima facie burden can be returned to the petitioner for refiling.¹⁶⁸ However, there is no exact process to refile and notify the court that a prior petition was filed. Notification of the case's refiled status is done manually in the narrative section of the CARE-100 petition. For a refiling, there is also a possibility that the county could accuse a petitioner of a bad faith filing.¹⁶⁹ This can theoretically happen if the county disagrees with the changed circumstances alleged by the petitioner. If this conflict occurs, a court hearing on the merits of the petition may be necessary, but is not discussed in the CARE Act itself. Thus, it is up to the judge's discretion.

Notably, the County Behavioral Health Directors Association (CBHDA) recommended limiting referrals from cities for homeless respondents because it opines that only 30 percent or less of individuals experiencing homelessness have severe mental health conditions.¹⁷⁰ CBHDA's recommendation included a suggestion that "inappropriate referrals" should result in caps, penalties, or fines. However, the recommendation was based on limiting the percentage of referrals made, rather than whether the petition met the prima facie burden required by the CARE Act.

Cities and counties may also differ in how they evaluate whether an individual is enrolled and stable, or likely to enroll in voluntary treatment.¹⁷¹ The question becomes, how long someone must be enrolled in a program to be considered stable. If someone is likely to enroll, but has a history of dis-enrolling, does that make them eligible for the CARE process? Is the respondent's longitudinal history taken into account? Given that the CARE Act is still in its early days, these questions could potentially be addressed in future legislative amendments. As the CARE Act is a voluntary program, counties determine whether the respondent is "voluntary enough" for a recommendation of petition dismissal. CARE Act data requirements could highlight this type of petition dismissal as a missed opportunity.

Additional resources for counties to locate the unhoused could decrease petition dismissals for the third reason discussed above—the respondent does not appear for court. But the fourth reason for petition dismissal—the respondent does not voluntarily cooperate with the

¹⁶⁴ Cal. Welf. & Inst. Code § 5977(a)(2).

¹⁶⁵ *Id.* subd. (a)(5)(A).

¹⁶⁶ *Id.* subd. (b)(2).

¹⁶⁷ CARE Agreements are created with voluntary participation. While CARE Plans can technically be created following a hearing pursued by the County, no CARE Plans have been created in San Diego County. San Diego County has stated they have created nearly double the CARE Agreements compared to the other pilot counties combined. Cassie N. Saunders, *County Highlights First Year of CARE Act Accomplishments*, COUNTY OF SAN DIEGO COMMUNICATIONS OFFICE (Oct. 24, 2024), <https://www.countynewscenter.com/county-highlights-first-year-of-care-act-accomplishments/>.

¹⁶⁸ Cal. Welf. & Inst. Code § 5977(a)(2).

¹⁶⁹ Cal. Welf. & Inst. Code § 5975.1(a).

¹⁷⁰ CBHDA, *Letter to Assembly Judiciary Committee Regarding AB 2830 (Bloom) CARE Court - Concerns* (April 16, 2022) at 7, <https://www.disabilityrightscs.org/system/files/file-attachments/003-Exhibits%20Vol%201%20%281-11%29.pdf> at 227.

¹⁷¹ Cal. Welf. & Inst. Code § 5977(a)(5)(A).

process—goes to the heart of the problem with overall access to care. Often, a refusal to voluntarily cooperate is linked to the severity of a respondent’s untreated mental illness.

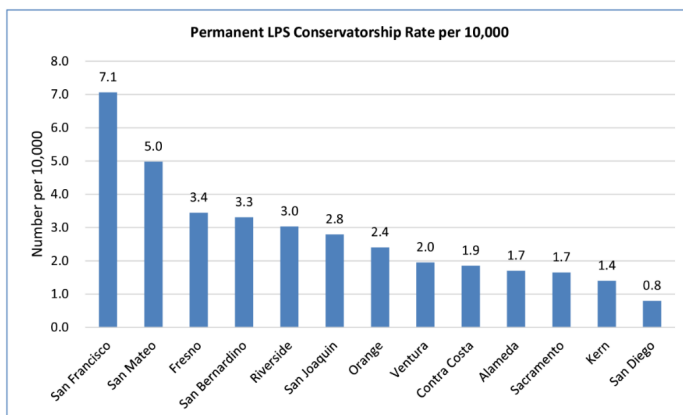
The ironic truth is that the more severe the mental illness, the less likely the CARE process can assist.¹⁷² A dismissal for lack of engagement leaves the respondent in the same bad situation they were in prior to the filing of the CARE petition. They remain untreated while the petition is pending, and they continue to refuse voluntary care after it is dismissed. As a result, individuals with severe mental illness who are unable or unwilling to engage often do not receive mental health care. Many return to cycling between the streets, hospitals and jail.

Some individuals who refuse treatment due to mental illness may meet the eligibility requirements for LPS conservatorships.¹⁷³ While involuntary conservatorships are available outside the criminal justice system through the Welfare and Institutions Code under the LPS Act,¹⁷⁴ obtaining access to care in that system is incredibly challenging. Unfortunately, there is little consistency in how counties use this option to mandate care. See chart below, labeled as Appendix V: California Counties and LPS Conservatorship Caseload.¹⁷⁵

Appendix V: California Counties and LPS Conservatorship Caseload

We surveyed the largest counties in California (excluding Los Angeles and Santa Clara) on new and renewed permanent LPS conservatorship caseload in FY 2020-21. Based on self-reported data from the 13 counties responding to the survey, the total permanent LPS conservatorship caseload per 10,000 population ranged from 0.8 in San Diego County to 7.1 in San Francisco, as shown in Exhibit 16 below.

Exhibit 16. Range of Permanent LPS Conservatorship Cases per 10,000 Population Among 13 of the Largest California Counties (FY 2020-21)



Source: San Francisco Superior Court; Budget and Legislative Analyst survey of counties (self-reported data)

¹⁷² “Grave disability among individuals with schizophrenia remains widespread despite anti-psychotic medications and their effects on psychosis. Evidence indicates that nearly 80 percent of individuals with schizophrenia have persistent deficits in social functioning...” Juliet Silberstein, BA & Philip D. Harvey, PhD, *Impaired Introspective Accuracy in Schizophrenia: An Independent Predictor of Functional Outcomes*, 24 COGN. NEUROPSYCHIATRY 1, at 28-39 (Jan. 2019) (citing D. Wiersma et al., *Social disability in schizophrenia: its development and prediction over 15 years in incidence cohorts in six European centres*, 30 PSYCH. MED. 5, 1155–1167 (2000)); and

Cal. Health & Human Services Agency, *supra* note 4, at slides 31-34, which reflects the presentation by Katherine Warburton DO, Statewide Medical Director, California Department of State Hospitals on *How We Serve and Support*, https://www.chhs.ca.gov/wp-content/uploads/2023/11/11082023-CARE-WG-Meeting_slides-posting.pdf.

¹⁷³ Cal. Welf. & Inst. Code § 5352.

¹⁷⁴ *Id.*

¹⁷⁵ City and County of San Francisco Board of Supervisors Budget and Legislative Analyst Office, *Memorandum on Review of Lanterman-Petris-Short (LPS) Conservatorship in San Francisco* (Jan. 10, 2022) at 31.

Welfare and Institutions Code section 5150 allows peace officers and certain county approved professionals to initiate involuntary holds up to 72 hours for an assessment¹⁷⁶ when an individual is gravely disabled.¹⁷⁷ An individual is deemed gravely disabled when they are unable to manage their food, shelter, clothing, personal safety, or necessary medical care due to a mental health disorder, a severe substance use disorder, or a combination of both.¹⁷⁸ This hold¹⁷⁹ can sometimes result in a referral to the county for an LPS conservatorship investigation.

This referenced definition of grave disability reflects a recent expansion in eligibility with the passing of SB 43 (effective Jan. 1, 2024). However, counties were given the option to postpone the effective date for this expanded definition of grave disability for up to two years if they chose. To illustrate, San Francisco County began implementation of SB 43 immediately on January 1, 2024, while San Diego and Sacramento Counties delayed until January 1, 2025. Regardless of the implementation dates or the fact that the definition was expanded, limitations in access to care under the LPS Act system remained unchanged.

Aside from a 5150 hold, the only other way for a patient to gain access to the LPS Act system of care is through a court order. As discussed above, a 5200-order can mandate that a grave disability evaluation be completed,¹⁸⁰ however the Code does not empower the court to initiate this order on its own motion. The Code requires review of “a petition pursuant to this article,”¹⁸¹ in which only counties are authorized to file these petitions.¹⁸² Under the Code, any individual can request that the county investigate and petition for an order.¹⁸³ But the consequences of the county’s failure to respond to such a request are not addressed. It appears the only recourse for someone requesting a 5200 petition from the county and receiving no response would likely be a Writ of Mandamus.

While the CARE Act does not contain any ability to make direct referrals for LPS conservatorships, the court retains the existing authority to use 5200-orders,¹⁸⁴ after notice is given to the respondent and after termination of the CARE process.¹⁸⁵

While the CARE process was conceived as a voluntary alternative to involuntary conservatorships, the CARE Act recognized that the community it sought to serve may require a higher level of care. How those referrals are being made is currently unknown. All proceedings pursuant to the CARE Act are confidential¹⁸⁶ and the use of 5200-orders by counties to obtain grave disability evaluations is not currently part of the CARE Act data reporting requirements.¹⁸⁷ Of note, given the confidentiality of CARE Act clinical information, without exception, the

¹⁷⁶ An “assessment” is defined by Cal. Welf. & Inst. Code § 5150.4 as “the determination of whether a person shall be evaluated and treated pursuant to Section 5150.”

¹⁷⁷ Cal. Welf. & Inst. Code §§ 5008(h) and 5150.

¹⁷⁸ Cal. Welf. & Inst. Code §§ 5150 and 5008(h).

¹⁷⁹ A 5150 hold can also be initiated for an individual who is a danger to self or danger to others. However, that hold is strictly limited to individuals suffering from a mental health disorder and cannot transition into an LPS conservatorship. Cal. Welf. & Inst. Code § 5150.

¹⁸⁰ Cal. Welf. & Inst. Code § 5206.

¹⁸¹ *Id.*

¹⁸² Cal. Welf. & Inst. Code § 5202.

¹⁸³ Cal. Welf. & Inst. Code § 5201.

¹⁸⁴ Cal. Welf. & Inst. Code § 5200. An “evaluation” is defined under Cal. Welf. & Inst. Code § 5008(a), and “consists of multidisciplinary professional analyses of a person’s medical, psychological, educational, social, financial, and legal conditions as may appear to constitute a problem.”

¹⁸⁵ Cal. Welf. & Inst. Code § 5979(a).

¹⁸⁶ Cal. Welf. & Inst. Code § 5976.5(e).

¹⁸⁷ Cal. Welf. & Inst. Code § 5985.

county behavioral health professional evaluating the CARE Act respondent pursuant to a 5200-order would be missing critical information related to making a determination of grave disability created through CARE Act intervention.¹⁸⁸ Without information on statewide 5200-order numbers, there is limited insight into civil interventions for CARE Act respondents when the standard support is insufficient.

In direct response to these concerns, Senate Bill 367, filed by Senator Allen on February 13, 2025, and sponsored by both the California State Association of Psychiatrists and the City of San Diego, included a provision which would allow a CARE Court judge to order a direct referral to the county officer providing LPS conservatorship investigations.¹⁸⁹ The CARE Court judge's inability to independently order a 5200 evaluation or include confidential CARE process documentation is also being addressed.

B. City First Responder Filings Are Different Than County or Family Filings

By the end of the first 9 months of implementation, the eight counties implementing the CARE Act received 557 petitions.¹⁹⁰ The dismissal rate was 39 percent, with 217 petitions being dismissed without a CARE Agreement or CARE Plan.¹⁹¹ In contrast, the dismissal rate for first responder petitions in one county was 75 percent.¹⁹² Implementation has been costly, especially considering the tens of millions invested and the low number of CARE Agreements or CARE Plans granted.¹⁹³

These statistics only tell part of the story, however.¹⁹⁴ While county behavioral health departments and public conservators started out as the least likely to use CARE Court, their use has increased dramatically in the second year of implementation.¹⁹⁵ Additionally, families and

¹⁸⁸ Cal. Welf. & Inst. Code § 5976.5(e).

¹⁸⁹ SB 367, 2025 Leg., Reg. Sess. 2025-26 (Cal. 2025) (as amended on March 24, 2025). In addition to CARE Court judges, SB 367 also seeks to include treating physicians, treating psychiatrists, and others as qualified to refer patients to the county agency providing probate conservatorship investigations. While CARE Act confidentiality laws significantly limit what information CARE Court judges can disclose with such a referral, amendments to the law could rectify that limitation if desired.

¹⁹⁰ DHCS, *CARE: Early Implementation*, *supra* note 74, at 6 (Nov. 2024).

¹⁹¹ *Id.* at 6-8. There are numerous reasons CARE Act Petitions are dismissed, including, but not limited to, failure to locate, refusal to engage in a CARE Agreement, failure to meet the prima facie burden, ineligible mental health diagnosis, and/or the likelihood the respondent will voluntarily enter treatment without CARE Court intervention. Of note, petitions decreased by 13.8 percent between the last two quarters, but dismissals increased by 9.3 percent. This summary reports petitions filed statewide as: Quarter 4, 2023 (190), Quarter 1, 2024 (197), Quarter 2, 2024 (170). Dismissals: Quarter 4: 2023 (37), Quarter 1: 2024 (86), Quarter 2: 2024 (94). *Id.*; and *see* Mai-Duc, *supra* note 143.

¹⁹² In the County of San Diego, with first responders accounting for 19 percent of the petitions filed, 12 of the 48 petitions filed by first responders received CARE Agreements. Lisa Halverstadt, *City of San Diego Urging CARE Court Reforms*, VOICE OF SAN DIEGO (Mar. 13, 2025). [Note: 17 percent were dismissed because of the respondent's refusal to engage but other cases were dismissed because voluntary engagement was successfully obtained. There is currently no regular data on the post-dismissal outcomes for respondents.]

¹⁹³ *See California State Budget 2023-24*, *supra* note 5, at 58.

¹⁹⁴ Families have been the leading group of petitioners. DHCS, *CARE: Early Implementation*, *supra* note 74, at 11 (Nov. 2024).

¹⁹⁵ *Id.*; and Halverstadt, *supra* note 3 (Feb. 27, 2025).

first responders have expressed discontent with the lack of elevated levels of care for respondents who are not successful in CARE Court.¹⁹⁶

The differences in accessibility for families, counties, and city first responders make sense when each petitioner experience is examined. Families file CARE petitions because they have been unable to access care for their loved one through traditional channels. City first responders file petitions because county referrals and outreach have been insufficient to encourage the respondent to access care on their own.¹⁹⁷ Through the CARE process, courts have the opportunity to become the newest partners to families and first responders. But with many dismissals and the lack of court ordered CARE Plans in some counties, this may become another missed opportunity.¹⁹⁸

For city first responder petitions and family petitions, it is not uncommon for the individual with severe mental illness to refuse to cooperate.¹⁹⁹ In contrast, county petitions to CARE Court are sometimes made as an alternative to a conservatorship proceeding already in progress.²⁰⁰ It is not surprising that county referrals would make up the majority of CARE Agreements in practice. Referral from a conservatorship process may incentivize the respondent to accept the CARE Agreement. Thus, it is not unexpected to see larger county numbers than any other applicant. In this way, the county is the only petitioner with a carrot and stick approach. The carrot is obviously the benefits of the CARE process, while the perceived stick is the alternative, undesired conservatorship.

As explained above, the CARE Act requires an individual to be (1) experiencing a severe mental disorder²⁰¹ and (2) not be stabilized in ongoing voluntary treatment.²⁰² The Code also requires that the respondent be either “unlikely to survive safely in the community without supervision and the person’s condition is substantially deteriorating” or “in need of services and supports in order to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm to the person or others, as used in Section 5150.”²⁰³ Highlighting these eligibility factors demonstrates the severity of need that must be proven to make a prima facie case.

¹⁹⁶ Halverstadt, *supra* note 3 (Feb. 27, 2025); Halverstadt, *supra* note 102 (Mar. 4, 2025).

<https://voiceofsandiego.org/2025/03/04/an-advocate-thought-care-court-would-be-a-lifeline-then-she-used-it/>.

¹⁹⁷ See articles on city first responder efforts to engage individuals in treatment outside of the criminal justice system, often focusing on the high utilizers of EMS. Examples include: Anthony Tadros et al., *Effects of an Emergency Medical Services-based Resource Access Program on Frequent Users of Health Services*, PREHOSPITAL EMERGENCY CARE: OFFICIAL JOURNAL OF THE NATIONAL ASSOCIATION OF EMS PHYSICIANS AND THE NATIONAL ASSOCIATION OF STATE EMS DIRECTORS (June 19, 2025); and James V. Dunford et al., *Impact of the San Diego Serial Inebriate Program on Use of Emergency Medical Resources*, ANNALS OF EMERGENCY MEDICINE, Vol. 47, Iss. 4, 2006, at 328-336 (Apr. 2006).

¹⁹⁸ Halverstadt, *supra* note 3 (Feb. 27, 2025).

¹⁹⁹ County of San Diego reports that 18 percent of CARE Act petitions are dismissed due to refusal to engage. *Id.*

²⁰⁰ Mai-Duc, *supra* note 143. “San Diego County’s program has been among the most robust, with 221 petitions filed since it launched in October 2023, although a third of the county’s participants were already under conservatorship. Irvine said 76 of the state’s 100 CARE Plan participants are from the county.” [Note: The authors of this article recognize the inaccuracies inherent in news articles on complicated legal issues. This article refers to CARE Plans in the County of San Diego, but the article should have said CARE Agreement.]

²⁰¹ Cal. Welf. & Inst. Code § 5972(b), citing 5600.3(b)(2).

²⁰² *Id.* subd. (c).

²⁰³ *Id.* subd. (d).

While the court can take any facts into account in making a prima facie determination, counties may interpret these factors differently from courts and cities. Thus, a county evaluation post-prima facie case to the court may differ dramatically from the city's assessment.

As an example, high utilization of emergency medical services (EMS) is the “canary in the coal mine” for an individual that is not clinically stable. It can serve as an early warning that something is wrong and their physical, mental health, substance use, or basic needs are not being met.²⁰⁴ However, high utilization of EMS is currently not a mandatory factor taken into account when evaluating whether a patient is a good fit for the CARE process. Theoretically, a patient's use of EMS could even increase the likelihood of a CARE petition dismissal if the county evaluates them as able to access care by their historical ability to receive emergency medical services.

Another challenge in implementing the CARE Act is that the phrase “stabilized in ongoing voluntary treatment” is not defined. Verbal willingness to engage in, or current enrollment in an ACT program may need to be questioned when contrasted with the fact that someone is calling 911 more than 20 times a year. Connection and enrollment are not always the same as participation and stabilization. Additionally, reliance on 911 cannot be a lifeline for survival for someone who otherwise meets the criteria for the program. Oversight by the judge and proactive county intervention are the reasons the CARE process has the potential to make a difference in some people's lives. However, stability is not defined in the code, so there can be inconsistency in how it is applied from county to county.

In evaluating the CARE Act eligibility process, cities and counties do not always share similar interests. As discussed in section VIII(A) above, the County Behavioral Health Directors Association (CBHDA), after recognizing that almost 30 percent of the homeless population suffer from severe mental illness, recommended limiting city referrals to the CARE process for homeless respondents to a similar percentage.²⁰⁵ The idea included a recommendation that inappropriate referrals should result in caps, penalties, or fines for city petitioners and paid no heed to whether petitions meet the prima facie burden already required by the CARE Act. This implication appears to highlight a lack of understanding of the unique needs of city petitions, and a disconnect in county-city stakeholder discussions.

Cities maintain EMS systems, but when behavioral health needs surpass emergency status, cities which contract with the county for behavioral health services may require county intervention with unmet behavioral health needs. In some instances, over-reliance on EMS can show lack of sufficient county engagement, but cities are not authorized to provide most behavioral health services independently, even if funding were abundant. With no mandate that cities be included in county CARE Court implementation meetings, city concerns like EMS overutilization, may not have been taken into consideration.

²⁰⁴ Tadros et al., *supra* note 197; Dunford et al., *supra* note 197;

Hemal K. Kanzaria et al., *Frequent Emergency Department Users: Focusing Solely On Medical Utilization Misses The Whole Person*, 38 HEALTH AFFAIRS 11, 1866–1875 (2019); and

B.S. Ku et al., *Factors associated with use of urban emergency departments by the U.S. homeless population*, 125 PUB. HEALTH REP. 3, 398-405 (May-June 2010), <https://pmc.ncbi.nlm.nih.gov/articles/PMC2848264/>, which states “Homeless people who seek care in urban EDs come by ambulance, lack medical insurance, and have psychiatric and substance abuse diagnoses more often than non-homeless people. The high incidence of repeat ED visits and frequent hospital use identifies a pressing need for policy remedies.”

²⁰⁵ CBHDA, *supra* note 170, at 4 and 7.

C. Individuals with Untreated Severe Mental Illness May Not Engage Voluntarily

Though the CARE Act's goal is to help the most severely mentally ill, the current model only helps those who suffer from the mildest forms of severe mental illness and are fortunate enough to have support.²⁰⁶ While the parameters as to who qualifies for the CARE process appear aimed at the most severely mentally ill, some argue these are the individuals who are most difficult to reach with the current process.²⁰⁷ The phrase "likely to deteriorate without care," describes a patient who desperately needs help, but also increases the likelihood that they will refuse the voluntary pathway offered through the CARE process.

This is more common than not for city first responder petitions. For respondents who lack resources and the support of family or friends, city first responders are often the only line of support in their lives. Following a CARE petition, the CARE team attempts to initiate voluntary compliance from resistant respondents.²⁰⁸ For families and other petitioners unable to reach their loved one, this is a critical and a powerful tool to potentially engage them. Unfortunately, this approach is not as effective for city first responder petitions. CARE team outreach is much the same government outreach that has proven unsuccessful prior to the petition's filing. And the county FSP and housing programs offered are the same programs that the respondent has refused to engage with previously. Repeated engagement by community paramedics, homeless outreach workers, members of law enforcement, and/or EMS are often offered generously for months, and sometimes years, before a city first responder petitioner takes the extra time and effort to seek assistance by filing a CARE petition.²⁰⁹ Consequently, when a city first responder has been unable to voluntarily engage a respondent, common sense dictates it unlikely they will agree to a CARE Agreement.

²⁰⁶ Help for respondents with severe untreated mental health disorders, including schizophrenia, who are resistant to accepting help, has often been sought through California policy. Hope was renewed with AOT, but few individuals were helped in California. Carrie Arnold, *How do you treat someone who doesn't accept they're ill?*, BBC (2014), <https://www.bbc.com/future/article/20180806-how-do-you-treat-someone-who-doesnt-accept-theyre-ill>; and California Health & Human Services Agency, *CARE Working Group Meeting*, YOUTUBE (May 17, 2023) at 3:38:15-3:40:25, <https://www.youtube.com/watch?v=zhrEK3oZAOQ>.

²⁰⁷ CARE Working Group Meeting, *Public comment from Tanya Fedek*, who submitted a CARE Act petition for her son, "asked that there be service provider accountability and records of engagement attempts, better information sharing, and audits of cases before they are dismissed.... She said her son's case has been closed and he never received services or was offered appropriate housing. The LCSW that was assigned to him did not have the proper knowledge to address his case. He is now hospitalized... She said the patients should not suffer just because the process is still being ironed out." Cal. Health & Human Services Agency (CalHHS), *California Health and Human Services Agency Community Assistance, Recovery & Empowerment (CARE) Act Working Group Meeting Minutes*, 21 (Feb. 14, 2024), <https://www.chhs.ca.gov/wp-content/uploads/2024/04/CARE-Working-Group-Minutes-Feb-14-2024.pdf>.

²⁰⁸ Halverstadt, *supra* note 3 (Feb. 27, 2025).

²⁰⁹ See articles on city first responder efforts to engage individuals in treatment outside of the criminal justice system, often focusing on the high utilizers of EMS. Tadros et al., *supra* note 197; and Dunford et al., *supra* note 197.

While the use of court-ordered CARE Plans was anticipated in the CARE Act, the actual use of CARE Plans varies from county to county, as previously mentioned.²¹⁰ CARE Agreements and CARE Plans are very different, however.²¹¹

With a CARE Plan, a participant is expected to *adhere* to the Plan, or face termination.²¹² In contrast, a participant can be dismissed for failing to *participate* in a CARE Agreement even if they are not *adhering* to the agreement in part because it is not a court order.²¹³ Technically, even if a participant goes to jail, they can still be listed as “participating” in the county’s statistics, even though their circumstances make adherence to the CARE Agreement impossible. As there is no definition of “participation,” mere enrollment in a CARE Agreement may be sufficient depending on county interpretation.

Without a CARE Plan, there is no CARE Act presumption for LPS conservatorship filings, if that eventually becomes necessary.²¹⁴ A CARE Plan allows the potential for a presumption of grave disability should an LPS conservatorship be sought post-dismissal.²¹⁵ No such presumption attaches to a CARE Agreement. Therefore, using CARE Agreements alone is only a partial implementation of the CARE Act by counties. The most vulnerable respondents may eventually fail to comply with the CARE Act because their needs require a higher level of care.²¹⁶ With a CARE Agreement, the codified presumption for the most vulnerable that only attaches to CARE Plans cannot be utilized. A public defender would most certainly object if a behavioral health professional attempted to highlight a patient’s lack of participation in a CARE Agreement as a presumption of grave disability.

Another challenge for the severely mentally ill is that the FSP agencies, such as ACT programs, used in CARE Agreements and CARE Plans are the same FSPs that have not adequately engaged those respondents to date. While the Department of Health Care Services (DHCS) reimburses county behavioral health agencies for outreach efforts, DHCS does not reimburse the county-contracted ACT agencies for outreach activities. These ACT agencies are also the same programs the city first responders have been encouraging respondents to enter.

Alternative and higher intensity contract oversight for CARE Act designated FSP programs may help convince more respondents to participate and, thus, achieve a higher level of success. But this begs the question, if all county-contracted FSP programs received the same level of contract oversight as the CARE Court FSP program, would court supervision be necessary?

Severe untreated mental illness and the expectation of voluntary participation in the CARE Act program should not be assumed, especially for city first responder petitioners who generally take extensive efforts to engage a respondent prior to filing a CARE petition. Changes

²¹⁰ See Halverstadt, *supra* note 3 (Feb. 27, 2025), reporting that the County of San Diego does not use CARE Plans; and see also Devin Trubey, *Inside Sacramento County Care Court: The first few months in review*, ABC10 (Jan. 20, 2025), <https://www.abc10.com/article/news/local/sacramento/inside-sacramento-county-care-court/103-54072256-e72d-49b9-be2d-9f50e3fd30f0> (reporting that the County of Sacramento intends to use CARE Plans).

²¹¹ Cal. Welf. & Inst. Code §§ 5971(a), (b) and 5979(a); and Halverstadt, *supra* note 3 (Feb. 27, 2025).

²¹² Cal. Welf. & Inst. Code § 5979(a)(1).

²¹³ See Cal. Welf. & Inst. Code § 5971(a) and (b); and Judicial Branch of California, *California Courts Self-Help Guide, About the CARE Act, What are CARE Agreement and CARE Plans?*, <https://selfhelp.courts.ca.gov/care-act/about> (accessed Feb. 17, 2025).

²¹⁴ Cal. Welf. & Inst. Code § 5979(a)(3).

²¹⁵ *Id.*

²¹⁶ Halverstadt, *supra* note 3 (Feb. 27, 2025); and Halverstadt, *supra* note 102 (Mar. 4, 2025).

to how counties engage respondents and the addition of alternative FSPs with greater county oversight may hold the key to better access.

D. The CARE Act's Inherent Conflicts of Interest

There is an unavoidable conflict of interest in the CARE Act's mandate that a county behavioral health services agency ("county BHS") must replace all non-county BHS petitioners at the first hearing.²¹⁷ Families and first responder petitioners generally file a CARE petition when standard county BHS are not adequately servicing a respondent's needs, and the respondent remains untreated. Once a CARE Agreement or a CARE Plan is approved, the county BHS agency is obligated to provide the needed services. If county BHS does not fulfill their duties under a CARE Plan, then financial sanctions are theoretically possible.

In contrast, a CARE Agreement is a voluntary agreement between the respondent and county BHS, rather than a court order.²¹⁸ Therefore, the primary and near-exclusive use of CARE Agreements may be because there is a financial disincentive for counties to create CARE Plans, even when a CARE Agreement is not likely to be successful. While an individualized, autonomy-focused approach is certainly preferred, an autonomy-only approach for CARE respondents may be used to conceal the more central motivation of cost avoidance. For every respondent named in a CARE petition, the voluntary county services have proven inaccessible or unsuccessful thus far.²¹⁹ If a county BHS agency initiates a CARE Plan and fails to provide these services, the county can be fined.²²⁰ There is no similar potential for fines related to a CARE Agreement violation since it is not a court order. Thus, this creates an understandable and inherent disincentive to create a robust CARE Plan. Unfortunately, the limited pursuit of CARE Plans may be a missed opportunity for some respondents whose petitions are otherwise dismissed. Of note, however, even with a higher use of CARE Plans, there is no evidence that it would improve outcomes for those otherwise dismissed for failure to engage, since the entire program remains voluntary.

CARE petitions may also be dismissed when respondents are voluntarily willing to engage in treatment.²²¹ However, while some respondents may express their verbal willingness to engage in treatment,²²² respondent willingness may sometimes be more indicative of knowing how to avoid the system, rather than a true readiness for voluntary treatment.²²³ Oddly, as the CARE Act is currently written, a respondent's *likelihood* to engage, rather than a demonstration of sustained participation, is enough for county BHS to recommend dismissal from the CARE process.²²⁴ This codified dismissal option is surprising, however, considering an element of CARE process eligibility is that the "person is not clinically stabilized in on-going voluntary treatment."²²⁵ A *likelihood* that a respondent will engage in treatment cannot be equated to

²¹⁷ See Cal. Welf. & Inst. Code § 5977 (b)(6)(A).

²¹⁸ See Cal. Welf. & Inst. Code §§ 5971(a)-(b); and Judicial Branch of California, *supra* note 213.

²¹⁹ Petitions through the CARE Act can only be filed when CARE Court represents the least restrictive alternative. Cal. Welf. & Inst. Code § 5972(e).

²²⁰ Cal. Welf. & Inst. Code § 5979(b).

²²¹ Cal. Welf. & Inst. Code § 5977(a)(5)(A).

²²² See *id.*

²²³ Angela Fagerlin, PhD, *When patients lie*, AAMC (June 4, 2019), <https://www.aamc.org/news/viewpoints/when-patients-lie>.

²²⁴ See Cal. Welf. & Inst. Code § 5977(a)(5)(A).

²²⁵ See Cal. Welf. & Inst. Code § 5972 (c).

stability in on-going treatment. Treatment for a short period of time does not necessarily mean stability, even if the attempt is voluntary.²²⁶ Substance use relapse is extremely common and directly affects prolonged engagement.²²⁷ However, the CARE Act does not specify what stabilization in treatment means, and the *likelihood* language is explicit. Thus, there is an inherent conflict in the eligibility criteria for the CARE process and the potential justification for a petition's dismissal.

This ambiguity related to stabilization is especially true for petitions filed by city first responders. A city first responder may submit a CARE petition when an individual is only two weeks into treatment in order to help them sustain their care. Unfortunately, under the vague language discussed above, county BHS may deem that person "stabilized" from the moment they engage with a provider. Given the discretion held by each county, prior history of failed treatment attempts and the respondent's high utilization of 911 may or may not be enough to overcome that conclusion, as discussed above. While all facts are taken into consideration by the CARE team, the CARE Act does not require the consideration of such factors in judging stabilization. City first responders can list all relevant details in the CARE-100 form²²⁸ and report them again to the court at the first hearing, but nothing in the CARE Act stops the case from dismissal if county BHS reports to the court that the respondent is *stabilized* in their opinion. Petitioners have no right to request an evidentiary hearing to counter the county BHS agency's position.

As discussed above, all petitioners,²²⁹ even a self-filing respondent, are removed from their role as petitioner after the initial hearing.²³⁰ The county BHS agency is then substituted in as the petitioner.²³¹ Under recent amendments, the court can allow family or roommates to stay involved to the degree that the respondent consents.²³² A voluntary supporter may assist the respondent in understanding their choices, but this role does not involve advocacy.²³³ While city first responders may serve as voluntary supporters, they do not have any options for continued notifications about the status of the CARE petition.

E. City Departments Cannot File CARE Petitions

While city first responders are eligible to file CARE petitions, the city departments that employ them are not eligible petitioners under the CARE Act.²³⁴ Some eligible first responder

²²⁶ J.F. Kelly et al., *How Many Recovery Attempts Does it Take to Successfully Resolve an Alcohol or Drug Problem? Estimates and Correlates From a National Study of Recovering U.S. Adults*, 43 ALCOHOL CLIN. EXP. RES. 7, 1533-1544 (July 2019), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6602820/>.

²²⁷ *Id.*

²²⁸ Cal. Welf. & Inst. Code § 5975(c).

²²⁹ There is an exception to allow some family or co-resident petitioners to continue to participate or receive ongoing rights of notice. Cal. Welf. & Inst. Code § 5977(b)(6)(B). However, there is no similar option for city first responder petitioners. *Id.*

²³⁰ Cal. Welf. & Inst. Code § 5977(b)(6)(A).

²³¹ *Id.*

²³² Cal. Welf. & Inst. Code § 5977(b)(6)(iii).

²³³ Cal. Welf. & Inst. Code §§ 5980-5981. Every CARE respondent is appointed legal counsel to protect their rights through the process. Cal. Welf. & Inst. Code §§ 5976(c) and 5981.5. However, the information they receive consists of reports from county BHS and their client alone. Thus, conflicts and problems in treatment may not be easily observed. While some legal counsel may be more vocal than others in the CARE process, legal counsel does not have a codified role in assessing the quality or effectiveness of treatment.

²³⁴ Cal. Welf. & Inst. Code § 5974(f).

petitioners, such as homeless outreach workers,²³⁵ want to seek help for potential respondents, but may be uncomfortable being named as the petitioner in court. The legal process can be intimidating, and city first responders may have limited experience utilizing the courts. Additionally, confusion over the filing process (particularly e-filing) and the steps involved in the CARE process may also stop city first responders from independently filing CARE petitions—particularly due to inaccurate news reporting on how the CARE Act works.

Cities may benefit if changes, similar to those made to Gun Violence Restraining Order (GVRO) filing requirements, were adopted by the CARE Act. When GVROs were first introduced, only an individual officer could file a GVRO as the petitioner, rather than the law enforcement agency that employed the officer. This created problems and hesitation in filings.²³⁶ Due to advocacy by the San Diego City Attorney’s Office, changes in the law now permit law enforcement agencies to file GVROs, as long as they are accompanied by affidavits from knowledgeable officers as to the merits of the filing.²³⁷ While only law enforcement officers are listed as appropriate petitioners for filings,²³⁸ the law now clarifies that a “petition brought by a law enforcement officer may be made in the name of the law enforcement agency in which the officer is employed.”²³⁹ This model has proven effective, and is also reflected in Judicial Council GVRO forms.²⁴⁰

City first responders are not yet permitted to file CARE petitions in the name of their city department under the CARE Act. This may at least partially explain the initial data indicating that cities are not filing nearly as many petitions as expected.²⁴¹

F. Challenges for City First Responders in Completing the CARE-101 Form

Currently, CARE petitions require both a CARE-100 petition form²⁴² (filled out by the original petitioner²⁴³) and a CARE-101 form²⁴⁴ (completed by a licensed behavioral health professional).²⁴⁵ Some petitioners have expressed frustration that the CARE-100 petition is so complicated to fill out.²⁴⁶ And unfortunately, many persons authorized to initiate a CARE petition do not have access to a licensed behavioral health professional to complete the CARE-101. This means petitioners, including city first responders, may see themselves as unable to file

²³⁵ Cal. Welf. & Inst. Code §§ 5171(i) and 5974(f).

²³⁶ Author’s Interview with Nicole Crosby, former Chief of the San Diego Office of the City Attorney’s Gun Violence Response Unit on Mar. 13, 2025.

²³⁷ *Id.*

²³⁸ Cal. Penal Code § 18170.

²³⁹ Cal. Penal Code § 18109.

²⁴⁰ Judicial Branch of California, *Petition for Gun Violence Restraining Order (GV-100)* (Jan. 1, 2025), <https://www.selfhelp.courts.ca.gov/jcc-form/GV-100>.

²⁴¹ Halverstadt, *supra* note 192 (Mar. 13, 2025), which states that County of San Diego data shows only 19 percent of petitions in the initial 15 months were from first responders. [Note: Outcome data is not available.]; and DHCS, *CARE: Early Implementation*, *supra* note 74, at 11 (Nov. 2024).

²⁴² Judicial Branch of California, *Petition to Commence CARE Act Proceedings (CARE-100)* (Sept. 1, 2024), <https://selfhelp.courts.ca.gov/jcc-form/CARE-100>.

²⁴³ Cal. Welf. & Inst. Code § 5975(a)-(c).

²⁴⁴ Judicial Branch of California, *Mental Health Declaration-CARE Act Proceedings (CARE-101)*, (Sept. 1, 2024), <https://selfhelp.courts.ca.gov/jcc-form/CARE-101>.

²⁴⁵ Cal. Welf. & Inst. Code § 5975(d)(1).

²⁴⁶ CalHHS, *supra* note 207, at 3 (Feb. 14, 2024), which reports that CalHHS Deputy Secretary Stephanie Welch heard complaints from CARE Court pilot counties, that “the petition itself is complex and difficult to fill out.”

a CARE petition.

The CARE Act uses the definition for a “licensed behavioral health professional” found in Welfare and Institutions Code section 4096(j) for *Programs for Seriously Emotionally Disturbed Children and Court Wards and Dependents*.²⁴⁷ Here, behavioral health professionals are used to certify that a child has been assessed for serious emotional disturbance criteria.²⁴⁸ Section 4096(j) defines a *licensed behavioral health professional* as

a physician licensed under Section 2050 of the Business and Professions Code, a licensed psychologist within the meaning of subdivision (a) of Section 2902 of the Business and Professions Code, a licensed clinical social worker within the meaning of subdivision (a) of Section 4996 of the Business and Professions Code, a licensed marriage and family therapist within the meaning of subdivision (b) of Section 4980 of the Business and Professions Code, or a licensed professional clinical counselor within the meaning of subdivision (e) of Section 4999.12.²⁴⁹

Regrettably, this definition is only a partial list of behavioral health professionals that could be qualified to assess a potential respondent for the CARE process. For instance, if the assessor is a licensed physician assistant under the supervision of a physician, or a licensed psychiatric-mental health nurse practitioner, though they may possess the medical qualifications necessary to perform the CARE-101 assessment, they are not authorized to complete the CARE-101 form. The CARE Act authorizes a licensed behavioral health practitioner to designate a designee to perform the assessment,²⁵⁰ and physician assistants and nurse practitioners can be utilized in this regard. However, the CARE-101 Judicial Council form does not currently reflect that option. Thus, unless a petitioner compares the CARE-101 form to the Welfare and Institutions Code, they would not know that such a designation is permissible. While this issue is correctable on future forms, the process will still require multiple signatures—one from the designee assessor and one from the licensed behavioral health professional. Of note, the Judicial Council offered adequate opportunity for anyone to comment on the form before it was approved. This was a nuance not easily seen prior to implementation and use.

Since cities often contract with counties to provide behavioral health services, the requirements of the CARE-101 form remain a hurdle to the submission of petitions for many cities. Cities have the option to spend funds to employ or contract licensed behavioral health professionals to complete the CARE-101 forms, or hope the court waives the requirement and orders the county to complete the CARE-101 assessment.²⁵¹ While the county can authorize its behavioral health personnel to collaborate with city petitioners and complete CARE-101 assessments for city first responder petitions, counties are not mandated to do so, and county approval of such efforts is variable. Further, a court’s waiver of the CARE-101 requirement is not established in the CARE Act and remains at the discretion of the CARE Court judge.

There is an alternative to the CARE-101 affidavit requirement, but it requires proof of

²⁴⁷ Cal. Welf. & Inst. Code §§ 4094-4096.6.

²⁴⁸ Cal. Welf. & Inst. Code § 4096(j).

²⁴⁹ Cal. Welf. & Inst. Code §§ 4096(j) and 5971(l).

²⁵⁰ Cal. Welf. & Inst. Code § 5975(d)(1).

²⁵¹ CalHHS has offered to connect cities with licensed behavioral health professionals for assistance with CARE-101 assessments. Judicial Branch of California, *supra* note 244.

two 14-day involuntary hospital stays, the last one within the past 60 days.²⁵² This is a rare occurrence, and this benchmark is usually not met. Family and city first responders generally submit CARE Act petitions because the LPS system has failed to hold the mentally ill respondent past the 72-hours allowed under a 5150 hold.²⁵³ Notably, a 5150 hold does not count toward this alternative requirement since it is less than 14 days. As discussed above, AOT has similar requirements²⁵⁴ that have proven difficult to meet.²⁵⁵

Even submitting the CARE-100 and CARE-101 forms to the court can be a challenge for eligible petitioners. There is no simple portal for encrypted filing and not all counties allow for electronic submittal of CARE Act petitions.²⁵⁶ For counties that do offer this service, filing electronically can be confusing for non-lawyers, with a filer having to choose between one of many possible vendors. To their credit, the California Health and Human Services Agency has conducted targeted outreach to encourage hospital filings to address this problem and has a Resource Center on their website.²⁵⁷

G. CARE Act Data Requirements Only Tell a Partial Story

The CARE Act's data requirements²⁵⁸ tell part of the story, but they may be missing critical data. Specifically, the CARE Act measures activities and progress for admitted participants but does not require any data collection related to the activities or progress of respondents dismissed without a CARE Agreement or CARE Plan. Senate Bill 1400 (2024) partially addressed this gap by codifying requirements for additional data, including but not limited to, data related to county outreach and engagement activities, the number of days between a petition and its disposition, and the number of contacts made to county BHS agencies about individuals eligible for the CARE process.²⁵⁹

However, the CARE Act's data requirements still do not require counties to collect or report data pertaining to the following categories:

- The number of petitions in each petitioner category and their respective dismissal rates.²⁶⁰

²⁵² Cal. Welf. & Inst. Code § 5975(d)(2).

²⁵³ Several family stories expressing frustration with this consistent occurrence have been expressed during public comment at CARE Act Working Group Meetings, but they are too numerous to list. *See* Halverstadt, *supra* note 102 (Mar. 4, 2025); and

see also The Office of the Governor of California, *Press Release: Governor Newsom's New Plan To Get Californians In Crisis Off The Streets And Into Housing, Treatment, And Care*, 2 (Sept. 26, 2024).

²⁵⁴ Cal. Welf. & Inst. Code § 5346. AOT is similar to the CARE Act and the AOT court has no means to force treatment or medication compliance.

²⁵⁵ *See* Cal. Welf. & Inst. Code § 5346(a)(4); and Newsom, *State of the State*, *supra* note 83.

²⁵⁶ California Courts, *Self Help Guide: How to file the CARE petition* (accessed April 15, 2025), <https://selfhelp.courts.ca.gov/care-act/how-to-file>.

²⁵⁷ California Health & Human Services (CalHHS), *CARE Act Resource Center* (accessed April 15, 2025), <https://care-act.org/>.

²⁵⁸ Cal. Welf. & Inst. Code § 5985.

²⁵⁹ SB 1400, *supra* note 71.

²⁶⁰ Halverstadt, *supra* note 192 (Mar. 13, 2025), stating that County of San Diego data shows only 12 of 48 first responder filed petitions resulted in CARE Agreements.

- The number of CARE Act respondents given an order for a grave disability evaluation pursuant to section 5200 at any point in the process.²⁶¹
- The number of individuals who were referred to an FSP after dismissal or termination from the CARE process.
- The number of individuals who enrolled in an FSP after dismissal or termination from the CARE process.
- The number of dismissed or terminated individuals who were able to maintain enrollment in an FSP for at least one-year post-enrollment.

While additional data collection could be seen as a burdensome requirement, these significant gaps in data collection make it difficult for the state to hold local jurisdictions accountable for their provision of behavioral health services.

H. CARE Act Confidentiality Rules May Block Access to Care

The detailed clinical evaluations and reports of a respondent's progress created throughout the CARE process are strictly confidential.²⁶² These evaluations could be helpful for ongoing care in different environments, but due to the CARE Act's confidentiality rules, "[a]ll reports, evaluations, diagnoses, or other information filed with the court related to the respondent's health shall be confidential" and may not be shared by the county with anyone.²⁶³

This confidentiality requirement is far beyond that of the federal Health Insurance Portability and Accountability Act (HIPAA) of 1996²⁶⁴ or the California Confidentiality of Medical Information Act (CMIA).²⁶⁵

If CARE Act evaluations could be shared with treatment providers, who are already subject to HIPAA and CMIA confidentiality rules, an argument can be made that a CARE Act dismissal could still offer some benefit to the respondent, due to the data that may have already been collected. As stated above, 39 percent of CARE Act petitions do not result in a CARE Agreement or a CARE Plan.²⁶⁶ In some counties those numbers are even lower.²⁶⁷ In many situations, this can mean that respondents continue to cycle through the system without access to care. If the evaluations and reports completed throughout the CARE process could subsequently be shared with other treatment providers for the purposes of providing treatment, the time, effort, and resources spent on CARE petitions that do not result in CARE Agreements or CARE Plans could still be well worth it. However, under the current confidentiality restrictions, evaluations performed for the purposes of the CARE process cannot be shared with other service providers,

²⁶¹ Cal. Welf. & Inst. Code § 5200 is a court order for a grave disability evaluation. It can be ordered by any superior court judge. *Id.*

²⁶² Cal. Welf. & Inst. Code § 5971(f).

²⁶³ See Cal. Welf. & Inst. Code § 5976.5.

²⁶⁴ 45 C.F.R. §§ 160-169.

²⁶⁵ Cal. Civ. Code §§ 56.10-56.16.

²⁶⁶ DHCS, *CARE: Early Implementation*, *supra* note 74, at 7 (Nov. 2024).

²⁶⁷ In San Diego, as of Sept. 24, 2024, 67 percent of CARE Act respondents never receive a CARE Agreement or a CARE Plan. County of San Diego Health & Human Services Agency, *Behavioral Health Services Director's Report* (Oct. 2024), <https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/bhs/documents/NOC/bhab/2024-october-bhab-meeting-materials/general-meeting/October%202024%20Director%27s%20Report.pdf#:~:text=September%2024,%202024%20.%20TO:%20Behavioral%20Health%20Advisory>.

even if they could be otherwise disclosable under HIPAA or CMIA laws. Notably, other states' confidentiality rules are not as rigid.²⁶⁸

As mentioned above, without the ability to access CARE Act clinical information, any behavioral health professional evaluating a deteriorating CARE Act respondent pursuant to a 5200-order could be missing helpful information.

IX. Pending Legislation

Ideas to improve the CARE process and address many of the gaps identified in this article are in active discussion. In addition to SB 35, SB 42, and SB 1400 discussed above in section II, new legislation that would further alter the CARE Act landscape has emerged in the 2025-2026 legislative cycle.

Senate Bill 367,²⁶⁹ initiated by Senator Allen, seeks to allow a CARE Court judge to make referrals directly to the county for conservatorship investigations. Current law gives the CARE Court judge no authority to refer a case to any other agency or department. Further, confidentiality rules block the sharing of information, even for the wellbeing of the respondent. This bill would allow a CARE Court judge to issue a court order authorizing the sharing of CARE information with the county officer investigating LPS conservatorships for that specific purpose.

Senate Bill 331,²⁷⁰ initiated by Senator Menjivar, seeks to allow petitioners to maintain their role in CARE proceedings with the consent of the respondent. Under current law, the petitioner is replaced by the director of the county behavioral health agency in all cases at the first hearing.²⁷¹ Under this bill, the petitioner could maintain their role as petitioner throughout the proceedings and would work with county behavioral health agencies to enter into CARE Agreements with respondents. This bill would also require county behavioral health agencies to provide training for the electronic submission of CARE related forms.

Senate Bill 823,²⁷² initiated by Senator Stern, seeks to include bipolar I disorder as an eligible diagnosis under the CARE Act. Under current law, eligibility is limited to individuals with a diagnosis of schizophrenia spectrum or other psychotic disorders.²⁷³

Senate Bill 27,²⁷⁴ initiated by Senator Umberg, seeks to hold the initial appearance hearing on the petition and the prima facie determination concurrently, if existing criteria for those hearings are met.

²⁶⁸ Some states have exceptions for disclosure when mentally ill patients are a danger to others or for purposes of substance use disorder treatment. *See* N.H. Rev Stat § 172:8-a (2023), <https://law.justia.com/codes/new-hampshire/2023/title-xii/chapter-172/section-172-8-a/>; and *see also* N.Y. Mental Hygiene Law § 9.46 (2013), <https://codes.findlaw.com/ny/mental-hygiene-law/mhy-sect-9-46/>.

²⁶⁹ SB 367, 2025 Leg., Reg. Sess. 2025-26 (Cal. 2025) (as amended on March 24, 2025).

²⁷⁰ SB 331, 2025 Leg., Reg. Sess. 2025-26 Reg. Sess. (Cal. 2025) (as amended on Mar. 24, 2025).

²⁷¹ Cal. Welf. & Inst. Code § 5977(b)(6)(A).

²⁷² SB 823, *supra* note 18.

²⁷³ Cal. Welf. & Inst. Code § 5972(b).

²⁷⁴ SB 27, 2025 Leg., Reg. Sess. 2025-26 Reg. Sess. (Cal. 2025) (introduced Dec. 2, 2024).

CONCLUSION

The intent behind the CARE Act is to bridge systemic gaps in mental health treatment for the most vulnerable. The State of California is motivated to make this new program work and has allocated 300 million dollars annually to support infrastructure related to the CARE Act.

Some CARE participants have already been helped by the CARE process, but others have returned to cycling between the streets, hospitals, and jails after their petitions are dismissed. Early reported numbers reveal that this may be more common for city first responder cases than county referrals. As discussed throughout this paper, the current version of the CARE Act has some challenges in the effectiveness of its processes. Whether cities can make it work will likely depend on how the law develops and evolves to address these limitations.



The Latest in Legal Ethics for Municipal Lawyers

Friday, May 9, 2025

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EVERYDAY ETHICS FOR CITY ATTORNEYS

Rebecca L. Moon
Sunnyvale City Attorney
Spring Conference, 2025

1. Introduction

While all California attorneys are subject to the State Bar's Rules of Professional Conduct, government lawyers navigate unique legal and ethical issues, shaped by the role we play in serving the public interest and maintaining the integrity of the legal system.

An indispensable reference for city attorneys is Cal Cities' *Practicing Ethics: A Handbook for Municipal Lawyers* (3rd Edition) which was comprehensively updated in 2023 by the City Attorneys' Ad Hoc Practicing Ethics Committee.¹

In addition, the City Attorneys Department of the League of California Cities has adopted Ethical Principles for City Attorneys (the Ethical Principles).² The Ethical Principles were published in 2005 and presented at Spring League Conferences in 2011 and 2019. The 2019 paper,³ authored by Joseph Montes, City Attorney of Alhambra and Santa Clarita, includes a detailed discussion of the Ethical Principles and how they intersect with the State Bar's 2018 revisions to the Rules of Professional Conduct.⁴ The Ethical Principles and the 2019 Montes paper are essential reading for all practitioners of municipal law.

Drawing on the Ethical Principles, the Rules of Professional Conduct (the Professional Rules), and Business and Professions Code 6068, this paper will shine a spotlight on some common ethical issues and traps for the unwary that city attorneys (and other public attorneys) may encounter in everyday practice.

¹ League of California Cities, *Practicing Ethics: A Handbook for Municipal Lawyers* (3rd ed., 2023), p. 13, <https://www.cacities.org/resource/practicing-ethics>

² League of California Cities, City Attorneys' Dept. Business Section, "Ethical Principles for City Attorneys" (Oct. 6, 2005), <https://www.cacities.org/UploadedFiles/LeagueInternet/d6/d60445e6-7918-459b-9780-00a714616297.pdf>

³ Joseph Montes, "Ethical Principles for City Attorneys" (May 10, 2019), <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Spring-Conference/5-2019-Spring-Montes-Ethical-Principles-for-City>

⁴ California State Bar, Rules of Professional Conduct, <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules>

2. City Attorneys as Public Officials

City attorneys, like all attorneys, have a duty to be competent, diligent, and zealous advocates for our client's interests. As officers of the court, we are held to a high standard of candor, fairness, civility, and integrity.⁵ In addition to our professional ethics, city attorneys are also public officials and stewards of a broader public interest. As stated in the Preamble to the City Attorneys' Department Ethical Principles:⁶

"A city attorney occupies an important position of trust and responsibility within city government. Central to that trust is an expectation and commitment that city attorneys will hold themselves to the highest ethical standards."

To be clear, the "public" is not the city attorney's client under Professional Rule 1.13. Rather, the city attorney's client is the city as an organization, acting through its duly authorized officers and employees.⁷ The city exists to serve the public, but the public itself is not a part of the city's organizational hierarchy. (The public duties of the city attorney as a prosecutor are discussed in the next section of this paper.)

Nevertheless, city attorneys are frequently called upon to ensure that the city complies with laws that protect the rights and interests of the public. Ethical Principle 1 of the City Attorneys' Department, "Rule of Law," instructs city attorneys to "promote the rule of law and the public's trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations."⁸

The explanatory note to Ethical Principle 1 states:

"The city attorney's advice and actions should always proceed from the goal of promoting the rule of law in a free, democratic society."

To achieve this goal, city attorneys must constantly and zealously educate city staff and officials about the law, model ethical behavior, and give sound, accurate legal advice even when it is not wanted. See Ethical Principle 1, Example 6:

⁵ See Professional Rule 3.3 (Candor), Rule 3.4 (Fairness); Calif. Rule of Court 9.7 ("the oath to be taken by every person on admission to practice law is to conclude with the following: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity.")

⁶ *Supra*, fn. 2.

⁷ But see Professional Rule 1.13, Comment 6: "It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole."

⁸ *Supra*, fn. 2.

“The city attorney should be willing to give unpopular legal advice that meets the law’s purpose and intent even when the advice is not sought but the legal problem is evident to the attorney.”

For comparison, Professional Rule 2.1, Comment 1, states that “a lawyer ordinarily has no duty to initiate investigation of a client’s affairs or give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.” It is the second half of this comment that has the most relevance to city attorneys. An important part of a city attorney’s job is to proactively spot legal issues, and bring them to the attention of city officials and staff without being asked.

HYPOTHETICAL: The Waste Management Consultant

A newly hired city attorney learns that the city’s waste management consultant is deeply involved in the city’s contracting decisions, some of which financially benefit the consultant. The city attorney informs the city manager that the contracts violated Government Code § 1090, but the city manager declines to take any action. The city attorney then sends a confidential email to the mayor and city council. In response, the mayor calls the city attorney and tells her: “We didn’t hire you to upset the apple cart. You should back off if you want to keep this job.” No other councilmembers respond to the email. What should the city attorney do next?

If a city attorney becomes aware of unlawful conduct, the city attorney has a duty to refer the matter to higher authority in the organization, if warranted by the circumstances (Professional Rule 1.13(b)). At the same time, Professional Rule 1.13(c) prohibits the city attorney from publicly revealing confidential information protected by Business and Professions Code section 6068(e). Section 6068(e) requires California attorneys to “maintain inviolate” the client’s confidences and secrets, which is broader than the evidentiary attorney-client privilege⁹ and applies equally to ancillary, non-legal business services.¹⁰

Thus, the city attorney’s duty of confidentiality precludes public whistleblowing.¹¹ If the highest authority in the city insists on actions that violate the law or will substantially injure the organization, resignation may be the city attorney’s only option (see Professional Rules 1.13(d), 1.16, 1.2.1). Even if a city attorney is terminated for raising objections to wrongful conduct, the

⁹ *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621.

¹⁰ Cal. State Bar Formal Opinion 1995-141.

¹¹ 84 Ops. Cal. Atty. Gen. 71 (2001); see also Rule 1.13, Comment 6: “a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization’s lawyers, consistent with [Bus. & Prof. Code 6068(e)] and rule 1.6.”

duty of confidentiality will bar a lawsuit for wrongful termination if the evidence is privileged, and the city council refuses to consent to its disclosure.¹²

3. City Attorneys as Prosecutors

HYPOTHETICAL: A Politically Sensitive Case

A particularly vocal resident repeatedly calls the mayor with complaints about a poorly-maintained neighboring property. The mayor tells the city attorney, "I don't want any more calls about this property. You need to do something immediately!" Although the city's normal practice is to start with administrative citations, the city attorney directs a deputy city attorney to file a misdemeanor complaint because "this case is extra sensitive." Is this ethical?

California courts recognize that government attorneys have a special obligation to serve the public interest, especially when there is a power imbalance between governmental authority and individual rights. Neutrality and objectivity are paramount when city attorneys prosecute criminal and quasi-criminal cases such as infractions and misdemeanors, administrative citations, and civil nuisance abatement. As a prosecutor, the city attorney cannot be influenced by political pressure or other concerns outside the interests of justice and probable cause.¹³ Professional Rule 3.8, Comment 1 states, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

When filing a criminal action in the name of the People of California, the city attorney represents the People and cannot meet in closed session or take direction from the city council. A city attorney can meet in closed session to receive direction prior to filing a civil nuisance abatement action in the name of the city, but the city attorney must still comply with the obligation to file such actions with impartiality and neutrality and to pursue fairness and the interests of justice.¹⁴

Courts have referenced the heightened ethical duties of prosecutors even in certain civil matters handled by government attorneys. Fifty years ago, in *City of Los Angeles v. Decker*,¹⁵ the California Supreme Court held that an attorney for the city committed prejudicial misconduct in

¹² *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164; see *Olivo v. City of Vernon* (2010) 2010 WL 2958398 (unpublished) [terminated city attorney unable to bring wrongful termination action required disclosure of an attorney-client privileged report]; but see *Cordero-Sacks v. Housing Authority of City of Los Angeles* (2012) 200 Cal.App.4th 1267, 1272 fn. 3 [attorney's whistleblower cause of action was non-suited, but she prevailed on a retaliatory discharge claim where privileged information was excluded at trial].

¹³ *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 746.

¹⁴ *Practicing Ethics, supra*, p.33.

¹⁵ *City of Los Angeles v. Decker* (1977) 18 Cal.3d 860.

an eminent domain trial by misleading the jury about a critical issue: whether the property was needed for airport parking. In closing argument, the attorney stated that the property was unlikely to be developed as parking, which led the jury to accept the city's valuation. Only three weeks after the judgment, the Board of Airport Commissioners approved a final environmental impact report recommending that a parking facility be built in the area covered by the city's eminent domain action, including the defendants' parcel.

Holding that the trial court should have granted the defendants' motion for new trial, the Supreme Court quoted former Professional Rule 7-105 (now contained in Bus. & Prof. Code § 6068(d)) that an attorney should never "seek to mislead a judge, judicial officer, or jury by an artifice or false statement of fact or law."

Beyond the general duty of candor, the Supreme Court also cited the American Bar Association's former Canon 7, Ethical Consideration 7-14,¹⁶ that "a government lawyer in a civil action has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." When "occupying a position analogous to a public prosecutor," a government attorney "is possessed of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice."¹⁷

Seven years after *Decker*, in *People ex rel. Clancy v. Superior Court*,¹⁸ the Supreme Court held that the City of Corona improperly hired a private attorney to prosecute a nuisance abatement action against an adult bookstore on a contingency fee basis, finding that the attorney's financial stake violated the duty of neutrality essential to a fair proceeding. In a later case, *County of Santa Clara v. Superior Court*,¹⁹ the Supreme Court reexamined *Clancy*, and explained that the outcome in that case stemmed from the "profound imbalance between the institutional power and resources of the government and the limited means and influence of the defendants".

Although the Supreme Court declined to impose an absolute prohibition on use of contingent fee contracts in public nuisance actions,²⁰ the court reiterated the principle that a city attorney serves the public interest when prosecuting a civil case:

¹⁶ The ABA Ethical Canons were superseded in 1983 by the Model Rules of Professional Conduct.

¹⁷ *Id.* at 869 (cleaned up), quoting "Professional Responsibility: Report of the Joint Conference" (1958) 44 A.B.A.J. 1159, 1218.

¹⁸ *Supra*, fn. 12.

¹⁹ *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35.

²⁰ *County of Santa Clara* was a public nuisance action against lead paint manufacturers, which the court concluded did not involve the same power imbalance and constitutional issues as *Clancy*. See also *Priceline.com Inc. v. City of Anaheim* (2010) 180 Cal.App.4th 1130 [contingency fees not prohibited in ordinary civil litigation].

“[A] civil attorney acting on behalf of a public entity, in prosecuting a civil case such as a public-nuisance abatement action, is entrusted with the unique power of the government and therefore must refrain from abusing that power by failing to act in an evenhanded manner. . . . Indeed, it is a bedrock principle that a government attorney prosecuting a public action on behalf of the government must not be motivated solely by a desire to win a case, but instead owes a duty to the public to ensure that justice will be done.”²¹

Even when city attorneys serve as advisors rather than prosecutors, a key part of the job is to educate city officials and employees about the requirements of the law, and try to ensure that they follow it, rather than bowing to pressure, even at risk of the city attorney’s own job. See the City Attorney’s Department Ethical Principal 1, Example 6, “The city attorney should be willing to give unpopular legal advice,” and Example 7, “The city attorney should not only explain and advise the city on the law, but should encourage the city to comply with the law’s purpose and intent.”

This responsibility has implications for the city attorney’s professional duties of competence and diligence (Professional Rules 1.1 and 1.3). City attorneys may be blamed for illegal conduct that occurs on their watch due to their lack of diligence or inattention. Contract city attorneys have been sued for malpractice in such situations.²² In 2013, for example, the City of Bell sued its former contract city attorney after a financial scandal was brought to light involving excessive salaries and other malfeasance by the former city manager, mayor, and four former councilmembers. These officials had apparently hidden some illegal conduct from the city attorney, but the case still resulted in a significant settlement.²³ Five of the disgraced councilmembers later sued the former city attorney for failing to tell them that their conduct was illegal.²⁴

4. Interactions with the Public

City attorneys are often involved in matters that have various options for civil, administrative, and criminal enforcement. For example, a code violation could potentially result in enforcement through administrative penalties, a nuisance lawsuit, or a misdemeanor prosecution under the

²¹ *Id.* 50 Cal.4th at 57.

²² In-house city attorneys are rarely sued for professional malpractice, but there is scant legal authority on the issue. One unpublished case, *1538 Cahuenga Partners, LLC v. Fabe* (2012) 2012 WL 19519, suggests in dicta that Calif. Labor Code § 2802 might bar a malpractice against an in-house attorney, as it requires the employer to indemnify the employee. See also Gov’t Code §§ 825, 995 (defense and indemnification of public employees) and § 995.2(a)(1),(2) (exceptions for fraud, corruption, malice, and actions outside course and scope of employment).

²³ “Corruption-scarred Bell finds itself on better financial footing,” *Los Angeles Times*, Dec. 22, 2013.

²⁴ “Five ex-Bell council members blame city attorney, file suit,” *Los Angeles Times*, Mar. 7, 2014.

city's municipal code. In working to gain compliance or settle a case, city attorneys must be careful not to violate Rule 3.10(a), which prohibits lawyers from threatening criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

HYPOTHETICAL: Be Warned

Staff ask the city attorney for help with a hotel that has failed to pay transient occupancy tax for several months. The city attorney prepares and signs a demand letter that includes the statement at the bottom, "Be warned that failure to pay TOT is a felony misuse of public funds (Penal Code § 424). This matter will be referred to law enforcement and the District Attorney for prosecution if payment is not received." Was this appropriate?

It is not *per se* improper for an attorney to advise an individual that "all available legal remedies will be pursued" as long as no threat of criminal prosecution is made.²⁵ An attorney should not, however, send a demand for payment that indicates the letter will be shared with regulatory agencies or law enforcement.²⁶ Similarly, a public prosecutor must not offer to dismiss a criminal prosecution in return for a release of civil liability.²⁷

In one State Bar case, an attorney who was representing himself in a civil dispute sent a letter that said, "I will be filing a lawsuit for fraud and conversion, reporting your theft to the Anaheim police department and the California Department of Insurance and sending a copy of the same to your landlord on Monday morning. Further I will set up a website where all of these documents will be available for public viewing. Once I do this there is no taking it back." The State Bar concluded that this letter was an improper threat to bring criminal charges for the purpose of recovering money owed.²⁸ Hopefully a city attorney would never be so intemperate in a demand letter, but frustration sometimes leads to hasty words and lasting regrets.

HYPOTHETICAL: Just Trying to Help

The city is being sued by a small business. Although the plaintiff has an attorney, he regularly comes to city hall alone and asks to speak to the mayor or city manager. One afternoon, the plaintiff becomes argumentative with staff and they call the city attorney for help. The city attorney comes to the counter and ends up talking to the plaintiff for about 10 minutes, mostly defensively as the plaintiff peppers him with questions about the case. A week later, the city attorney is notified that the plaintiff's attorney has filed a complaint with the State Bar. Is the city attorney in trouble?

²⁵ California State Bar Formal Opinion No. 1991-124.

²⁶ *Crane v. State Bar* (1981) 30 Cal.3d 117.

²⁷ California State Bar Formal Opinion No. 1989-106.

²⁸ *Matter of Erwin* (Cal. Bar Ct., Aug. 10, 2022, No. SBC-20-O-30279) 2022 WL 3681261, at *7

Another trap for unwary city attorneys is Professional Rule 4.2, which prohibits communications with represented persons without the consent of that person's lawyer. Members of the public who have pending litigation or other disputes sometimes call the city attorney's office to talk about their case. Represented parties have also been known to show up at City Hall to meet with staff without their lawyer, which they have the right to do under the First Amendment.

The city attorney must resist the urge to rush in and help staff when they are confronted by a represented party at the permit counter or city manager's office. If the city attorney, or city attorney staff, are unable to avoid an interaction with the person, they must not discuss anything within the scope of the represented matter. It is a good practice for the city attorney to email the party's attorney immediately after the interaction to document what occurred.

5. Joint Representation of City and Employees

As discussed at the beginning of this paper, Professional Rule 1.13 establishes that city attorney's client is the city as an organization, not individual officers and employees. Because the city is the client under Rule 1.13, in house attorneys typically have no ethical conflict advising staff who have opposing interests. There is an exception, however, when the city attorney's office represents employees in litigation.

HYPOTHETICAL: I'm Your Lawyer

The city and a police officer are being sued in an excessive force case. At the beginning of the case, the city attorney sends a standard representation letter to the officer advising him of the city's duty to defend and indemnify the officer under Government Code § 825. The city attorney retains outside litigation counsel, but he also meets with the officer and tells him, "I'm your lawyer." While the litigation is pending, the officer is terminated as a result of a separate excessive force incident, and sues the city for wrongful termination. The officer's attorney moves to disqualify the city attorney's office from involvement in the wrongful termination case. Does this motion have merit?

Public entities in California have a statutory duty to defend employees civil actions that arise from acts and omissions in the course and scope of employment.²⁹ The same attorney can represent both the employee and the city in the litigation as long as there is no conflict of interest (see Professional Rules 1.7 and 1.9).

If the employee is facing discipline, the city should retain separate outside counsel for the employee, or use an "ethical wall" to separate the attorneys handling the litigation from those

²⁹ Gov't. Code §§ 995 through 996.6. See Rule 1.13, Comment 6: "It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. ... Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations."

handling the disciplinary matter (if feasible). An ethical wall is inadequate when the conflict involves the city attorney, because of the city attorney's power over subordinate attorneys.³⁰

Outside counsel is also necessary if the employee's conduct may have been outside the course and scope of employment and the city is defending the employee under a reservation of rights.³¹

These rules are familiar to most litigation counsel when individual employees are sued as co-defendants. Sometimes overlooked, however, are the potential conflicts between the city and employees who are merely witnesses. If the witness employee's interests are adverse to the city's, under Professional Rule 1.13(f) the attorney must make it clear, when interacting with the employee, that the attorney does not represent them. Failure to do so can lead to the type of ethical breach that occurred in the case *Yanez v. Plummer*.³²

Plummer was an in-house corporate attorney who attended a deposition with Yanez, an employee who was a witness in a lawsuit against the corporation. Prior to the deposition, Plummer told Yanez that he was his attorney. He reassured Yanez that his job would not be affected if he told the truth. At the deposition, Yanez denied witnessing the incident, which conflicted with his previous written statement. Plummer then questioned Yanez on the record and had him acknowledge that he made the previous statement.

The employer subsequently terminated Yanez for dishonesty, leading Yanez to sue his employer for wrongful termination and Plummer for legal malpractice, breach of fiduciary duty and fraud. In reversing a grant of summary judgment for Plummer, the appellate court expressed criticism of Plummer's failure to comply with "well-recognized rules of professional conduct" related to a conflict of interest between Yanez and his employer.³³

6. Use of Ethical Walls

In-house city attorney offices commonly put ethical walls between the advocacy and advisory sides of administrative hearings to protect the third party's due process right to a fair hearing.³⁴ City attorneys familiar with "due process walls" from code enforcement matters may confuse them with ethical screening walls under the Rules of Professional Conduct; but they are not the

³⁰ *City & County of San Francisco v. Cobra Solutions* (2006) 38 Cal.4th 839, 847.

³¹ See *Practicing Ethics, supra*, p.13.

³² *Yanez v. Plummer* (2013) 221 Cal.App.4th 180.

³³ *Id.* at 190.

³⁴ See *Howitt v. Superior Court (County of Imperial)* (1992) 3 Cal.App.4th, 1575, 1586-87. Note that an ethical wall between private law firm partners will not prevent a due process violation due to the partners' financial interest in the success of the firm. *Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489.

same. Ethical screens to avoid conflicts of interest must be implemented with great care because they “are fraught with danger in cases of simultaneous adverse representation as to the same matter.”³⁵

Prior to 2018, the State Bar did not have rules on the use of ethical screens, but this subject is now addressed in Professional Rules 1.0.1 (definition of screening), 1.10 (imputation of conflicts in private firms), and 1.11 (conflicts involving former government officials and employees).

When a government lawyer moves from government to private practice, Rule 1.11 allows screening without limitation. However, when lawyers move the other direction, from private practice to government, Rule 1.11, Comment 10, states that caselaw governs the extent to which conflicts will be imputed to other lawyers in the agency. Caselaw has upheld the use of ethical walls within government law offices, noting that disqualification of an entire government law office poses unique burdens on public agencies.³⁶

However, as noted in the discussion of the previous hypothetical, an ethical wall is not available when the conflict arises from the city attorney’s representation of a former client. This is because “individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency’s resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants.”³⁷

Conclusion

City attorneys navigate a complex ethical landscape, balancing our obligations to our municipalities with a broader duty to uphold the rule of law and public trust. The challenges we face as advisors, prosecutors, litigators, and in our interactions with parties and the public, underscore the need for unwavering integrity and sound legal judgment. By adhering to high ethical standards, city attorneys not only protect our clients but also reinforce public trust in local government and the legal profession.

³⁵ Practicing Ethics, *supra*, fn. 1, p.14.

³⁶ *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27.

³⁷ *City & County of San Francisco v. Cobra Solutions, supra*, 38 Cal.4th at 853.

Ethical Principles for City Attorneys¹

Adopted October 6, 2005

City Attorneys Department Business Session

Preamble

A city attorney occupies an important position of trust and responsibility within city government. Central to that trust is an expectation and commitment that city attorneys will hold themselves to the highest ethical standards. Every effort should be made to earn the trust and respect of those advised, as well as the community served.

The City Attorneys Department of the League of California Cities has therefore adopted these ethical principles to:

- ❑ Serve as an aspirational guide to city attorneys in making decisions in difficult situations,
- ❑ Provide guidance to clients and the public on the ethical standards to which city attorneys aspire, and
- ❑ Promote integrity of the city and city attorney office.

City attorneys are also subject to the State Bar's Rules of Professional Conduct. For an explanation of how the rules apply to city attorneys, please see [Practicing Ethics](#) published by the League of California Cities in 2004, available at www.cacities.org/attorneys. These aspirational ethical principles are not an effort to duplicate or interpret the State Bar's requirements or create additional regulatory standards.

The role of the city attorney and the client city varies. Some city attorneys are full-time public employees appointed by a city council; some are members of a private law firm, who serve under contract at the pleasure of a city council. A few are directly elected by the voters; some are governed by a charter. When reflecting on the following principles, the city attorney should take these variations into account.

The city attorney should be mindful of his or her unique role in public service and take steps to ensure his or her words and deeds will assist in furthering the underlying intent of these principles.

¹ When used in this document, the term "city attorney" refers to all persons engaged in the practice of municipal law. This includes attorneys in firms that provide legal services to cities on an ongoing basis that are the functional equivalent to services provided by assistant or deputy city attorneys (for example, on redevelopment and personnel issues).

City Attorney Ethical Principles

Adopted October 6, 2005

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Fundamental Principles (There is no significance to the order of the list.)

Principle 1 (Rule of Law). As an officer of the courts and local government, the city attorney should strive to defend, promote and exemplify the law's purpose and intent, as determined from constitutional and statutory language, the case law interpreting it, and evidence of legislative intent. As an attorney representing a public agency, the city attorney should promote the rule of law and the public's trust in city government by providing representation that helps create a culture of compliance with ethical and legal obligations.

***Explanation.** The city attorney's advice and actions should always proceed from the goal of promoting the rule of law in a free, democratic society. Because the public's business is involved, within the city organization the city attorney should consistently point out clear legal constraints in an unambiguous manner, help the city to observe such constraints, identify to responsible city officials known legal improprieties and remedies to cure them, and if necessary, report up the chain of command to the highest level of the organization that can act on the client city's behalf.*

Examples

1. The city attorney should give advice consistent with the law and the policy objectives underlying those laws, but may consider and explain good faith arguments for the extension or change of a legal principle.
2. The city attorney should not attempt to justify a course of action that is clearly unlawful. Where the city attorney's good faith legal assessment is that an act or omission would be clearly unlawful, the city attorney should resist pressure to be "creative" to come up with questionable legal conclusions that will provide cover for the elected or appointed public officials to take actions which are objectively unlikely to be in conformance with the legal constraints on the city's actions.
3. The city attorney's guiding principle in providing advice and services should be sound legal analysis. The city attorney should not advise that a course of action is legal solely because it is a common practice ("everyone else does it that way"), a past practice ("we have always done it that way"), or because the risk of suit or other consequence for action is considered low.
4. The city attorney's advice should reflect respect for the legal system.
5. If the city has made a decision that the city attorney believes may be legally harmful to the city, the city attorney should encourage the city to take any necessary corrective action but do so in a way that minimizes any damage to the city's interests.
6. The city attorney should be willing to give unpopular legal advice that meets the law's purpose and intent even when the advice is not sought but the legal problem is evident to the attorney.

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7. The city attorney should not only explain and advise the city on the law, but should encourage the city to comply with the law's purpose and intent.

Principle 2 (Client Trust). The city attorney should earn client trust through quality legal advice and the manner in which the attorney represents the city's interests.

***Explanation.** It is difficult for the city attorney to effectively represent the city if public officials do not trust the city attorney's competence and professionalism.*

Examples

1. The city attorney should use available resources to maximize his or her ability to advise knowledgeable on issues of municipal law.
2. The city attorney should be clear with individual council members and staff on the extent to which their communications with the city attorney can and will be kept confidential. The city attorney should be especially clear when confidentiality cannot be lawfully maintained.
3. Sometimes the city attorney will be asked a question during a public or private meeting and the city attorney is unsure of the answer. When time permits, the city attorney should advise that additional time is needed to research the matter and provide an appropriate response. If extra time is not available, then the city attorney should be candid regarding any uncertainty he or she feels about the answer given.
4. When a question is posed and the city attorney knows there is no definitive, clear conclusion, the city attorney should describe the competing legal considerations, as well as inform the city of the legally supportable courses of action, together with an evaluation of the course that is most likely to be upheld.
5. In the event the city attorney is asked in a public forum to provide advice that could undermine the city's ultimate position, the city attorney should seek to meet in closed session, if legally permissible, or, if time permits, provide his or her opinion in a confidential memorandum. If the advice must be given during an open session, then the city attorney must be mindful of the impact that advice given in public may have on the city's ultimate position.
6. When the city attorney has a duty to provide documents or other information to outside law enforcement authorities, he or she should do so in a way to minimize harm to the city consistent with that duty.

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Principle 3 (No Politicization). The city attorney should provide legal advice in a manner that avoids the appearance that the advice is based on political alignment or partisanship, which can undermine client trust.

***Explanation.** The city attorney and the city attorney's advice needs to be trusted as impartial by the entire council, staff and community.*

Examples

1. The city attorney should provide consistent advice with the city's overall legal interests in mind to all members of the city team regardless of their individual views on the issue.
2. Each city council member, irrespective of political affiliation, should have equal access to legal advice from the city attorney, while legal work on a matter consuming significant legal resources should require direction from a council majority.
3. The city attorney or persons seeking to become city attorney should not make campaign contributions to or participate in the campaigns of that city's officials, including candidates running for that city's offices or city officers running for other offices. For private law firms serving as city attorney or seeking to become city attorney, this restriction should apply to the law firm's attorneys.
4. When considering whether to become involved in policy advocacy on an issue that may potentially come before the city, the city attorney should evaluate whether such involvement might compromise the attorney's ability to give unbiased advice or create the appearance of bias.

Principle 4 (No Self Aggrandizement). The city attorney should discharge his or her duties in a manner that consistently places the city's interests above self-advancement or enrichment.

***Explanation.** The city attorney, by his or her acts and deeds, should demonstrate that his or her highest professional priority is to serve the city's needs.*

Examples

1. The city attorney's operating and legal services budget requests should be based on the goal of efficiently serving the client city's realistic legal needs (*i.e.* avoid "empire building").
2. The city attorney should provide advice without a focus on garnering personal support or avoiding personal criticism.

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3. While it is appropriate for a city attorneys to provide both advisory and litigation services, a city attorney should give the city a full range of reasonable options including alternatives to litigation for resolving issues.

Principle 5 (Professionalism and Courtesy). The city attorney should conduct himself/herself at all times in a professional and dignified manner, interacting with all elected officials, city staff, members of the public, and the media with courtesy and respect.

***Explanation.** The city attorney should be a role model of decorum and composure.*

Examples

1. The city attorney should provide advice and information to the council and individual council members in an evenhanded manner consistent with city policy governing the provision of legal services to the city.
2. The city attorney should communicate in a way that is sensitive to both the context and audience, explaining the law in a way that is understandable.
3. In interactions with the public, the city attorney's role is to explain procedures and the law, but not engage in debate.
4. The city attorney should show professional respect for city staff, colleagues, the legal system and opponents. The city attorney should not personally attack or denigrate individuals, particularly in public forums.
5. The city attorney should not seem to endorse, by silence or otherwise, offensive comments made to him/her about others.
6. Sometimes the city attorney will provide advice in public, either because of a city's approved practices or as necessitated during a public meeting. Such advice should be provided in a low-key, dispassionate and non-confrontational manner.
7. The tone of the city attorney's advice and representation should not give the appearance of a personal attack on an individual, even when it is necessary to explain that a particular official's action is unlawful.
8. The city attorney should be open to constructive feedback and criticism.

Principle 6 (Policy versus Law). The city attorney's obligation is to understand the city's policy objectives and provide objective legal advice that outlines the legally defensible options available to the city for achieving those objectives.

***Explanation.** The city attorney must respect policymakers' right to make policy decisions.*

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Examples

1. The city attorney may offer input on policy matters, but should make clear when an opinion is legal advice and when it is practical advice.
2. The city attorney should not let his or her policy preferences influence his or her legal advice.
3. If a city attorney finds it necessary to advise the city that a particular course of action would be unlawful, the city attorney should strive to identify alternative approaches that would lawfully advance the city's goals.

Principle 7 (Consistency). The city attorney should conduct his or her practice in a way that consistently furthers the legitimate interests of cities.

***Explanation.** Consistency in the legal positions taken by city attorneys is vital to city attorneys' credibility with the courts, clients, and the public.*

Examples

1. The city attorney should not represent a private client if that representation will necessitate advancing legal principles adverse to cities' clearly recognized and accepted interests.
2. When providing advice, the city attorney should inform his or her city of any far-reaching negative impacts a position may have on the city's own potential future interests as well as cities' interests in general, particularly when establishing legal precedent.
3. The city attorney should carefully consider whether to hire or recommend a firm that advances legal principles adverse to city interests on behalf of private clients.

Principle 8 (Personal Financial Gain). The city attorney's primary responsibility is to serve the city's interest without reference to personal financial gain.

***Explanation.** An important aspect of the city attorney profession is public service.*

Examples

1. The city attorney should provide the highest possible quality work regardless of the remuneration received.
2. The city attorney's representation should be based on a realistic understanding of the city's needs in light of the city's fiscal and other constraints. However the city

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attorney should advise the city when additional resources are necessary to provide the level of legal services the city requires.

3. The city attorney should refrain from providing unnecessary or redundant services to the city.
4. The city attorney should never use the power, resources or prestige of the office for personal gain.

Principle 9 (Hiring by and of City Attorneys). The selection and retention of the city attorney and city attorney staff should be based on a fair process that emphasizes professional competence and experience. The process should not include inappropriate considerations such as political, personal or financial ties.

***Explanation.** The public's trust in the quality of the city's legal services is undermined if it appears that considerations other than competence affected the decision to hire someone.*

Examples

1. The city attorney should engage staff and vendors based on objective standards relating to professional competence and experience.
2. The city attorney should avoid providing gratuities to decision-makers during the pendency of decisions relating to the city attorney's employment.
3. City attorneys must keep employment negotiations separate from the city attorney's role as the city's legal advisor.
4. The city attorney should not undermine the employment of an incumbent city attorney. The city attorney may respond to unsolicited inquiries from a potential client about future representation.
5. The city attorney should maintain an office that is open to employees from diverse backgrounds and remove unnecessary barriers to success in his or her office and in the legal profession.
6. The city attorney should not award or recommend award of litigation or legal services-related contracts if the public could question whether the contract was awarded for reasons other than merit, such as the contractor (or member of the contractor) providing gifts to or participating in political campaigns of (including making campaign contributions to) officials with the power to award the contracts.

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7. The city attorney should hire or recommend staff and consultants who adhere to these ethical principles and encourage existing staff and consultants to do likewise.
8. The city attorney should seriously consider refusing to represent cities that do not support the city attorney's adherence to these principles

Principle 10 (Professional Development). The city attorney should contribute to the profession's development by improving his or her own knowledge and training and by assisting other public agency attorneys and colleagues in their professional development.

***Explanation.** For city attorneys to remain a vital, positive part of municipal government, members of the profession should take affirmative actions to advance respect for and proficiency by its practitioners.*

Examples

1. City attorneys have a strong tradition of assisting their colleagues through formal or informal sharing of their knowledge and expertise, including active participation in the League of California Cities, the State Bar and a local municipal attorney group or bar association. This tradition also includes sharing of research and opinions when consistent with protecting client confidences.
2. The city attorney should continually strive to improve his or her substantive knowledge of the law affecting municipalities through presenting or attending appropriate educational programs.
3. The city attorney should keep in mind the dynamic nature of municipal law and update his or her understanding of the law on an issue, rather than relying on past knowledge.

CITY ATTORNEY ETHICS

USE OF ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW¹

James R. Ross

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I. Introduction

Artificial intelligence (“AI”) tools are increasingly being used by attorneys and law offices. If you are not already using AI tools, for many, the question is not whether you will use an AI tool but when you will begin to use the tools. Lawyers in California are utilizing AI in areas ranging from legal research and document automation to predictive analytics and client interactions. AI offers the potential to streamline operations and improve client services. However, the use of AI involves new challenges and raises new ethical concerns.

The use of AI in the practice of law implicates several of California’s Rules of Professional Conduct² including the:

1. Duty of Competence and Diligence ([Rule 1.1](#) and [Rule 1.3](#));
2. Confidentiality and Data Security ([Bus. & Prof. Code, §6068, subd. \(e\)](#), [Rule 1.6](#), and [Rule 1.8.2](#))

¹ Much of the information in this paper is derived from the Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law, The State Bar of California Standing Committee on Professional Responsibility and Conduct (the “State Bar Practical Guidance”)

² Unless otherwise provided, all citations are to the California Professional Rules of Conduct.

3. Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers ([Rule 5.1](#), [Rule 5.2](#), and [Rule 5.3](#));
4. Prohibition of Discrimination, Harassment, and Retaliation ([Rule 8.4.1](#));
5. Scope of Representation and Communication with Clients ([Rule 1.4](#), [Rule 1.2](#))
6. Fees for Services (in the AI world) ([Rule 1.5](#), [Bus. & Prof. Code, § 6147](#), [Bus. & Prof. Code, § 6148](#));
7. Meritorious Claims and Contentions and Candor to the Tribunal; ([Rule 3.1](#) [Rule 3.3](#)); and
8. Professional Responsibilities Owed to Other Jurisdictions ([Rule 8.5](#)).

This memo provides an overview of how attorneys and law offices are using AI. After understanding some of AI's uses, this memo also discusses the benefits, risks, ethical considerations, and regulatory guidelines that lawyers must navigate.

II. The Growing Role of AI in Legal Practice

AI is being used in a number of different areas by attorneys and law offices. In the past year, it seems that AI is increasingly being used as technology advances. The following are some key applications:

1. Legal Research and Document Review

AI tools, powered by machine learning, can analyze and categorize large volumes of case law, statutes, and regulations in a fraction of the time it would take a human lawyer. For example, AI can help identify key precedents, summarize case outcomes, and highlight legal issues relevant to a specific matter. These tools generally provide faster research results compared to traditional methods. AI is also being used to conduct document review, identifying relevant contracts, clauses, and provisions that might be crucial in litigation, mergers, or negotiations.

2. Contract Review and Analysis

AI can assist lawyers and law offices with contract review and drafting. AI can assist with identifying risks, anomalies, and compliance issues in legal documents. For example, AI tools can flag unusual clauses or terms that deviate from standard industry practices. Additionally, AI can help draft standard contract language, offering templates and suggesting modifications to tailor documents to the specific needs of a case or client.

3. Predictive Analytics

The use of predictive analysis in law offices continues to evolve. "Predictive analytics involves using AI and machine learning algorithms to analyze large datasets, including past case rulings, legal filings, judicial decisions, and even jury behavior. The goal is to predict future legal outcomes and guide strategy by identifying patterns and trends."³

³ [Ashley Hallene and Jeffrey Allen, Using Predictive Analytics in Litigation, October 16, 2024.](#)

These datasets can include both structured (e.g., case records) and unstructured data (e.g., written opinions). The use of predictive analysis can allow the attorney to provide more accurate advice on case strategy, settlement negotiations, and litigation risk management. As predictive analytics improve and evolve, integrating their use can increase efficiency, reduce costs, and provide better service to your clients.

4. Document Automation and Billing

AI is increasingly used to automate document drafting and billing processes. AI tools can generate routine legal documents quickly and accurately and reduce the time necessary for performing the task resulting in faster responses to inquiries. AI can also assist with automated time-tracking, billing, and invoicing by automatically categorizing work and providing automated reporting.

III. Ethical Considerations and Risks

AI potentially offers significant benefits to attorneys and law offices. However, the use of AI brings with it ethical concerns and challenges with integrating the use of AI into your legal practice.

1. Competence and Due Diligence

Under Rule 1.1, attorneys are required to provide competent representation to clients. This includes ensuring the competent use of technology and the associated risks and benefits. An attorney using AI must make sure the information is not false, inaccurate, or biased. Lawyers are advised to maintain control over decision-making processes, ensuring that AI tools are viewed as assistants rather than replacements for human judgment. Regular testing and evaluation of AI tools should be conducted to assess their effectiveness and accuracy.

Under Rule 1.3, attorneys are required to act with reasonable diligence in representing a client. When using AI, attorneys should have some understanding of how the technology works. Attorneys should also understand the products and the applicable terms of use and other policies governing the use and exploitation of client data by the product. The California State Bar has issued guidance on the use of AI which provides that overreliance on the use of AI is inconsistent with the practice of law and the application of judgment of a trained lawyer.

AI can be used as a starting point but needs to be scrutinized, reviewed, and validated to ensure the information being used is accurate and supports the interests of your client.

Applicable Authority

[Rule 1.1](#)

[Rule 1.3](#)

2. Confidentiality and Data Security

The use of AI in the legal profession often means giving access to confidential information. Rule 1.6 mandates that attorneys protect the privacy and confidentiality of client information. You must take steps to ensure that any AI product you use will protect the privacy and confidentiality of your client and, in some cases, other individuals. It is essential that AI tools comply with privacy regulations such as the California Consumer Privacy Act (CCPA) and industry standards for data security.

Law offices must ensure that AI platforms utilize secure encryption protocols and that data storage and processing practices are compliant with confidentiality obligations. Attorneys should also scrutinize third-party AI vendors for compliance with privacy laws and confidentiality requirements.

Applicable Authority

[Bus. & Prof. Code, §6068, subd. \(e\)](#)

[Rule 1.6](#)

[Rule 1.8.2](#)

3. Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers

Attorneys who supervise other attorneys or staff must make reasonable efforts to ensure that subordinate attorneys or staff comply with their ethical obligations in the use of AI. These efforts should include adopting policies for the use of AI and providing training in its use. The training should address the ethical and practical aspects and pitfalls of the use of AI. Subordinate lawyers are responsible for using AI in a manner that does not violate their ethical obligations.

It is critical that lawyers do not abdicate their professional responsibilities to AI. The use of AI tools should be seen as augmenting human judgment, not replacing it. Lawyers should retain full oversight over all decisions influenced by AI outputs and remain prepared to intervene when necessary. In instances where AI-generated suggestions or analyses lead to negative outcomes, lawyers must be prepared to accept accountability for those decisions, as per Rule 5.1 on professional responsibility.

Applicable Authority

[Rule 5.1](#)

[Rule 5.2](#)

[Rule 5.3](#)

4. Prohibition of Discrimination, Harassment, and Retaliation

Because of the way that some AI tools operate and learn, including learning from past data, the information generated may contain biases reflecting social inequalities or past injustices. For example, predictive analytics systems used to estimate case outcomes could perpetuate existing biases, leading to unjust results. Lawyers must take proactive steps to assess and mitigate any potential biases embedded in AI tools. Attorneys using AI engage in continuous learning about AI biases and their implications in legal practice.

Under Rule 8.4.1, attorneys have an obligation not to unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic. AI systems that perpetuate bias may violate these ethical standards. Lawyers should conduct regular audits of the AI tools they use and be transparent with clients about any limitations or potential biases inherent in the technology.

Applicable Authority

[Rule 8.4.1](#)

5. Communication Regarding Generative AI Use

Attorneys should consider whether the use of AI is appropriate in any particular representation based on the facts and circumstances of the representation and consider whether they need to communicate to the client the risks and benefits of the use of AI, including the novelty of the AI technology, risks associated with generative AI use, scope of the representation, and sophistication of the client.

Applicable Authority

[Rule 1.4](#)

[Rule 1.2](#)

6. Charging for Work Produced by Generative AI and Generative AI Costs

Attorneys may charge for the actual time spent using AI to create the work product. For example, attorneys may charge for the time crafting the inputs or refining the inputs to generate the information and then charge the time spent reviewing and validating the results. Attorneys must not charge hourly fees for the time saved by using generative AI. Costs associated with the AI product may

be charged in compliance with applicable law. Fee agreements should explain the basis for all fees and costs associated with the use of generative AI.

Applicable Authority

[Rule 1.5](#)

[Bus. & Prof. Code, § 6147](#)

[Bus. & Prof. Code, § 6148](#)

7. Candor to the Tribunal; and Meritorious Claims and Contentions

Attorneys must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court. Attorneys should also check for any local rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.

Example: Standing Order for Civil Cases before Northern California District Judge Araceli Martinez-Olguin (revised November 22, 2023) provides, in part, that:

- (a) Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any content generated by these tools.
- (b) At all times, counsel—and specifically designated lead trial counsel—bears responsibility for any submission made by the party that the attorney represents.
- (c) Any submission containing AI-generated content must include a certification that the lead trial counsel has personally verified the content’s accuracy. Failure to include this certification or comply with this verification requirement will be grounds for sanctions.
- (d) Counsel is responsible for maintaining records of all prompts or inquiries submitted to any generative AI tools in the event those records become relevant at any point.

Applicable Authority

[Rule 3.1](#)

[Rule 3.3](#)

8. Professional Responsibilities Owed to Other Jurisdictions

Attorneys should also analyze the laws, regulations and Court rules in each jurisdiction in which they are licensed to practice to determine their responsibilities regarding the use of AI.

Applicable Authority

Rule 8.5

It is important to monitor legislative enactments that might affect your use of AI in the practice of law. Currently, there are approximately thirty bills being considered by the California legislature that impact AI.

Best Practices for Lawyers Using AI

To ensure that AI is used effectively and ethically in legal practice, lawyers should adopt the following best practices:

1. **Stay Informed and Educated:** Lawyers should make efforts to understand how the AI tools they use operate. This involves understanding how AI models are trained, what data is used, and any potential biases or limitations. Regular training on the latest AI tools and technologies is essential.
 2. **Ensure Transparency:** When AI tools significantly influence legal outcomes or decisions, attorneys should fully disclose this to clients and explain the potential benefits and risks associated with the use of AI.
 3. **Exercise Judgment and Oversight:** AI should never replace a lawyer's professional judgment. Lawyers must review AI-generated outputs carefully, particularly in high-stakes matters, and retain final decision-making authority.
 4. **Ensure Security and Compliance:** Attorneys must take steps to ensure that AI tools they use comply with data security and privacy laws. This includes reviewing vendor contracts, ensuring encryption standards, and adhering to confidentiality regulations. Consider consulting an information technology expert regarding security and confidentiality of an AI product before using it.
 5. **Monitor AI Outputs for Bias and Accuracy:** Regular audits of AI tools are necessary to ensure that they do not introduce biases or inaccuracies into legal decision-making. Tools should be recalibrated and evaluated periodically to ensure continued reliability.
-

Conclusion

The integration of AI in legal practice presents both opportunities and challenges. By carefully managing AI tools and adhering to established ethical principles, AI can help to improve

efficiency, reduce costs, and provide better service to their clients. At the same time, lawyers must be diligent in complying with their professional obligations, ensuring that AI is used responsibly and transparently. Adhering to best practices and staying updated on evolving regulatory frameworks is essential for lawyers seeking to integrate AI into their practice.

ATTORNEY-CLIENT PRIVILEGE (AND ATTORNEY WORK PRODUCT): WAIVER AND POTENTIAL PITFALLS

The following paper addresses attorney-client privilege and attorney work product, with a focus on the disclosure of communications or materials that would otherwise be protected under either doctrine and whether such disclosure results in waiver.

In short, disclosure of such communications or materials is not as fatal as many attorneys fear. In the practice of law, especially local government law, the analysis of whether disclosure equates to waiver is more nuanced and often requires a risk assessment that involves analysis of the pros and cons of disclosure.

After providing a summary of the general principles governing attorney-client privilege, attorney work product, and waiver, this presentation focuses on these issues through the lens of common scenarios:

- materials developed through investigations, such as recordings of witness interviews and witness lists;
- potential public disclosure of investigative findings (such as through press releases); and
- inadvertent disclosure of privileged communications through public records requests.

I. Attorney-Client Privilege

California law closely guards attorney-client privilege, and attorneys soon learn its importance when they begin the practice of law. But attorneys should keep in mind that the attorney-client privilege exists to benefit the *client*, rather than any attorney's concerns.

The attorney-client privilege confers a privilege on the client “to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer.” (Evid. Code, § 954.) Where it applies, “the privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.” (*Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1557.)

In any adjudication of attorney-client privilege, a party seeking to protect communications from disclosure based upon the attorney-client privilege must establish the preliminary facts necessary to support its exercise—i.e., a communication made in the course of an attorney-client relationship. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*)). “Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply.” (*Ibid.*)

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II. Attorney Work Product

Unlike attorney-client privilege, attorney work product protection exists for the benefit of the attorney rather than the client. Also, unlike attorney-client privilege, there are two categories of attorney work product – absolute and qualified – with different levels of protection.

“‘The work product privilege is held by the attorney, not the client.’” [Citation.] An attorney seeking to invoke work product protection has the burden to show that materials are either absolute or qualified work product.” (*Southern California Edison Co. v. Superior Court* (2024) 102 Cal.App.5th 573, 585.)

Absolute work product “reflects an attorney’s impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.” (CCP § 2018.030(a).) Any attorney work product that does not reflect counsel’s impressions, conclusions, opinions, or legal research or theories – referred to as “qualified” work product – “is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party’s claim or defense or will result in an injustice.” (CCP § 2018.030(b).)

While “absolute” work product seeks to establish a zone of privacy around an attorney’s thoughts and shields them from opposing counsel or parties, the protection of “qualified” work product is motivated by general fairness concerns. In particular, “qualified” work product seeks to prevent attorneys from “stealing” other attorneys’ work, especially where those other attorneys had an equal opportunity to pursue their own case development. With respect to potential disclosure of qualified work product, “[u]nfair prejudice results where the party seeking discovery establishes that there exists ‘no adequate substitute’ for the material[.]. [Citation.] Conversely, when the party has equivalent opportunity to generate comparable evidence in its own case presentation, there is no unfair prejudice. [Citation.]” (*Armenta v. Superior Court* (2002) 101 Cal.App.4th 525, 535; see also *Coito v. Superior Court* (2012), 54 Cal.4th 480, 496 [qualified work product seeks to prevent an attorney from free riding on the industry and efforts of opposing counsel].)

III. Waiver

Waiver of attorney-client privilege and attorney work product is often an attorney’s worst nightmare. But one should bear in mind that waiver is more complicated in practice, especially with respect to “implied” waiver. And of course, attorney-client communications that occur in public – such as advice provided in open session at a public meeting – are not privileged at all due to their lack of confidentiality in the first instance.

a. General Principles

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While attorneys often have concerns about “subject matter” waiver – where the disclosure of a handful of privileged communications results in the disclosure of an entire category of such communications – California law does not support such a broad conception of waiver as a general matter. If waiver occurs, it generally impacts privileged communications on a communication-by-communication basis.¹

California case law holds “[t]he scope of the waiver ‘is narrowly defined and the information required to be disclosed must fit strictly within the confines of the waiver.’” (*Ross v. Superior Court* (2022), 77 Cal.App.5th 667, 683; see also *Manela v. Superior Court* (2009) 177 Cal.App.4th 1139, 1147 [“[i]n light of the important public policies underlying privileges, moreover, the scope of the waiver of a privilege is generally construed narrowly”].)

Waiver under Evidence Code section 912 occurs on a communication-by-communication basis, not topic-by-topic. (See Evid. Code, § 912 [“the right of any person to claim a privilege provided [by statute] is waived with respect to *a communication* protected by the privilege”], italics added; Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (Rutter Group 2023) 8:1907 [“Disclosure of a significant part of a privileged communication waives the privilege only with respect to *that* communication. Other privileged communications in the same relationship are unaffected even if they relate to the same subject matter.”].)

California law recognizes two types of waiver: express and implied.

i. Express Waiver

Evidence Code section 912 provides that an express waiver of the attorney-client privilege occurs when any holder of the privilege “has disclosed a significant part of the communication or has consented to such disclosure made by anyone . . .” A “significant part” means disclosure of enough substantive information as to “reveal the *specific content*” of the alleged confidential communication. (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 46 [emphasis added].)

Importantly, “a client does not waive the privilege by testifying about facts which might have been discussed in confidential conversations with his or her lawyer, as such testimony is not equivalent to disclosure of the actual content of those attorney-client conversations.” (*Maas v. Municipal Court* (1985) 175 Cal.App.3d 601, 606.)

¹ Waiver of work product protection is generally found under the same set of circumstances as waiver of the attorney-client privilege. (*McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239.)

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Likewise, disclosure of the facts that establish the existence of attorney-client privilege – the identities of the attorney and client, and the fact that the client is consulting with an attorney – should not result in express waiver.

ii. Implied Waiver

Implied waiver of attorney-client privilege is more treacherous ground because it may be inadvertent. For example, implied waiver may unwittingly occur when the attorney relies on certain defenses or legal theories. Also, implied waiver can be complicated in the day-to-day operation of government agencies, where there is an emphasis on public transparency and often a motivation to respond to public concerns.

Implied waiver occurs where one party relies on a document “to establish key facts while simultaneously shielding that same document from the other side” to create an “unfair adversarial advantage.” (*People v. Superior Court (Jones)* (2021) 12 Cal.5th 348, 363.) “[T]he person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action.” (*Southern Cal. Gas Co.*, *supra*, 50 Cal.3d at p. 40.)

“[The] theory of implied waiver is premised on the need to protect the integrity of the judicial proceeding. The cases recognize that allowing one party to rely on a document to establish key facts while simultaneously shielding that same document from the other side works an unfair adversarial advantage. Considerations of basic fairness accordingly ‘may require disclosure of otherwise privileged information or communications where [a party] has placed in issue a communication which goes to the heart of the claim in controversy.’” (*Jones, supra*, 12 Cal.5th at p. 363.) But “[p]rivileged communications do not become discoverable simply because they are related to issues raised in the litigation.” (*Southern Cal. Gas Co.*, *supra*, 50 Cal.3d at p. 45.)

An implied waiver may occur when the *party asserting the privilege*, rather than the opposing party, places a confidential communication at issue. (See, e.g., *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 116 [defendant may have waived privilege by raising adequacy of investigation in its answer and discovery responses]; *Merritt v. Superior Court* (1970) 9 Cal.App.3d 721, 730 [plaintiff waived privilege by placing at issue the state of mind of his attorney].)

A classic implied waiver scenario arises when a client relies on “defense of counsel” to excuse its actions. Of course, when a prior attorney’s advice is relied upon for such a reason, that advice must be disclosed in the course of the related litigation. Similarly, implied waiver also arises in attorney fee or malpractice disputes where an attorney’s alleged activities, errors or oversights are at issue.

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b. Investigations – Work Product

In 2012, the California Supreme Court provided clarity regarding attorney work product protection in investigations conduct by attorneys. The *Coito* decision is an important decision for the attorneys who perform such investigations and provides helpful guidance.

In *Coito v. Superior Court* (2012) 54 Cal.4th 480, the Supreme Court addressed the extent of work product protection for recorded witness interviews and lists of witnesses who provided statements. The court of appeal had held that such materials did *not* qualify as work product. In the underlying case, the plaintiff filed a complaint for wrongful death naming several defendants, including the State Department of Water Resources and the City of Modesto. In the course of discovery, the plaintiff’s counsel sought recordings of four witness interviews.

The *Coito* court held that disclosing a list of witnesses interviewed by attorney investigators may reveal the attorney’s impressions of the case and, in some instances, qualify as “absolute” work product. But the court held that witness statements procured by an attorney are not automatically entitled to absolute work product status, and that this determination must be made on a case-by-case basis. Such a determination must be made based upon a showing that disclosure would reveal his or her “impressions, conclusions, opinions, or legal research or theories” – such as if the questions that the attorney has chosen to ask (or not ask) provide a window into the attorney’s legal theories or evaluation of the merits. But importantly, the court held that not all witness statements reveal an attorney’s thoughts and would qualify as absolute work product.

A list of the witnesses interviewed by an attorney may constitute either absolute or qualified work product, but neither should be assumed. The court provided this example:

Take, for example, a bus accident involving 50 surviving passengers and an allegation that the driver fell asleep at the wheel. If an attorney for one of the passengers took recorded statements from only 10 individuals, disclosure of the list may well indicate the attorney’s evaluation or conclusion as to which witnesses were in the best position to see the cause of the accident.

Ibid.

In the court’s view, in the situation, the attorney may have – but it should not be assumed – devoted significant effort to tracking down individual passengers and then decided to take recorded statements from ten of them (perhaps selecting those sitting closest to the driver). In this hypothetical, even without obtaining the witness statements themselves, opposing counsel would gain valuable information by “free riding” on the attorney’s identification of ten particularly relevant witnesses. But not all lists of witnesses interviewed are necessarily work

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product – if an attorney simply interviewed every known witness to an incident, the court held opined that it was unlikely that any work product protection would apply at all.

Implied waiver may also result in employment discrimination matters where the defendant relies on the adequacy of an investigation. For example, in *Wellpoint Health Networks, supra*, 59 Cal.App.4th at 128, the court recognized:

If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy. The defendant cannot have it both ways. If it chooses this course, it does so with the understanding that the attorney-client privilege and the work product doctrine are thereby waived.

c. Press Releases (Regarding Investigations)

Related to investigations, it is not uncommon for public agencies to consider press releases – or similar type of public communication – after an investigation has concluded, in order to address public interest or concerns. As with other work product determinations, whether such press releases result in waiver is a fact-based determination and there are few “bright lines” about how much may be disclosed.

In *In re Banc of California Securities Litigation* (C.D. Cal., June 21, 2018) 2018 WL 11350297, a defendant sought discovery from a third-party law firm based on the argument that the defendant bank waived the attorney-client privilege by selectively disclosing findings made by the law firm in two press releases. The court declined to find a waiver of privilege, however, reasoning that the press releases only summarized the law firm’s findings in broad terms, and “merely releasing those general findings does not constitute a broad waiver.” (*Id.* at *1-2.)

In *In re Veeco Instruments, Inc. Securities Litigation* (S.D.N.Y., Jan. 25, 2007) 2007 WL 210110, the plaintiffs argued that the defendants waived work product protection through the disclosure of a press release and a letter from the defendant’s outside counsel to the SEC. (*Id.* at *2.) The press release announced to investors that the defendant had completed its internal investigation and concluded that “the improper accounting entries were made by a single individual.” (*Ibid.*) The SEC letter stated that “there were not sufficient facts to come to a conclusion on whether the improper accounting entries were made intentionally.” (*Ibid.*) The court held that these disclosures did not constitute waiver of the work product privilege because it “merely summarized the findings and conclusions of the internal investigation and did not quote, paraphrase or reference any of the specific documents at issue in support of its conclusions.” (*Ibid.*)

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In *In re Dayco Corp. Derivative Securities Litigation* (S.D. Ohio 1983) 99 F.R.D. 616, 619, the defendant issued a two-page press release which summarized the establishment of a special review committee, the retention of the law firm to conduct an investigation, and the investigations findings and conclusions. Neither the facts which led to those conclusions, nor the Report itself, were released. (*Ibid.*) The court held there was no waiver, since the defendant merely released the findings and did not summarize the evidence relied upon. (*Ibid.*)

d. Public Records Requests (Inadvertent Disclosure)

Steering away from investigations, public records requests are another area in which waiver issues may be encountered – especially with respect to the risk of mistaken or “inadvertent” disclosure. But thankfully, the Supreme Court has provided a clear answer in response to these concerns. In *Ardon v. City of Los Angeles*, 62 Cal.4th 1176 (2016), the California Supreme Court held that the inadvertent release of privileged documents does *not* result in waiver.

In *Ardon*, the City had inadvertently disclosed three privileged documents in response to the plaintiff’s public records act request. The City informed the plaintiff’s attorney that the three documents were privileged and inadvertently produced and requested that they be returned.

Ardon focused on Government Code Section 6254.5², which provided:

Notwithstanding any other provisions of law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter [the Public Records Act], to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in Section 6254, 6254.7, or other similar provisions of law.

In light of this provision’s purpose and legislative history, the Court held:

. . . it is doubtful the Legislature intended to enact a statutory scheme that would prevent government agencies from minimizing the damage caused by the inadvertent disclosure of private and confidential information. Nor is it likely the Legislature intended to adopt a rule that inadvertent disclosure requires confidential information to be made generally available to the public. Much more plausible is that the Legislature intended to permit state agencies to waive the exemptions by making a *voluntary and knowing disclosure*, while prohibiting them from selectively disclosing the records to one member of the public but not others.

(*Ibid.* at 1183 [emphasis added].)

² A similar provision is now codified in Government Code Section 7921.505.

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In reaching this conclusion, the Court also relied on *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 and *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, two cases in which the courts have held that inadvertent disclosure of privileged materials does not result in waiver in the context of discovery. The *Ardon* court opined that similar principles apply to public records requests and in “considering the language of section 6254.5 in its proper context. . . it does not apply to inadvertent disclosures.” (*Ibid.* at 1189.)

CONCLUSION

The confidentiality of attorney-client communications and work product is of paramount importance to practicing attorneys. While practicing attorneys are well-aware of its importance, and their ethical duty to protect this confidentiality, attorneys – particularly those practicing local government law – should bear the nuances of these doctrines in mind. For example, while many attorneys are likely more concerned about express waiver of attorney-client privilege through disclosure, it is quite possible that attorney-client privilege is more often waived – and inadvertently so – through implied waivers. Likewise, regarding attorney work product protection, it is possible that many attorneys make broad assumptions about work product, especially in the context of investigations. Attorneys should carefully consider such issues, with a full awareness of the limits of these doctrines.